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Introduction

The need for this guide was identified during specialist training sessions attended by UNISON reps on race and sex discrimination law. This booklet provides an introduction and practical guide to the legal concepts of discrimination. The main purpose is to help UNISON officials and lay activists spot hidden as well as obvious discrimination, and to recognise what evidence is helpful. The checklists in the guide provide some pointers to how discrimination law works but they are not intended to be totally comprehensive.

This guide does not cover equal pay law, nor does it give any substantial guidance on how to run a discrimination case in an employment tribunal. More guidance on law and procedure is necessary before running a case. It is available in other publications listed in the Bibliography at the end of the guide.

The Equality Act 2010 forbids ‘race’ discrimination, which it defines as meaning colour, nationality, and national or ethnic origins. This means that workers from many different backgrounds will be able to make claims to an employment tribunal. When bringing a legal claim, the member will need to identify on what basis s/he feels s/he has been discriminated against, e.g. is it because s/he is black as opposed to white; black and of African nationality as opposed to black British; Polish as opposed to non-Polish or British?

Although the law requires precision, in policy terms, UNISON uses the word ‘Black’ to refer to ‘black’ and ‘minority ethnic’ workers collectively. The use of these terms in the booklet must not be taken to be obscuring important differences between and within all the groups of different backgrounds who may suffer race discrimination.

While race discrimination against white workers is also prohibited, the history of the legislation shows that the original Race Relations Act was brought in specifically in response to evidence that black and other minority ethnic groups experience race discrimination in the workplace.

Similarly, although the Equality Act prohibits discrimination against men as well as against women, statistically sex discrimination has affected many more women than men. This guide therefore most frequently gives examples of discrimination against women. It should also be remembered that black women are often doubly discriminated against.

If you have a member experiencing discrimination, why not see if they are in touch with our self-organised groups which include groups for Black members; lesbian, gay, bisexual and transgender members; and women members. These groups meet locally and nationally to discuss, campaign and organise around the specific issues that affect them. They help UNISON understand equality and meet our equality aims. Find out more here: http://www.unison.org.uk/about/our-organisation/member-groups/

This guide has been written for UNISON’s Learning and Organising Services by Tamara Lewis. She is a solicitor who worked for over 20 years...
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The UNISON guidance notes referred to in this guide have been added by UNISON.

Further copies of this guide are available by emailing LearningAndOrganising@unison.co.uk and quoting Stock ref. ACT152, or contact

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1. The legal framework

The legislation
The law against race discrimination at work used to be contained in the Race Relations Act 1976. The law against sex discrimination at work used to be set out in the Sex Discrimination Act 1975. Where it concerned sex discrimination in pay or contract terms, it was contained in the Equal Pay Act 1970. Now all these different statutes have been replaced by the Equality Act 2010.

The Equality Act 2010 (referred to in this guide as the EqA) forbids discrimination based on certain ‘protected characteristics’. This guide looks at the protected characteristics of race, sex, gender reassignment, being married or a civil partner, pregnancy and maternity. The other protected characteristics in the EqA are age, disability, religion and belief and sexual orientation.

There is long-standing European law which prohibits sex discrimination by employers in the member states. This is now set out in Article 157 of the Treaty on the Functioning of the European Union and in the Recast Directive (2006/54/EC). There is also the Pregnant Workers Directive (92/85/EEC). Race discrimination is covered by the Directive on equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC). This is known for short as the ‘Race Directive’ or the ‘Race Discrimination Directive’ or the ‘Race Equal Treatment Directive’.

The final decision as to what is required by European Union (EU) law is made by the European Court. This used to be called the European Court of Justice (ECJ), but it now tends to be referred to as the Court of Justice of the European Union (CJEU).

The use of EU law by British workers is complex and not within the scope of this Guide. Most of the time, the EqA covers the same ground as EU race and sex discrimination law. But occasionally, there are better rights under EU law. Where this happens, tribunals and courts should interpret the EqA in line with EU law as far as possible. Where there is a straight conflict in the discrimination field, workers employed by ‘state employers’, e.g. local authorities, can usually rely on EU law anyway. Private sector workers may not be able to, though in recent years, the CJEU has suggested that might no longer be true.

The Equality and Human Rights Commission
The Equality and Human Rights Commission (EHRC) was set up in 2007. It replaced the previous Commission for Racial Equality, Equal Opportunities Commission and Disability Rights Commission, which are now referred to as the ‘legacy commissions’.

The EHRC has responsibility for all the protected characteristics under the EqA as well as a role in relation to human rights, although it cannot run cases which are purely to do with the Human Rights Act. In theory, the EHRC has an educational as well as an enforcement role, and can take on strategic cases.
and conduct inquiries. In practice, its formal powers, budget and staff have been severely reduced by the coalition government.

The EHRC has an interesting and informative website, which is listed in the Bibliography at the end of this Guide.

The Codes of Practice
The EHRC has issued two statutory Codes of Practice, which apply in England, Scotland and Wales:

- The Employment Code
- The Equal Pay Code

The Codes are available on the EHRC website via links at www.equalityhumanrights.com/publications/guidance-and-good-practice-publications/codes-of-practice

Make sure you look at the pdf version of the Employment Code rather than the word version of the Code, since the latter has some mistakes in its paragraph numbering.

The Codes do not impose legal obligations in themselves and they do not purport to be an authoritative statement of the law. Nevertheless, tribunals must take into account any relevant provision in the Codes.

The Employment Code is extremely long (over 200 pages), but you can use the index to find your way around. Part 1 sets out the law with different chapters, e.g. on direct discrimination, indirect discrimination, victimisation, harassment and positive action. Part 2 gives guidance on the law and good practice in recruitment, during employment, in equality policies and practice, and when terminating employment.

It is a good idea to read through the Code and make your own index of sections which you find helpful. Some sections which may be relevant to the subjects of this guides are:

- paras 2.21 – 2.30: gender reassignment
- paras 7.1 – 7.20: harassment
- paras 17.8 – 17.12: flexible working
- paras 17.25 – 17.32: absences related to pregnancy; gender reassignment; in vitro fertilisation; and family leaves
- paras 17.44 – 17.51: language in the workplace

Employment tribunals
Individuals can bring cases of race and sex discrimination against their employers in an employment tribunal. These are the same tribunals that hear unfair dismissal cases.

Who is protected by the EqA?
The EqA covers more workers than unfair dismissal law. There are two big differences:

1. For ordinary unfair dismissal, the member must have been continuously employed by the employer for at least two years. Under the EqA, there is no minimum length of service required.
2. To claim unfair dismissal, it is necessary to be an ‘employee’. It is
sometimes difficult to know whether or not the member fits the legal definition of an employee. This is not a subject covered by this guide, but by way of example, it can lead to uncertainty if the employer is not legally obliged to offer any work at all for certain periods. Under the EqA, these technical problems do not arise. This is because, as well as employees, the following workers are also protected:

● Individuals working on a contract personally to do work.
● Job applicants.
● Work-trainees.
● Contract workers.

This last category covers discrimination by a ‘principal’ against a worker supplied by another organisation (the employer) under a contract between the principal and the other organisation. It can be difficult to know exactly who is covered, but usually it will cover:

● Discrimination by a local authority against employees of a contract cleaner or caterer.
● Discrimination by a Trust against Agency employees supplied to work for the Trust under a contract between the Trust and the Agency.

Race
Under section 9, an employer must not discriminate in relation to ‘race’ which covers:

● colour
● nationality
● national origin
● ethnic origin.

The EqA protects everyone from race discrimination, whatever their ethnic background. For example, the member must not be discriminated against

— because s/he is black or because s/he is white
— because s/he has French or Algerian or British nationality
— because s/he was born in Italy or Kenya or Ireland or England.

‘Ethnic origin’ is recognised to cover discrimination against a worker because s/he is Sikh or Jewish.

The EqA also forbids religious discrimination. Race and religious discrimination are sometimes closely related. Members who are discriminated against because they are Sikh or Jewish can claim race discrimination and religious discrimination.

A person can belong to a racial group which consists of more than one distinct racial group. For example, the member might be discriminated against because s/he is black and of Nigerian national origin, as opposed to black and of British national origin.

Sex
Under section 11, an employer must not discriminate against the member because she is a woman or because he is a man.

Marriage and Civil Partnership
Under section 8, the member must not be discriminated against because s/he is married or a civil partner. The EqA does
not forbid discrimination against a worker because s/he is not married or a civil partner.

Discrimination related to sexual orientation is also unlawful, although it is not the subject of this guide.

Gender reassignment
Under section 7, the member will have the protected characteristic of ‘gender reassignment’ if s/he is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the person of reassigning his/her sex by changing physiological or other attributes of sex. This process need not be under medical supervision.

The EqA refers to someone with the protected characteristic of gender reassignment as a ‘transsexual’ person. This is not UNISON’s preferred term as we discuss further at page 61, but for legal purposes, it is necessary to be aware of the language used in the EqA.

The legal meaning of race and sex discrimination
There are four types of discrimination set out in the EqA which apply to the protected characteristics of race, sex, being married or a civil partner, or gender reassignment:

- Direct discrimination – section 13
- Indirect discrimination – section 19
- Victimisation – section 27
- Harassment – section 26

Each of these types of discrimination has a precise legal meaning. In summary:

Direct discrimination is where the member is treated less favourably because of his/her race or sex or because s/he is married or a civil partner or because s/he is proposing to undergo, is undergoing or has undergone gender reassignment.

For example:
- A black worker is not treated the same way as s/he would have been if s/he were white.
- A woman is not treated the same way as she would have been if she were a man.
- A married person is not treated the same way as s/he would have been if s/he were unmarried.

Direct discrimination also applies where the member is treated less favourably, not because of his/her own race or sex etc but because of the race or sex of someone else.

For example:
In a racist workplace, a manager not only treats the black employees less favourably, but also treats the member – who is white – less favourably, because she is friendly with the black employees.

This is sometimes called ‘discrimination by association’ or ‘associative discrimination’.

Direct discrimination is also unlawful if the member is treated less favourably because the employer wrongly perceives him/her to have a particular protected characteristic.
For example:
The member is not shortlisted for a job because her name suggests that she is black African. In fact, it is her husband's name and she is white British.

There is no justification defence to direct discrimination because of any of the protected characteristics except age discrimination.

Points to note:
The employer’s motive is irrelevant. If a manager has treated a black worker or a woman or a married worker less favourably because of race or sex or marital status, then there is no defence that s/he did not intend to do so or that s/he had good motives.

There are some limited exceptions for occupational requirements (OR) and for positive action.

A fuller explanation of the meaning of direct discrimination is on pages 14-19 and of the Occupational Qualification and positive action exceptions on pages 38-39.

Indirect discrimination is where a provision, criterion or practice (‘PCP’) is applied which puts workers of a certain race at a particular disadvantage compared with those not of that race, or puts women at a particular disadvantage compared with men, or married or civil partners at a particular disadvantage compared with those who are not married or civil partners.

For example:
A requirement for English Language GCSE could disqualify many foreign-born workers from employment.

A criterion that workers be at least 6 foot tall would have adverse impact on women, since proportionally fewer women than men are 6 foot.

Point to note:
Provisions, criteria and practices which can be objectively justified are not unlawful indirect discrimination.

A fuller explanation of the meaning of indirect discrimination is on pages 20-31.

Victimisation is where a worker is treated unfavourably because s/he has previously complained of race or sex discrimination or given evidence for another worker in a discrimination case or done another ‘protected act’.

For example:
An employer sacks a worker because s/he complained of race discrimination in a grievance.

An employer refuses to promote a female worker because she complained that she was paid less than a male colleague.

Point to note:
It is a defence for the employer if the worker made a false allegation and the allegation was made in bad faith.

A fuller explanation of the meaning of victimisation is on pages 33-37.

Harassment is where the harasser engages in unwanted conduct which has the purpose or effect of violating the worker’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her. For more detail, see pages 53-54.
Multiple discrimination
The member may be subjected to more than one type of discrimination.

For example:

An Egyptian catering worker is told s/he has not been promoted because s/he does not have formal catering qualifications. A white British worker without such qualifications is in fact promoted. When the Egyptian worker complains, s/he gets dismissed. This may be:

— Direct race discrimination (a comparable white worker was promoted) and/or

— Indirect race discrimination (an unjustifiable requirement of formal qualifications was imposed) and/or

— Victimisation (dismissal for raising the complaint).

If this worker is female, she may have suffered both race and sex discrimination.

It weakens the member’s chances of proving a case if s/he makes too many allegations of discrimination or involves too many protected characteristics. It is usually best to stay focussed on the strongest points.

When may discrimination occur?

Unlike the law on unfair dismissal, the EqA does not only cover dismissal situations. It forbids discrimination in a whole range of situations at work. Section 39 sets these out in detail. In summary, an employer or potential employer must not discriminate against a worker:

● When choosing whether to employ him/her.

● When choosing whether to promote him/her.

● In the terms and conditions offered to a worker.

● In offering training opportunities.

● In access to benefits and services generally.

● When dismissing him/her.

● By subjecting him/her to ‘any other detriment’, e.g. disciplinary action.

Because discrimination (whether direct, indirect or victimisation) can occur at so many points, you need to be constantly alert to the possibility.

Indirect discrimination may be particularly hard to detect. You need to consider what hidden rules and conditions may determine:

● Access to particular jobs - who is short-listed, who is appointed.

● Access to promotion - who is short-listed, who is promoted.

● Access to acting-up opportunities.

● Access to overtime opportunities.

● Access to training opportunities.

● Access to opportunities to earn additional bonuses and benefits.

● Access to subsidised mortgages.

● Access to occupational pension schemes.
Race and Sex Discrimination

- When and for how long holidays can be taken.
- Who gets selected for redundancy.
- Access to voluntary enhanced redundancy packages.
- Eligibility to formal disciplinary/grievance procedures.
- Grading levels.

For example:
- Promotion may depend on a worker’s previous acting-up experience. In the particular workplace, past acting-up opportunities may have been given mainly to white workers.
- Temporary staff may not be covered by formal disciplinary and grievance procedures. In many workplaces, it is black workers and women who hold the temporary positions and would be the worst affected.
- Voluntary redundancy packages may not be available to staff on a career break. It is far more likely that women will be on a career break than men.

Vicarious liability
As a general rule, the employing organisation is automatically responsible for any discrimination by one worker or manager against another in the course of employment. This concept is called ‘vicarious liability’. It applies even if the top people in the organisation did not know what their junior managers were doing.

The organisation cannot escape responsibility by dealing promptly with the discrimination once it finds out, e.g. in a harassment case, by sacking the perpetrator. The organisation will still be responsible for the harassment that has already happened - although it will avoid additional liability for mishandling the issue once it comes to light.

Employers often do not realise that they can be held legally responsible for discrimination carried out by one manager or employee against another, even if they did not know about such discrimination and did not approve of it. This is a powerful incentive for employers to take effective preventative action.

The organisation’s only defence will be if it has taken all reasonable steps to prevent such discrimination ever occurring. In practice, employers can rarely use this defence. It means they must operate an equal opportunities policy very actively indeed.

What kind of preventative steps would be sufficient?
There are no rigid guidelines, but a tribunal is likely to expect the employer to have a detailed written Equal Opportunities or Harassment policy, which is properly implemented. Paper policies are not enough.

As an example, in one racial harassment case, the tribunal were impressed by the following aspects of the policy:
- The policy gave detailed guidance both to managers and to employees.
- Harassment was broadly defined and included non-verbal actions such as comments, ‘jokes’ and banter.
The policy stated that, where appropriate, the alleged harasser would be transferred to work in another area while any complaint against him/her was investigated.

The emphasis was on moving the harasser, not the person harassed.

Notices about harassment were posted.

A questionnaire was sent out to the workforce asking if workers had been harassed. Of the 16 workers who said yes, the employers investigated every single case.

Employees were trained in equal opportunities.

The tribunal stated:

‘We are satisfied that the policy is not only detailed, careful, reasonable and in our view, exemplary, but was acted upon. Harassment is a live issue, not a dead letter. There is a tight code of conduct.’

This case demonstrates how a high level of preventative action is required to use the defence.

The European Code on Sexual Harassment is a useful reference point for assessing steps taken by the employer in cases of sexual harassment, as it sets out detailed recommendations both on prevention and on handling a grievance.
2. How discrimination may occur at work

What is direct race discrimination?

Direct discrimination is the most obvious form of discrimination. The formal definition in section 13 of the EqA states:

‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat other persons.’

Applying this to ‘race’ and using less legalistic language, the definition amounts to this:

An employer discriminates against the member if s/he treats the member less favourably because of the member’s race than s/he treats or would treat someone of a different race.

The ‘but for’ test is often a very good way to understand and identify direct race discrimination. Always ask yourself whether the employer treated the member differently because of his/her race, e.g. ‘but for’ the fact that the member was black, would the employer have promoted him/her?

As explained on page 9 above, it is also unlawful to treat a person less favourably due to someone else’s race or because s/he is wrongly perceived to be of a certain race.

The employer’s motives

The employer’s motives are irrelevant. What matters is what the employer does. An employer may not be personally prejudiced and may even act with good intentions, but if s/he treats a black worker differently from how s/he would treat a white worker in the same circumstances, s/he has directly discriminated.

Examples of different motives which are all unlawful:

Loss of business: an employer decides not to put a black worker in a customer-facing role due to fear of customer disapproval or other outside pressure.

Reaction of existing workforce: an employer refuses to recruit a black worker due to fear of industrial unrest, or that a worker will not ‘fit in’, or that white workers will not take orders from a black supervisor.

Politics or populism: a Council decides to reduce the number of black managers it employs for political reasons or to appease the populist media pressure.

Patronising: an employer treats a black worker differently, even if for benevolent motives, e.g. not employing black bar-staff in a National Front area.

Stereotyping: an employer refuses a job to an Irish worker who has just arrived in England because s/he thinks Irish workers get homesick quickly and return to Ireland after a short time.

Unconscious discrimination: an employer in fact treats a black worker less favourably, but without realising it.
Unconscious discrimination

Obviously it is easier to prove discrimination where the employer displays racial prejudice, rather than proving that unconscious attitudes or stereotyping operated. However, it is important to remember that a manager may have discriminated even if s/he is unaware of it and appears genuinely well-intended. Evidence is always necessary and it is most revealing to look at what the manager has actually done in practice. In an important case, the House of Lords recognised that racial discrimination can be unconscious:

‘All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of the claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that whether the employer realised it at the time or not, race was the reason why he acted as he did ..... Members of racial groups need protection from conduct driven by unconscious prejudice as much as from conscious and deliberate discrimination.’

Nagarajan v London Regional Transport (1999 IRLR 572)

Where the less favourable treatment takes the form of harassment, it may fall within the specific definition of harassment – see page 53.

Defences to direct race discrimination

There is no defence. Less favourable treatment because of race, whatever the motive, is inexcusable. However, there are some limited exceptions for occupational requirements (ORs) and positive action (see pages 38-39).

Evidence to prove direct race discrimination

It is best to look for evidence of ‘different’ treatment as opposed to simply ‘unfair’ treatment. The most helpful evidence, though not essential, is:

● **A comparator** - evidence to show a comparable work colleague of a different ‘race’ has been treated more favourably in similar circumstances.

● There is no neutral non-discriminatory explanation as to why the comparator has been treated more favourably. The explanation need not be fair, but it must be believable.

● **Racist comments** made by the relevant decision-makers. These can be hard to prove.

Unfair treatment is not enough on its own.
AN EXAMPLE OF DIRECT RACE DISCRIMINATION
Valdez v L B Camden, December 2012

Mr Valdez is of mixed race. On a reorganisation in 2011, staff had to apply for new positions. Mr Valdez was appointed to the role of Environmental Management Officer, but failed in his application for one of several Senior Environmental Manager Officer (‘SEMO’) vacancies. At the end of the interview process, he scored 17. A white candidate, Mr Gray, had scored 16, but following a moderation meeting by the panel, his score was increased to 18.

The employment tribunal found direct race discrimination against Mr Valdez for the following reasons: no satisfactory account was given for the alteration of Mr Gray’s score; the successful candidates for the SEMO post were all white; the decision makers were all white; the upper levels of management were almost all white; there was a remarkable racial divide between the North and South Teams in the Street Environment Service; the Council repeatedly failed to document crucial decisions in relation to the reorganisation; and the Council had failed to answer Mr Valdez’s EqA questionnaire.

Comment - the crucial evidence of direct discrimination was:
● A comparator treated better in similar circumstances.
● No convincing non-discriminatory explanation for the better treatment of the comparator.
● Key decisions not documented.
● Ethnic profile of decision-makers, senior managers and successful candidates.

What is direct sex discrimination?

Direct discrimination is the most obvious form of discrimination. The formal definition under section 13 is set out above under the section on direct race discrimination.

Applying this to ‘sex’ and using less legalistic language, the definition amounts to this:

An employer discriminates against the member if s/he treats the member less favourably because she is a woman than s/he treats or would treat a man.

Direct discrimination can also be because the member is a man or because s/he is married or a civil partner or undergoing gender reassignment.

The ‘but for’ test is often a very good way to understand and identify direct sex discrimination. Always ask yourself whether the employer treated the...
member differently because of his/her sex, e.g. ‘but for’ the fact that the member was a woman, would the employer have promoted her?

As explained on page 9 above, it is also unlawful to treat a person less favourably due to someone else’s sex etc or because s/he is wrongly perceived to be of a certain sex.

The employer’s motives
As with direct race discrimination, an employer’s motives are irrelevant. What matters is what the employer does. An employer may not be personally prejudiced and may even act with good intentions, but if s/he treats a female or married worker differently from how s/he would treat a male or unmarried worker in the same circumstances, s/he has directly discriminated.

Examples of different motives which are all unlawful:

- **Loss of business**: an employer decides not to place a woman on a front desk on the assumption that customers or clients will prefer to deal with a man.

- **Reaction of existing workforce**: an employer refuses to appoint or promote a woman because she will not ‘fit in’ or because male workers will not accept a female supervisor.

- **Patronising**: a taxi service refuses to employ women on night shifts for fear of them being attacked and the employer’s cars being damaged.

- **Stereotyping and the idea that there are women’s jobs and men’s jobs**: an employer refuses to employ a woman for a warehouse job, because it is assumed that she cannot lift heavy loads.

- **Assumptions about childcare**: an employer decides not to promote a woman because the employer just assumes that she will be unable to travel or work extra hours or that she will be absent a lot due to childcare.

- **Unconscious discrimination**: an employer in fact treats a female worker less favourably, but without realising it.

Obviously it is easier to prove discrimination where the employer displays overtly sexist attitudes, rather than proving that unconscious attitudes or stereotyping operated. Where unconscious attitudes may be a factor, note the comments of the House of Lords regarding race discrimination on page 15.

Pregnancy discrimination is dealt with on page 57-59, discrimination in relation to gender reassignment on page 61-63 and sexual harassment on pages 53-54.

Defences to direct sex discrimination
Again, as with cases of race discrimination, there is no defence. Less favourable treatment because of sex, whatever the motive, is inexcusable. However, there are some limited exceptions for occupational requirements and positive action (see pages 38-39).
Evidence to prove direct sex discrimination

It is best to look for evidence of ‘different’ treatment as opposed to simply ‘unfair’ treatment. The most helpful evidence, though not essential, is:

- A comparator - evidence to show a comparable work colleague of a different sex has been treated more favourably in similar circumstances.

- There is no neutral non-discriminatory explanation as to why the comparator has been treated more favourably. The explanation need not be fair, but it must be believable.

- Sexist comments made by the relevant decision-makers. These can be hard to prove.

Unfair treatment is not enough on its own.
AN EXAMPLE OF DIRECT SEX DISCRIMINATION

Megahey v Action Cancer, IDS Diversity at Work No.48, June 2008

Ms Megahey worked as a retail support officer. On a reorganisation, her role and that of her immediate manager were amalgamated into a new post of retail manager. A number of employees applied including Ms Megahey and Mr Lynch (manager of one of the shops which Ms Megahey had been responsible for supervising). Ms Megahey, Mr Lynch and six others were interviewed by a three person panel. Ms Megahey got the highest marks (292 points), while Mr Lynch and a Ms Sloan came joint second with 285 points. The panel decided to invite all three candidates back for a second interview, although there had been no previous indication this might happen. The evening after the 1st interview, one of the panel members telephoned Ms Sloan at home and asked whether he could contact her employer with regard to a question she had asked at interview about salary. Ms Sloan strongly objected to him contacting her employer before she had been offered the post and later that evening she withdrew her application. The second interview panel was the same as the first plus the incoming head of fundraising who was to line manage the new post. Mr Lynch scored 98 and was appointed. Ms Megahey scored 97.

A Northern Ireland tribunal found sex discrimination against Ms Megahey for these reasons: She had scored 7 points more than Mr Lynch first time round. There was so little information on Mr Lynch’s application form that the tribunal could not see how he had made it through to the interview stage. There was no woman on the short-listing panel and there were few notes of the short-listing or post-interview discussions. On balance, the tribunal also thought the panel member’s purpose in contacting Ms Sloan had been to discourage a strong female candidate from continuing with her application.

Comment - the crucial evidence of direct discrimination was:

- A comparator treated better in similar circumstances.
- No convincing non-discriminatory explanation for the better treatment of the comparator.
- Another person of the same sex also treated badly in similar circumstances
- Key decisions not documented.
- Gender profile of decision-makers and other candidates.
What is indirect race discrimination?
The stages in the definition

Direct discrimination means treating workers differently according to their race. Indirect discrimination occurs where the employer treats – or would treat - all workers the same way, whatever their race, but the result of the treatment is that workers of a particular racial group are disadvantaged.

Indirect discrimination only applies to the application of provisions, criteria or practices which have an adverse impact disproportionately on certain racial groups.

For example, a requirement that all job applicants speak fluent English, while applied to everyone, would disproportionately debar from employment people born and brought up in non-English speaking countries.

The definition of indirect discrimination contained in section 19 of the EqA is notoriously hard to understand and apply. It is as follows:

‘(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

‘(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.’

Applying this to race discrimination, it is indirect race discrimination if the employer applies to the member a provision, criterion or practice which

— puts or would put other people of the same ‘race’ as the member at a particular disadvantage compared with those of a different ‘race’
— puts or would put the member at that disadvantage
— and which the employer cannot show to be a proportionate means of achieving a legitimate aim.

To understand this wording, it is easier to ask the following questions in order:

● Was the member selected for redundancy or prevented from getting promotion etc because of a certain provision, criterion or practice?

● Was the provision, criterion or practice one which put people from the same racial group as the member at a particular disadvantage?

● Can the employer prove the application of the provision, criterion or practice was a proportionate means of achieving a legitimate aim?
The following pages explain in more detail:

- What kinds of provision, criterion or practice may occur and when (pages 21-23).
- Whether a provision, criterion or practice puts the member at a particular disadvantage (page 24).
- Whether the member’s racial group is generally disadvantaged by such a provision, criterion or practice (page 24).
- What kind of justification from the employer tribunals will accept (page 25).

**Indirect race discrimination: provisions, criteria or practices**

In everyday working patterns and policies, there are countless hidden provisions, criteria or practices which certain groups of workers find hard or impossible to meet. For example, a requirement that job applicants hold British qualifications would disadvantage candidates of non-British nationality or national origin. These requirements often create unnecessary barriers to true equal opportunities for getting jobs, promotion and improvement in pay and conditions.

Some provisions, criteria or practices (‘PCPs’) with adverse effects are unavoidable and it is not unlawful for employers to impose PCPs which they can objectively justify. However, many PCPs cannot be justified once challenged. Requiring a higher level of language fluency than necessary for the job would be unjustifiable, for example. (Page 38 gives further examples of what may justify otherwise discriminatory PCPs.)

Discriminatory PCPs are often hidden and members may not themselves notice them. When a black or minority ethnic member brings a grievance to you, you need to investigate whether any hidden discriminatory practices or requirements have caused the problem. More generally, employers’ systems and policies, existing and new, need to be carefully examined for their effects. (Sections 5, 6 and 7 give checklists to detect hidden PCPs.)

As set out in the checklist on page 11, discriminatory practices may occur in a whole range of working situations. On page 21 is a list of PCPs which, unless an employer can objectively justify them, often have a discriminatory effect on black or foreign-born workers. (Many such PCPs also affect other disadvantaged groups and particularly women.)

Pages 42-44, 47 and 51-52 give examples of PCPs to be wary of in particular situations, i.e. recruitment, promotion, redundancy selection.
Checklist of possibly discriminatory provisions, criteria or practices: race

Check to see whether any of the following provisions, criteria or practices apply in your workplace. They may well have a discriminatory effect on black or minority ethnic workers.

**QUALIFICATIONS**
- formal qualifications
- qualifications only obtainable in the UK
- university degree
- qualifications from certain universities/organisations/Oxbridge
- English language qualifications

**LANGUAGE / EXPRESSION / CULTURE / CONFIDENCE**
- English language fluency - written/verbal
- communication skills
- writing skills
- essay-based tests and application forms
- psychometric testing
- culturally-biased testing
- articulacy/fluency in interview performance
- acquiring new technical skills/knowledge, within short time periods/without special training (difficult in an unfamiliar language/with foreign technology)

**EXPERIENCE / SERVICE / PAID EMPLOYMENT**
- previous kinds of work experience
- previous management experience
- already being at a certain grade/holding a certain high level job
- previous (fast) promotions
- previous width/variety of experience
- length of previous experience or service in certain positions/with the employer/in the industry/with past employer
Checklist continued

previous paid employment/paid relevant experience

previous steady employment/no periods of unemployment

having attended refresher/training courses (usually unavailable to night staff who tend to be black/women)

previous acting-up experience

being on a permanent rather than temporary contract

DRESS

● uniform/dress/no turbans

● clean-shaven (e.g. affects Sikhs)

ATTENDANCE / SHIFTS

● days/hours of work/shifts/flexibility (Sabbaths/religious holidays)

● not taking holiday entitlement at one time (visits to family abroad)

● limited unpaid/compassionate leave (need to visit ill family abroad)

● good attendance record (extended holidays/unpaid leave to visit family abroad)

● late travel home (danger of racial attacks)

KEEPING IT INTERNAL / REFERENCES IN AND OUT / BEING PART OF THE CLUB

● nomination/recommendation by/reference from particular staff/management for recruitment/promotion

● word of mouth recruitment (knowing existing workers)

● favouring children from existing staff

● jobs/vacancy lists only on enquiry

● internal applications only

● customer satisfaction (liability to racist complaints)

● membership of certain organisations, professional bodies or trade unions/certain (culturally specific) leisure activities or interests
Is the member at a disadvantage?
The member must prove that she would be or has been put at a disadvantage due to the discriminatory provision, criterion or practice.

It is sufficient if the provision, criterion or practice is to the member’s detriment at the time it is applied.

For example:
There is a requirement that job applicants have lived in a certain Borough for three years or that they possess an English language GCSE. It is irrelevant that the member is capable of acquiring the GCSE in the near future or that s/he could easily move to the Borough and live there. She could not meet the criterion at the time it mattered (i.e. to get the job).

The most obvious example of indirect discrimination is where a worker physically cannot meet the requirement.

For example:
A requirement that workers be over 6’ tall would disadvantage people from some countries.

However, it is also unlawful if the member cannot meet a requirement because of his/her cultural and community obligations.

For example:
A requirement to be clean-shaven or to wear a short-skirted uniform. In theory Sikhs could shave their beards and Pakistani women of the Muslim religion could wear the uniform, but in practical terms they could not do so. This could also be indirect religious discrimination.

A worker who simply prefers not to meet the PCP, but is not at a disadvantage in the senses set out above, cannot claim indirect discrimination.

For example:
A man wishes to have a beard because he thinks it suits him, but not for any cultural/religious reason.

Would others of the same racial group also be put at a particular disadvantage by the provision, criterion or practice?
It is not sufficient that the member is disadvantaged by the provision, criterion or practice (‘PCP’). It needs to be shown that other workers of the same racial group would have the same difficulty. It is unnecessary to show the PCP has in fact been applied to other workers of the same racial group. It is enough to show it is the sort of PCP which if applied would have adverse impact on that racial group.

The requirement need not disadvantage all members of the relevant racial group. You need only show that it would put some workers of the relevant group at a disadvantage compared with others.

For example:
A requirement that workers hold British qualifications would not exclude all workers of non-British nationality, but would bar more of them than workers of British nationality.

A requirement that employees work on Saturdays would not cause difficulties for all Jewish workers, because many of them would not feel they should not do so for religious reasons. But it is enough
that some Jewish workers feel they should not work on the Sabbath.

**Justification: Is the provision, criterion or practice a proportionate means of achieving a legitimate aim?**

Many provisions, criteria or practices are imposed in everyday working life which adversely affect minority ethnic workers. However, in many cases, these practices are necessary and cannot be challenged. If an employer can prove that it was justifiable to adopt the practice or impose the criterion, then it will not be unlawful. To justify the provision, criterion or practice, the employer must show it is a proportionate means of achieving a legitimate aim.

It is not enough for employers to say that they considered their reasons to be adequate for adopting the practice or imposing the provision or criterion. The provision, criterion or practice must be objectively justifiable regardless of race, not simply justifiable in the personal opinion of the particular employer.

Employers must prove

3. That they are trying to achieve an aim which is legitimate.

4. That using the provision, criterion or practice is a proportionate means of achieving that aim.

Legitimate aims could be:

- Administrative efficiency.
- Health and safety
- Maintaining continuous service provision.

Whether an employer can justify applying the provision, criterion or practice depends on the facts and circumstances of the particular case. The greater the adverse effect of the particular PCP on the individual concerned and on people from his/her racial group generally, the better justification the employer must provide.

Discriminatory provisions, criteria or practices, where unavoidable, should be kept to the minimum necessary for the employer's needs. Where there is a fairer way of achieving the same end, the requirement is unlikely to be justifiable.

*For example:*

- A requirement that workers in a large kitchen be clean-shaven for hygiene reasons is unlikely to be justifiable, because protective clothing could be worn.

- A requirement that a worker from abroad with English as a second language should acquire considerable technical information and skills within a short time may not be justifiable if more time and training could be offered.

- A criterion that only deputy head teachers can apply for head teacher posts is probably not justifiable, since there are other ways of measuring potential.

- In one case, a tribunal said that a requirement that a charge nurse applying for a nurse manager job should have a record of rapid career progression in the past was not justifiable. There are other ways of...
measuring management potential and it is known that black nurses have not progressed in the NHS due to past discrimination.

**What is indirect sex discrimination?**

**The stages in the definition**

Direct discrimination means treating workers differently according to their sex. Indirect discrimination occurs where the employer treats – or would treat - everyone the same way, but the result of the treatment is that women (or men) are particularly disadvantaged.

For example, a requirement that all employees work full-time would have adverse impact on women because they are more likely to have childcare commitments.

The definition of indirect discrimination contained in section 19 of the EqA is notoriously hard to understand and apply. It is as follows:

‘(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

‘(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.’

Applying this to sex discrimination, it is sex discrimination if the employer applies to a female member a provision, criterion or practice which

— puts or would put other women at a particular disadvantage compared with men

— puts or would put the member at that disadvantage

— and which the employer cannot show to be a proportionate means of achieving a legitimate aim.

To understand this wording, it is easier to ask the following questions in order:

● Was the member selected for redundancy or prevented from getting promotion etc because of her inability to meet a certain provision or criterion or because of a practice adopted by her employer?

● Was the provision, criterion or practice one which would put women at a particular disadvantage compared with men?

● Can the employer show that applying the provision, criterion or practice was a proportionate means of achieving a legitimate aim?

Indirect sex discrimination also applies to
men or being married or a civil partner or in connection with gender reassignment.
The following pages explain in more detail:

● What kinds of provision, criterion or practice may occur and when (pages 28-30).

● Whether the provision, criterion or practice puts the member at a particular disadvantage (page 30).

● Whether the member’s gender group is generally disadvantaged by such a criterion, provision or practice (page 31).

● What kind of justification from the employer the tribunals will accept (page 31).

Indirect sex discrimination:
provisions, criteria and practices
As with race discrimination, in everyday working life, there are countless practices which disadvantage certain groups of workers. These practices often create unnecessary barriers to true equal opportunities for getting jobs, promotion and improvement in pay and conditions.

Some practices with adverse effects are unavoidable and it is not unlawful for employers to act in a way which they can objectively justify. However, many practices cannot be justified once challenged. For example, requiring a secretary in a typing pool to work full-time when two part-timers could do the job just as easily. (Page 32 gives further examples of what may justify otherwise discriminatory practices.)

Discriminatory practices are often hidden and members may not themselves notice them. When a woman brings a grievance to you, you need to investigate whether any hidden discriminatory requirement or practice has caused the problem. More generally, employers’ systems and policies, existing and new, need to be carefully examined for their effects. (Sections 5-7 give checklists on detecting potentially discriminatory requirements and practices.)

As set out in the checklist on page 11, discriminatory practices may occur in a whole range of working situations. On pages 28-30 is a list of PCPs which, unless justifiable, often have a discriminatory effect on women. (Many such requirements also affect other disadvantaged groups and particularly black and other minority ethnic workers.)

Pages 43-44, 47 and 51-52 give examples of PCPs to be wary of in particular situations, i.e. recruitment, promotion, redundancy selection.
Checklist of possibly discriminatory criteria and provisions: sex
Check to see whether any of the following requirements, criteria and provisions apply to your workplace. They may well have a discriminatory effect on women workers.

QUALIFICATIONS
- certain types of formal qualifications
- university degree in certain subjects
- qualifications from certain universities/organisations/Oxbridge

EXPERIENCE / SERVICE / PAID EMPLOYMENT
- previous kinds of work experience
- previous management experience
- already being at a certain grade/holding a certain high level job
- previous (fast) promotions
- previous width/variety of experience
- acquiring certain types of technical skill/knowledge, within short time periods/without special training
- length of previous experience or service in certain positions/with the employer/in the industry/with past employer
- previous length of continuous experience/experience by a certain age (disadvantages women due to career breaks)
- previous paid employment/paid relevant experience
- previous steady employment/no periods of unemployment
- having attended refresher/training courses (usually unavailable to night staff who tend to be black/women)
- previous experience of ‘acting’ or ‘substitution’ (opportunities may have gone to men)
- being employed permanently rather than on a temporary or fixed term contract

MISCELLANEOUS
- age bars (women may be out of the job market during child-bearing age)
Checklist continued

- to have acquired a certain level of experience by a certain age
- certain forms of dress or uniform (e.g. may indirectly discriminate against Muslim women)
- late finishing hours (possibly dangerous travel home)
- home visits, e.g. to patients or tenants unaccompanied (in some circumstances may be dangerous)

NOTE: Employers should provide a safe system of work for all workers, but should not directly discriminate against women unless allowed by statute (e.g. in certain circumstances in relation to pregnancy and childbirth).

ATTENDANCE / SHIFTS / FLEXIBILITY / MOBILITY

(Requirements likely to cause difficulty for women - and sometimes for married men - usually due to childcare commitments.)

- full-time work (refusal to allow job-share or part-time working)
- permitting part-time working, but requiring some hours to be worked each day
- overtime or week-end working
- shift-working, especially rotating shifts varying from day to day or week to week
- requirements to work overtime or varying shifts imposed at very short notice
- specified and inflexible start or finish times (interfering with times of taking or collecting children from school or child-minding)
- all year round working (e.g. as opposed to term-time only)
- requirements entailing certain (high) attendance levels / limited absences
- open hours contracts (no fixed working hours)

MOBILITY

- long journeys to and from work locations (necessitating earlier departures from and returns to home)
- work trips necessitating staying overnight away from home
- relocation (may be unacceptable if woman is not the primary earner in the household)
Is the member at a disadvantage?  
The member must prove that she would be or has been put at a disadvantage due to the discriminatory provision, criterion or practice.

It is sufficient if the provision, criterion or practice is to the member’s detriment at the time it is applied.

For example:  
An employer who selects part-timers first for redundancy indirectly discriminates against women who are then working part-time. It is irrelevant if a woman works part-time for historical reasons and her children are now grown-up, because she is not given the option of working full-time when the selection criterion applies.

The most obvious example of indirect discrimination is where a worker physically cannot meet an employer’s job criteria.

For example:  
A woman is not recruited because she is only 5 feet 6 inches tall. The employer requires workers to be 6 feet tall.

However, if a woman is disadvantaged because of childcare obligations, this is usually also considered unlawful.

For example:  
A woman is dismissed because she is
unable to work a flexible rota as she has young children to look after. Most tribunals accept that there are two conflicting but equally valid messages directed towards women in today's society – one of which says she should remain at home and look after her children. (The other encourages her to go out to work.) Some tribunals take a more literal approach, however, and insist that a woman proves that alternative childcare arrangements are practically or financially impossible.

Obviously, a worker who simply prefers not to work full-time, but is not at a disadvantage in the senses set out above, cannot claim indirect discrimination.

For example:
A woman may wish to work part-time because she wants to spend the rest of her time gardening.

Would the provision, criterion or practice put other women at a particular disadvantage too?
It is not sufficient that a particular woman is disadvantaged. It is necessary to show that many other women would have the same difficulty. However, it is unnecessary to show that all women would be disadvantaged by the provision, criterion or practice.

For example:
A full-time work requirement would debar proportionately more women than men, but many women would not find this a problem.

Justification: Is the provision, criterion or practice a proportionate means of achieving a legitimate aim?

Many criteria and practices exist in everyday working life which adversely affect women. However, in many cases, these practices are necessary and cannot be challenged. If an employer can prove that it was justifiable to adopt the practice or impose the criterion, then it will not be unlawful. To justify the provision, criterion or practice, the employer must show it is a proportionate means of achieving a legitimate aim.

It is not enough for employers to say that they considered their reasons to be adequate for adopting the practice or imposing the provision or criterion. The PCP must be objectively justifiable regardless of sex, not simply justifiable in the personal opinion of the particular employer.

Employers must prove
1. That they are trying to achieve an aim which is legitimate.
2. That using the provision, criterion or practice is a proportionate means of achieving that aim.

Legitimate aims could be:
- Administrative efficiency.
- Health and safety.
- Maintaining continuous service provision.

Whether an employer can justify applying the provision, criterion or practice depends on the facts and circumstances
of the particular case. The greater the adverse effect of the particular requirement on the individual concerned and on women generally, the better justification the employer must provide.

For example:
Employers constantly insist on full-time working and shift-working. Whether this is justifiable varies very much from case to case looking at the practicalities of the situation.

Discriminatory PCPs, where unavoidable, should be kept to the minimum necessary for the employer’s needs. Where there is a fairer way of achieving the same end, the PCP is unlikely to be justifiable.

For example:
- Insisting that only deputy head teachers can apply for head teacher posts may not be justifiable, since there are other ways of measuring potential.
- A requirement that a woman work rotating shifts was not justifiable in one case because the employer had a sufficiently large workforce to be able to accommodate her needs.
- In another case, it was not found justifiable to insist that a female receptionist work full-time because it was perfectly feasible to arrange for a job-share.

AN EXAMPLE OF INDIRECT SEX DISCRIMINATION
Thomas v The Arts Council of Wales, 192 EOR, Sept. 2009
Ms Thomas was an Arts Development Officer. She asked to work part-time on her return from maternity leave, working either 5 days / fortnight or 2½ days / week. Her employer refused, saying it would have a detrimental effect on client service, in particular because it was necessary to have five-day cover in case clients had emergencies. The employer also argued it would be difficult to recruit a part-time worker for the other 2 or 3 days/week.

The tribunal said the full-time work requirement was not justified. The employer had very significantly overstated the need for a 5 day service by Arts Development Officers to cover potential emergencies. Moreover, even if 5 day cover was provided, there would still be week-ends when Arts organisations might be operating but there would be no cover anyway. Any delay resulting from Ms Thomas only working part-time would be no greater than delays caused when emergencies happened at week-ends. As for the argument that the employer could not recruit another part-timer, the employer had not even tested this by trying to recruit or making enquiries about the availability of such staff.
3. Victimisation

What is meant by victimisation (race)?

Under section 27 of the EqA, victimisation is made unlawful. ‘Victimisation’ has a very specific meaning under the EqA. It does not simply mean picking on the member. It means treating the member unfavourably because s/he has complained about discrimination.

Under victimisation law, an employer must not subject the member to a detriment because s/he has complained of discrimination or given evidence supporting another worker or done any other ‘protected act’.

The member is protected if s/he makes an allegation of anything which would be unlawful race discrimination - s/he need not actually use the words ‘race discrimination’ or refer to the EqA. However, the employer must clearly understand that s/he is referring to race discrimination and penalise him/her for that reason.

For example:
- A worker is sacked because s/he brings a grievance complaining about race discrimination in a recent failed promotion attempt.
- A worker is transferred because s/he complains that work colleagues are making racist remarks.

In addition, it is victimisation to subject the member to a detriment because s/he has made a relevant pay disclosure or tried to obtain information from such a disclosure. A ‘relevant pay disclosure’ is one which is made in order to find out if there is any connection between pay and race or other protected characteristic.

It is also unlawful if the employer penalises the member simply because s/he suspects that the member has alleged race discrimination or that s/he intends to do so. However, this is harder to prove.

The employer has a defence only if the member made a false allegation in bad faith.

For example:
A worker who is disciplined for making an allegation of race discrimination which is found to be wrong must not be victimised as long as s/he genuinely believed the allegation was true when s/he made it.

Points to note:
- Be careful because potential victimisation claims are frequently missed. Be alert to any change in the employer’s attitude or behaviour towards the worker after the allegation is made.
- Where an allegation of race discrimination is made, it should be explicit, unambiguous and in writing, so that the making of the allegation can be proved.

Victimisation is an industrial relations issue as well as a legal issue. Many employers with policies against direct and indirect discrimination have not thought about how to avoid victimising
a worker who makes an allegation of racism.

An employment tribunal in Birmingham has commented:

‘Perhaps the question of victimisation has not been sufficiently publicised and yet it is a very important part of the Act. Indeed a very important part of race relations philosophy, and as a matter of public policy employers should be made more aware of their responsibilities in this connection.’

See pages 36-37 for further examples and a checklist on victimisation.

**What is meant by victimisation (sex)?**

Under section 27 of the EqA, victimisation is made unlawful. ‘Victimisation’ has a very specific meaning under the EqA. It does not simply mean picking on the member. It means treating the member unfavourably because s/he has complained about discrimination.

Under victimisation law, an employer must not subject the member to a detriment because s/he has complained of discrimination or given evidence supporting another worker or done any other ‘protected act’.

The member is protected if s/he makes an allegation of anything which would be unlawful sex discrimination - s/he need not actually use the words ‘sex discrimination’ or refer to the EqA. However, the employer must clearly understand that s/he is referring to sex discrimination and penalise him/her for that reason.

**For example:**

- A worker is sacked because she brings a grievance complaining about sex discrimination in a recent failed promotion attempt.
- A worker is transferred because she complains that a colleague is being given better work because he is a man.

In addition, it is victimisation to subject the member to a detriment because s/he has made a relevant pay disclosure or tried to obtain information from such a disclosure. A ‘relevant pay disclosure’ is one which is made in order to find out if there is any connection between pay and gender or other protected characteristic.

It is also unlawful if the employer penalises the member simply because s/he suspects that the member has alleged sex discrimination or that s/he intends to do so. However, this is harder to prove.

**For example:**

An employer finds in a worker’s desk her private diary noting down incidents of pregnancy discrimination and issues her with a warning for leaving defamatory notes in a public place. Although the worker has not made any allegation of sex discrimination, the employer clearly thinks she is likely to do so and is attempting to intimidate her out of doing so. This is victimisation.

The employer has a defence only if the
member made a false allegation in bad faith.

For example:
A worker who is disciplined for making an allegation of sex discrimination which is found to be wrong must not be victimised as long as she genuinely believed the allegation was true when she made it.

Points to note:
● Be careful because potential victimisation claims are frequently missed. Be alert to any change in the employer's attitude or behaviour towards the worker after the allegation is made.

● Where an allegation of sex discrimination is made, it should be explicit, unambiguous and in writing, so that the making of the allegation can be proved.

Victimisation is an industrial relations issue as well as a legal issue. Many employers with policies against direct and indirect discrimination have not thought about how to avoid victimising a worker who makes an allegation of sex discrimination.

The EC Code on Sexual Harassment says:

‘it is good practice to make it clear that it will be considered a disciplinary offence to victimise or retaliate against an employee for bringing a complaint of sexual harassment in good faith.’

See page 36-37 for further illustrations and a checklist on victimisation.

How to spot victimisation in the workplace
The law against victimisation is designed to enable workers to raise issues of discrimination without fear of retaliation. You need to look out for:

● The ‘trigger’ or ‘protected act’, i.e. the way the member originally raised the discrimination issue. You must be able to prove this reference to discrimination was made by the member.

● Evidence that the employer reacted badly to the issue being raised. It is often worth comparing the employer's treatment of the member before and after the allegation of discrimination.

If victimisation could be an issue, remember to ask the member:

● Did s/he ever allege discrimination?

● If so, when? Was it in writing? Were there witnesses?

● Did s/he make it clear that s/he was alleging race or sex discrimination?

● To whom was the allegation made? What was that person’s immediate reaction? Were any hostile comments made?

● How did the employer react? Has s/he been treated differently before and after s/he made the allegation? Has s/he been treated differently from other workers who have made no such allegations?

● Check dates. It is hard to prove victimisation if there has been a
very long time between the original allegation and the subsequent victimisation, unless there have been other incidents of victimisation in between.

AN EXAMPLE OF VICTIMISATION
Campbell v Leeds United FC, IDS Diversity at Work No.46, April 2008

Ms Campbell, an assistant conference and banqueting manager, brought a discrimination claim against her employer, Leeds United FC in 2005. After the tribunal hearing but before the outcome had been given, the club Chairman questioned her veracity in his programme notes. The next month, the tribunal gave its decision in her favour. On her return to work in February 2006 after absence due to a road traffic accident, the first words of a Mr H were ‘fucking hell, here we go again’. She was given menial tasks to perform, subjected to a wall of silence by other staff and contrary to normal practice, not provided with lunch. When she raised a grievance, there were obstructions and delays in dealing with it.

Amongst other things, a tribunal found Ms Campbell had been victimised because of her earlier discrimination claim. No one else had been subjected to aggressive comments by Mr H or faced a wall of silence or faced a refusal to deal adequately with their grievance.

Comment - the crucial evidence of victimisation was:

- The protected act – Ms Campbell brought a tribunal claim for discrimination
- The employer was angry about the claim – demonstrated by the programme notes and by Mr H’s comment on her return
- Ms Campbell was subjected to hostile behaviour that other people, who had not complained of discrimination, did not have to face.
Victimisation Checklist

Triggers (‘protected acts’)

The member is victimised because:

● S/he has brought a tribunal case under the Equality Act.

● S/he has acted as witness in a case brought by someone else under the Equality Act.

● The employer knows the member intends to be a witness in an EqA case.

● The employer suspects the member will be a witness in an EqA case.

● S/he has brought a formal grievance alleging race or sex discrimination or unequal pay.

● S/he has informally alleged racism or sexism or raised the issue of unequal pay.

● S/he has actively represented a colleague at a grievance who alleges race or sex discrimination.

● S/he has alleged race or sex discrimination during a disciplinary hearing.

● S/he has alleged that a member of the public has discriminated against him/her.

● S/he has complained of harassment.

● S/he has objected to racist remarks.

● S/he has spoken to the Equality and Human Rights Commission.

● S/he has objected to the playing of a racist video or objected to the display of a sexist calendar which is directed towards him/her.

Forms of victimisation

As a result of the member’s action, the employer:

● Disciplines or dismisses the member.

● Denies the member the usual overtime opportunities.

● Bars the member from the bonus scheme.

● Enforces petty rules against the member that were previously - and with other members – overlooked.

● Refuses transfer requests.

● Refuses to agree holiday dates.

● Excludes the member from important meetings; marginalises the member or sends him/her to Coventry.

● Puts the member on tasks below his/her experience or on the least pleasant tasks.

● Denies the member promotion.

● Pressurises the member to drop the allegation, e.g. threatens the member with damage to his/her career if s/he persists with the allegation.
4. When discrimination may be permitted

Occupational requirements
It is not unlawful discrimination for an employer to require a worker to be of a particular race or sex if, having regard to the nature or context of the work:

- it is an occupational requirement to be of that race or sex, and
- it is a proportionate means of achieving a legitimate aim.

For more detail of this general OR exception, see paras 13.3 – 13.8 of the EHRC Employment Code.

The exception will very rarely apply, but it could be used as a form of positive action.

For example:
A Council decides to recruit a Somali worker to visit older people from the Somali community in their homes to take up health services. This would probably be an OR if the Council did not have a Somali worker already in post who could take up the duties. (EHRC Employment Code, para 13.09.)

The OR exception could also be used for certain jobs which require employees to be of a particular sex to preserve privacy and decency.

The same OR exception can apply if the employer requires a worker not to be married or a civil partner or to have the protected characteristic of gender reassignment.

Religious requirements
An employer can apply a requirement that a worker is of a particular sex or that s/he does not have the protected characteristic of gender reassignment or that s/he is not married or a civil partner (or married to or a civil partner of someone who has a living former spouse or partner etc) if

- the employer is for the purposes of an organised religion, and
- the application of this requirement engages the compliance principle (to comply with the doctrines of the religion) or the non-conflict principle (because of the nature of the employment, to avoid conflicting with the strongly held religious views of a significant number of the religion’s followers).

For more detail of the religious OR exceptions, see paras 13.12 – 13.18 of the EHRC Employment Code.

Positive action
Positive action is optional.

Employers may take positive action if they reasonably think that:

- people with a particular protected characteristic suffer a disadvantage connected to that protected characteristic; or
- people with a particular protected characteristic have different needs; or
- participation in an activity by people with a particular protected characteristic is disproportionately low.
In any of these situations, the employer can take any action which is a proportionate means of achieving the aim of enabling or encouraging those people to overcome or minimise the disadvantage, or to participate in the activity or to meet their needs.

For example:
Targeting advertising at certain groups.

Chapter 12 of the EHRC Employment Code deals with positive action.

**Recruitment and promotion tie-breaks**
Employers cannot generally discriminate at the point of deciding who to offer a job or promotion. However, in limited tie-break situations, they can choose to appoint a worker with a particular protected characteristic. This is only where

- the preferred worker is as qualified as the other candidate to be recruited or promoted
- the decision is a proportionate means of achieving the aim of enabling or encouraging people with the relevant protected characteristic to overcome or minimise the disadvantage of the relevant group.

Points to note:

- It is optional for employers whether they want to carry out this type of positive action
- What exactly is meant by ‘as qualified’ is untested.

- The employer cannot have a policy of treating people with the relevant protected characteristic more favourably than others.

**Pregnancy and childbirth**
It is permitted to treat women more favourably than men in connection with pregnancy and childbirth. However, this more favourable treatment must not go any further than is reasonably necessary to compensate the woman for any disadvantage.
Part Two: How to identify and tackle race and sex discrimination at work

5. Recruitment

Direct race or sex discrimination
You should consider the possibility of direct or indirect discrimination (both may be present) or even victimisation.

The following could be warning signs of direct race or sex discrimination, although none of these in themselves necessarily indicate that direct discrimination in recruitment has occurred. Information to substantiate any of these points can be collected from various sources including by interviewing the member, speaking or writing informally to the employer, taking a formal grievance, sending a Questionnaire (until the procedure is abolished), or bringing an employment tribunal case.

The member is of a group statistically likely to be discriminated against.

Watch for:
— Black or minority ethnic workers.
— Pregnant workers.
— Female workers trying to get a job traditionally associated with male workers.

● The member has not been short-listed for a job when one would expect him/her to be short-listed, comparing his/her application with the advertisement and job specification.

● Comments or questions at interview indicating hostility or stereotyping of the member on racial or gender grounds or questions regarding childcare.

● Subjective recruitment procedures. (The purpose of objective procedures is to reduce the chances of direct discrimination.)

Watch for:
— Decision-making by one individual or one individual with particular influence on a panel.
— No pre-fixed selection criteria.
— No objective marking or scoring system.
— Pre-fixed criteria which are departed from by the decision-makers.
— Breach of the employer’s own recruitment or equal opportunities procedures.
— Breach of relevant guidelines in the EHRC Employment Code of Practice (see in particular chapter 16).

● Unsatisfactory or vague reasons for rejection and explanations such as the member would not “fit in”.

● An existing workforce, particularly at the relevant level and at the highest levels, which is dominated by one race or sex.

● If someone else has been appointed, s/he is patently less suitable for the job and is of a different race or sex.

Indirect Race or Sex Discrimination

Points to look for:
To spot hidden indirect discrimination, look out for the following:

● Informal recruitment procedures which may indirectly discriminate, particularly where existing staff are mainly white or male.
Watch for:
— Word of mouth recruitment. (Depends on knowing/being friendly with existing workers and on the attitude of existing workers as to who is employed in the workplace.)
— Never advertising due to a high level of ‘on-spec’ demand. (Benefits those who know existing workers so they can write in at times of vacancies.)
— No application forms, or application forms which do not specify what information is required. (Benefits those who know existing workers and who have more inside information about the workplace and know what is relevant.)

● Where are advertisements placed? Are they put in places or with organisations that will not be seen by certain groups? (Although remember that targeted advertising can be a form of positive action.)

Watch for:
— Advertisements placed in job centres in primarily white areas.
— Visits to mainly white or single-sex schools to promote interest.
— Recruitment of temporary or permanent staff through agencies in all white areas.
— Recruitment through a union office where union members are primarily white male.

● Is the job advertised internally and externally?

Watch for:
— Ring-fencing or keeping jobs internal. This can be indirect discrimination where existing and internal staff are mainly white or of one sex.

● Method of selection - over-emphasis on interviews can disguise hidden requirements of fluency, articulacy, confidence etc and tends to benefit white male workers or workers with an academic background.

Watch for:
— Preliminary telephone interviews.
— Over-emphasis on interview performance.
— Interview arrangements (at short-notice or awkward times) which could cause attendance problems for workers with childcare responsibilities.

● Requirements of the job - these should be kept to the minimum necessary and relevant to the job.

Watch for:
— Excessive qualifications.
— Previous experience at certain levels, specific types of previous experience, good record of previous promotions, previous management experience, previous acting-up experience etc. (This type of requirement is a key issue of indirect discrimination - as black workers are often concentrated in the lower levels of the workforce, measuring potential only by what level they have already achieved puts them into a catch 22 situation.)
— Requirements as to how the job should be performed, eg dress and appearance, late night working, no provision for extended unpaid leave.
Race and Sex Discrimination

— Full-time work requirements; shift-working; overtime requirements.

For a fuller list of possibly discriminatory provisions, criteria or practices, see pages 22-23 (race) and 28-30 (sex).

Victimisation
The member may not be recruited because it is known that s/he previously alleged discrimination against this employer or a former employer.

For full checklist on victimisation, see page 37.

Recruitment Checklists

Investigating discrimination when a member brings a grievance to you regarding recruitment

When assessing an individual case, there are various formal and informal methods of gathering information. These include:

● Interviewing the member effectively.
● Obtaining information from the employer through informal conversations, letters, formal feedback.
● Other research.

The checklists on the following pages provide a guide to asking the right questions.

RECRUITMENT: INTERVIEW CHECKLISTS

Recruitment checklist

[1] Direct race or sex discrimination

1. Ask the member why s/he thinks s/he did not get the job.

2. Check the job description, person specification and advertisements to see what the employers required. How well did the member match this?

3. Ask what reason the member was given as to why s/he did not get the job. Check whether this is in writing.

4. Ask the employer to inform you or the worker in writing why the member did not get the job. Does this explanation stand up to scrutiny?

5. Compare the member’s application with the information at 2 - 4 above. Look for inconsistencies by the employer.

6. Try to find out whether anyone else was short-listed or appointed and if so, how they compare with the member’s application and with what the employer asked for in the paperwork. Were they of a different race or sex?

7. Check the objectivity of the recruitment process, eg:

— Was the member issued with a job description and person specification setting out identifiable selection criteria?
— Did more than one person interview the member?
— Were notes taken?

8. Check for other indicators of discrimination. See warning signs on pages 40-41.

Point to note:
Although it helps to compare the member with a successful candidate of a different race or sex, this is not essential to prove direct discrimination as there can be other indicators such as at points 4, 5 and 7 above.

[2] Indirect discrimination:
looking for hidden provisions, criteria or practices

1. Ask the member why s/he thinks s/he did not get the job.

2. Ask what reason the member was given as to why s/he did not get the job. Check whether this is in writing.

3. Ask the employer to inform you or the member in writing why the member did not get the job.

4. Check the job description, person specification and advertisements to see what the employer required. Also check the recruitment process to see whether the process itself contained discriminatory requirements.

5. If at any of the stages 1 - 4 above, you find a provision, criterion or practice which disadvantaged the member, there may be an element of indirect discrimination. See pages 22-23, 28-30, 40-42 for examples of discriminatory requirements generally and in recruitment. To check whether there is indirect discrimination on this occasion, go on to stages 6 - 9 below.

6. Check whether the likely reason the member did not get short-listed/appointed was a result of his/her failure to meet the particular provision, criterion or practice.

7. Note whether the provision, criterion or practice was applied to all workers regardless of their race or sex.

Point to note:
If the requirement was applied only to the member, then there could also be a case of direct race or sex discrimination, eg a worker, who is black, is told s/he has not been recruited because s/he has inadequate management experience, whereas the person who is recruited, who is white, has no more management experience than the worker.

8. Consider whether the provision, criterion or practice particularly disadvantages those of the member’s race or sex compared with those not of the member’s race or sex.

9. Consider whether the employer will be able to come up with a good objective justification for insisting on such a provision, criterion or practice.

10. If the answer to stages 6 - 8 is yes and to stage 9 is possibly no, then the member may win a case of indirect discrimination. You should look out for whether any other workers of the same sex or racial group as the member were also disadvantaged by the provision,
criterion or practice. They may also have an indirect discrimination case.

[3] Victimisation

1. Ask the member if s/he has previously made any allegation of race or sex discrimination against his/her former employer or the employer to whom s/he is now applying.

2. If so, ask for details as to when, what the allegation was, against whom it was made, what was the reaction at the time.

3. Would those making the decision to recruit know about the former allegation? Would it have upset them?

   — Did the member do anything else by reference to the EqA which may have upset the recruiter? For example, did the member challenge the recruiting employer on any discrimination issue during the interview?

   — Looking at the job description and person specification, the member’s application, the employer’s reasons for rejecting him/her, and the successful candidate(s), does the evidence suggest the member should have been short-listed/recruited?

[4] Possible action in an individual case

Gain further information, formally or informally, with a view to deciding whether or not to take legal action. (Watch time-limits. See summary page 66.) An informal approach, e.g., a letter asking why the member was unsuccessful may be the best first step.

N.B. In line with UNISON’s Race Discrimination Protocol (see https://www.unison.org.uk/upload/sharepoint/Policies/Race%20Discrimination%20Protocol.pdf for full details), where a member or their representative believes that they have been the subject of race discrimination in their workplace, the branch must ask the member to complete a CASE form as soon as possible to ensure that any employment tribunal deadline is not missed. All CASE forms setting out allegations of race discrimination must then be forwarded by branches to the region without delay so that they can be sent to Thompson’s to make preliminary legal assessment using the CASE protocol.

● The member can take a case to the employment tribunal for discrimination. (If a worker of a different racial group or sex was recruited, this indicates possible direct discrimination. If the member has not yet established the exact reason s/he was rejected, an indirectly discriminatory criterion could emerge. Where the evidence suggests that each is a real possibility, both direct discrimination and indirect discrimination can be claimed.)

● Take several cases at the same time on behalf of several workers who have been similarly affected. (This is particularly suited to indirect discrimination cases.)

● Negotiate a change in the employer’s appointments/promotion policy.
6. Promotion

Direct race or sex discrimination

As when the member is being recruited, there is a risk when applying for promotion of both direct and indirect discrimination. The purpose of objective procedures is to reduce the chances of direct discrimination. The following could be warning signs, although none of these in themselves necessarily indicate that direct discrimination has occurred in the promotion procedure. Information to substantiate any of these points can be collected from various sources including by interviewing the member, speaking or writing informally to the employer, taking a formal grievance, sending a Questionnaire (until the procedure is abolished), bringing an employment tribunal case.

- The member is of a group statistically likely to be discriminated against.

Watch for:
- Black or minority ethnic workers.
- Pregnant workers.
- Workers trying to get a supervisory position over workers primarily of another race/sex.

- The member has not been short-listed for a job when one would expect him/her to be short-listed, comparing his/her application with the advertisement and job specification.

- Comments or questions at interview indicating hostility or stereotyping of the member on racial or gender grounds or questions regarding childcare.

- Subjective promotion procedures.

Watch for:
- Decision making by one individual or one individual with particular influence.
- No pre-fixed selection criteria.
- No objective marking or scoring system.
- Pre-fixed criteria which are departed from by the decision-makers.
- Breach of the employer's own recruitment or equal opportunities procedures.
- Breach of relevant guidelines in the EHRC Employment Code of Practice (see in particular paras 17.82 – 17.90).

- Unsatisfactory or vague reasons for rejection.

- Few employees of the member's race/sex at higher levels in the organisation including at the level to which the member attempted to get promoted; general pattern of promoting more men/white workers than women/black workers.

- Past failed promotion attempts.

- The member has successfully 'acted-up' or 'substituted' into the higher grade post in the past.

- Other evidence of discriminatory tendencies by those making the decision:
  - Towards other black/female workers.
  - Towards the member.

- If someone else has been promoted, s/he is patently less suitable for the job and is of a different race or sex.
Indirect race or sex discrimination

Points to look for:
To spot hidden indirect discrimination, look out for the following points:

●Merit promotions, not in response to specific vacancies. What hidden criteria are in fact applied? Who makes the decision?

●Does the promotion require nomination by a particular manager first?

●Reliance on management assessment or appraisals (past or present). On what criteria is the assessment based? Is ‘management assessment’ a discriminatory requirement in itself, if the manager making the assessments treats black/ethnic minority staff/women less favourably?

●How is the promotion advertised? Is it at a time or in a place where certain staff may not see it?

●Is the position only available by internal promotion rather than to external candidates? This would discriminate if the existing workforce is all white or of one sex. Black/female workers would only gain access to the lower levels of the organisation and it would take a long time for them to work up to the higher positions (especially if management controlling the promotions was all white/male.)

●Method of selection - over-emphasis on interviews can disguise hidden requirements of fluency, articulacy, confidence etc and tends to benefit white male workers or workers with an academic background.

●Requirements of the job - these should be kept to the minimum necessary and relevant to the job.

Watch for:

— Excessive qualifications.
— Previous experience at certain levels, specific types of previous experience, good record of previous promotions, previous management experience, previous acting-up experience etc. (This type of requirement is a key issue of indirect discrimination. As black workers are often concentrated in the lower levels of the workforce, measuring potential only by what level they have already achieved puts them into a catch 22 situation.)
— Requirements as to how the job should be performed, eg dress and appearance, late night working, no provision for extended unpaid leave.
— Full-time work requirements; shift-working; overtime requirements

See fuller list of possibly discriminatory requirements on pages 22-23 (race) and 28-30 (sex).

Victimisation

The member may not have been promoted because those making the decision know that s/he has previously alleged race or sex discrimination against the organisation.

For full checklist on victimisation, see page 37.
Promotion checklists

Investigating discrimination when a member brings a grievance to you regarding promotion.

When assessing an individual case, there are various formal and informal methods of gathering information. These include:

- Interviewing the member effectively.
- Obtaining information from the employer through informal conversations, letters, formal grievances.
- Other research.

The checklists in this guide are designed to help you ask the right questions. As the procedure for cases of promotion is broadly similar to the procedure for recruitment, there are cross-references to the Recruitment checklists (pages 42-43).

PROMOTION: INTERVIEW CHECKLISTS

Promotion checklist

[1] Direct race or sex discrimination

See: Points to look for at page 40. Checklist on Recruitment on page 42.

[2] Indirect discrimination: looking for hidden provisions, criteria or practices

See: Checklist on Recruitment on page 42. Examples of generally discriminatory provisions, criteria or practices in promotion on pages 22-23, 28-30 and 37.

[3] Victimisation

1. Has the member previously raised an issue of race or sex discrimination with the employer?

2. If so, would those involved in the current promotion decision know about it?

3. Get details as to nature and date of allegation and employer’s reaction. Is this in writing or can it otherwise be proved?
   - Is there any evidence of a change in the employer’s attitude before and after the allegation was made?
   - Looking at the job description and person specification, the member’s application, the employer’s reasons for rejecting him/her and the successful candidate(s), does the evidence suggest the member should have been short-listed/promoted?

[4] Possible action in an individual case

The member can take a case to the employment tribunal for discrimination. (If a worker of a different racial group or sex was recruited, this indicates possible direct discrimination. If the member has not yet established the exact reason s/he was rejected, an indirectly discriminatory criterion could emerge. Where the evidence suggests that each is a real possibility, both direct discrimination and indirect discrimination can be claimed.)
N.B. In line with UNISON’s Race Discrimination Protocol (see https://www.unison.org.uk/upload/sharepoint/Policies/Race%20Discrimination%20Protocol.pdf for full details), where a member or their representative believes that they have been the subject of race discrimination in their workplace, the branch must ask the member to complete a CASE form as soon as possible to ensure that any employment tribunal deadline is not missed. All CASE forms setting out allegations of race discrimination must then be forwarded by branches to the region without delay so that they can be sent to Thompson’s to make preliminary legal assessment using the CASE protocol.

● If the worker intends to bring an employment case, it may be useful to bring a grievance first, though being sure not to miss time-limits. A grievance can be useful to:
  — Find out more information and to help decide whether there is enough evidence to bring a tribunal case.
  — Formally record the allegation of discrimination in case the worker wishes to bring a case in the future.
  — Reach an acceptable negotiated solution.

● Take several cases at the same time on behalf of several workers who have been similarly affected. (This is particularly suited to indirect discrimination cases.)

● Negotiate a change in the employer’s appointments / promotion policy.

**7. Redundancy selection**

**Direct race or sex discrimination**

The following could be warning signs of direct race or sex discrimination, although none of these in themselves necessarily indicate that direct discrimination in redundancy selection has occurred:

● The member is of a group statistically likely to be discriminated against.

**Watch for:**
  — Black or minority ethnic workers.
  — Pregnant workers.
  — Women, particularly in a male dominated profession or industry.

● An illogical or unfair selection pool has been chosen, which appears to target those of a particular race or sex, or enables the employer to target the particular member or bring him/her into contention for redundancy.

● Subjective selection procedures, subjective and ill-defined criteria, subjective and inconsistent marking.

● The member is marked inaccurately against the selection criteria and/or the member’s work is assessed by managers who have no first-hand knowledge of it.

● The employer has departed from its own redundancy policy with no clear reason or coherent alternative method.

● There was no clear reason for selecting the member for redundancy.
● There is a pattern in terms of those retained or selected for redundancy according to race or sex.

● In particular, the member can identify a person of a different race or sex who has been retained who:
  — On the selection criteria applied by the employer should have scored less successfully than the member.
  — For other reasons would seem more obvious to select for redundancy than the member, e.g., s/he has a very poor conduct record or has only just started employment.

● The workforce as a whole including management, personnel and those making the redundancy selection, is dominated by one race or sex.

● There is other evidence of discrimination against the member in particular or against black or women workers generally in the workplace.

Indirect race or sex discrimination

Traditionally the favoured method of redundancy selection has been ‘Last In, First Out’ (LIFO). This method is superficially attractive as it seems to ensure objectivity and feels fair. It has become less popular with employers in recent years as it does not distinguish between the skills and capabilities of workers retained and dismissed. From an equal opportunities point of view, LIFO has been severely discredited because workers with shortest service tend to be those from disadvantaged groups.

The search for other objective criteria to replace LIFO is not easy and many alternative criteria also have hidden discriminatory effects. In any redundancy selection, the following criteria need to be carefully considered for their impact on workers:

● Attendance (particularly if reasons for absence are not differentiated).

Warning:
  — Foreign born workers may need more unpaid leave/extended holidays to visit family abroad, particularly if anyone is ill.
  — Women workers may take more time off for child-care or gynaecological reasons.

● Job proficiency (as opposed to potential).

Warning:
  — Longer serving workers will have acquired greater job proficiency than newer workers who are still learning and being trained. This may disadvantage black/women workers.

● Merit assessments (past or present).

Warning:
  — Assessments, particularly when carried out by one manager, can be very subjective and black/women workers are vulnerable to conscious or unconscious discrimination, stereotyping or misunderstanding.
  — Reliance on past appraisals or personal development plans carries similar problems.
Customer complaints.

*Warning:*
— Black workers may be subject to a number of racist complaints from the public.

Seniority – status or length of service.

*Warning:*
— Whether this targets any particular minority ethnic or gender group depends on the workforce in question.

Contract workers.

*Warning:*
— Many workers are employed for years on a succession of fixed-term contracts, carrying out exactly the same job as permanent employees. These workers are often disproportionately black/women.

Flexibility with hours and shifts/mobility.

*Warning:*
— Shift working and flexi-hours are a particular issue for women workers. Late night shifts may involve dangerous travel home for Asian as well as women workers.

Victimisation

The member may have been selected for redundancy because s/he has previously made an allegation of race or sex discrimination against the employer.

For full checklist on victimisation, see page 37.

Redundancy selection checklists

Investigating discrimination when a member complains about being selected for redundancy

When assessing an individual case, there are various formal and informal methods of gathering information. These include:

— Interviewing the member effectively.
— Obtaining information from the employer through informal conversations, letters, formal grievances.
— Other research.

**REDUNDANCY SELECTION: INTERVIEW CHECKLISTS**

**Redundancy selection checklist**

[1] Direct race or sex discrimination

1. Ask the member why s/he thinks s/he was selected for redundancy.
2. Ask what reason the member was given as to why s/he was selected. Check whether this is in writing.
3. Ask the employers to inform you or the member in writing why the member was selected. Does this explanation stand up to scrutiny?
4. Compare the member’s likely/actual marking against the redundancy selection criteria with the likely/actual marking of retained workers, particularly those of a different race or sex. Look for inconsistencies by the employer.
5. Check the objectivity of the redundancy selection process, eg:
— Were specific, unambiguous and measurable selection criteria set out in advance?
— Was the marking system objective and consistent and by managers who had first-hand knowledge and information?
— Were notes taken?

Check for other indicators of discrimination. See warning signs on page 49.

[2] Indirect discrimination: looking for hidden conditions and requirements, provisions, criteria and practices

1. Ask the member why s/he thinks s/he was selected for redundancy and what criteria were applied.
2. Ask what reason was given to the member by the employer and check whether it is in the dismissal letter or in writing elsewhere.
3. Get the employer to put in writing why the member was selected and what criteria were applied, in what order and on what weighting.
4. Check other documents indicating what criteria were applied, eg previous letters to the member, internal minutes of the employer, correspondence with the union in advance of the selection.
5. If at any of the stages 1 - 4 above, you find a provision, criterion or practice which the member could not meet, there may be an element of indirect discrimination. See pages 22-23, 28-30 and 37 for examples of discriminatory provisions, criteria or practices generally and in redundancy selection. To check whether there is indirect discrimination on this occasion, go on to stages 6 - 9 below.

6. Check that the likely reason the member was selected for redundancy was a result of the provision, criterion or practice.
7. Note whether the provision, criterion or practice was applied to all workers regardless of their race or sex.

**Point to note:**
If the requirement etc was applied only to the member, then there could also be a case of direct race or sex discrimination, eg an employer decides to select the member because s/he has no qualifications, whereas other unqualified workers of a different race or sex are retained.

8. Consider whether the provision, criterion or practice puts others of the member’s race or sex at a particular disadvantage compared with those not of the member’s race or sex.
9. Consider whether the employer will be able to come up with a good objective justification for the provision, criterion or practice.

10. If the answer to stages 6 - 8 is yes and to stage 9 is possibly no, then the member may win a case of indirect discrimination. You should look out for whether any other workers of the same sex or racial group as the member were also
disadvantaged by the requirement. They may also have an indirect discrimination case.

[3] Victimisation

1. Ask the member if s/he has previously made any allegation of race or sex discrimination or harassment against the employer.

2. If so, ask for details as to when, what the allegation was, against whom it was made, what was the reaction at the time.

3. Would those making the decision who to select for redundancy know about the former allegation? Would it have upset them?

4. Looking at the redundancy selection criteria and process generally, is it odd that the member has been selected for redundancy?

[4] Possible action in an individual case

● An appeal by the member, raising the issue of discrimination, with a view to:
  — Securing reinstatement; or
  — Finding out more information to assess whether there is evidence to bring a discrimination case.

N.B. In line with UNISON’s Race Discrimination Protocol (see https://www.unison.org.uk/upload/sharepoint/Policies/Race%20Discrimination%20Protocol.pdf for full details), where a member or their representative believes that they have been the subject of race discrimination in their workplace, the branch must ask the member to complete a CASE form as soon as possible to ensure that any employment tribunal deadline is not missed. All CASE forms setting out allegations of race discrimination must then be forwarded by branches to the region without delay so that they can be sent to Thompson’s to make preliminary legal assessment using the CASE protocol.

● Gain further information, formally or informally, with a view to deciding whether or not to take legal action. (Watch time-limits – see page 66.) An informal approach, eg a letter asking why the member was selected may be the best first step.

● The member takes a case to the employment tribunal for discrimination. This may be direct and/or indirect discrimination or even victimisation.

● Take several cases at the same time on behalf of several workers who have been similarly affected. (This is particularly suited to indirect discrimination cases)

● Negotiate a change in the employers’ redundancy policy.
8. Racial and sexual harassment

The harassment itself

Race
The definition of harassment is set out in section 26(1) of the EqA, which says:

‘A person (A) harasses another (B) if -
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of -
(i) violating B’s dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.’

Harassment is therefore unlawful either where the harasser intends to violate the member’s dignity etc, or where the harasser has no such intention, but that is nevertheless the effect of the harasser’s actions.

In judging whether harassment has the said effect, the EqA says it is not enough that the member subjectively feels his/her dignity has been violated etc. The tribunal must also take into account the other circumstances and whether it is reasonable for the conduct to have that effect.

Points to look for:
● Watch for comments, nicknames, so-called ‘banter’ and ‘jokes’, abuse which are race specific or which would not be said to a white person. Physical assaults would also be covered.

● Harassment can be related to the race of someone else. For example, a white worker may feel harassed by having to listen to colleagues making racist remarks.

Sex
Both male and female workers can be subjected to sexual harassment. As the statistics show that women are far more commonly subjected to harassment than men, the law is drafted using a woman as an example. However, it applies equally where a man is subjected to harassment.

There are three definitions of harassment in s26 of the EqA. The first definition applies to harassment related to sex, gender reassignment and race, as well as certain of the other protected characteristics in the EqA:

‘(1) A person (A) harasses another (B) if -
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of -
(i) violating B’s dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.’

There are two further forms of harassment in s26:

‘(2) A also harasses B if -
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).’
‘(3) A also harasses B if -
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.’

In summary, it is harassment if
— the member is subjected to unwanted conduct related to sex or gender reassignment or unwanted conduct of a sexual nature
— which is either intended to violate his/her dignity or create an intimidating etc environment, or
— even if it is not intended, it has that effect, taking account of the member’s perceptions, the other circumstances and whether it is reasonable to have that effect.

It is also harassment to treat the member less favourably because s/he has rejected such conduct or indeed because s/he has submitted to it.

Points to watch for:

● Watch for comments, nicknames, so-called ‘banter’ and ‘jokes’ or abuse which are of a sexual nature or sex specific or which would not be said to a man. Physical assaults would also be covered.

● Harassment can be related to the gender of someone else. For example, a man may feel harassed by having to listen to colleagues making sexist ‘jokes’.

● The EC Code on Sexual Harassment contains a useful and broad definition of sexual harassment:

‘Sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct. … The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive.’

● With sexual harassment, rejection of sexual ‘advances’ often turns to non-sexual bullying, shouting, sending to Coventry, threats and warnings. Watch for a sudden deterioration in the work relationship and new criticisms of the member’s quality of work.

The employer’s legal liability for the harassment

● Employers are legally responsible for harassment which has already been carried out by one member of staff against another, even if they were unaware of such harassment and disapprove of it (and sacks the perpetrator when they find out what has been happening). There are two exceptions:
— The harassment did not occur in the course of employment, eg took place after hours, off work premises and not on work-related business. (However, harassment occurring during work outings or even when work colleagues go out together for a drink straight after work is probably covered.)

— The employer had taken all reasonable steps to prevent any harassment happening (see pages 12-13 on vicarious liability).

● The law is more complicated if harassment is carried out by an external person, eg a member of the public or a patient. In some circumstances, employers may have legal responsibilities if their failure to deal with harassment of which they are made aware amounts to harassment in itself. The EqA originally contained a specific offence of ‘third party harassment’, but at the time of writing, the coalition government plans to abolish this.

● There are other legal remedies including the Protection from Harassment Act 1997, which may be useful in harassment situations. Unfortunately these are less accessible than the EqA, because they involve bringing a case in a county court or in the high court, rather than an employment tribunal. They are therefore outside the scope of this guide.

● For further information and guidance regarding the law on harassment and handling of a grievance, see chapter 15 in the UNISON law book, ‘The Law and You’.

The employer’s handling of a complaint

The employer’s handling of a complaint of harassment may be incompetent, unsympathetic or unfair. It may also amount to further harassment or acts of direct discrimination or victimisation. For example:

● If employers handle a complaint of harassment by a woman or black worker less seriously than they would handle a comparable complaint by a man or white worker, this may be direct discrimination in the handling of the complaint or further harassment. This can apply whether the harassment complained of is between members of staff or by members of the public towards members of staff.

● Watch for casual treatment of the complaint, eg remarks made indicating the complaint is not taken seriously, taking an extremely long time to investigate and deal with the complaint, not following the normal grievance procedure or any suitable alternative.

● Watch for more favourable treatment of the alleged perpetrator during any investigation, eg the alleged harasser is given the member’s statement at the outset and kept informed of all the evidence against him/her, whereas the member never sees the harasser’s statement and is generally kept in the dark.
SUSPENDING OR TRANSFERRING THE MEMBER

- Suspending or transferring the member who complained of harassment rather than the alleged perpetrator, whether during or after the investigation, may also be direct discrimination on grounds of race or sex or further harassment.

- If the employer punishes the member in any way for alleging harassment, this may be victimisation or further harassment. This includes failing to deal with the grievance properly because it concerns an allegation of harassment.

- Suspending or transferring the member, during or after any investigation, may be victimisation or further harassment.

- Warning or dismissing the member; starting to criticise his/her work; blocking any promotion attempts or job opportunities - all may be victimisation.

- See full checklist on victimisation on page 37.

RACIAL AND SEXUAL HARASSMENT: INTERVIEW CHECKLISTS

Racial and Sexual Harassment Checklists

[1] Gathering evidence of direct discrimination and victimisation

- Ask the member to tell you or write down every incident of harassment plus the date.

- Does the member have evidence of any of the harassment? Are there witnesses to the harassment? Has s/he told anyone inside or outside the workforce? Does s/he keep a diary? Has s/he been to a doctor?

- Did the member ever confront the perpetrator? If so, when and what happened? Was there a witness?

Warning:
It is important to reassure the member that it is quite understandable if s/he felt unable to confront the perpetrator. The perpetrator should have known better.

- Has the member ever told HR or management? If so, who and when? What happened? Was anything put in writing?

Warning:
Again it is important to reassure the member that it is understandable if s/he has not previously complained. The EC Code on Sexual Harassment recognises that workers subjected to sexual harassment often do not complain for a long time for very understandable reasons.

- If the member either confronted the perpetrator or told management, has the attitude of the perpetrator or of management towards the member changed since then? In what way?

- If the harassment or victimisation includes criticisms or disciplinary action or even dismissal:
  - What reason has been given by the employer for the action?
  - Can the member show there was no
valid basis to discipline or dismiss him/her?

— If the member has committed any minor errors, can s/he show that other workers have not been penalised for the same errors?
— Has the employer failed to follow the usual disciplinary procedures?

● What would the member like to do?

● Interviewing workers who have been subjected to harassment is very sensitive. For a more detailed checklist on interviewing women with sexual harassment claims, see ‘The Law and You’ (Bibliography, page 00).

[2] Possible action
Gather more evidence, eg by the member keeping a diary; approaching other workers of the same race or sex.

N.B. In line with UNISON’s Race Discrimination Protocol (see https://www.unison.org.uk/upload/sharepoint/Policies/Race%20Discrimination%20Protocol.pdf for full details), where a member or their representative believes that they have been the subject of race discrimination in their workplace, the branch must ask the member to complete a CASE form as soon as possible to ensure that any employment tribunal deadline is not missed. All CASE forms setting out allegations of race discrimination must then be forwarded by branches to the region without delay so that they can be sent to Thompson’s to make preliminary legal assessment using the CASE protocol.

● The member makes an informal approach to the perpetrator or to management, alone or with a colleague or Union Rep.

● Take a formal grievance.

● Bring an employment tribunal claim, possibly preceded by a Questionnaire (until the procedure is abolished - see page 67) to gather evidence about any investigation carried out by management.

● Collective action.

● Negotiate a better harassment policy

Warning:
It is easy to miss time-limits for bringing any tribunal claim for harassment (see page 66). Very broadly speaking, a claim must be made within 3 months of the earliest act of harassment or at least the earliest major act of harassment. Beware missing time-limits while management takes time to investigate.

9. Pregnancy discrimination

What is pregnancy discrimination?

● Discrimination against a woman because she is pregnant is unlawful under the EqA. It is also an unlawful detriment under the Employment Rights Act 1996. To dismiss a woman because she is pregnant is both sex discrimination and automatic unfair dismissal.

● It is also unlawful to discriminate against or dismiss a woman for a reason related to her pregnancy, eg
a pregnancy-related illness or her inability to perform certain duties.

- Where a pregnant woman is disciplined or dismissed, harassed or fails to get promoted, consider whether the reason is connected with her pregnancy.

- A woman who is pregnant will also have other rights at work. See the pregnancy discrimination checklist below and the UNISON Maternity Rights Factsheet.

- Chapter 8 of the EHRC Employment Code focuses particularly on pregnancy and maternity.

PREGNANCY: INTERVIEW CHECKLISTS

Pregnancy discrimination checklist

[1] Gathering evidence

- Did the employer know that the member was pregnant? If so, how and when did the employer find out and what was the reaction of the relevant managers?

  Warning: Employers often deny they were aware the woman was pregnant.

Consider how the member can prove she told her employer.

- How has the employer reacted generally to the member’s pregnancy? Does the employer willingly give time-off for ante-natal care? Have there been spiteful comments or lack of tolerance for the member’s increased tiredness? Has the employer shown a hostile attitude towards maternity pay or to the member returning afterwards?

- Look for changes in the employer’s attitude towards and treatment of the member before and after she told the employer she was pregnant.

  For example:

  - Before she became pregnant, the employer never complained if the member had not finished all her typing by the end of the day. Now the employer always complains about this.

  - Look for differences in the way the employer treats non-pregnant workers in similar situations.

  For example:

  - A pregnant worker and a non-pregnant worker both come back half an hour late for lunch. The employer reprimands the pregnant worker but says nothing to the other worker.

  - If the member has failed in a recruitment or promotion attempt, see also general checklist on pages 28-30.

  - If the member has been disciplined or dismissed:
— What reason was given to the member for the employer’s action?
— Is the reason in writing?
— Does the reason stand up to examination?
— What was the member’s record and relationship with the employer prior to her pregnancy?

● If the member was made redundant, see also checklist on pages 50-52.
● How are pregnant workers usually treated by the employer or the relevant managers?

[2] Possible Action
● Informal attempt to resolve situation.
● Take formal grievance or appeal.
● Start an employment tribunal claim.
● Negotiate an improved pregnancy / maternity policy.

  Warning:
  Beware of time-limits (see page 68), even if they coincide with the expected date of birth. A claim must be lodged in time although the tribunal may well be prepared to delay the hearing until after the birth.

[3] Related advice
A member who is pregnant may seek your advice on any of a number of issues. Whatever she asks you, you need to make sure she knows she may have rights on all the matters set out below:

1. The member must find out her rights to maternity leave (whether statutory or contractual) and must understand the importance of strictly following the rules, before she goes on to leave and when she is wishing to return.

  Warning:
  These rules are complex. Ensure the member gets correct advice.

2. The member should check her entitlement to statutory and contractual maternity pay.

3. The member is entitled to reasonable time off on a paid basis for ante-natal care.

4. If the member is exposed to a biological, chemical or physical risk (including fatigue), she may be entitled to a modification of her duties, a reduction in hours or a fully paid health and safety suspension.

5. Does the member wish to return to work part-time? If so, is she entitled to change to part-time or job-share under her contract? If she is not entitled to change under her contract, may she nevertheless have an indirect sex discrimination claim if the employer refuses. (See page 27)

  Warning:
  Be careful about tribunal time-limits. If - before she goes onto leave – the member asks to return part-time and is refused, there is a risk that the 3 month tribunal time-limit is counted from this refusal. Some cases suggest that if – on her return - the woman asks again and is refused again, the time-limit may be extended. However, it is very risky to rely on this.
Watch for indirectly discriminatory working arrangements on her return from maternity leave, eg hours and shifts incompatible with childcare.

For further detail on the above legal rights, see ‘The Law and You’ (page 69).

10. Part-time working

The law on part-time working

● There is no absolute right under the legislation to work part-time, although the member may have the right to do so under his/her contract of employment.

● Some workers need to work part-time for childcare reasons. Unjustifiable refusal to allow a woman to work part-time may be indirect sex discrimination. (See pages 26-27 for the definition of indirect sex discrimination.)

● It may also be indirect sex discrimination to insist that the member works flexi-shifts or specific hours which interfere with childcare. It will not be unlawful if the employer can objectively justify imposing such hours.

● Part-timers should not be treated less favourably than full-timers, and they are generally entitled to the same terms and conditions, adjusted pro rata. Unjustifiable failure to treat part-timers equally may be unlawful under the EqA or the Part-Time Workers Regulations.

● The Part-Time Workers Regulations protect male as well as female part-timers.

● It is unlawful to victimise the member for claiming rights under the Part-Time Workers Regulations or alleging sex discrimination.

● Any worker can ask his/her employer for flexible working arrangements. Employees with at least 26 weeks’ service can make a request under the Flexible Working Regulations for a reduction or change in their hours or to work wholly or partly at home in order to care for a child under 17 (or 18 if disabled). There are rules about how to use the procedure. Employers can refuse the request on one of the specified grounds, which cover nearly every situation. However, a refusal can be challenged if it is indirect sex discrimination.

● If the member needs time off to care for dependants, settle his/her child into nursery etc., s/he may find the statutory rights to dependant leave and parental leave useful. These rights are limited and are not available to all workers. You should also check the contract of employment for additional rights.

● For more detail on the law on part-time working, dependant leave and parental leave, see UNISON’s law book, ‘The Law and You’ (page 69).

Points to look for:

Ways in which part-timers may be discriminated against include:
— Selection of part-timers first for redundancy.
— Refusing to allow women to change to part-time working after maternity leave or imposing hours or shifts inconsistent with childcare needs.
— More favourable terms and conditions for full-timers, eg higher hourly rates; faster progression through incremental scales; enhanced holiday and sick pay entitlements; greater training opportunities.

11. Gender reassignment discrimination

Under section 7 of the EqA, the member will have the protected characteristic of ‘gender reassignment’ if s/he is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the person of reassigning his/her sex by changing physiological or other attributes of sex. This process need not be under medical supervision.

For example:
A person born physically female decides to spend the rest of his life as a man. He lives as a man but does not seek medical advice because he successfully passes as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment. (EHRC Employment Code: para 2.24.)

The member is protected if s/he proposed to go through gender reassignment, even if s/he never completed the process.

For example:
The member, who was born physically male lets her friends know that she intends to reassign her sex. She attends counselling sessions to start the process, but then decides to go no further. She is still protected under the law. (EHRC Employment Code: para 2.25.)

The EqA uses the term ‘transsexual’ to refer to someone with the protected characteristic of gender reassignment. UNISON prefers use of the term ‘transgender’ as it has wider application. However, if a member wants to use the specific protection offered by the EqA, it is necessary to understand the legal definition of gender reassignment and the terminology used.

The EqA prohibits direct discrimination, indirect discrimination, victimisation and harassment in relation to gender reassignment. As well as the usual definitions of discrimination, it is discrimination under section 16 to treat the member less favourably in relation to an absence because of gender reassignment than s/he would be treated in relation to a sickness absence, or some other absence where it would not be reasonable to treat the member less favourably.

For example:
The member, who is undergoing gender reassignment has to take some time off for medical appointments and surgery. The employer notes these down as absences under the attendance management policy. However, when a work colleague breaks his leg skiing, the employer disregards the absences because ‘it wasn’t really sickness and it
won’t happen again’. This is potentially discrimination under section 16 against the member. (EHRC Employment Code: para 17.27.)

Quite apart from the above, the Gender Recognition Act 2004 enables people to obtain legal recognition of their acquired gender on the issue of a gender recognition certificate. However, as the EHRC Employment Code says, transsexual people should not be routinely asked to produce their gender recognition certificate as proof of their legal gender. Such a request would compromise their right to privacy.

You need to be very careful about confidentiality when helping a transgender member. You should also remember to treat the member with sensitivity, avoiding irrelevant intrusive and inappropriate questions, and using the name and pronoun which the member wishes. There is an excellent UNISON guide, ‘Gender Identity: An introductory guide for trade union reps supporting trans members’ (see Bibliography, page 70).
EXAMPLE OF GENDER REASSIGNMENT DISCRIMINATION
This is a real case but names have been changed and initials used to preserve confidentiality.

DE was employed as a taxi driver. When she started employment, her name was ‘Rob’. In November 2006, she explained to Mr A, one of the managers, that she would be undergoing gender reassignment. In January 2007, she started wearing women’s clothes at work. On the whole, customers were supportive, but mid January, another manager, Mr C, told her he had received 10 – 15 complaints and said that if he received any further complaints, there would be disciplinary action. The next week-end, Mr C made it impossible for her to achieve her targets because he double-booked her on three occasions. When she complained to him, he said if she was not happy, she should leave.

One month later, Ms E arrived at work to find a cartoon strip about transsexuals had been put on the notice board by Mr A and someone had written her name over the drawing of the woman and the name of Mr C over the drawing of the man.

Despite wanting to be addressed as ‘Debbie’, the job sheets continued to refer to her as ‘Rob’. When she started altering her name on the job sheets, Mr C told her to stop. He claimed the Inland Revenue required the paperwork to show her name as ‘Rob’ for audit purposes. Mr C said he would not change the company documentation even if she obtained a gender recognition certificate. She complained to Mr A, who said Mr C was acting against instructions and her name would be changed on the job sheets. This did not happen and she resigned.

The employment tribunal said Ms E had been treated less favourably by Mr C because of her gender reassignment by exaggerating the customer complaints (there was only one of any substance), double-booking her, refusing to use the name ‘Debbie’ on the job sheets, wrongly telling her that this was on the accountants’ advice, and refusing to recognise her new name and gender even when a gender recognition certificate was obtained.

The tribunal also found Mr A had harassed Ms E when he put up the cartoon. He had not intended to cause her distress but that was plainly the effect of what he had done.

Note: As long as Ms E was undergoing gender reassignment or had done so or proposed to do so, the employer’s behaviour would have amounted to discrimination, even if she did not have a gender recognition certificate.
12. Employers’ policies

In practice, employers operate systems and policies governing a large range of practice for work situations. When an employer wishes to introduce a new policy or if you want to challenge an existing policy, look out for the following points:

- Is there a written and detailed Equal Opportunities Policy? Does the policy explain the meaning of all forms of unlawful discrimination and harassment? Does it relate to all aspects of the employer’s conduct? Is the policy drawn to the attention of all managers and employees? Is it effectively monitored and implemented? Are staff and management trained in what it means for their work practice?

- Lack of detailed objective guidelines for various employment decisions can lead to conscious or unconscious favouritism and stereotyping and direct discrimination. Watch for a lack of objective guidelines governing decisions such as:
  - Who can apply for promotion and who gets interviewed and appointed.
  - Who is selected for redundancy.
  - Who is offered opportunities for acting-up/substitution/overtime.
  - Who is awarded pay rises or merit bonuses.

**Indirect discrimination**

Check for indirectly discriminatory provisions, criteria or practices in:

- Appointment and promotion procedures, systems for advertising jobs, methods of short-listing and selection.
- Redundancy policies – procedures, selection criteria, rules on offering voluntary packages.
- Criteria for pay rises and bonuses.
- Practice on overtime and acting-up/substitution opportunities.
- Shift patterns.

(See full checklist on pages 28-30.)

If you identify any provisions, criteria or practices in these policies which could indirectly discriminate, you could take the following action:

- Work with your branch to negotiate a change.
- Consider taking out a joint grievance.
- Consider industrial action.
- Find one or more workers to run a test case.

**Points to note:**

- If you are taking a test case, it is important that the facts are as strong as possible. It is best to find a case that will strike the employment tribunal as obviously unjust.

- In very rare cases, consider applying for an injunction, eg to prevent a local authority implementing an indirectly discriminatory redundancy selection policy.
Where a discriminatory requirement is inserted into a worker's contract, consider applying for a declaration that it is unenforceable, e.g., a very wide-ranging mobility clause in a woman's contract.

*Warning:* These last two options are unusual and will only rarely be practical to obtain or be successful.

**Other policy areas**

- Is there a specific policy on harassment? Does this deal with the definition of harassment; the responsibility of both employers and other employees; training and other preventative action; a special grievance procedure? How does it compare with the EC Code on Sexual Harassment?

- Consider whether to negotiate improved rights to dependant and parental leave. (See the UNISON Bargaining Support Guides available on the UNISON website and in the Bibliography, page 70.)

- Negotiate to eliminate discrimination against part-timers and open up opportunities.

- Employers' policies should also take account of other forms of discrimination, e.g., related to age, disability, religion, and sexual orientation.

**Using the Employment Code of Practice**

- Check through the EHRC Employment Code of Practice for employment (see link on page 69) and note where it can be used to negotiate change.

- See also chapter 18 of the Code, which deals specifically with equality policies and practice.

**The public sector equality duty**

- The general duty is set out in section 149(1) of the EqA 2010 which states:

  ‘A public authority must, in the exercise of its functions, have due regard to the need to –

  (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

  (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

  (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.’

- Specific duties for public authorities have been set out in regulations. You should make yourselves familiar with these obligations. They are different in England, Scotland, and Wales. The duties in Wales and Scotland are far more detailed than those for England. See Bibliography, page 69 for references to each of the national regulations.

- The EHRC has published ‘Technical Guidance’ on the public sector equality duty in each of England,
Scotland and Wales. The EHRC had originally planned to produce statutory Codes, but the government said it would not lay these before parliament. The EHRC has instead produced the text as non-statutory ‘technical guidance’. The EHRC says this guidance will still be ‘a formal, authoritative and comprehensive legal interpretation of the duty’. There are separate guides for England, Scotland and Wales.

- The EHRC has enforcement powers if these duties are not carried out. Other interested parties can also bring a judicial review, though that would be an expensive and heavy weight type of case.

- In the light of the above, you should:
  - Make yourself familiar with the special duties applicable in your particular country.
  - Ensure your employer takes account of its obligations when exercising every employment (and other) function.
  - Use the duty and the technical guidance to negotiate change.
  - Press for consultation through various methods, especially of people likely to be affected by a policy, and ensure their views are taken into account.
  - Watch for changes to the duties, especially in England. At the time of writing (September 2013), the report of the steering group on the public sector equality duty has just been published.

### 13. Time-limits, tribunals and questionnaires

An individual worker can bring a race or sex discrimination case to an employment tribunal. A case is started by lodging a tribunal Claim form through the on-line process or at one of the nominated tribunal offices. There is an issue fee unless the member qualifies for a remission although UNISON members taking union-supported employment tribunal cases will not have to pay this fee.

The member can make more than one claim in the same document if relevant, eg s/he can claim direct discrimination and/or indirect discrimination and/or victimisation, or s/he can claim discrimination and/or unfair dismissal.

The member can also claim more than one act of discrimination in the same document. For example, s/he may claim that a warning and a subsequent dismissal were both acts of discrimination. Similarly, s/he could claim that his/her dismissal was race and sex discrimination.

#### Time-limits

The tribunal Claim form (referred to as the Claim) must arrive at the employment tribunal within the time-limit. The time-limits are very strict and need to be checked and recorded the first time a member consults you.

The Claim must arrive at the tribunal office within three months of the act of discrimination. For example, if

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1 This policy will be reviewed in early 2014 to ensure it is compliant with the law, when the High Court publishes its decision on UNISON’s application for a Judicial review on employment tribunal fees.
the member was dismissed due to discrimination on 20th January, the Claim must arrive on or before 19th April in the same year. Every act of discrimination claimed in the Claim must be within the time-limit. It is safest to consider what was the earliest act of discrimination and count the time-limit from then.

For example:
- The member receives a first warning on 3rd May, a final warning on 10th June and is dismissed on 6th July. The Claim should be lodged by 2nd August if it is to claim that all three incidents were acts of discrimination.
- The member suffers harassment between 2nd February and 4th July; complains about it on 5th July, after which the harassment stops, but is dismissed on 20th July. To cover any of the harassment at all, the Claim should be lodged by 3rd October at the latest, ie counting from the last day before the harassment stopped. But the time-limit is probably even earlier, to include all the major acts of harassment which have occurred since 2nd February. In fact, some of the harassment may already be out of time when the member first takes advice, unless it can be argued that it amounts to an ongoing act of discrimination.

Points to note:
- The time-limit on a dismissal or disciplinary warning runs from the date of the dismissal or warning, not from the date an appeal failed.
- The time-limit on a failed promotion runs from the date the employer decided not to promote the member, not from the date of the outcome of any internal grievance about it.
- This means it may be necessary to start a tribunal claim before the appeal or grievance process is completed.

Late claims
If you are out of time, it may be worth trying to get the tribunal’s permission to submit a late Claim. The tribunal has more discretion than for a late unfair dismissal claim. The test is whether it is ‘just and equitable’ to allow in a late claim.

In the first example above, it may be that the member first sought the advice on 1st September. By then, only the final warning and the dismissal would still be in time. However, it would be worth asking the tribunal’s permission to add in the first warning as a late claim.

Once you are late, the sooner you try to get in the claim, the better. Don’t make it worse by delaying before asking the tribunal’s permission to put in the claim late.

Questionnaires
For over 30 years, there has been a special ‘Questionnaire’ procedure in discrimination cases. The coalition government has decided to abolish the procedure and to replace it with some kind of voluntary scheme with ACAS guidance. At the time of writing, the procedure still applies and it is worth knowing about.

Under the procedure, a worker can send direct to the employer a Questionnaire
which requires the employer to answer relevant questions. This helps the member gather information of the kind set out in the checklists – see sections 5-9.

Although technically this is an optional procedure, it is in fact absolutely essential to giving the member a good chance of winning his/her case.

The Questionnaire must be served on the employer within strict time-limits. Note that sending a Questionnaire is not enough to start a case running.

The time-limits are:
- If no tribunal Claim form has been lodged, the Questionnaire must arrive at the employer within three months of the act of discrimination.
- If a tribunal Claim form has already been lodged, the Questionnaire must be served on the employer within 28 days after that.

For more detail on running a discrimination case including time-limits and the Questionnaire procedures, see Employment Law: An Adviser’s Handbook (see Bibliography, page 69) which sets out procedure in detail with precedents and check-lists.

It will also be important to make yourself aware of the replacement voluntary procedure and ACAS guidance once it comes through.

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### 14. Compensation

Compensation for race or sex discrimination in the employment tribunal is not subject to any statutory ceiling. Compensation is awarded in three categories:

- **Actual financial loss**, eg loss of earnings and pension value following a dismissal, loss of potential earnings on a failed promotion, loss of acting-up allowance etc.

- **Injury to feelings**. This can include compensation for injury to health caused by the discrimination, eg psychiatric damage. Aggravated damages can also be awarded where an employer has behaved particularly badly. The total award for injury to feelings including aggravated damages is constantly rising and hard to predict. Awards rarely fall below £1000 and in serious cases can reach £25,000 or more.

- **Interest**.

**Recommendations**

The tribunal can also make recommendations that employers take action which would benefit the worker concerned, eg that certain documents are removed from a personnel file, that the finding of discrimination is noted on the personnel file, that an apology is circulated etc. A tribunal can also recommend training of staff or management if appropriate.

The tribunal cannot insist on a worker being reinstated or getting the next promotion vacancy. If any settlement
is negotiated prior to the hearing, then there is of course no limitation on what may be negotiated.

15. Other sources of assistance

Your UNISON officials. Ensure you follow the correct union procedures to get advice and help.

Bibliography

Books


*The Law and You: a UNISON guide to key employment rights.*
UNISON’s employment law book, with large discrimination content and cross-references to other UNISON and general publications. 5th edition: 2012. ISBN: 978 0 904198 22 5

Legal updates and periodicals

UNIMAG
Popular quarterly electronic legal update for UNISON branch officials written in accessible and educational style. Cross-refers to latest edition of ‘The Law and You’ and helps keep it up to date.

Published by Diversity Works Ltd. Case reports written by Tamara Lewis. For sample publicity copy and subscription details, branch officials can contact the editor, John Gordon, at 0207 431 1712.

*Equal Opportunities Review* (EOR).
Published every month by Michael Rubenstein Publishing. Tel: 0844 800 1863. Cases, case-law round-ups, news, features and reports on initiatives in the equal opportunities field.

Codes of Practice

*Code of Practice on Measures to Combat Sexual Harassment* – European Commission.


Both Codes are available on the EHRC website via links at www.equalityhumanrights.com/publications/guidance-and-good-practice-publications/codes-of-practice

The public sector equality duty

Equality Act 2010 (Specific Duties) Regulations 2011 SI No 2260


Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 SI No 162

Guides

Proving disability and reasonable adjustments: A worker's guide to evidence under the EqA

Detailed advice on proving that different impairments fall within the definition of disability, plus ideas for reasonable adjustments, including a gazette of 26 different impairments. Available on EHRC website at www.equalityhumanrights.com/uploaded_files/Questionnaire_guides/proving_disability_and_reasonable_adjustments_workers_guide_final.doc

An employer's guide to reasonable adjustments for disabled workers under the EqA

Useful negotiating tool which can encourage employers to understand what is required. Hard copies bought widely by local authorities. Available on EHRC website at www.equalityhumanrights.com/uploaded_files/Questionnaire_guides/dda_employers_guide_ed_3_final.doc

Using the Data Protection Act and Freedom of Information Act in Employment Discrimination cases

Although written for discrimination cases, the principles can be used in any kind of employment case. Written pre-Equality Act 2010. Available at www.equalityhumanrights.com/uploaded_files/dpa_and_foi_in_employment_discrim_cases.doc

Redundancy discrimination: Law and evidence for tribunal cases


UNISON Guides:

Identifying Legal Cases in the Workplace. 5th edition (Feb 2011)

Order through Learning and Organising Services email LearningAndOrganising@unison.co.uk and quote Code ACT172.

Gender Identity: An introductory guide for trade union reps supporting trans members

Available at www.unison.org.uk/file/2010%20-%20STA%20UNISON%20trans%20guide%20for%20union%20reps.pdf or it can be ordered from UNISON comms. or from Carola Towle UNISON national officer, LGBT equality, direct dial phone number 0207 121 5241.

UNISON Race Discrimination Protocol


UNISON Factsheets and Resources

Visit http://www.unison.org.uk/for-activists/help-and-advice/supporting-members/negotiating-and-bargaining/ for a range of in depth guides to support effective negotiating and bargaining with employers including:

— LGB workers rights factsheet
— Maternity rights factsheet
— Public Sector Equality Duty factsheet
— Transgender Workers Rights factsheet

UNISON Pregnancy Diary (email women@unison.co.uk for the latest version.

**Web-sites**

- UNISON
  www.unison.org.uk

- Equality and Human Rights Commission
  www.equalityhumanrights.com