

2. Your rights to equality at work: working hours, flexible working and time off.

Equality Act 2010 Guidance for employees.
Vol. 2 of 6.



Equality and
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Commission

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Introduction

This guide is one of a series written by the Equality and Human Rights Commission to explain your rights under equality law. These guides will support the introduction of the Equality Act 2010. This Act brings together lots of different equality laws, many of which we have had for a long time. By doing this, the Act makes equality law simpler and easier to understand.

There are six guides giving advice on your rights under equality law when you are at work, whether you are an employee or in another legal relationship to the person or organisation you are working for. The guides look at the following work situations:

1. When you apply for a job
2. Working hours and time off
3. Pay and benefits
4. Promotion, transfer, training and development
5. When you are being managed
6. Dismissal, redundancy, retirement and after you've left

Other guides and alternative formats

We have also produced:

- A separate series of guides which explain your rights in relation to people and organisations providing services, carrying out public functions or running an association.
- Different guides explaining the responsibilities people and organisations have if they are employing people to work for them or if they are providing services, carrying out public functions or running an association.

If you require this guide in an alternative format and/or language please contact the relevant helpline to discuss your needs.

England

Equality and Human Rights Commission Helpline

FREEPOST RRLG-GHUX-CTR

Arndale House, Arndale Centre, Manchester M4 3AQ

Telephone: 0845 604 6610

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www.equalityhumanrights.com

The legal status of this guidance

This guidance applies to England, Scotland and Wales. It has been aligned with the Codes of Practice on Employment and on Equal Pay. Following this guidance should have the same effect as following the Codes. In other words, if a person or an organisation who has duties under the Equality Act 2010's provisions on employment and other work situations does what this guidance says they must do, it may help them to avoid an adverse decision by a tribunal in proceedings brought under the Equality Act 2010.

This guide is based on equality law as it is at 1 October 2010. Any future changes in the law will be reflected in further editions.

This guide was last updated on 23 July 2010. You should check with the Equality and Human Rights Commission if it has been replaced by a more recent version.

1. Your rights to equality at work: working hours, flexible working and time off

What's in this guide

If your employer is making decisions about the hours you work, whether you can work flexibly or have time off, equality law applies to what they are doing.

Equality law applies:

- whatever the size of the organisation
- whatever sector you work in
- whether your employer has one worker or ten or hundreds or thousands
- whether or not your employer uses any formal processes or forms to help them make decisions.

This guide tells you what your employer must do to avoid all the different types of unlawful discrimination. It recognises that smaller and larger employers may operate with different levels of formality, but makes it clear how equality law applies to everyone, and what this means for the way every employer (and anyone who works for them) must do things.

It covers the following situations and subjects (we tell you what any unusual words mean as we go along):

- Decisions about hours of work and flexible working
 - Avoiding direct and indirect discrimination
 - Making reasonable adjustments to remove barriers for disabled people and avoiding discrimination arising from disability
 - Requests for changes to hours of work or flexible working on the basis of association with a protected characteristic
 - Requests for changes to hours of work or flexible working relating to a worker's religion or belief
 - Requests for changes to hours of work or flexible working relating to a worker's gender reassignment

- Decisions relating to time off
 - Avoiding direct and indirect discrimination
 - The specific age exception allowing different levels of annual leave based on length of service of up to five years
 - Reasonable adjustments to remove barriers for disabled people and avoiding discrimination arising from disability
 - Requests for time off relating to religion or belief
 - Requests for time off relating to gender reassignment
 - Pregnancy-related absences
 - Sickness absence
 - Ante-natal care
 - Maternity, paternity and adoption leave

What else is in this guide

This guide also contains the following sections, which are similar in each guide in the series, and contain information you are likely to need to understand what we tell you about working hours, flexible working and time off:

- Information about when an employer is responsible for what other people do, such as their employees.
- Information about reasonable adjustments to remove barriers if you are a disabled person.
- Advice on what to do if you believe you've been discriminated against.
- A list of words and key ideas you need to understand this guide – all words highlighted in **bold** are in this list. They are highlighted the first time they are used in each section. Exceptions to this are where we think it may be particularly useful for you to check a word or phrase.
- Information on where to find more advice and support.

Your rights not to be discriminated against at work: what this means for how your employer must behave towards you

Are you a worker?

This guide calls you a **worker** if you are working for someone else (who this guide calls your **employer**) in a **work situation**. Most situations are covered, even if you don't have a written **contract of employment** or if you are a **contract worker** rather than an **employee**. Other types of worker such as **trainees**, **apprentices** and **business partners** is also covered. If you are not sure, check under 'work situation' in the list of words and key ideas. Sometimes, equality law only applies to particular types of worker, such as employees, and we make it clear if this is the case.

Protected characteristics

Make sure you know what is meant by:

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

These are known as **protected characteristics**.

What is unlawful discrimination?

Unlawful discrimination can take a number of different forms:

- Your employer must not treat you worse just because a protected characteristic (this is called **direct discrimination**).

For example:

An employer is considering two requests for flexible working, from workers who do not qualify for the statutory employment **right to request flexible working**. One worker is a Christian and the other is not. The employer decides to agree only to the Christian's request, believing they will use the time in a more worthwhile way. This will probably be direct discrimination against the non-Christian because of religion or belief. The correct approach is for the employer to consider the requests by looking at the impact of the proposed working pattern on the organisation, and not at the protected characteristics of the person making the request. This may or may not lead to the same result, but the decision would not have been made because of the protected characteristic of religion or belief, so neither worker would have a claim for unlawful discrimination because of their religion or belief.

- If you are a woman who is **pregnant** or on **maternity leave**, the test is not whether you are treated worse than someone else, but whether you are treated **unfavourably** from the time you tell your employer you are pregnant to the end of your maternity leave (which equality law calls the **protected period**) because of your pregnancy or a related illness or because of maternity leave.
- Your employer must not do something to you in a way that has a worse impact on you and other people who share a particular protected characteristic than on people who do not have that characteristic. Unless your employer can show that what they have done, or intend to do, is **objectively justified**, this will be **indirect discrimination**. 'Doing something' can include making a decision, or applying a rule or way of doing things.

For example:

An employer says that senior managers at an office cannot work flexibly. This is likely to have a worse impact on women who are more likely to be combining work with childcare responsibilities. Unless the employer can objectively justify the requirement, this may be indirect discrimination because of sex.

- If you are a disabled person, your employer must not treat you **unfavourably** because of something connected to your disability where they cannot show that what they are doing is **objectively justified**. This only applies if an employer knows or could **reasonably** have been expected to know that you are a disabled person. This is called discrimination arising from disability.

For example:

An employer insists that all employees have to be in the office by 9am or face disciplinary action. An employee has a mobility impairment that makes travelling in the rush hour difficult. Unless the employer can objectively justify the requirement to be in at that time, this may be discrimination arising from disability, because the disabled person would be treated unfavourably (being disciplined) for something connected to their disability (the inability to travel in the rush hour). This may also be a failure to make reasonable adjustments.

- Your employer must not treat you worse than someone else because you are **associated with** a person who has a protected characteristic.

For example:

An employer allows all staff with children to leave work early one afternoon before Christmas to attend their children's school play or show. They assume that an employee with a disabled child will not need this time off so do not give them the same concession. This is likely to be direct discrimination because of disability on the basis of the employee's association with their disabled child.

- Your employer must not treat you worse than someone else because they incorrectly think you have a protected characteristic (**perception**).
- Your employer must not treat you badly or **victimise** you because you have complained about discrimination or helped someone else complain or done anything to uphold your own or someone else's equality law rights.

For example:

When an employee asks to work flexibly, their employer refuses because the employee helped a colleague with a complaint about discrimination. This is almost certainly victimisation.

- Your employer must not **harass** you.

For example:

An employee is given permission by their manager to take annual leave but only after offensive questioning related to their sexual orientation which has made them feel humiliated. This is likely to be harassment.

In addition, if you are a disabled person, to make sure that you have the same access, as far as is reasonable, to everything that is involved in getting and doing a job (including flexible working and time off) as a non-disabled person, your employer must make **reasonable adjustments**.

For example:

An employer has a written policy which covers all types of leave, including what to do if workers are too ill to come to work, how decisions will be made about when annual leave is taken, and on flexible working. As a reasonable adjustment for a disabled worker who has a visual impairment, the employer reads the policy onto a CD and gives it to the worker.

Your employer must make reasonable adjustments to what they do as well as the way that they do it.

For example:

A worker who has a learning disability has a contract to work from 9am to 5.30pm but wishes to change these hours. This is because the friend who accompanies the worker to work is no longer available before 9am. Allowing the worker to start later is likely to be a reasonable adjustment for that employer to make.

You can read more about reasonable adjustments to remove barriers for disabled people in Chapter 3.

Situations where equality law is different

Sometimes there are situations where equality law applies differently. This guide refers to these as exceptions.

There are two exceptions which are relevant to decisions about working hours, flexible work and time off. These apply to all employers:

- The possibility that direct age discrimination can be **objectively justified**.
- Special treatment for women in connection with pregnancy and maternity.

We only list the exceptions that apply to the situations covered in this guide. There are more exceptions which apply in other situations, for example, when an employer is recruiting someone to do a job. These are explained in the relevant guide in the series.

In addition to these exceptions, equality law allows your employer to:

- Treat disabled people better than non-disabled people.
- Use voluntary **positive action** in the way workers are managed. While positive action is most often seen as applying in recruitment, promotion and training, it can also be helpful in addressing workers' different needs when managing them.

Age

Age is different from other protected characteristics. If they can show that it is **objectively justified**, your employer can make a decision based on someone's age, even if this would otherwise be direct discrimination.

For example:

An employer decides to allow workers over the age of 55 to ask to work flexibly, regardless of whether they qualify for the **right to request flexible working**. This is so that they can keep the skills of their older workers in the organisation for longer, while also fitting in with the older workers' desire to work fewer hours. A younger worker says that they should also be able to work flexibly even if they do not qualify for the right to request. Provided the employer can **objectively justify** their decision, equality law would allow this difference of treatment based on age.

There is a specific age exception allowing different levels of annual leave based on length of service of up to five years.

Special treatment in connection with pregnancy and maternity

It is not sex discrimination against a man to provide special treatment for a woman in connection with pregnancy or childbirth.

For example:

An employer allows a pregnant worker to have time off not just for ante-natal appointments (which is a legal requirement) but also to attend fitness classes for pregnant women at a nearby gym. The worker makes up the lost hours at another time, which she would not have to do for an ante-natal appointment. It would not be sex discrimination to refuse a man's request to go to a fitness class during working hours.

Positive action

'Positive action' means the steps that your employer can take to address the different needs or past track record of disadvantage or low participation of people who share a particular protected characteristic.

Although most often thought of in the context of recruitment, promotion or training, positive action is available to your employer in all employment situations, although they have to go through a number of tests to show that positive action is needed.

Taking positive action is voluntary. Your employer does not have to take positive action. However:

- Meeting the different needs of the workforce can help make staff more productive.
- If an employer is a **public authority**, positive action may help them meet the **public sector equality duty**.

If you want to know more about what it might mean for you if your employer takes voluntary positive action in relation to how they manage you and their other workers, read the Equality and Human Rights Commission's guide: *Your rights to equality at work: when you are managed*.

Treating disabled people better than non-disabled people

As well as these exceptions, equality law allows an employer to treat a disabled person better - or **more favourably** - than a non-disabled person. This recognises that disabled people face a lot of barriers to participating in work and other activities.

What's next in this guide

The next part of this guide tells you more about how your employer can avoid all the different types of unlawful discrimination in the following situations:

- Decisions about hours of work and flexible working
 - Avoiding direct and indirect discrimination
 - Reasonable adjustments to remove barriers for disabled people and avoiding discrimination arising from disability
 - Requests for changes to hours of work or flexible working on the basis of association with a protected characteristic
 - Requests for changes to hours of work or flexible working relating to a worker's religion or belief
 - Requests for changes to hours of work or flexible working relating to a worker's gender reassignment
 - A helpful approach for your employer to take
- Decisions relating to time off
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 - Maternity, paternity and adoption leave

Decisions about hours of work and flexible working

Flexible working and the 'right to request'

What is 'flexible working'?

By 'flexible working', this guide means any change from the usual working week of 35 or more hours worked between set times and at a set place. In practice, this might mean a worker:

working part time, working only during term time, or working from home some of the time

adjusting their start and finish times

adopting a particular shift pattern or working extended hours on some days with time off on others.

For more information on how flexible working can benefit you and your employer, see the Equality and Human Rights Commission's *Working Better* report. Contact details for the Equality and Human Rights Commission are at the beginning of this guide.

What is 'the right to request'?

This guide only tells you about equality law. There are other laws giving many employees with caring responsibilities for children or particular adults the right to have a request for flexible working considered according to set procedures (this is the 'right to request').

If you have worked for your employer for at least 26 weeks and qualify for the right to request flexible working, your employer can refuse only on one of the business-related grounds set out in the statutory rules. If your employer does not follow the set procedures, they risk being taken to an Employment Tribunal and possibly having to pay compensation.

You will find more information on the right to request at Directgov. Although the information by Directgov is generally provided for people who live in England and Wales, the law on this is the same in Scotland.

Contact details for Directgov are in Chapter 5: *Further sources of information and advice*.

Your employer must avoid unlawful discrimination when they make decisions about what hours you should work and whether to allow you to work flexibly.

Use the information earlier in this guide to make sure you know what equality law says your employer must do to avoid unlawful discrimination.

This section of the guide covers the following:

- Avoiding direct and indirect discrimination
- Reasonable adjustments to remove barriers for disabled people and avoiding discrimination arising from disability
- Requests for changes to hours of work or flexible working on the basis of association with a protected characteristic
- Requests for changes to hours of work or flexible working relating to a worker's religion or belief
- Requests for changes to hours of work or flexible working relating to a worker's gender reassignment

Avoiding direct and indirect discrimination

Unless the situation comes into one of the exceptions where your employer is specifically allowed to take your protected characteristic(s) into account, they must not base their decision about your working hours or flexible working on your protected characteristic(s).

If your employer does this, it is likely to be direct discrimination, which cannot be justified (unless the protected characteristic is **age** – this is explained at page 10).

For example:

An employer bases their decision whether to agree to a request to work flexibly on the worker's sex. The employer agrees a mother's request to work flexibly but refuses a father's request, just because he is a man and the employer believes it is less important for him. This is probably direct sex discrimination and it would also be a breach of the right to request flexible working if the father had applied under that procedure.

Your employer must not make a decision that has a worse impact on you and other people who share a particular protected characteristic than it has on people who do not share it. Unless your employer can show that what they have done is **objectively justified**, this will be indirect discrimination.

For example:

A woman returns from maternity leave and asks to work part-time using the right to request flexible working, for which she qualifies. Her employer turns down the request because none of the jobs at the organisation similar to hers are done part-time. The employer must:

- follow the procedures set out in the law on the right to request flexible working, including basing the decision on business reasons, and
- be able to **objectively justify** the refusal, as the decision not to allow people in similar jobs to the woman's to work part-time has a worse impact on her and on other women, who are more likely to be combining paid work with caring responsibilities. If the employer cannot objectively justify the refusal and the application of the rule (about no part-time work in that job), this is likely to be indirect discrimination because of sex.
- An employee who is caring for her disabled partner applies to work flexibly using the right to request, for which she qualifies. She is turned down. She makes another request six months later, suggesting a different working pattern that could easily be accommodated. Her employer does not have to use the procedures set out under the right to request, because these requests only have to be considered at 12 month intervals. However, if the employer refuses to look at her request altogether or if they refuse her again, this may be indirect discrimination because of sex, unless the employer can objectively justify what they have done. This is because a refusal to consider a change in the woman's working arrangements has a worse impact on both the individual employee and on women generally, because they are more likely to combine paid work with caring responsibilities.
- A woman who works part time is required by her employer to change to full-time hours when her job-share partner resigns. She is told that if she does not work full time she will be dismissed. The employer does not consider recruiting another job-share partner and argues that there are business reasons for no longer allowing her to work part time. This may be a breach of the right to request if the employer cannot show a genuine business need for the decision, and indirect sex discrimination, because the requirement to work full-time has a worse impact on women.

This does not just apply to existing employees who request flexible working (whether or not they qualify for the right to request). If a rule about working hours prevents more women than men from *applying* for a job, this may be unlawful sex discrimination, unless an employer can **objectively justify** the rule. This may result in an employer having to agree to a request to work flexibly from the time a woman starts working for them.

For example:

- A woman is unable to apply for a job for which she is well-qualified because the employer requires all staff to work a rotating shift pattern. The woman is unable to work during all the shift patterns because she needs to look after her 80-year-old mother at particular times of the day. No allowances are made because of this need. Such a requirement would put the woman and other women at a disadvantage because women are more likely to combine paid work with caring responsibilities. The employer will have indirectly discriminated against the woman because of her sex unless the requirement can be objectively justified.
- A woman is put off applying for a job to work in a small newsagent's and convenience store because the job requires working hours of 7am to 3pm, and she cannot combine the early start with her childcare responsibilities. Because the very nature of the business is to open early, it is likely that the employer would be able to objectively justify the requirement for the early start.

However, the woman and a friend in a similar situation apply to do the job between them. One will take on the early morning childcare for both of them one week while the other works, and then they will swap over. In this situation, if they are between them the best person for the job, it may be indirect discrimination for the employer to refuse to allow this arrangement, unless the employer can objectively justify the refusal. Of course, as a matter of good practice, the employer themselves could open the job up to flexible working of this kind.

Although it is more likely that women will be combining paid work with caring responsibilities, employers must avoid making assumptions about who has responsibilities for caring for children or adults. If an employer acts on an assumption based on a person's protected characteristics, for example, that a gay man's request for particular working hours is less important than a straight woman's, this may result in direct or indirect discrimination.

Reasonable adjustments to remove barriers for disabled people and avoiding discrimination arising from disability

If you are a disabled person, it may be a reasonable adjustment for your employer to allow you to work flexibly if this removes a barrier to your being able to do the job. If the change in hours is a reasonable adjustment, your employer must agree to it.

Your employer must make the change from the first point at which the duty to make reasonable adjustments arises, in other words, either when you start working for them or (if you are already working for them) when you become a disabled person, provided your employer knew or ought reasonably to have known this.

For example:

A disabled person has to eat at set times to manage their blood sugar for their diabetes, which is only possible by taking their breaks at slightly different times (and therefore working slightly different hours) from those that usually apply within an organisation. This does not have a negative impact on the worker's ability to do the job; quite the opposite, it removes a barrier which would otherwise stop them doing the job. If this is a reasonable adjustment, the employer must allow the change in hours.

It does not matter whether or not your employer would allow a non-disabled person to work flexibly in the particular job, as:

- Your employer is under a duty to make reasonable adjustments and
- Your employer is allowed to treat a disabled person better than a non-disabled person.

If you are a disabled person, to avoid discrimination arising from disability, your employer must also avoid treating you **unfavourably** when making a decision about your working hours or considering your request to work flexibly if:

- this is because of something connected to your disability, and
- your employer cannot show that what they are doing is **objectively justified**, and
- your employer knows or could reasonably be expected to know that you are a disabled person.

Changes to hours of work or flexible working on the basis of association with a protected characteristic

The duty to make reasonable adjustments to remove barriers for disabled people does not apply to people who are associated with a disabled person. People in this position, and those assisting older relatives with their day-to-day care needs, are often referred to as carers.

Most carers will qualify for the right to request flexible working once they have worked for their employer for at least 26 weeks.

An employer also needs to think about whether refusing a request for flexible working may be direct or indirect discrimination, as explained at the beginning of this chapter.

The protected characteristic of the person with whom a worker is associated may be relevant if an employer makes a decision based on that protected characteristic.

For example:

An employer offers flexible working to all staff. Requests are supposed to be considered on the basis of the business needs of the organisation, but a manager decides that a man's request to work flexibly to care for his 90-year-old father is more important than another man's to care for his 50-year-old wife. If the manager's decision is based on the age of the person being cared for, this is almost certainly discrimination because of age by association.

If the manager made their decision based on the fact the person with whom the worker was associated was a disabled person rather than an older person, that too might be direct discrimination by association because of whichever protected characteristic lost out. The manager should base any decision on the business needs of the organisation, not on the protected characteristics of the people making the requests.

Requests for changes to hours of work or flexible working relating to a worker's religion or belief

Some religions or beliefs may require their followers to pray at certain times of day, or to have finished work by a particular time.

For example:

Some Jews will finish work before sunset on Friday in order to avoid working on the Jewish Sabbath, and will not work again until after sunset on Saturday.

If your employer applies a rule like this, such as refusing to allow a worker to take particular rest breaks or to finish work by a particular time, they need to **objectively justify** what they are doing, as otherwise this may be indirect discrimination because of religion or belief.

For example:

- An employer imposes a permanent work rota requiring occasional Sunday working. One employee is an active Christian. When the woman accepted the job six months earlier she had told her company that she was unable to work on a Sunday because of her faith. This was accepted at the time. She resigns when told that the change to working Sundays is non-negotiable. This rule has a worse impact on the woman and other Christians for whom Sunday observance is a **manifestation** of their religion. Applying the rule will be indirect discrimination because of religion or belief unless the employer can objectively justify it.
- A small manufacturing company needs its staff to take their breaks at set times because of the manufacturing process which requires that a process has to be complete before equipment can be left. A worker for whom praying at particular times of the day is a requirement of their religion asks if they can take their breaks at the times when they need to pray, making up the time over the course of the rest of the day. The company considers the request by looking at the impact on the business. Refusing the request may be indirect discrimination because of religion or belief unless the employer can objectively justify it, which it may be able to do if, for example, there is no alternative way of doing the work.

Some religions require extended periods of fasting. If your employer chooses to make special arrangements to support workers through a fasting period, this would be a matter of good practice. Employers are not required to do this. However, if your employer does put special arrangements in place, they need to be careful that they are not disadvantaging other workers.

Not only might this cause resentment by the workers who are not receiving the special support, it may amount to worse treatment because of religion or belief and give rise to claims of discrimination.

For example:

A large catering company employs a large number of Muslim workers. During Ramadan, when the Muslim workers are fasting as an integral part of their religion, the employer takes on additional temporary staff. Each Muslim worker is given a non-Muslim assistant as the employer does not expect the fasting workers to be able to work as hard. The employer is trying to be considerate of their Muslim staff, but this approach may be both unnecessary and discriminatory. A better approach would be for the employer to consult all staff, and the recognised trade union if they have one, about how to accommodate the needs of the Muslim staff fairly and effectively. For example, it might be possible to take on a smaller number of additional staff to help out anyone who needs help to finish a task in time, regardless of their religion or belief.

Requests for changes to hours of work or flexible working relating to a worker's gender reassignment

If your request to work flexibly is because you propose to undergo, are undergoing or have undergone gender reassignment, your employer should consider your request on the same basis as they would consider any similar request which was not made under the right to request flexible working.

Employers should not refuse a request or treat it less seriously because it is being made by a transsexual person.

For example:

A transsexual person asks their employer if they can compress their working hours into 9 days out of every 10. This is so that on the tenth day they can attend an appointment related to the process of gender reassignment. The employer decides to agree to the request. This is because they have looked at their organisation's needs and would have agreed such a request if it had been made by someone who was not undergoing gender reassignment. If they had refused because the worker is a transsexual person, this would be direct discrimination because of gender reassignment.

A helpful approach for your employer to take

One important way an employer can avoid discrimination when deciding who can change their working hours or work flexibly is to set up a process which does not look at the reason for the worker's request but looks at whether their organisation would still be able to carry out its purpose if they agreed the request.

So, if you make a request, your employer should look at the impact on your work and on their organisation, not at the impact on your personal circumstances (unless you are a disabled person and the reason for the request is as a reasonable adjustment).

This is the approach your employer must take if you are using the right to request flexible working under employment law.

But it is also a helpful approach for an employer to take if flexible working is available to a wider range of workers.

For example:

An employer does not need to know that it is important to a worker to accompany a relative to kidney dialysis sessions on a Wednesday afternoon, just that they wish to adjust their hours to avoid working at that time.

When you make a request for flexible working, whether that is under the right to request or not, do it in a way that answers questions your employer may have about the impact on their organisation if they agreed your request, rather than telling them about your personal circumstances.

Decisions relating to time off

How employment law and equality law interact

Employment law (rather than the equality law which is explained in this guide) sets out people's rights to:

- A minimum number of days of paid time off
- Paid and unpaid maternity leave
- Paid paternity leave
- Paid and unpaid adoption leave
- Unpaid parental leave
- Unpaid family emergency leave in certain circumstances (for example, if a worker's usual childcare or care for other family members who depend on them is not available at short notice)
- Paid or unpaid time off for public duties and trade union responsibilities.

You can find out more about these rights at Directgov, whose contact details are in Chapter 5: *Further sources of information and advice*.

In general, equality law applies not to whether you have a right to time off, but how your employer makes decisions about:

- who gets to take time off, when and how much
- whether the time off should be paid or unpaid
- how your employer records different types of absence.

Exceptions to this, where equality law does affect whether someone has a right to time off, are:

- Time off as a reasonable adjustment to remove barriers for disabled people
- Gender reassignment leave
- Pregnancy-related absence

These situations are explained in the next section of this guide.

Your employer must avoid unlawful discrimination when making a decision about time off. Decisions about time off might range from who takes their holiday when to how your employer records workers' absences.

Use the information earlier in this guide to make sure you know what equality law says your employer must do to avoid unlawful discrimination.

This section of the guide covers the following:

- Direct and indirect discrimination
 - the specific age exception allowing different levels of annual leave based on length of service of up to five years
- Reasonable adjustments to remove barriers for disabled people and avoiding discrimination arising from disability
- Requests for time off relating to a worker's religion or belief
- Requests for time off relating to a worker's gender reassignment
- Pregnancy-related absences
 - sickness absence
 - ante-natal care
- Maternity, paternity and adoption leave

Some types of leave, such as holiday, count as a benefit and are treated in the same way as pay. You can read more about what this means in the Equality and Human Rights Commission guide: *Your rights to equality at work: pay and benefits*.

Direct and indirect discrimination

If your employer:

- refuses a request for leave because of a protected characteristic, or
- pays some people more than others during their time off because of a protected characteristic, or
- gives some people more leave than others because of a protected characteristic

this is likely to be direct discrimination, unless employment law or equality law specifically allows an employer to do this (as it does with maternity leave, for example).

If your employer:

- says that everyone has to take leave at a particular time of year, or
- sets conditions on when someone qualifies for extra leave

this may have a worse impact on a person with a particular protected characteristic and others with the same characteristic than it would have on people who do not have it. Unless your employer can **objectively justify** what they are doing, this may be indirect discrimination.

The specific age exception allowing different levels of annual leave based on length of service of up to five years

Equality law allows an employer to make a distinction between workers in pay and benefits based on length of service, including how much annual leave they get.

An employer can give workers with less than five years' service different holiday entitlements to those with more than five years without having to objectively justify this.

For example:

To encourage workers to stay with them for more than two years, an employer gives workers an extra day's paid annual leave for each complete year of service, up to five years. The exception allows the employer to do this without having to objectively justify the practice. This applies even though it is harder for younger employees to qualify for the extra leave and is therefore, on the face of it, indirect age discrimination against the younger workers.

Length of service can be worked out in one of two ways:

- by the length of time that the employee has been working for the employer at or above a particular level, or
- by the length of time the employee has been working for the employer in total.

If an employer uses length of service of more than five years to award or increase a benefit, this falls outside the exception.

But there is a further difference: an employer may still be able to use length of service of more than five years to make decisions about holiday entitlement if they **reasonably** believe that using length of service in this way fulfils a business need. They may believe it rewards higher levels of experience, encourages loyalty, or increases or maintains workers' motivation.

This is a less difficult test than the general test for **objective justification** for indirect discrimination. However, an employer still has to have evidence to support their belief that it did fulfil a business need.

For example:

An employer wants to give an extra five days' annual leave to workers after 10 years' service. The employer can only do this if they **reasonably believe** this practice fulfils a business need.

Reasonable adjustments to remove barriers for disabled people and avoiding discrimination arising from disability

Employers sometimes use workers' sickness absence records to help them make decisions about things like:

- promotion
- bonuses
- redundancy
- references.

If you are a disabled person and your employer treats time off taken by you which relates to your disability in exactly the same way as they treat sickness absence taken by a worker who is not disabled, this may result in your being treated worse than another worker because of something connected to your disability.

For example:

A worker who is a disabled person requires a day off every month for physiotherapy related to their condition. The employer records these days off as sickness absence. When the employer is deciding which staff to pay an annual bonus to, one of the tests is having had fewer than five days' sickness absence in the year. The disabled person is therefore not eligible for the bonus. They have been treated worse than other employees for a reason arising from their disability (the need to take time off for physiotherapy). To avoid this being unlawful, the employer must be able to **objectively justify** it.

Instead of trying to objectively justify the application of the rule in this way, the employer decides to record the absence related to the worker's disability separately from ordinary sickness absence. The employer excludes these days from the worker's sickness absence record when working out eligibility for the bonus. Recording the leave separately like this would probably be a reasonable adjustment.

Once your employer knows that you come within the definition of a disabled person, to avoid:

- direct or indirect discrimination because of disability, or
- discrimination arising from disability

and to make sure that you have complied with the duty to make reasonable adjustments your employer should:

- Record your disability-related time off separately from general sick leave. This will mean that they are not calculating bonuses or making other pay or employment decisions in a way that may unlawfully discriminate against you.
- Stay in touch if you are absent for a long period to find out how you are and to tell you what's happening at work (though they should make it clear they don't expect you to come back to work before you are ready).
- Think about a plan for your return to work, for example, arranging for you to start work again gradually or to do some work at home before you come into the office, if this is possible in your job.
- Consider reasonable adjustments with you and, if necessary, use expert advice to work out what reasonable adjustments can be made for when you are ready to return to work. If a change is reasonable, your employer must make it.

Your employer does not have to pay sick pay beyond what they normally pay just because your time off is disability-related. But it may be a reasonable adjustment to:

- extend your sick pay
- offer unpaid 'disability leave', or
- allow you to take the extra time off as annual leave.

If the reason you are absent is because of a delay by your employer in implementing a reasonable adjustment that would enable you to return to the workplace, maintaining full pay would almost certainly be a reasonable adjustment for your employer to make.

For example:

A woman who has a visual impairment needs work documents to be enlarged. Her employer fails to make arrangements to provide her with these. As a result, she has a number of absences from work because of eye-strain. After she has received full sick pay for four months, the employer is considering a reduction to half-pay in line with its sickness policy. It is likely to be a reasonable adjustment to maintain full pay as her absence is caused by the employer's delay in making the original adjustment.

Your employer could also change the targets expected of someone so that that person has an equal chance of earning bonuses.

For example:

A worker in sales takes every Thursday afternoon as unpaid leave for a disability-related reason. As a reasonable adjustment, their employer reduces their sales target to reflect their absence. Their team's target is also reduced by a proportionate amount.

Requests for time off relating to religion or belief

If a worker's religion or belief has special festival or spiritual observance days, they may ask for time off at a particular time in order to celebrate festivals or attend ceremonies.

An employer does not have to give a worker extra leave, either paid or unpaid, because of their religion or belief. They could require workers to use annual leave instead.

If an employer does decide to give some people extra leave just because of their religion or belief, this may be direct discrimination against people of another religion or belief or none, who will be getting less time off.

A worker may want to use a month's leave all at once for a religious occasion, such as a pilgrimage. This is a situation where your employer needs to balance everyone's interests carefully:

- If an employer places a limit on the number of weeks' leave that can be taken together, this may be indirect discrimination against the workers who want to go on pilgrimage. This is because it stops them doing this, thus having a worse impact on them than on people who do not share their religion or belief. To avoid a refusal being indirect discrimination, your employer needs to be able to **objectively justify** the refusal.
- If an employer grants a request from a person who is making a request relating to their religion or belief and refuses other requests for extended time off, (for example, to spend three weeks as a spectator at an overseas football tournament), this may be indirect discrimination against the person whose request you refuse if you could not **objectively justify** your decision.
- Alternatively, an employer could allow any worker to make a request for an extended period of leave and to look at the needs of their organisation when deciding whether to grant it or not, with a presumption that they grant the request unless there is a good reason not to.

If an employer tells workers that they must take leave during an annual closedown, the employer needs to think about whether this has a worse impact on workers sharing a protected characteristic who need annual leave at other times, for example, during religious festivals. Unless they can **objectively justify** the practice, it may amount to indirect discrimination because of religion or belief.

On the other hand, if an employer needs staff to be working for them at particular times of year, they may be able to **objectively justify** refusing a request for leave, even though this has a worse impact on people who share the protected characteristic of the person making the request.

For example:

A small toy shop employing four staff may be unable to release an individual for a religious festival in the busy pre-Christmas period. The employer may well be able to **objectively justify** refusing a request for such an absence because of the needs of the business.

Requests for time off relating to gender reassignment

If you are a transsexual person your employer must not treat you worse for being absent from work because you propose to undergo, are undergoing or have undergone gender reassignment than they would treat them:

- if you were absent because you were ill
- if you were absent for any other reason, and it is **unreasonable** to treat you worse.

This includes not treating you worse when your employer makes a decision about what time off you should have. If your employer would agree to a request for time off for someone to recover from an injury, then they should not refuse your request for time off for part of a process of gender reassignment. The request does not have to relate to a medical process. It could, for example, be for electrolysis to remove hair or for counselling.

Pregnancy-related absences

Sickness absence

Special rules apply to sickness absence which is related to a woman's pregnancy or to her having given birth.

Employers should record pregnancy-related illness separately from other kinds of illness and should not count it towards someone's total sickness record.

An employer should not pay a woman who is absent for a pregnancy-related illness less than the contractual sick pay she would receive if she was absent for any other illness with a statement of fitness to work ('fit note').

An employer must not take into account a period of absence due to pregnancy-related illness, or maternity leave, when making a decision about a woman's employment, for example, for disciplinary purposes or if they are selecting workers for redundancy. Sickness absence associated with a miscarriage should be treated as pregnancy-related illness.

For example:

A worker has been off work because of pregnancy complications since early in her pregnancy. Her employer has now dismissed her in accordance with the sickness policy which allows no more than 20 weeks' continuous absence. This policy is applied regardless of sex or pregnancy and maternity. The dismissal is unfavourable treatment and would be unlawful even if a man would be dismissed for a similar period of sickness absence, because the employer took into account the worker's pregnancy-related sickness absence in deciding to dismiss.

You can find out more about what employers should do in this situation using the Equality and Human Rights Commission's *Guidance on managing new and expectant parents*.

You can read more about pay during pregnancy and maternity leave in the Equality and Human Rights Commission guide: *Your rights to equality at work: pay and benefits*.

Ante-natal care

An employer must give a pregnant employee time off for ante-natal care. Ante-natal care can include medical examinations, relaxation and parenting classes.

For example:

A pregnant employee has booked time off to attend a medical appointment related to her pregnancy. Her employer insists this time must be made up for through flexi-time arrangements or her pay will be reduced to reflect the time off. This is unlawful: a pregnant employee is under no obligation to make up time taken off for ante-natal appointments and an employer cannot unreasonably refuse paid time off to attend such appointments.

The right for paid time off does not extend to the partners of pregnant women, although an employer could choose, as a matter of good practice, to allow someone to take annual leave or unpaid leave or to work flexibly to support their partner.

If an employer does allow this, they should make sure that they do not discriminate unlawfully in their approach.

For example:

An employer allows a man whose female partner is pregnant to take annual leave to attend ante-natal appointments with her. The employer refuses a similar request from a woman whose female partner is pregnant. This is likely to be direct discrimination because of sexual orientation.

Maternity, paternity, adoption and parental leave

When dealing with workers who request or take maternity, paternity, adoption or parental leave, your employer must make sure they do not discriminate against a person because of a protected characteristic.

For example:

A lesbian has asked her employer for unpaid parental leave. She and her partner adopted a child two years ago and she wants to be able to look after her child for part of the summer holidays. The worker made sure the time she has requested does not conflict with parental leave being taken by other workers. In exercising their discretion whether to grant parental leave, the woman's line manager refuses her request because they do not agree with same-sex couples being allowed to adopt children. This is likely to be direct discrimination because of sexual orientation.

You may be interested in the practical guidance for employers on managing maternity, paternity, parental and adoption leave in the Equality and Human Rights Commission's *New and expectant parents toolkit*. Contact details for the Commission are at the end of this guide.

Your questions answered

Q. As a woman, do I have a right to time off to have fertility treatment?

A. Neither equality law nor employment law gives a woman a right to paid time off for in vitro fertilisation (IVF) or other fertility treatment.

Of course, after a fertilised embryo has been implanted, a woman is legally pregnant and from that point is protected from unfavourable treatment because of pregnancy, including pregnancy-related sickness. She would also be entitled to time off for ante-natal care.

It is good practice (though not a legal requirement) for an employer to treat sympathetically any request for time off for IVF or other fertility treatment, and consider working out a procedure to cover this situation. This could include allowing women to take annual leave or unpaid leave when receiving treatment and designating a member of staff whom they can inform on a confidential basis that they are undergoing treatment.

For example:

A female worker who is undergoing IVF treatment has to take time off sick because of its side effects. Her employer treats this as ordinary sickness absence and pays her contractual sick pay that is due to her. Had contractual sick pay been refused, this could amount to sex discrimination.

2. When your employer is responsible for what other people do

It is not just how your employer personally behaves that matters.

If another person who is:

- employed by your employer, or
- carrying out your employer's instructions to do something (who the law calls your employer's agent)

does something that is **unlawful discrimination, harassment or victimisation**, your employer can be held legally responsible for what they have done.

This part of the guide explains:

- When your employer can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation
- How your employer can reduce the risk that they will be held legally responsible
- When your employer's employees or agents may be personally liable
- What happens if a person instructs someone else to do something that is against equality law
- What happens if a person helps someone else to do something that is against equality law
- What happens if an employer tries to stop equality law applying to a situation

When your employer can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation

Your employer is legally responsible for acts of discrimination, harassment and victimisation carried out by their employees in the course of their employment.

Your employer is also legally responsible as the 'principal' for the acts of their agents done with their authority. Their agent is anyone your employer has instructed to do something on their behalf, even if your employer does not have a formal contract with them.

As long as:

- the employee was acting in the course of their employment – in other words, while they were doing their job, or
- the agent was acting within the general scope of their principal's authority – in other words, while they were carrying out your employer's instructions

it does not matter whether or not your employer:

- knew about, or
- approved of

what their employee or agent did.

For example:

- A shopkeeper goes abroad for three months and leaves an employee in charge of the shop. This employee harasses a colleague with a learning disability, by constantly criticising how they do their work. The colleague leaves the job as a result of this unwanted conduct. This could amount to harassment related to disability and the shopkeeper could be responsible for the actions of their employee.
- An employer engages a head-hunter to work in-house to recruit a team of senior management. The head-hunter weeds out applications from women of child bearing age. This is almost certainly unlawful sex discrimination. Both the employer and the head-hunter (who is the employer's agent) would be legally responsible for the discrimination, except that the employer can show that they told the head-hunter to comply with equality law. This means that the authority given to the head-hunter as agent did not extend to acting in a discriminatory way, the agent acted outside the scope of the employer's authority and only the agent is liable for the discrimination.

However, your employer will not be held legally responsible if they can show that:

- they took **all reasonable steps** to stop an employee acting unlawfully
- an agent acted outside the scope of their authority (in other words, that they did something so different from what your employer asked them to do that they could no longer be thought of as acting on your employer's behalf).

How your employer can reduce the risk that they will be held legally responsible

Your employer can reduce the risk that they will be held legally responsible for the behaviour of their employees or agents if they tell them how to behave so that they avoid unlawful discrimination, harassment or victimisation.

This does not just apply to situations where your employer and their other staff are dealing face-to-face with you, but also to how your employer and the people who work for them plan what happens in your workplace.

When your employer or their employees or agents are planning what happens to you in a work situation, your employer needs to make sure that their decisions, rules or ways of doing things are not:

- **direct discrimination**, or
- **indirect discrimination** that they cannot **objectively justify**, or
- **discrimination arising from disability** that they cannot **objectively justify**, or
- **harassment**,

and that they have made **reasonable adjustments** for you if you are a disabled person.

So it is important for your employer to make sure that their employees and agents know how equality law applies to what they are doing.

When your employer's employees or agents may be personally liable

An employee or agent may be personally responsible for their own acts of discrimination, harassment or victimisation carried out during their employment or while acting with their employer's authority. This applies where either:

- your employer is also liable as their employer or principal, or
- your employer would be responsible but they show that:
 - they took **all reasonable steps** to prevent their employee discriminating against, harassing or victimising you, or
 - that their agent acted outside the scope of their authority.

For example:

A factory worker racially harasses their colleague. The employer would be liable for the worker's actions, but is able to show that they took all reasonable steps to stop the harassment. The colleague can still claim compensation against the factory worker in an employment tribunal.

But there is an exception to this. An employee or agent will *not* be responsible if their employer or principal has told them that there is nothing wrong with what they are doing and the employee or agent **reasonably** believes this to be true.

It is a criminal offence, punishable by a fine, for an employer or principal to make a false statement which an employee or agent relies upon to carry out an unlawful act.

What happens if a person instructs someone else to do something that is against equality law

An employer or principal must not instruct, cause or induce their employee or agent to discriminate against, harass or victimise another person, or to attempt to do so.

'Causing' or 'inducing' someone to do something can include situations where someone is made to do something or persuaded to do it, even if they were not directly instructed to do it.

Both:

- the person who receives the instruction or is caused or induced to discriminate against, harass or victimise, and
- the person who is on the receiving end of the discrimination, harassment or victimisation

have a claim against the person giving the instructions if they suffer loss or harm as a result of the instructing or causing or inducing of the discrimination, harassment or victimisation.

This applies whether or not the instruction is actually carried out.

What happens if a person helps someone else to do something that is against equality law

A person must not help someone else carry out an act which the person helping knows is unlawful under equality law.

However, if the person helping has been told by the person they help that the act is lawful and he or she **reasonably** believes this to be true, he or she will not be legally responsible.

It is a criminal offence, punishable by a fine, to make a false statement which another person relies on to help to carry out an unlawful act.

What happens if an employer tries to stop equality law applying to a situation

An employer cannot stop equality law applying to a situation if it does in fact apply. For example, there is no point in an employer making a statement in a contract of employment that equality law does not apply. The statement will not have any legal effect. That is, it will not be possible for the employer to enforce or rely on a term in a contract that tries to do this. This is the case even if the other person has stated they have understood the term and/or they have agreed to it.

For example:

- A worker's contract includes a term saying that they cannot bring a claim in an Employment Tribunal. Their employer sexually harasses them. The term in their contract does not stop them bringing a claim for sexual harassment in the Employment Tribunal.
- A business partner's partnership agreement contains a term that says 'equality law does not apply to this agreement'. The partner develops a visual impairment and needs reasonable adjustments to remove barriers to their continuing to do their job. The other partners instead ask them to resign from the partnership. The partner can still bring a claim in the Employment Tribunal for a failure to make reasonable adjustments and unlawful disability discrimination.
- An applicant for a job is told 'equality law does not apply to this business, it is too small'. She still agrees to go to work there. When she becomes pregnant, she is dismissed. She can still bring a claim in the Employment Tribunal for pregnancy discrimination.

3. The employer's duty to make reasonable adjustments to remove barriers for disabled people

Equality law recognises that bringing about equality for disabled people may mean changing the way in which employment is structured, the removal of physical barriers and/or providing extra support for a disabled **worker** or **job applicant**.

This is the **duty to make reasonable adjustments**.

The duty to make reasonable adjustments aims to make sure that as a **disabled person**, you have, as far as is reasonable, the same access to everything that is involved in getting and doing a job as a non-disabled person.

When the duty arises, your **employer** is under a positive and proactive duty to take steps to remove or reduce or prevent the obstacles you face as a disabled worker or job applicant.

Many of the adjustments your employer can make will not be particularly expensive, and they are not required to do more than it is reasonable for them to do. What is reasonable depends, among other factors, on the size and nature of your employer's organisation.

If, however,

- you are a disabled person, and
- you can show that there were barriers your employer should have identified and reasonable adjustments your employer could have made, and
- your employer does nothing,

you can bring a claim against your employer in the Employment Tribunal, and your employer may be ordered to pay you compensation as well as make the reasonable adjustments. A failure to make reasonable adjustments counts as unlawful discrimination. You can read more about what to do if you believe you've been discriminated against in Chapter 4.

In particular, if you are a disabled person, the need to make adjustments for you as a worker or job applicant:

- must not be a reason not to appoint you to a job or promote you if you are the best person for the job with the adjustments in place
- must not be a reason to dismiss you
- must be considered in relation to every aspect of your job

provided the adjustments are reasonable for your employer to make.

Many factors will be involved in deciding what adjustments to make and they will depend on individual circumstances. Different people will need different changes, even if they appear to have similar impairments.

Your employer only has to make adjustments where they are aware – or should **reasonably** be aware – that you are a disabled person.

It is advisable for your employer to discuss the adjustments with you, otherwise any changes they make may not be effective.

The rest of this section looks at the detail of the duty and gives examples of the sorts of adjustments your employer could make. It looks at:

- Which disabled people does the duty apply to?
- How can your employer find out if you are a disabled person?
- The three requirements of the duty
- Are you at a substantial disadvantage as a disabled person in that work situation?
- Changes to policies and the way an organisation usually does things
- Dealing with physical barriers
- Providing extra equipment or aids
- Making sure an adjustment is effective
- Who pays for reasonable adjustments?
- What is meant by 'reasonable'

- Reasonable adjustments in practice
- Specific situations
 - Employment services
 - Occupational pensions
- Questions about health or disability

Which disabled people does the duty apply to?

The duty applies to you if you:

- are working for an employer, or
- apply for a job with an employer, or
- tell an employer you are thinking of applying for a job with them.

It applies to all stages and aspects of employment. So, for example, where the duty arises your employer must make reasonable adjustments to disciplinary or dismissal procedures and decisions. It does not matter if you were a disabled person when you began working for them, or if you have become a disabled person while working for them.

The duty may also apply after you have stopped working for an employer.

The duty also applies in relation to **employment services**, with some differences which are explained later in this part of the guide.

Reasonable adjustments may also be required in relation to occupational pension schemes. This is explained later in this part of the guide.

How can your employer find out if you are a disabled person?

Your employer only has to make these changes where they know or could **reasonably** be expected to know that you are a disabled person. This means your employer must do everything they can reasonably be expected to do to find out.

For example:

An employee's performance has recently got worse and they have started being late for work. Previously they had a very good record of punctuality and performance. Rather than just telling them they must improve, their employer talks to them in private. This allows the employer to check whether the change in performance could be for a disability-related reason. The employee says that they are experiencing a recurrence of depression and are not sleeping well which is making them late. Together, they agree to change the employee's hours slightly while they are in this situation and that the employee can ask for help whenever they are finding it difficult to start or complete a task. These are reasonable adjustments.

This does not, however, mean that an employer should be asking intrusive questions or ones that violate your dignity. Employers must still think about privacy and confidentiality in what they ask and how they ask it.

Be aware that there are restrictions on when an employer can ask health- or disability-related questions during recruitment before shortlisting someone or making a job offer. This is to make sure that job applicants are not discriminated against because of issues related to health or disability. The exceptions to the restriction are set out at the end of this part of this guide.

An employer can ask you questions to find out if you need reasonable adjustments for the recruitment process. But they must use your answers only for working out the adjustments you need and whether these are reasonable.

If the adjustments are reasonable, and the employer used the fact that you needed the adjustments as a reason not to take you further into the recruitment process, this would be unlawful discrimination.

If you are applying for a job and you do not ask for adjustments in advance but turn out to need them, the employer must still make them, although what is reasonable in these circumstances may be different from what would be reasonable with more notice. The employer must not hold the fact that they have to make last minute adjustments against you.

For example:

A job applicant does not tell an employer in advance that they use a wheelchair and the employer does not know about this. On arriving for the interview the applicant discovers that the room is not accessible. Although the employer could not have been expected to make the necessary changes in advance, it would be a reasonable adjustment to hold the interview in an alternative, accessible room if one was available without too much disruption or cost. Alternatively, it might be a reasonable adjustment to reschedule the interview if this was practicable.

There is more information about what this means in the Equality and Human Rights Commission guide: *Your rights to equality at work: when you apply for a job*.

The three requirements of the duty

The duty contains three requirements that apply in situations where a disabled person would otherwise be placed at a **substantial disadvantage** compared with people who are not disabled.

- The first requirement involves changing the way things are done (equality law calls this a **provision, criterion or practice**).

For example:

An employer has a policy that designated car parking spaces are only offered to senior managers. A worker who is not a manager, but has a mobility impairment and needs to park very close to the office, is given a designated car parking space. This is likely to be a reasonable adjustment to the employer's car parking policy.

- The second requirement involves making changes to overcome barriers created by the **physical features** of a workplace.

For example:

Clear glass doors at the end of a corridor in a particular workplace present a hazard for a visually impaired worker. Adding stick-on signs or other indicators to the doors so that they become more visible is likely to be a reasonable adjustment for the employer to make.

- The third requirement involves providing extra equipment (which equality law calls an **auxiliary aid**) or getting someone to do something to assist you (which equality law calls an **auxiliary service**).

For example:

An employer provides specialist software for a member of staff who develops a visual impairment and whose job involves using a computer.

Each of these requirements is looked at in more detail later in this part of the guide.

Are you at a substantial disadvantage as a disabled person?

The question an employer needs to ask themselves is whether:

- the way they do things
- any physical feature of their workplace
- the absence of an auxiliary aid or service

puts you, as a disabled worker or job applicant, at a substantial disadvantage compared with a person who is not disabled.

Anything that is more than minor or trivial is a substantial disadvantage.

If a substantial disadvantage does exist, then the employer must make reasonable adjustments.

The aim of the adjustments the employer makes is to remove or reduce the substantial disadvantage.

But the employer only has to make adjustments that are reasonable for them to make. There is more information about how to work out what is reasonable a bit later in this part of the guide.

Changes to policies and the way an organisation usually does things

The first requirement involves changing the way things are done (equality law calls this a **provision, criterion or practice**).

This means the employer must look at whether they need to change some written or unwritten policies, and/or some of the ways they usually do things, to remove or reduce barriers that would place you at a substantial disadvantage, for example, by stopping you working for that employer or applying for a job with that employer or stopping you being fully involved at work.

This includes your employer's processes for deciding who is offered a job, criteria for promotion or training, benefits, working conditions and contractual arrangements.

For example:

- Supervisors in an organisation are usually employed on a full-time basis. The employer agrees to a disabled person whose impairment causes severe fatigue working on a part-time or job share basis. By doing this, the employer is making a reasonable adjustment.
- The design of a particular workplace makes it difficult for a disabled person with a hearing impairment to hear, because the main office is open plan and has hard flooring, so there is a lot of background noise. Their employer agrees that staff meetings should be held in a quieter place that allows that person to fully participate in the meeting. By doing this, the employer is making a reasonable adjustment.

Dealing with physical barriers

The second requirement involves making changes to overcome barriers created by the **physical features** of an employer's workplace.

This means your employer may need to make some changes to their building or premises.

Exactly what kind of change the employer makes will depend on the kind of barriers the premises present to you. The employer will need to consider the whole of their premises. They may have to make more than one change.

Physical features include: steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, public facilities (such as telephones, counters or service desks), lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items (such as equipment and display racks). Physical features also include the sheer scale of premises (for example, the size of a building). This is not an exhaustive list.

- Physical features could be something to do with the structure of the actual building itself like steps, changes of level, emergency exits or narrow doorways.
- Or it could be something about the way the building or premises have been fitted out, things like heavy doors, inaccessible toilets or inappropriate lighting.
- It could even be the way things are arranged inside the premises such as fixtures and fittings like shelf heights in storage areas or fixed seating in canteens.

For example:

An employer has recruited a worker who is a wheelchair user and who would have difficulty negotiating her way around the office. In consultation with the new worker, the employer rearranges the layout of furniture in the office. The employer has made reasonable adjustments.

Providing extra equipment or aids

The third requirement of the duty involves providing extra equipment – which equality law calls **auxiliary aids** – and **auxiliary services**, where someone else is used to assist you, such as a reader, a sign language interpreter or a support worker.

This means an employer may need to provide some extra equipment, auxiliary aids or services for you if you work for them or apply for a job with them.

An auxiliary aid or service may make it easier for you to do your job or to participate in an interview or selection process. So the employer should consider whether it is reasonable to provide this.

The kind of equipment or aid will depend very much on:

- you as an individual disabled person and
- the job you are or will be doing or what is involved in the recruitment process.

You may well have experience of what you need, or you and your employer may be able to get expert advice from some of the organisations listed in Chapter 5: *Further sources of information and advice*.

Making sure an adjustment is effective

It may be that several adjustments are required in order to remove or reduce a range of disadvantages and sometimes these will not be obvious to the employer. So your employer should work, as much as possible, with you to identify the kind of disadvantages or problems that you face but also the potential solutions in terms of adjustments.

But even if you don't know what to suggest, your employer must still consider what adjustments may be needed.

For example:

A disabled employee has been absent from work as a result of depression. Neither the employee nor their doctor is able to suggest any adjustments that could be made. Nevertheless the employer should still consider whether any adjustments, such as working from home for a time or changing working hours or offering more day-to-day support, would be reasonable.

You and/or your employer may be able to get expert advice from some of the organisations listed in Chapter 5: *Further sources of information and advice*.

Who pays for reasonable adjustments?

If something is a reasonable adjustment, your employer or prospective employer must pay for it. The cost of an adjustment can be taken into account in deciding if it is reasonable or not.

However, there is a government scheme called Access to Work which can help you if your health or disability affect your work. They help by giving advice and support. Access to Work can also help with extra costs which would not be reasonable for your employer or prospective employer to pay.

For example, Access to Work might pay towards the cost of getting to work if you cannot use public transport, or for assistance with communication at job interviews.

You may be able to get advice and support from Access to Work if you are:

- in a paid job, or
- unemployed and about to start a job, or
- unemployed and about to start a Work Trial, or
- self-employed

and

- your disability or health condition stops you from being able to do parts of your job.

You should make sure your employer knows about Access to Work. Although the advice and support are given to you, your employer will obviously benefit too. Information about Access to Work is in Chapter 5: *Further sources of information and advice*.

What is meant by ‘reasonable’

Your employer only has to do what is reasonable.

Various factors influence whether a particular adjustment is considered reasonable. The responsibility for making the decision about reasonableness rests with the employer, although you could challenge it if you felt this was necessary.

When deciding whether an adjustment is reasonable an employer can consider:

- how effective the change will be in avoiding the disadvantage you would otherwise experience
- its practicality
- the cost
- their organisation’s resources and size
- the availability of financial support.

Your employer’s overall aim should be, as far as possible, to remove or reduce any substantial disadvantage faced by you as a worker or job applicant which would not be faced by a non-disabled person.

Issues your employer can consider:

- Employers are allowed to treat disabled people better or ‘more favourably’ than non-disabled people and sometimes this may be part of the solution.
- The adjustment must be effective in helping to remove or reduce any disadvantage you are facing. If it doesn’t have any impact at all or only a very minor one, then there is no point.
- In reality it may take several different adjustments to deal with that disadvantage but each change must contribute towards this.
- The employer can consider whether an adjustment is practical. The easier an adjustment is, the more likely it is to be reasonable. However, just because something is difficult doesn’t mean it can’t also be reasonable. The employer needs to balance this against other factors.

- If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as impracticality or lack of effectiveness) made it unreasonable.
- Your employer's size and resources are another factor. If an adjustment costs a significant amount, it is more likely to be reasonable for your employer to make it if your employer has substantial financial resources. Your employer's resources must be looked at across their whole organisation, not just for the branch or section where you are or would be working. This is an issue which the employer has to balance against the other factors.
- In changing policies, criteria or practices, the employer does not have to change the basic nature of the job, where this would go beyond what is reasonable.
- What is reasonable in one situation may be different from what is reasonable in another situation, such as where you are already working for your employer and face losing your job without an adjustment, or where you are a job applicant. Where you are already working for an employer, or about to start a long-term job with them, they would probably be expected to make more permanent changes (and, if necessary, spend more money) than for someone who is attending a job interview for an hour.
- If they are a larger rather than a smaller organisation, the employer is also more likely to have to make certain adjustments such as redeployment or flexible working patterns which may be easier for an organisation with more staff.
- If advice or support is available, for example, from Access to Work or from another organisation (sometimes charities will help with costs of adjustments), then this is more likely to make the adjustment reasonable.
- If making a particular adjustment would increase the risks to the health and safety of anybody, including yours, then the employer can consider this when making a decision about whether that particular adjustment or solution is reasonable. But the employer's decision must be based on a proper assessment of the potential health and safety risks.

If, having taken all of the relevant issues into account, the employer decides that an adjustment is reasonable, then they must make it happen.

If you do not agree with them about whether an adjustment is reasonable or not, in the end, only an Employment Tribunal can decide this. You can read more about what to do if you believe you've been discriminated against in Chapter 4. This includes if an employer has failed to make what you believe are reasonable adjustments to remove barriers you are facing.

Providing information in an alternative format

Equality law says that where providing information is involved, the steps which it is reasonable for the employer to take include steps to make sure that the information is provided in an accessible format.

For example:

- A job applicant asks for information about the job to be read onto an audio CD and sent to them. This is likely to be a reasonable adjustment that the employer must make.

Reasonable adjustments in practice

Examples of steps it might be reasonable for an employer to have to take include:

- **Making adjustments to premises.**

For example:

An employer makes structural or other physical changes such as widening a doorway, providing a ramp or moving furniture for a wheelchair user; relocates light switches, door handles, or shelves for someone who has difficulty in reaching; or provides appropriate contrast in decor to help the safe mobility of a visually impaired person.

- **Allocating some of your duties to another person.**

For example:

An employer reallocates minor or subsidiary duties to another employee as a disabled person has difficulty doing them because of their disability. For example, the job involves occasionally going onto the open roof of a building the employer transfers this work away from an employee whose disability involves severe vertigo.

- **Transferring you to fill an existing vacancy.**

For example:

An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. This might also involve retraining or other reasonable adjustments such as equipment for the new post or a transfer to a position on a higher grade.

- **Altering your hours of working or training.**

For example:

An employer allows a disabled person to work flexible hours to enable them to have additional breaks to overcome fatigue arising from their disability. It could also include permitting part-time working, or different working hours to avoid the need to travel in the rush hour if this is a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

- **Assigning you to a different place of work or training.**

For example:

An employer relocates the work station of a newly disabled employee (who now uses a wheelchair) from an inaccessible third floor office to an accessible one on the ground floor. If the employer operates from more than one workplace, it may be reasonable to move the employee's place of work to other premises of the same employer if the first building is inaccessible and the other premises are not.

- **Allowing you to be absent during working or training hours for rehabilitation, assessment or treatment.**

For example:

An employer allows a disabled person who has recently developed a condition to have more time off work than would be allowed to non-disabled workers to enable them to have rehabilitation. A similar adjustment would be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.

- **Giving, or arranging for, training or mentoring (whether for you or for other people). This could be training in particular pieces of equipment which you will be using, or an alteration to the standard employee training to reflect your particular impairment.**

For example:

- All workers are trained in the use of a particular machine but an employer provides slightly different or longer training for an employee with restricted hand or arm movements, or training in additional software for a visually impaired person so that they can use a computer with speech output.
- An employer provides training for employees on conducting meetings in a way that enables a Deaf staff member to participate effectively.
- A disabled person returns to work after a six-month period of absence due to a stroke. Their employer pays for them to see a work mentor, and allows time off to see the mentor, to help with their loss of confidence following the onset of their disability.

- **Acquiring or modifying equipment.**

For example:

An employer might have to provide special equipment (such as an adapted keyboard for someone with arthritis or a large screen for a visually impaired person), an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled workers (such as longer handles on a machine).

The employer does not have to provide or modify equipment for personal purposes unconnected with your job, such as providing a wheelchair if you need one in any event but do not have one. This is because in this situation the disadvantages you are facing do not flow from things your employer has control over.

- **Modifying instructions or reference manuals.**

For example:

The format of instructions and manuals might need to be modified for some disabled people (such as being produced in Braille or on audio CD) and instructions for people with learning disabilities might need to be conveyed orally with individual demonstration or in Easy Read.

- **Modifying procedures for testing or assessment.**

For example:

A person with restricted manual dexterity would be disadvantaged by a written test, so the employer gives that person an oral test instead.

- **Providing a reader or interpreter.**

For example:

An employer arranges for a colleague to read hard copy post to a person with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader.

- **Providing supervision or other support.**

For example:

An employer provides a support worker or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence.

- **Allowing you to take a period of disability leave.**

For example:

A worker who has cancer needs to undergo treatment and rehabilitation. Their employer allows a period of disability leave and permits them to return to their job at the end of this period.

- **Participating in supported employment schemes, such as Work step.**

For example:

A person applies for a job as an office assistant after several years of not working because of depression. They have been participating in a supported employment scheme where they saw the job advertised. As a reasonable adjustment the person asks the employer to let them make private phone calls during the working day to a support worker at the scheme.

- **Employing a support worker to assist a disabled worker.**

For example:

An adviser with a visual impairment is sometimes required to make home visits to clients. The employer employs a support worker to assist them on these visits.

- **Modifying disciplinary or grievance procedures.**

For example:

A person with a learning disability is allowed to take a friend (who does not work with them) to act as an advocate at a meeting with the person's employer about a grievance. The employer also makes sure that the meeting is conducted in a way that does not disadvantage or patronise the disabled person.

- **Adjusting redundancy selection criteria.**

For example:

A person with an autoimmune disease has taken several short periods of absence during the year because of the condition. When their employer is taking the absences into account as a criterion for selecting people for redundancy, they discount these periods of disability-related absence.

- **Modifying performance-related pay arrangements.**

For example:

A disabled person who is paid purely on their output needs frequent short additional breaks during their working day – something their employer agrees to as a reasonable adjustment. It is likely to be a reasonable adjustment for their employer to pay them at an agreed rate (e.g. their average hourly rate) for these breaks.

It may sometimes be necessary for an employer to take a combination of steps.

For example:

A woman who is blind is given a new job with her employer in an unfamiliar part of the building. The employer:

- arranges facilities for her assistance dog in the new area
- arranges for her new instructions to be in Braille, and
- provides disability equality training to all staff.

In some situations, a reasonable adjustment will not work without the co-operation of other workers. Your employer's other staff may therefore have an important role in helping make sure that a reasonable adjustment is carried out in practice. Your employer must make this happen. It is unlikely to be a valid 'defence' to a claim under equality law for a failure to make reasonable adjustments for an employer to argue that an adjustment was unreasonable because other staff were obstructive or unhelpful when the employer tried to make an adjustment happen. The employer would at least need to be able to show that they took all reasonable steps to try and resolve the problem of the attitude of their other staff.

For example:

An employer makes sure that a worker with autism has a structured working day as a reasonable adjustment. As part of the reasonable adjustment, it is the responsibility of the employer to make sure that other workers co-operate with this arrangement.

If you do not want your employer to involve other workers, the employer must not breach your confidentiality by telling them about your situation.

But if you are reluctant for other staff to know about your impairment, and your employer believes that a reasonable adjustment requires the co-operation of your colleagues, it may not be possible for the employer to make the adjustment unless you are prepared for some information to be shared. It does not have to be detailed information, just enough to explain to other staff what they need to do.

Specific situations

Employment services

An **employment service provider** must not unlawfully discriminate against people who are using or want to use its services. There is more information about what this means in the list of words and key ideas.

In addition, an employment service provider has a duty to make reasonable adjustments, except when providing a **vocational service**.

For employment service providers, unlike for employers, the duty is 'anticipatory'. If an organisation is an employment service provider, this means they cannot wait until you or another a disabled person wants to use their services, but must think in advance (and on an ongoing basis) about what disabled people with a range of **impairments** might reasonably need, such as people who have a visual impairment, a hearing impairment, a mobility impairment, or a learning disability.

For example:

An employment agency makes sure its website is accessible to disabled people and that it can provide information about job opportunities in a range of **alternative formats**. It also makes sure its staff are trained to assist disabled people who approach it to find out about job opportunities.

Occupational pensions

Occupational pension schemes must not unlawfully discriminate against people. There is more information about what this means in the Equality and Human Rights Commission guide: *Your rights to equality at work: pay and benefits*.

In addition, an occupational pension scheme must make reasonable adjustments to any provision, criterion or practice in relation to the scheme which puts you at a substantial disadvantage in comparison with people who are not disabled.

For example:

The rules of an employer's final salary scheme provide that the maximum pension receivable is based on the member's salary in the last year of work. Having worked full-time for 20 years, a worker develops a condition which leads them to reduce their working hours two years before their pension age. The scheme's rules put them at a disadvantage as a result of their disability, because their pension will only be calculated on their part-time salary. The trustees decide to convert the worker's part-time salary to its full-time equivalent and make a corresponding reduction in the period of their part-time employment which counts as pensionable. In this way, their full-time earnings will be taken into account. This is likely to be a reasonable adjustment to make.

Questions about health or disability

Except in very restricted circumstances or for very restricted purposes, employers are not allowed to ask any job applicant about their health or any disability until the person has been:

- offered a job either outright or on conditions, or
- included in a pool of successful candidates to be offered a job when a position becomes available, where more than one post is being recruited to (for example, if an employer is opening a new workplace or expects to have multiple vacancies for the same role).

This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence are questions that relate to health or disability.

This applies whether or not you are a disabled person.

No-one else can ask these questions on the employer's behalf either. So an employer cannot refer you to an **occupational health practitioner** or ask you to fill in a questionnaire provided by an occupational health practitioner before the offer of a job is made (or before you have been included in a pool of successful applicants) except in very limited circumstances, which are explained next.

The point of stopping employers asking questions about health or disability is to make sure that all job applicants are looked at properly to see if they can do the job in question, and not ruled out just because of issues related to or arising from their health or disability, such as sickness absence, which may well say nothing about whether they can do the job now.

The employer can ask questions once they have made a job offer or included you in a group of successful candidates. At that stage, the employer could make sure that your health or disability would not prevent you from doing the job. But the employer must also consider whether there are reasonable adjustments that would enable you to do the job.

What happens if an employer asks questions about health or disability?

You can bring a claim against an employer if:

- the employer asked health or disability-related questions of a kind that are not allowed, and
- you believe there has been direct discrimination as a result of the information that you gave (or failed to give) when answering the questions.

Separately, the Equality and Human Rights Commission can take legal action against the employer if they ask job applicants any health or disability-related questions that are not allowed by equality law. Contact details for the Equality and Human Rights Commission are at the end of this guide.

When an employer is allowed to ask questions about health or disability

An employer can ask questions about health or disability when:

- They are asking the questions to find out if you need reasonable adjustments for the recruitment process, such as for an assessment or an interview.

For example:

An application form states: 'Please contact us if you need the application form in an alternative format or if you need any adjustments for the interview'. This is allowed.

- They are asking the questions to find out if you (whether you are a disabled person or not) can take part in an assessment as part of the recruitment process, including questions about reasonable adjustments for this purpose.

For example:

An employer is recruiting play workers for an outdoor activity centre and wants to hold a practical test for applicants as part of the recruitment process. It asks a question about health in order to ensure that applicants who are not able to undertake the test (for example, because they are pregnant or have an injury) are not required to take the test. This is allowed.

- They are asking the questions for **monitoring** purposes to check the **diversity** of applicants.
- They want to make sure that any applicant who is a disabled person can benefit from any measures aimed at improving disabled people's employment rates. For example, the **guaranteed interview scheme**. The employer should make it clear to job applicants that this is why they are asking the question.
- They are asking the question because having a specific impairment is an **occupational requirement** for a particular job.

For example:

An employer wants to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states that this is an occupational requirement. The employer can ask on the application form or at interview about the applicant's disability.

- Where the questions relate to a requirement to vet applicants for the purposes of **national security**.
- Where the question relates to a person's ability to carry out a function that is intrinsic (or absolutely fundamental) to that job. Where a health or disability-related question would mean the employer would know you can carry out that function with reasonable adjustments in place, then the employer can ask the question.

For example:

A construction company is recruiting scaffolders. The company can ask about health or disability on the application form or at interview if the questions relate specifically to an applicant's ability to climb ladders and scaffolding to a significant height. The ability to climb ladders and scaffolding is intrinsic or fundamental to the job.

In practice, even if a function is intrinsic to the job, the employer should be asking you (if you are a disabled person) about your ability to do the job with reasonable adjustments in place. There will be very few situations where a question about a person's health or disability needs to be asked.

Most of the time, whether on an application form or during an interview, an employer should ask you a question about whether you have the relevant skills, qualities or experience to do the job, not about your health or about any disability you may have.

For example:

An employer is recruiting a person as a cycle courier. They ask applicants to send in a CV setting out their relevant experience and a covering letter saying why they would be suitable for the job. The employer will score candidates on their experience of and enthusiasm for cycling. It is not necessary to ask applicants questions about health or disability. If the employer considers a health check is necessary, for example, for insurance purposes, this can be carried out once an applicant has been offered the job, and the job offer can be made conditional on the health check.

4. What to do if you believe you've been discriminated against

If you believe you have been **unlawfully discriminated** against by your **employer**, or their **employee** or **agent**, in a **work situation**, what can you do about it? Or if you have applied for a job (or been stopped from applying) and believe you have been unlawfully discriminated against during the application process, what can you do about it?

This part of this guide covers:

- Your choices
- Was what happened against equality law?
- Ways you can try to get your employer to sort out the situation by complaining directly to them:
 - Making a complaint informally
 - Using your employer's grievance procedures
 - Alternative dispute resolution (getting more information about involving other people in sorting the situation out)
 - What your employer can do if they find that there has been unlawful discrimination
 - What your employer can do if they find that there wasn't any unlawful discrimination
 - Monitoring the outcome
- The questions procedure, which you can use to find out more
- Key points about discrimination cases in a work situation:
 - Where claims are brought
 - Time limits for making a claim
 - The standard and burden of proof
 - What the Employment Tribunal can order your employer to do.
- Where to find out more about making a tribunal claim

Read the whole of this part of the guide before you decide what to do, so you know all the options you have.

It is especially important that you work out when the last day is that you can tell the Employment Tribunal about your complaint, so that you don't miss that deadline, even if you are trying to work things out with your employer first.

Your choices

There are three things you can do:

- Complain informally to your employer.
- Bring a grievance using your employer's grievance procedures.
- Make a claim to the Employment Tribunal.

You do not have to choose only one of these. Instead, you could try them in turn. If you cannot get your employer to put things right, then you can make a claim to the Employment Tribunal.

Just be aware that if you do decide to make a claim to the Employment Tribunal, you need to tell the tribunal about your claim (by filling in a form) within three months (less one day) of what happened.

You do not have to go first to your employer before making a claim to the Employment Tribunal.

But there are two reasons for doing this:

- You should think carefully about whether making a claim to the Employment Tribunal is the right thing for you personally.

Making a claim may be demanding on your time and emotions, and before starting the process you may want to look at whether or not you have a good chance of succeeding. You may also want to see if there are better ways of sorting out your complaint.

- If you do not use your employer's procedures for solving a problem before you make a claim to the Employment Tribunal, and you win your case, the tribunal can reduce any money it tells your employer to pay you by up to a quarter if it thinks you acted unreasonably.

Was what happened against equality law?

Write down what happened as soon as you can after it happened, or tell someone else about it so they can write it down. Put in as much detail as you can about who was involved and what was said or done. Remember, the problem will sometimes be that something was not done.

For example:

- If you are a disabled person and you asked for a **reasonable adjustment** which was not made.
- If someone did not change a decision they had made or stop applying a rule or way of doing things and this had a worse impact on you and other people with the same protected characteristic (**indirect discrimination**).

Read the rest of this guide. Does what happened sound like any of the things we say a person or organisation must or must not do?

Sometimes it is difficult to work out if what happened is against equality law. You need to show that your protected characteristics played a part in what happened. The rest of this guide tells you more about what this means for the different types of unlawful discrimination or for harassment or victimisation.

If you think you need more information from the person or organisation before deciding what to do, then you can use the questions procedure, which we explain at page 72.

If you feel you need to get more advice on whether what happened was against equality law, you will find information on places where you can get help in Chapter 5: *Further sources of information and advice*.

Is your complaint about equality law or is it about another sort of problem at work?

This guide focuses on making a complaint about something that is against equality law.

You may have a complaint (which is often called ‘bringing a grievance’) about something else at work, which is not related to a **protected characteristic**.

Sometimes it is difficult to work out which laws apply to a situation.

If you are not sure what to do, you can get advice about your situation from other organisations, particularly the Arbitration and Conciliation Service (Acas) or Citizens Advice or your trade union. Contact details for these and other organisations who may be able to help you are in Chapter 5: *Further sources of information and advice*.

Ways you can try to get your employer to sort out the situation by complaining directly to them

Making a complaint informally

It may be that your employer can look into what has happened and decide what to do without it being necessary for you to make a formal complaint.

Often all it needs to stop something happening is for the other person to understand the effect of what they have done or that the situation is being taken seriously by you – and their – employer.

This is especially the case if they did not intend something to have the impact it did – for example, if what has happened is indirect discrimination or discrimination arising from disability.

Making a complaint informally means talking to the person at your workplace who can make the situation better. This may be your manager or, if it is your manager who is behaving in the way you believe is unlawful discrimination, someone higher up. In a small organisation, it may be your employer themselves.

It is a good idea to ask your manager or employer for a meeting, so that there is enough time for you to talk about what has happened and to say what you’d like them to do.

The meeting needs to be somewhere where you can talk to your manager or employer without other people hearing what you are saying.

Even though it is an informal meeting, you can still prepare for the meeting by writing down what you want to say. This can help you make sure you have said everything you want to say to your manager or employer.

This may be especially important if you work for a small organisation and it is the person in charge (who may be the only manager) who has done what you want to complain about. If you can, you may get a better result from the meeting if you can explain what has happened in a way that does not immediately make your employer feel you are blaming them for doing something wrong.

If you need help with this, you could contact one of the organisations listed in Chapter 5 or you could ask your trade union if you have one or a colleague or friend. It may help to practise what you want to say.

Tell the person you are meeting:

- what has happened
- what effect it had or is having on you
- what you want them to do about it, for example, talking informally to the person or people who have done something

Your manager or employer may need time to think about what has happened and what to do about it. They may need to talk to other people to find out if they saw or heard anything. Tell your manager or employer if you agree to them doing this. If you do not agree, this may make it harder for them to find out what happened.

Your manager or employer should tell you what they are going to do, and then later what the result was.

If after investigating what has happened, your manager or employer decides:

- no unlawful discrimination took place, or
- that they are not responsible for what has happened (see page 38)

then they should tell you this is what they have decided within a reasonable time.

If they don't explain why they decided this, you can ask them to explain. They do not have to explain, but if they do it may help you to decide what to do next: for example, if it is worth taking things further.

You then have two options:

- accepting the outcome
- taking things further by making a formal complaint using any procedures your employer has for doing this.

If your employer or manager agrees with you that what happened was unlawful discrimination, then they will want to make sure it does not happen again.

This may mean you don't need you to do anything other than carry on with your job as usual. Or they may want you to do something such as meeting the person who discriminated against you. In any case, you may need to go on working with that person.

Don't feel that you have to do anything you are not comfortable with. But it may help sort things out to do what your employer suggests, if necessary with some expert help, for example, from your trade union or from another person or organisation, such as a mediator. You can read more about this on page 71: *Alternative dispute resolution*.

If the discrimination was serious or just one of a series of events, your employer may want to take disciplinary action against the person who discriminated against you. You would probably have to explain to a disciplinary hearing what happened. You may be able to get help or support in doing this from your trade union if you have one or from one of the organisations listed in Chapter 5: *Further sources of information and advice*.

If your employer does not tell you what they have decided, even after you have reminded them, then you can either make a formal complaint or make an Employment Tribunal claim. Make sure you know when the last day is for bringing your claim so you don't miss this deadline.

Using your employer's grievance procedures

If you are not satisfied with the result of your informal complaint, then you can make a formal complaint, using the set procedures your employer has. It is the use of the set procedures that makes it 'formal'.

If you make a formal complaint, this is often called a 'grievance'.

Your employer should be able to tell you what their procedures are.

If they don't have any information they can give you, there is a standard procedure which you can get from Acas. Your employer can use this too, if, for example, they don't have their own procedures. Contact details for Acas are in Chapter 5: *Further sources of information and advice*.

If you are not happy about the outcome of a grievance procedure, then you have a right to appeal.

Alternative dispute resolution

If you or your employer want to get help in sorting out a complaint about discrimination, you can agree to what is usually called 'alternative dispute resolution' or ADR. ADR involves finding a way of sorting out the complaint without a formal tribunal hearing. ADR techniques include mediation and conciliation.

In complaints relating to work situations, this can happen:

- as part of an informal process
- when formal grievance procedures are being used, or
- before an Employment Tribunal claim has been brought or finally decided.

There are different organisations who may be able to help with this:

- your trade union
- Acas
- ADRnow, an information service run by the Advice Services Alliance (ASA).

There is more information about the options at [Directgov](#).

Acas in particular runs a free conciliation service.

Details of how to contact these organisations are in Chapter 5: *Further sources of information and advice*.

What your employer can do if they find that there has been unlawful discrimination

The action your employer can take will depend on the specific details of the case and its seriousness. Your employer should take into consideration any underlying circumstances and the outcome of previous similar cases. Actions your employer could take include:

- Some form of alternative dispute resolution (which is explained above), which may be especially useful where you and the person who discriminated have to carry on working together.
- **Equality training** for the person who discriminated.
- Appropriate disciplinary action (your employer can find out more about disciplinary procedures from Acas).

What your employer can do if they find that there wasn't any unlawful discrimination

If your employer hears your grievance and any appeal but decides that you weren't unlawfully discriminated against, they still need to find a way for everyone to continue to work together.

Your employer may be able to do this themselves, or it may be better to bring in help from outside as with alternative dispute resolution (which is explained above).

Monitoring the outcome

Whether your employer decides that there has been unlawful discrimination or not, you must not be treated badly for having complained. For example, if your employer made you transfer to another part of their organisation (if it is big enough) this may be **victimisation**. However, you could ask to be transferred, and your employer should do this if you are sure this is what you really want.

Your employer should monitor the situation at your workplace to make sure that the unlawful discrimination (if your employer found there was discrimination) has stopped and that there is no victimisation of you or anyone who helped you.

If you are not satisfied with what has happened, whether that is with

- your employer's investigation
- their decision
- the action they have taken to put the situation right
- how you have been treated after you made the complaint

you could bring a claim in the Employment Tribunal. This is explained in the next part of this guide.

The questions procedure

If you think you may have been unlawfully discriminated against, then you can get information from your employer to help you decide if you have a valid claim or not.

There is a set form to help you do this which you can see at: www.equalities.gov.uk, but your questions will still count even if you do not use the form, so long as you use the same questions.

If you send the questions to your employer, they are not legally required to reply to the request, or to answer the questions, but it may harm their case in the Employment Tribunal if they do not.

The questions and the answers can form part of the evidence in a case brought under the Equality Act 2010 (in other words, the law explained in this guide).

You can send your employer the questions before you make your claim to the Employment Tribunal, or at the same time, or after you have sent your claim.

If it is before, then you must send the questions to your employer so that they receive them no later than three months after what happened which you believe was unlawful discrimination.

If you have already sent your claim to the Employment Tribunal, then you must send the questions to your employer so that they receive them:

- within 28 days of your claim being sent to the Employment Tribunal if the claim involves disability discrimination (including a failure to make **reasonable adjustments**) or
- within 21 days of the claim being sent to the Employment Tribunal in all other cases.

If your employer does not respond to the questionnaire within eight weeks of your sending it to them, the Employment Tribunal can take that into account when making its decision. The Employment Tribunal can also take into account answers which are evasive or unclear.

- There is an exception to this. The Employment Tribunal cannot take the failure to answer into account if a person or organisation states that to give an answer could prejudice criminal proceedings and this is reasonable. Most of the time, breaking equality law only leads to a claim in a civil tribunal or court. Occasionally, breaking equality law can be punished by the criminal courts. In that situation, the person or organisation may be able to refuse to answer the questions, if in answering they might incriminate themselves and it is reasonable for them not to answer. If your employer says this applies to them, you should get more advice on what to do.

If you send your employer the questions, your employer must not treat you badly because you have done this. If your employer did, it would almost certainly be **victimisation**.

Key points about discrimination cases in a work situation

The key points this guide explains are:

- Where claims are brought
- Time limits for bringing a claim
- The standard and burden of proof
- What the Employment Tribunal can order your employer to do.

Where claims are brought

An Employment Tribunal can decide a complaint involving unlawful discrimination in a **work situation**.

Employment Tribunals can also decide cases about:

- Collective agreements, which can cover any terms of employment, such as pay or other benefits or working conditions.
- Equal pay and occupational pensions cases, which you can read more about in the Equality and Human Rights Commission guide: *Your rights to equality at work: pay and benefits*.
- Requirements an employer places on someone to discriminate against people as part of their job, for example, if someone works in a shop, telling them not to serve customers with a particular protected characteristic.

If you want to complain about questions being asked about your health or disability when you were applying for a job, you can bring a claim in the Employment Tribunal if you believe you were discriminated against because of disability, or for a reason connected with your disability and it relates to the answers you gave to those questions.

For example:

A job applicant who is a disabled person is asked questions about their health and disability during their interview. They do not get the job. They believe this is because of the answers they gave to the questions. They can bring a claim in the Employment Tribunal.

You cannot bring a case against the employer just for asking the questions if these had no impact on you personally, for example, if it is clear why you did not get the job and this does not relate to the answers you gave to those questions. Of course, if other unlawful discrimination happened, you can still bring a case.

Only the Equality and Human Rights Commission can take up the wider case (in the County Court in England or Wales, and the Sheriff Court in Scotland) to challenge the employer just for asking the questions if no individual was unlawfully discriminated against.

If you are a member of the armed services, you can only bring your complaint to the Employment Tribunal after your **service complaint** has been decided.

Time limits for bringing a claim

You must bring your claim within three months (less one day) of the claimed unlawful discrimination taking place.

For example:

An employer unlawfully discriminates against a worker. The discrimination took place on 5 May. The worker must tell the Employment Tribunal about their claim using the proper form by 4 August at the latest.

There are two situations where this is slightly different:

- in equal pay cases, different time limits apply – see the Equality and Human Rights Commission guide: *Your rights to equality at work: pay and benefits*, and
- for cases involving the armed forces, the time limit is six months (less one day).

If you bring your a claim after the date has passed, it is up to the Employment Tribunal to decide whether it is fair to everyone concerned, including both you and your employer, to allow your claim to be brought later than this.

Do not assume they will allow you to bring a late claim. They may not, in which case, you will have lost any chance to get the situation put right by the Employment Tribunal.

When a claim concerns something that was not a one-off incident, but which has happened over a period of time, the time limit starts when the period has ended.

For example:

An employer operates a mortgage scheme for married couples only. Someone who is a civil partner would be able to make a claim for unlawful discrimination because of sexual orientation to a tribunal at any time while the scheme continues to operate in favour of married couples or within three months of the scheme ceasing to operate in favour of married couples.

If you are complaining about a failure to do something, for example, a failure to make **reasonable adjustments**, then the three months begins when your employer made a decision not to do it.

If there is no solid evidence of when they made a decision, then the decision is assumed to have been made either:

- when the person who failed to do the thing does something else which shows they don't intend to do it, or
- at the end of the time when they might reasonably have been expected to do the thing.

For example:

A wheelchair-user asks their employer to install a ramp to enable them to get over the kerb between the car park and the office entrance more easily. The employer indicates that it will do so but no work at all is carried out. After a period in which it would have been reasonable for the employer to commission the work, even though the employer has not made a positive decision not to install a ramp, it may be treated as having made that decision anyway.

The standard and burden of proof

The standard of proof in discrimination cases is the usual one in civil (non-criminal) cases. Each side must try to prove the facts of their case are true on the balance of probabilities, in other words, that it is more likely than not in the view of the tribunal that their version of events is true.

If you are claiming unlawful discrimination, harassment or victimisation against your employer, then the burden of proof begins with you. You must prove enough facts from which the tribunal can decide, without any other explanation, that the discrimination, harassment or victimisation has taken place.

Once you have done this, then, in the absence of any other explanation, the burden shifts onto your employer to show that they or someone for whose actions or omissions they were responsible did not discriminate against, harass or victimise you.

What the Employment Tribunal can order your employer to do

What the tribunal can order if you win your case is called a 'remedy'.

The main remedies available to the Employment Tribunal are to:

- Make a declaration that your employer has discriminated.
- Award compensation to be paid for the financial loss you have suffered (for example, loss of earnings), and damages for injury to your feelings.
- Make a recommendation, requiring your employer to do something specific within a certain time to remove or reduce the bad effects which the claim has shown to exist on the individual.

For example:

Providing a reference or reinstating you to your job, if the tribunal thinks this would work despite the previous history.

The Employment Tribunal can also make a recommendation requiring your employer to do something specific within a certain time to remove or reduce the bad effects which the claim has shown to exist on the wider workforce (although not in equal pay cases). This might be particularly applicable where you have already left that employer so any individual recommendation would be pointless.

For example:

- introducing an equal opportunities policy
- ensuring its harassment policy is more effectively implemented
- setting up a review panel to deal with equal opportunities and harassment/grievance procedures
- re-training staff, or
- making public the selection criteria used for transfer or promotion of staff.

If your employer does not do what they have been told to do in a recommendation relating to you, the tribunal may order them to pay you compensation, or an increased amount of compensation, instead.

In cases of **indirect discrimination**, if your employer can prove that they did not intend what they did to be discriminatory, the tribunal must consider all of the remedies before looking at damages.

The tribunal can also order your employer to pay your legal costs and expenses, although this does not often happen in Employment Tribunal cases.

Where to find out more about making a tribunal claim

You can find out more about how to bring an Employment Tribunal case against your employer from the Employment Tribunal itself. They have information that tells you how to fill in the right form, and what to expect once you have made a claim.

This applies to England, Scotland and Wales, although occasionally tribunal procedures themselves are different in England and Wales and in Scotland.

You can find contact details for the Employment Tribunal in Chapter 5: *Further sources of information and advice*.

5. Further sources of information and advice

Equality and Human Rights Commission:

The Equality and Human Rights Commission is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. The Equality and Human Rights Commission helplines advise both individuals and organisations such as employers and service providers.

Website: www.equalityhumanrights.com

Helpline – England

Email: info@equalityhumanrights.com

Telephone: 0845 604 6610

Textphone: 0845 604 6620

Fax: 0845 604 6630

08:00–18:00 Monday to Friday

Helpline – Wales

Email: wales@equalityhumanrights.com

Telephone: 0845 604 8810

Textphone: 0845 604 8820

Fax: 0845 604 8830

08:00–18:00 Monday to Friday

Helpline – Scotland

Email: scotland@equalityhumanrights.com

Telephone: 0845 604 5510

Textphone: 0845 604 5520

Fax: 0845 604 5530

08:00–18:00 Monday to Friday

Acas – The Independent Advisory, Conciliation and Arbitration Service:

Acas aims to improve organisations and working life through better employment relations. It provides impartial advice, training, information and a range of problem resolution services.

Website: www.acas.org.uk

Telephone: 08457 47 47 47 (Monday–Friday: 08:00–20:00; Saturday: 09:00–13:00)

Access to Work:

Access to Work can help disabled people or their employers if their condition or disability affects the ease by which they can carry out their job or gain employment. It gives advice and support with extra costs which may arise because of certain needs.

Website:

www.direct.gov.uk/en/disabledpeople/employmentsupport/workschemesandprogrammes

London, East England and South East England:

Telephone: 020 8426 3110

Email: atwosu.london@jobcentreplus.gsi.gov.uk

Wales, South West England, West Midlands and East Midlands:

Telephone: 02920 423 29

Email: atwosu.cardiff@jobcentreplus.gsi.gov.uk

Scotland, North West England, North East England and Yorkshire and Humberside:

Telephone: 0141 950 5327

Email: atwosu.glasgow@jobcentreplus.gsi.gov.uk

Advicenow:

An independent, not-for-profit website providing accurate, up-to-date information on rights and legal issues.

Website: <http://www.advicenow.org.uk/>

Advice UK:

A UK network of advice-providing organisations. They do not give out advice themselves, but the website has a directory of advice-giving agencies.

Website: www.adviceuk.org.uk

Telephone: 020 7469 5700

Fax: 020 7469 5701

Email: mail@adviceuk.org.uk

Association of Disabled Professionals (ADP):

The ADP website offers advice, support, resources and general information for disabled professionals, entrepreneurs and employers.

Website: www.adp.org.uk

Telephone: 01204 431638 (answerphone only service)

Fax: 01204 431638

Email: info@adp.org.uk

Carers UK:

The voice of carers. Carers provide unpaid care by looking after an ill, frail or disabled family member, friend or partner.

England

Website: www.carersuk.org

Telephone: 020 7378 4999

Email: info@carersuk.org

Scotland

Website: www.carerscotland.org

Telephone: 0141 445 3070

Email: info@carerscotland.org

Wales

Website: www.carerswales.org

Telephone: 029 2081 1370

Email: info@carerswales.org

ChildcareLink:

ChildcareLink provides details of local childcare providers for employees and employers, as well as general information about childcare.

Website: www.childcarelink.gov.uk

Telephone: 0800 2346 346

Citizens Advice:

Citizens Advice Bureaux provide free, confidential and independent advice in England and Wales. Advice is available face-to-face and by telephone. Most bureaux offer home visits and some also provide email advice. To receive advice, contact your local Citizens Advice Bureau, which you can find by visiting the website.

Website: www.citizensadvice.org.uk

Telephone: (admin only) 020 7833 2181

Fax: (admin only) 020 7833 4371

The Adviceguide website is the main public information service of Citizens Advice. It covers England, Scotland and Wales.

Website: www.adviceguide.org.uk/

Citizens Advice Scotland:

Citizens Advice Scotland is the umbrella organisation for bureaux in Scotland. They do not offer advice directly but can provide information on Scottish bureaux.

Website: www.cas.org.uk

Community Legal Advice:

Community Legal Advice offers free, independent and confidential legal advice in England and Wales.

Website: www.communitylegaladvice.org.uk

Telephone: 0800 0856 643

Directgov:

Directgov is the UK government's digital service for people in England and Wales. It delivers information and practical advice about public services, bringing them all together in one place.

Website: www.direct.gov.uk

Disability Law Service (DLS):

The DLS is a national charity providing information and advice to disabled and Deaf people. It covers a wide range of topics including discrimination, consumer issues, education and employment.

Website: www.dls.org.uk

Telephone: 020 7791 9800

Minicom: 020 7791 9801

Government Equalities Office (GEO):

The GEO is the Government department responsible for equalities legislation and policy in the UK.

Website: www.equalities.gov.uk

Telephone: 020 7944 4400

Law Centres Federation:

The Law Centres Federation is the national co-ordinating organisation for a network of community-based law centres. Law centres provide free and independent specialist legal advice and representation to people who live or work in their catchment areas. The Federation does not itself provide legal advice, but can provide details of your nearest law centre.

Website: www.lawcentres.org.uk

Telephone: 020 7842 0720

Fax: 020 7842 0721

Email: info@lawcentres.org.uk

The Law Society:

The Law Society is the representative organisation for solicitors in England and Wales. Their website has an online directory of law firms and solicitors. You can also call their enquiry line for help in finding a solicitor. They do not provide legal advice.

Website: www.lawsociety.org.uk

Telephone: 020 7242 1222 (general enquiries)

They also have a Wales office:

Telephone: 029 2064 5254

Fax: 029 2022 5944

Email: wales@lawsociety.org.uk

Scottish Association of Law Centres (SALC):

SALC represents law centres across Scotland.

Website: www.scotlawcentres.blogspot.com

Telephone: 0141 561 7266

Mindful Employer:

Mindful Employer provides information, advice and practical support for people whose mental health affects their ability to find or remain in employment, training, education and voluntary work.

Website: www.mindfulemployer.net

Telephone: 01392 208 833

Email: info@mindfulemployer.net

NHS Carers Direct:

NHS Carers Direct gives information about carers' rights in employment and beyond, as well as the services available to them.

Website: www.nhs.uk/carersdirect

Telephone: 0808 802 0202

The Office of the Pensions Advisory Service (OPAS):

OPAS provides free advice on pensions including help with problems.

Website: www.opas.org.uk

Telephone: 0845 601 2923

Email: enquiries@opas.org.uk

Pay and Work Rights Helpline:

The Pay and Work Rights Helpline provides advice on government enforced employment rights.

Website: www.payandworkrightscampaign.direct.gov.uk/index.html

Telephone: 0800 917 2368

People First Ltd:

People First is a charity run by and for people with learning difficulties. It provides information on self advocacy and provides training and consultancy for organisations and employers.

Website: www.peoplefirstltd.com

Telephone: 020 7820 6655

Email: general@peoplefirstltd.com

Press for Change (Pfc):

PfC is a political lobbying and educational organisation. It campaigns to achieve equality and human rights for all Trans people in the United Kingdom, through legislation and social change. It provides a free legal advice service for Trans people.

Telephone: 0161 432 1915 (10:00–17:00, Thursdays only until further notice)

Website: www.transequality.co.uk / www.pfc.org.uk

Email: transequality@pfc.org.uk

Sainsbury Centre for Mental Health:

The Sainsbury Centre for Mental Health works to improve the quality of life for people with mental health conditions. They carry out research, policy work and analysis to improve practice and influence policy in mental health as well as public services.

Website: www.scmh.org.uk

Telephone: 020 7827 8300

Email: contact@scmh.org.uk

Stonewall:

Stonewall is the UK's leading lesbian, gay and bisexual charity and carries out campaigning, lobbying and research work as well as providing a free information service for individuals, organisations and employers.

Website: www.stonewall.org.uk

Telephone: 08000 50 20 20

Email: info@stonewall.org.uk

TUC – the Trades Union Congress (England and Wales):

With 59 member unions representing over six and a half million working people, the TUC campaigns for a fair deal at work and for social justice at home and abroad.

Website: www.tuc.org.uk

Telephone: 020 7636 4030

Scottish Trades Union Congress (STUC):

Website: www.stuc.org.uk

Telephone: 0141 337 8100

Email: info@stuc.org.uk

Working Families:

Working Families is a work–life balance organisation, helping children, working parents and carers and their employers find a better balance between responsibilities at home and work.

Website: www.workingfamilies.org.uk

Telephone: 0800 013 0313

Email: office@workingfamilies.org.uk

WorkSMART:

WorkSMART aims to help everyone at work – whether or not they are union members – to get a good deal from their working life. Available to help when things go wrong at work or simply to give help for planning for the future.

Website: www.worksmart.org.uk

Contact us

The Equality and Human Rights Commission aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights.

You can find out more or get in touch with us via our website at www.equalityhumanrights.com or by contacting one of our helplines below. If you require this publication in an alternative format and/or language please contact the relevant helpline to discuss your needs.

Equality and Human Rights Commission helpline – England

Telephone: 08456 046 610

Textphone: 08456 046 620

Fax: 08456 046 630

8am–6pm, Monday to Friday

Equality and Human Rights Commission helpline – Scotland

Telephone: 08456 045 510

Textphone: 08456 045 520

Fax: 08456 045 530

8am–6pm, Monday to Friday

Equality and Human Rights Commission helpline – Wales

Telephone: 08456 048 810

Textphone: 08456 048 820

Fax: 08456 048 830

8am–6pm, Monday to Friday

www.equalityhumanrights.com

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