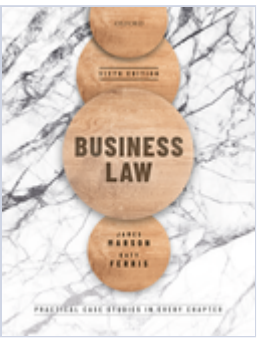


Business Law (6th edn)
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p. 565

# 22. Equality In Employment Relationships

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## Abstract

This chapter discusses the Equality Act (EA) 2010. There have been many changes adopted following the enactment of this legislation. The Act is relevant for businesses as it imposes obligations to provide a safe system of work, including regulating the activities of management, colleagues, and third parties. This is an area of law that will evolve over the forthcoming years, and whilst much of the previous case law is applicable to this new Act, new judgments will likely expand and clarify the extent of equality law. An employer who is not aware of the provisions of EA 2010 runs the risk of facing very expensive claims, poor industrial relations, and potential damage to his or her reputation as an employer.

**Keywords:** Equality Act 2010, EA, European Union, EU, safe system of work, equality law

Does an employer have to take action to prevent an employee from telling rude jokes at work? What responsibility does an employer have with regards to unwanted conduct perpetrated by or to their employee? How many times must an employee complain to the employer about this unwanted conduct before it becomes actionable? Do you know the ‘protected characteristics’ that are protected against prohibited conduct by the Equality Act 2010? Do you as an employer/does your business have policies in place to reflect the changes in equality law that took effect from 1 October 2010? If you answered ‘no/don’t know’ to any or indeed all of the above questions you are exposing yourself and your business to potentially very expensive claims, poor industrial relations, and potential damage to your reputation as an employer. Equality law has changed, it will continue to develop over the coming years, and ignorance is likely to be a costly error.

## Business Scenario 22

Clara and Chitra work as silver service waitresses in a hotel. Their duties include entering the kitchen to collect courses of dinner to be served and assisting the kitchen staff with general catering duties such as cleaning surfaces, collecting and distributing deliveries, and so on. The hotel has a policy where female staff who have been trained as providing 'silver service' are required to wear skirts instead of trousers. The male staff are required to wear trousers, a white shirt, and a black tie when providing the silver service. Clara has requested that in the interests of safety she and her colleagues should be permitted to choose to wear either a skirt or trousers. The management of the hotel refuse this request. During a particularly busy shift when the work in the kitchen was chaotic, hot fat from the fryers was accidentally spilt onto Clara's legs. She is badly injured as a result, and it is later confirmed that she would not have been injured had she been wearing the trousers requested.

Chitra injured her back whilst moving a delivery of potatoes and required several weeks' leave to recover. During a conversation with her doctor, Chitra was advised that she should not return to her role as a waitress or her back problem would recur. In the opinion of the doctor, Chitra should not return to a job involving lifting and/or standing for long periods. Chitra contacted her line manager about the news who promised to provide Chitra with alternative work. However, when the general manager of the hotel discovered this arrangement he requested that Chitra resign from her position as she is unfit for work. Chitra thinks that if she does not resign she will be dismissed.

p. 566

## Learning Outcomes

- Explain the development of the Equality Act 2010 in relation to its main aims and the legislation it replaced (**22.2–22.3**)
- Identify the groups of workers protected by the Act through the use of 'protected characteristics' (**22.4–22.5**)
- Explain the codification of the previously discriminatory behaviour and identify where the law has added new protection against 'prohibited conduct' (**22.6**)
- Consider the extent of protection against prohibited conduct of an individual with a protected characteristic (**22.5**)
- Identify the 'heads' under which an equal pay claim may be made, and apply these in problem scenarios (**22.12.4–22.12.4.3**)
- Explain the protection against discrimination based on sex and race in employment (**22.6–22.6.6.2**)
- Identify the protection against discrimination in employment of those working under part-time and fixed-term contracts (**22.15–22.16**)
- Identify the rights at work of pregnant employees and biological and adopting parents, including the right to request flexible working and family-friendly policies (**22.18–22.18.5**).

## 22.1 Introduction

From 1 October 2010 much of the previous equality law developed through the common law, statute, and the United Kingdom's membership of the European Union has been codified in the Equality Act (EA) 2010. There have been many changes adopted following the enactment of this legislation. The Act is relevant for businesses as it imposes obligations to provide a safe system of work, including regulating the activities of management, colleagues, and third parties. This is an area of law that will evolve over the coming years, and whilst much of the previous case law is applicable to this Act, new judgments will likely expand and clarify the extent of equality law.

## 22.2 The equality act 2010

According to the Government Equalities Office:

> **The Equality Act 2010 is intended to provide a new cross-cutting legislative framework to protect the rights of individuals and advance equality of opportunity for all; to update, simplify and strengthen the previous legislation; and to deliver a simple, modern and accessible framework of discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society.**

Previous anti-discrimination and equality laws were spread over many pieces of legislation, statutory instruments, and case law. It was unwieldy to identify the relevant laws applicable to employers, employees, workers, third parties, organizations, and so on. It had also developed different approaches to the application of these laws through the various amendments and decisions of the EU and the Court of Justice of the
p. 567 European Union. Therefore, EA 2010 was enacted to harmonize these complex areas of law, apply ↵ consistent approaches to the interpretation and application of the provisions, and to take the opportunity to extend rights to the new 'protected characteristics'. The body with the responsibility for overseeing EA 2010 is the Government Equality Office.

Previous equality legislation provided for the establishment of the Commission for Equality and Human Rights (merging the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission). The Commission took the previous powers enjoyed by these Commissions and consolidated their experience in promoting equality and respect for human rights, and enforcing legislation against transgressors. The Act was significant in placing a duty on public authorities to promote equal opportunities between men and women, and prohibiting sex discrimination in the exercise of public functions.

A further, significant, introduction in EA 2010 was explicit reference to allowing positive action policies to be adopted by organizations (in recruitment and promotion). Positive action enables an employer to pursue a policy of appointing applicants where there is an under-representation of persons from the specific group in

the organization; or where they suffer a disadvantage associated with that characteristic (EA 2010, s. 159). This has been incorporated into EA 2010, but it is at present applicable where the employer voluntarily adopts the policies—it is not a legal requirement.

## 22.3 Previous anti-discrimination law repealed

EA 2010 formally repeals/revokes and changes much of the previous legislation (in its attempt to simplify and codify the provisions contained in the plethora of statutes). The following have been repealed in their entirety (note this list is not exhaustive and refers to those statutes relevant for this section of the text):

1. The Equal Pay Act 1970
2. The Sex Discrimination Act 1975
3. The Race Relations Act 1976
4. The Sex Discrimination Act 1986
5. The Disability Discrimination Act 1995
6. The Employment Equality (Religion or Belief) Regulations 2003
7. The Employment Equality (Sexual Orientation) Regulations 2003
8. The Equality Act (Sexual Orientation) Regulations 2007.

## 22.4 Groups affected by the Act

This Part of the text is focused on employment laws, and hence this chapter considers the effects of EA 2010 on employers, employees, and workers. But these are not the only groups who will be affected by the Act. Former employees, agency workers, self-employed workers, consumers, and providers of goods and services are each subject to provisions of EA 2010 and should be aware of how it affects them. Further, there are increasing obligations on employers in the public sector regarding disclosure of pay details and greater transparency, with the consequent need for effective policies to be established to avoid transgression of the
p. 568 Act. ↵

### Consider

For Clara and Chitra to have protection under the Equality Act 2010 they must have been discriminated against on the basis of a recognized protected characteristic and they must have experienced prohibited conduct.

## 22.5 The protected characteristics (groups)

The previous anti-discrimination laws (the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, and so on) each identified groups who were protected from the discriminatory acts contained within the remit of the particular piece of legislation. In its attempt to simplify and harmonize equality laws, EA 2010 identifies the following as being 'protected characteristics'—a method of explaining which groups are protected from discrimination and who will be part of these groups—and hence possess a characteristic that is protected under this legislation (ss. 4–12 and 72–76). They are as follows:

- age (s. 5);
- disability (s. 6);
- gender reassignment (s. 7);
- marriage and civil partnership (s. 8)—single people are not covered;
- pregnancy and maternity (ss. 72–76);
- race (s. 9);
- religion or belief (s. 10);
- sex (s. 11);
- sexual orientation (s. 12).

## 22.6 Prohibited conduct

EA 2010 outlines the forms of conduct that the Act seeks to prohibit (ss. 13–27). These harmonize the definitions of actions such as **direct** and **indirect discrimination**, **harassment**, and **victimization** which the previous anti-discrimination laws defined. The forms of conduct, to which of the protected characteristics they apply, and where changes have been made from the previous legislation are contained in the following paragraphs.

### Consider

Clara has experienced discrimination based on her sex and thus this will be direct discrimination. A key issue is whether the employer's action falls into the category of an exception—an occupational requirement (remember, direct discrimination on the basis of sex cannot be justified).

p. 569

## 22.6.1 Direct Discrimination

### 22.6.1.1 The protected characteristics

There are no changes to this form of discrimination (from the legislation it replaced) and it covers all the protected characteristics.

### 22.6.1.2 Application of the law

Direct discrimination occurs when a person treats another less favourably because of their protected characteristic than they would a person without the characteristic. The less favourable treatment has been extended in EA 2010 in the following ways. A person is treated less favourably than another due to:

1. a protected characteristic they possess; or
2. a protected characteristic it is thought they possess (this amounts to perceptive discrimination); or
3. their association with someone who has a protected characteristic (this amounts to associative discrimination) (s. 13).

Therefore, perceptive and associative forms of discrimination are included in the Act (these are covered in the following sections).

In relation to pregnancy and maternity, the test is not whether the claimant was subject to less favourable treatment, but whether the treatment was unfavourable. This is because there is no need for the claimant to compare her treatment with other workers.

To determine whether the claimant has been a victim of direct discrimination the test is to identify if an act of discrimination had been committed; and if so, would, but for the claimant's protected characteristic, they have been treated more favourably.

### *James v Eastleigh BC* (1990)

**Facts:**

The Council gave free entry to its swimming pools to people of pensionable age. Women reached that age at 60 whilst the retirement age for men was 65. A 61-year old man claimed this was discriminatory.

**Authority for:**

This action was direct discrimination as it treated one sex (men) less favourably than the other. The Council's benign motive was irrelevant.

When discrimination occurs between groups of workers, the claim requires the discrimination is on the basis of the protected characteristic and not on matters that are materially different.

### *Bullock v Alice Ottley School* (1993)

#### Facts:

A school had a policy of requiring academic staff to retire at 60 whilst the gardening staff had to retire at 65.

p. 570

#### Authority for:

In a claim of direct discrimination, the Court of Appeal held that this was discrimination on the basis of the jobs and not on the sex of the workers. Just because the academic staff tended to be female and the gardening staff male, did not stop women becoming members of the gardening staff and being subject to the retirement policy at 65.

Direct sex discrimination cannot be justified on the basis of the motives of the employer.

### *Hafeez v Richmond School* (1981)

#### Facts:

A job at the school required the successful applicant to teach English and the students had expressed their opinions that they would rather be taught by an English teacher. The claimant's application to work in the school was rejected on the basis that he was not English.

#### Authority for:

Regardless that the employer did not mean to discriminate, the rejection on the basis of the race of the claimant was unlawful.

However, exceptions do exist. In relation to the protected characteristic of age, less favourable treatment may be justified if it is a proportionate means of achieving a legitimate aim. A disabled person may be treated more favourably than a non-disabled person; and justification for direct discrimination may be evidenced through the **occupational requirements** of the job.

### 22.6.1.3 Occupational requirements

Due to the nature of certain types of employment, or by necessity, the role to be filled may require a person from a specific protected characteristic group.

> **Note:** this will not extend to a policy of only employing women in a female clothes retailer (*Etam Plc v Rowan*) and the same argument applies to men's fashion retailers (*Wiley v Dee and Co. (Menswear) Ltd*).

As such, EA 2010 provides for exceptions to acts that would otherwise amount to direct discrimination. This is merely an option and a claim cannot be raised that the employer could/should have restricted the post to (e.g.) a particular gender (*Williams v Dyfed CC*).

It is important that EA 2010 identifies the Occupational Requirement (OR) to be a proportionate means of achieving a legitimate aim and there exists a link between the requirement and the job (hence it is not a sham).

Discrimination laws provide for the following ORs:

- Where the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina—*Barker v Goodwave Security*), or in dramatic performances (e.g. a leading man in a
p. 571 film), or for authenticity (e.g. the role of playing Othello). The OR of authenticity has been used to prevent a male applicant for a job on a 'chat line' that was advertised as 'live girls ... 1–2–1 chat'. The nature of the employment was restricted to female applicants (*Cropper v UK Express Ltd*).
- The job needs to be held by a man to preserve decency or privacy (*Lasertop Ltd v Webster*). This has been applied to employment situations where, whilst being in a state of undress is not of itself a requirement of the job, it was reasonably incidental to it (*Sisley v Britannia Security Systems*), or the job involved entering women's toilets to carry out maintenance work. It was quite foreseeable in these circumstances that women may object to a man carrying out such functions (*Carlton v Personnel Hygiene Services*).
- The nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in the premises provided by the employer; and separate living accommodation/sanitary facilities for women are unavailable. Where an employer would be unable, reasonably, to make provisions to adapt the available accommodation to allow members of the opposite sex to take up a post, this will satisfy the OR. However, where the employer simply does not wish to make an adaptation, and this would be reasonable to do so, the defence will not be accepted (*Wallace v Peninsular and Oriental Steam Navigation Company*).
- The holder of the job provides individuals with personal services promoting their welfare or education (or similar services) that can be most effectively provided by (e.g.) a man; or a person of a particular race. In *Tottenham Green Under Fives Centre v Marshall (No. 2)* the case involved a day care centre where 84 per cent of the children at the centre were of Afro-Caribbean descent. The previous nursery worker (who was of Afro-Caribbean descent) left the employment and it was considered by the Centre's committee to appoint a replacement of the same ethnic origin. Mr Marshall (a white man) applied for the position and

when it was discovered that he was not of the required ethnicity, his application was rejected. It was held by the EAT that this requirement was included under the Race Relations Act (RRA) 1976, s. 5(2)(d) (the previous applicable legislation) as the ability to read and speak in dialect was an OR.

- The job is required to be held by a man because it is likely to involve the performance of the duties outside the UK in a country whose laws/customs mean that the job could not, or could not effectively, be performed by a woman.
- The job involves participation as an artist's or photographic model in the production of a work of art, in which a person of that racial group is required for authenticity.

### Consider

From the above list does it appear that wearing a skirt rather than trousers is an occupational requirement? How do dress codes affect individuals at work when they apply on the basis of sex?

## 22.6.2 Associative Discrimination

### 22.6.2.1 The protected characteristics

In relation to race, religion and belief, and sexual orientation the law remains the same as each is covered.

In age, disability, gender reassignment, and sex this is a new right to protection.

p. 572 ↵ It does *not* apply to the marriage and civil partnership, and pregnancy and maternity protected characteristics.

### 22.6.2.2 Application of the law

When a person is directly discriminated against due to their association with another person who has a protected characteristic, this has the potential to provide substantial benefits and protection to workers. For example, where an employee is refused promotion due to her having a disabled spouse and the employer believes the employee will have to spend time away from work to care for that person, this is now an act of discrimination. It is evidently not based on a disability which the employee (claimant) has, but rather someone associated with her.

## 22.6.3 Perception Discrimination

### 22.6.3.1 The protected characteristics

In relation to age, race, religion or belief, and sexual orientation each remains covered by EA 2010.

The protected characteristics of disability, gender reassignment, and sex are now protected through EA 2010.

Marriage and civil partnership, and pregnancy and maternity are *not* covered in previous legislation or under EA 2010.

#### 22.6.3.2 Application of the law

A person is directly discriminated against when those discriminating believe they possess a particular protected characteristic (even if in fact the person discriminated against does not actually possess that protected characteristic). The EAT in *Chief Constable of Norfolk v Coffey* held that it is discriminatory for an employer to reject a job applicant because, whilst that applicant is currently non-disabled, the employer perceives that a condition the applicant possesses could become a disability in the future.

### 22.6.4 Indirect Discrimination

#### 22.6.4.1 The protected characteristics

Age, race, religion and belief, sex, sexual orientation, and marriage and civil partnership remain covered under EA 2010.

Disability and gender reassignment are now covered as protected characteristics.

The protected characteristics of pregnancy and maternity are *not* covered (although in pregnancy and maternity indirect sex discrimination may still apply).

#### 22.6.4.2 Application of the law

Following enactment of EA 2010, there is a common definition of what will amount to indirect discrimination. Indirect discrimination is a seemingly neutral provision, criterion, or practice (PCP) that is applied to everyone but it particularly affects people who share a protected characteristic and it puts them (or would put them) at a particular disadvantage. An obvious example was recently provided in a reference to the Court of Justice of the European Union by Greece. In *Ypourgos Ethnikis Pedias kai Thriskevmaton v Kalliri* it was held that the same height requirement imposed on men and women to join the police service was unjustifiable sex
p. 573 discrimination. The purported objective being achieved, that ↵ of ensuring the physical capability of the job, could have been achieved in a less discriminatory way.

The requirement within the PCP does not have to amount to actual coercion to be actionable. In *United First Partners Research v Carreras* the Court of Appeal found that the claimant, who had previously worked long hours at a brokerage firm, felt under pressure to resume these hours after suffering an injury and having temporarily reduced his working hours. The repeated requests by his employer that he was expected to work long hours established sufficient pressure on him to amount to a particular ‘practice’ to establish disability discrimination. Further on the issue of injury to feelings awards in discrimination cases, the EAT confirmed that rarely will an award be reduced for contributory negligence. In *First Greater Western Limited & Linley v Waiyego* the EAT held that while s.1(1) of the Law Reform (Contributory Negligence) Act 1945 can apply to some

discrimination claims made under the Equality Act 2010, these are very unlikely due to the difficulty in identifying or attributing 'fault' to a victim. It may be possible, however, to deal with the issue as a failure to mitigate loss.

EA 2010, s. 19 requires that the claimant has suffered a disadvantage due to the application of the PCP, but the wording 'or would put them' (s. 19(2)(b)) enables a challenge to a PCP which has not yet been applied but whose effect would be discriminatory if it were.

To justify discrimination, the following two-stage test should be adopted to establish an 'objective justification':

1. Is the aim legitimate? Therefore is the rule/practice non-discriminatory and one that represents a real and objective consideration?
2. If the aim satisfies the test of being legitimate, is it necessary in the circumstances (is it proportionate)?

A legitimate aim must constitute a genuine, objective need, which can include business/economic needs, but should not be based solely on (e.g.) reducing costs.

The disadvantage to be suffered by the claimant is not defined in the Act, but it may include denial of a promotion or imposition of a dress code. However, dress codes in par-ticular may be justified for a broader, objectively justified reason. In *Panesar v Nestle Ltd* the workers at the confectionary factory were prohibited from wearing beards or their hair long. The provision was discriminatory against members of the Sikh religion who suffered a detriment, as they could not comply with the provision. However, this did not constitute a breach of the law (RRA 1976), as it was a provision in fulfillment of health and safety legislation and in the interests of hygiene (similar findings to *Singh v British Rail Engineering Ltd* involving a requirement to wear protective headgear).

Establishing the link between the disadvantage with the PCP may be possible through the use of statistics.

- *Provision, criterion, or practice:* The tribunal will assess the employer's provision, criterion, or practice in an objective manner to assess whether there may be a justification for its imposition. The objective nature of the examination removes the employer's beliefs or understandings of the need of the business but rather will require tangible grounds that would make such a provision acceptable. The test considers the prima facie evidence of discrimination that is established by the claimant, and has previously included a requirement to work from an office location (*Lockwood v Crawley Warren Group Ltd*), a provision of working full-time (*Home Office v Holmes*), or the necessity of the inclusion of a mobility clause in the contract (*Meade-Hill and National* ↵ *Union of Civil and Public Servants v British Council*). Having established that there does exist a provision in the requirements of employment, the next stage is to demonstrate that it has caused the claimant a disadvantage.

p. 574

- *Disadvantage:* The claimant has to demonstrate that they had suffered a disadvantage, or would be put at a disadvantage, due to the provision to enable a claim to proceed. The requirement of 'being placed at a disadvantage' instils an element of *locus standi*, which stops 'busybodies' from taking offence at what they may see as discrimination and lodging claims against the employer. The disadvantage shows the claimant has suffered a loss and hence enables/justifies their action against the employer (*Home Office v Holmes*).

In *The City of Oxford Bus Services Limited t/a Oxford Bus Company v Harvey*, the EAT held that when considering if a rule is justified in cases of alleged indirect discrimination, the tribunal should not restrict its view to how the rule was applied to the claimant, rather the justification for the rule in general should be considered. Note that the **comparator** in instances of indirect discrimination based on a worker's disability is not with *all* disabled people, but rather with people with the particular disability. Similarly, where the protected characteristic is race, the comparator may be persons of a specific race. In age-related indirect discrimination, the correct age group of persons disadvantaged is an important aspect in demonstrating discrimination.

However, does the claimant have to offer an explanation of the reasons why a PCP puts one group at a disadvantage when compared to others? The Supreme Court offered an answer to the question in the following case:

### *Essop and Others v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice* (2017)

#### Facts:

Mr Essop was the lead claimant of a group of Home Office employees. He alleged that the use of a test for the purposes of career advancement was indirectly discriminatory on race and/or age. Statistics demonstrated that persons from BME backgrounds and those over 35 years old had a significantly lower pass rate than white and younger candidates. Naseem's case was that as a newly appointed Muslim chaplain at a prison, he was paid on the lowest pay band because there had been no such role prior to 2002. This was different for Christian chaplains and this led to a claim of indirect race/religious discrimination.

#### Authority for:

The cases are significant because the Supreme Court had to address the issue of indirect discrimination (direct discrimination, as provided by the EA 2010, being largely settled law). To succeed, it was not necessary to establish the reason for the particular disadvantage being applied to the group affected. The essential element in a claim on this basis is a causal connection between the PCP and the disadvantage suffered—not only by the group, but also the individual claimant.

p. 575

## 22.6.5 Harassment

### 22.6.5.1 The protected characteristics

The protected characteristic of sex remains covered by EA 2010 (s. 26(5)).

The protected characteristics of age, disability, gender reassignment, race, religion or belief, and sexual orientation were already covered through existing legislation, which is now subject to EA 2010.

Marriage and civil partnership, and pregnancy and maternity are still *not* covered.

### 22.6.5.2 Application of the law

The types of harassment covered by s. 26 include:

1. harassment related to a person of a relevant protected characteristic;
2. sexual harassment;
3. less favourable treatment of a worker because of the sexual harassment or harassment related to sex or gender reassignment.

Harassment continues to be 'unwanted conduct' related to a protected characteristic, which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment. The right gives employees the power to complain of offensive behaviour, even if not directed at them, and complainants also are not required to personally possess the protected characteristic. Employees are further protected from harassment due to association or perception (s. 26). The harassment may involve the harasser performing actions that gradually lead to a complaint, but if the action is sufficiently serious (*In Situ Cleaning v Heads*), a one-off act may enable a claim of harassment to be made (*Bracebridge Engineering Ltd v Darby*, see **21.3**).

The words 'purpose or effect' are important as they enable a claim for harassment even where the harasser did not intend for this to be the effect of their actions. For example, male workers may be downloading an image of a naked woman at work. A female colleague may know this is happening and may feel it is creating a hostile and humiliating environment. Therefore, she has a claim for harassment even though this was not the intention of the men. It is the perception of the worker (a subjective test) that is relevant—(EA 2010, s. 26(4)(a)), their personal circumstances (such as health or culture)—EA 2010, s. 26(4)(b), and whether it was reasonable that the conduct would have that effect on the worker (an objective test)—EA 2010, s. 26(4)(c). Hence, it may not be harassment if the claimant was deemed by the tribunal to be hypersensitive.

As noted earlier, unwanted conduct related to a protected characteristic affords protection due to the worker's own protected characteristic or a situation connected with a protected characteristic (associative discrimination or perceived discrimination). The issue of a 'connection with' the protected characteristic allows for protection against a broad range of discriminatory scenarios. For example, a worker subject to homophobic banter could have been harassed in relation to his sexual orientation, an employer racially abusing a black worker could lead to a white worker being offended, which could lead to a claim of racial discrimination, and a worker who has a disabled son whose colleagues make offensive remarks about the disability could lead to a claim of harassment related to disability.

There is no need for the claimant to establish a comparator in harassment cases.

p. 576

## 22.6.6 Victimization

### 22.6.6.1 The protected characteristics

Each of the protected characteristics are subject to changes following enactment of EA 2010.

### 22.6.6.2 Application of the law

Where a worker is subjected to a detriment because they have performed a 'protected act' or because the employer believes that they have done, or will do a protected act in the future, they have a complaint under the Act (EA 2010, s. 27(1)) for victimization (*Aziz v Trinity Street Taxis Ltd*). A protected act includes:

1. initiating proceedings under EA 2010 (s. 27(2)(a));
2. providing evidence/information in relation to proceedings under EA 2010 (s. 27(2)(b));
3. doing anything related to the provisions of EA 2010 (s. 27(2)(c));
4. making an allegation that another person has done something in contravention of EA 2010 (s. 27(2)(d)); or
5. making/trying to obtain a 'relevant pay disclosure' from a colleague/former colleague (EA 2010, s. 77(3)).

The worker is not required to possess the protected characteristic personally to be protected under the Act. A detriment for the purposes of victimization may take many forms and can include a refusal to provide a reference to a former worker (*Coote v Granada Hospitality Ltd*), or if the employer applies unfair pressure and intimidation to prevent the pursuit of a claim (*St Helens Borough Council v Derbyshire and Others*).

Remember that the test adopted in cases of discrimination and victimization is not the 'but for' test introduced in the chapters on torts law. Rather the test considers the reason for the decision taken by the decision-maker as in *Greater Manchester Police v Bailey*, where the claimant had been a victim of the termination of his agreed secondment to another department of the employer. The decision to terminate the position only occurred due to the claimant's (successful) first claim against the employer.

An important change in EA 2010 is that the need for a comparator in such instances is no longer required. Where a complaint is made maliciously, or the employee supports a complaint they know is untrue, then protection under the legislation is lost (s. 27(3)).

## 22.7 Liability for acts of third parties

Under the (now repealed) Sex Discrimination Act 1975, an employer could be liable to an employee who was subject to unwanted conduct by a third party. A 'third party' is someone who is not under the control of the employer (such as another employee) but rather can be a customer, client, delivery driver, and so on (essentially a visitor to the premises).

The employer may be vicariously liable where the employee has been the victim of unwanted conduct and the employer has failed to take 'reasonable steps' to prevent it.

Despite the repeal of the third-party harassment liability of the employer (previously included in EA 2010, s. 40(2)), the affected employee may have an action under the Pro-tection from Harassment Act 1997, with its six-year time limit to bring a claim and with the availability of awards of injunctions to prevent further acts of
p. 577 unwanted conduct. ↵ However, such claims are heard in the County Court and are subject to rules of evidence that are similar to a criminal proof of liability (a not insubstantial test) and subject to potential costs being awarded against the party who loses the case. EA 2010 requires claims of discrimination to be brought within a three-month time period, and as the claims are heard in the Employment Tribunal (ET), costs are rarely awarded.

## 22.8 Age discrimination

Age is one of the protected characteristics under EA 2010. However, it should be noted that some discrimination on the basis of age is allowed, and indeed age is the one protected characteristic that permits a justification of direct discrimination. This is allowed where the employer can successfully demonstrate that the less favourable treatment suffered by the claimant on the basis of their age is a proportionate means of achieving a legitimate aim (e.g. an employer's mandatory retirement age policy of 65 years old was held as appropriate and justified—*Seldon v Clarkson Wright and Jakes*). This is the 'objective justification test'.

### *Gorka Salaberria Sorondo v Academia Vasca de Policia y Emergencias* (2017)

#### Facts:

The Basque Police and Emergency Services Academy required applicant police officers to be younger than 35 years old when applying to join the police force. Following a question regarding the possible breach of age discrimination laws, the CJEU identified that there was no unlawful discrimination based on the facts of the case.

#### Authority for:

The policy did impact on workers' access to employment, but this was not unlawful as it was based on a genuine occupational requirement. The state had to be mindful of the physical requirements of the job, the consequences if the officers lacked the ability to use physical force, and it was not merely a question of looking at age at recruitment. The years of service that may be accomplished thereafter was a further factor to be considered.

Section 5 defines 'age' in reference to a person of a particular age group and persons of the same age group. All age groups are protected (hence not just 'old' people). Also, as evidenced above, age discrimination is interpreted in conformity with EU law and the jurisprudence of the CJEU.

## *Abercrombie & Fitch v Bordonaro* (2017)

### Facts:

Mr Bordonaro worked for Abercrombie & Fitch in Italy under a zero hours contract until he turned 25 years old. He was then excluded from the work schedule and was informed that, under Italian law,
p. 578 individuals under 25 years old and those over 45 years old may ↵ be employed on such contracts. Those in the 25–44 age group may only be so employed in limited circumstances. On the basis of an age discrimination claim by Bordonaro, the Italian court made a reference for clarification to the CJEU.

### Authority for:

It is for national courts to determine discrimination and any objective justification presented by the employer. However, Advocate-General Bobek provided the following as factors to take into consideration when deciding on the potential for discrimination:

1. less favourable treatment is determined according to a comprehensive assessment of the rule's impact;
2. promoting a system which facilitates the recruitment of younger workers may be a legitimate aim;
3. the greater the number of 'legitimate aims' raised will become increasingly difficult to justify;
4. justification of the aim requires specific evidence and cannot amount to generalizations; and
5. according to the Advocate-General, on the evidence provided he was not convinced that dismissing workers at the age of 25 was justified to allow younger workers to have access to employment opportunities.

## Consider

Chitra has been injured at work and, according to her doctor, cannot continue in her employment undertaking the same duties. If this physical impairment affects her day-to-day activities it may be held as a disability and will place an obligation on the employer to take action to make reasonable adjustments.

## 22.9 Disability discrimination

Since the enactment and coming into force of the Disability Discrimination Act (DDA) 1995, employers (and a wider group of service providers—such as shops and businesses giving access to the public) have had to make reasonable adjustments to their businesses to ensure that those individuals with a disability are not discriminated against (this duty does not extend to an employee associated with a disabled person—see *Hainsworth v Ministry of Defence* regarding the interpretation of EA 2010 and the Equal Treatment Framework Directive, Art. 5). Since October 2004, all service providers/employers have been required to produce a Disability Equality Policy covering the delivery of services; an employment policy; training and education; consultation with disabled representatives; and access to buildings, information, and services.

EA 2010 provides a new definition of discrimination based on disability. This has been largely welcomed
p. 579 following the problems encountered after the judgment in *London Borough of Lewisham v Malcolm*. ↵

### *London Borough of Lewisham v Malcolm* (2008)

#### Facts:

Mr Malcolm was a tenant of the Council. He had a disability (schizophrenia) and, as a result, had moved from his council accommodation and sublet it. This had continued for more than one year, and as a long-term tenant Malcolm was exercising his right to buy the property. However, the sublet had ended his secure tenancy. The Council then served him with notice to quit and brought proceedings for possession. Malcolm argued that his disability had caused him to sublet the property and the Council, in taking the action, was breaching the Disability Discrimination Act 1995.

#### Authority for:

The House of Lords held there was no breach by the Council. The comparator in such a case was any other tenant who had sublet. Any defence related to disability discrimination required knowledge of the disability and this was not present here.

Section 15 provides:

> **A person (A) discriminates against a disabled person (B) if—(1) A treats B unfavourably because of something arising in consequence of B's disability, and (2) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Under EA 2010, s. 6 a person is defined as having a disability if they have a physical or mental impairment that:

has a substantial:

### *Foster v Hampshire Fire and Rescue Service* (1998)

**Facts:**

Ms Foster was employed as a clerk for the Service who was dismissed for capability. In the latter years of her employment she had a poor attendance record and this was attributed to her suffering, although admittedly to a minor degree, from asthma and migraines.

**Authority for:**

The EAT upheld the decision of the tribunal that the claimant was not a disabled person within the meaning of the Disability Discrimination Act 1995. The EAT accepted that Foster had a physical impairment and this adversely affected her mobility, this was not 'substantial'.

... and long term

p. 580

### *Rowley v Walkers Nonsuch Ltd* (1997)

**Facts:**

Rowley sustained a back injury at work and had to take six months sick leave.

**Authority for:**

His injury did not satisfy the requirements of a disability as it did not have a long-term and adverse effect on his ability to carry out day-to-day activities.

... adverse effect on their ability to carry out normal day-to-day activities.

### *Law Hospital NHS Trust v Rush* (2001)

#### Facts:

Ms Rush was employed as a staff nurse working night shifts. One evening whilst helping a patient she injured her back. This led to her taking sick leave for 14 months and, on her return, having been moved to a ward involving lighter duties. Rush no longer completed the duties which caused her injury and, following an assessment, she was identified as being 7 per cent disabled for life. She did, however, have to take medication to manage her pain. Nearly 12 years later Rush was dismissed and she complained of unlawful disability discrimination.

#### Authority for:

In holding that Rush was disabled in the meaning of the DDA 1995, the correct test is whether the employee can carry out their normal day-to-day activities rather than whether they can carry out the particular job properly.

DDA 1995 widened the scope of a disability and from 5 December 2005 it includes people with, or diagnosed with, cancer, HIV, and multiple sclerosis. With these conditions, the claimant does not have to demonstrate an impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (as stipulated in s 6(1) EA 2010). Also, the definition of cancer includes pre-cancerous conditions. In *Lofty v Hamis* the EAT confirmed that 'when determining whether a condition satisfies the deeming provision of paragraph 6, there is no justification for the introduction of distinctions between different cancers or for a tribunal to disregard cancerous conditions because they have not reached a particular stage.' The Act covers all employers (since 1 October 2004), regardless of size (with exceptions for recruitment to the armed services).

### *Taylor v Ladbrokes Betting & Gaming Ltd* (2016)

#### Facts:

The claimant was dismissed and claimed that for the year before his dismissal he had been disabled due to his type 2 diabetes condition.

p. 581

#### Authority for:

The EAT held that as type 2 diabetes is a progressive condition, it would amount to a disability even if it did not have a substantial adverse effect at that time. The important element for the tribunal was that it was likely to result in such a condition and hence was likely to result in an impairment.

An employer may not discriminate against a person due to their disability, or for a reason related to a disability, although the employer may provide an objective ground for any discrimination in this respect. In relation to service providers, objective reasons for discrimination may include where health and safety are at risk, where a person is incapable of entering a contract, and where a service provider is unable to provide that service to the public.

### Consider

Does Chitra's back problem have a substantial effect (probably given that she cannot return work in the capacity of waitressing); is it long term (yes as it is not identified by the doctor as being for a number of weeks/months); and does it affect her day-to-day activities (again yes, and this is not limited to her job). As such, given she would be held to possess a disability of which she has informed her employer, the employer is required to make reasonable adjustments.

In an attempt to prevent discrimination to a person with a disability, the employer has to make reasonable adjustments to their premises, practices, or procedures to ensure disabled employees are not put at a substantial disadvantage compared with non-disabled employees (EA 2010, s. 212(1)—this is a disadvantage that is not minor or trivial and is assessed objectively on the facts of the case). This can include installing ramps/lifts to enable persons in wheelchairs to gain access, producing documents in Braille/large print/or in audio format, and providing workers with speech recognition software for their computers. Where an employer fails to comply with the duty to make reasonable adjustments, the disabled person is discriminated against (EA 2010, s. 21(2)). EA 2010 identifies the following three steps as being reasonable to comply with the law:

1. avoid substantial disadvantage where a provision, criterion, or practice applied by or on behalf of the employers puts the disabled person at a substantial disadvantage compared with persons without the disability (EA 2010, s. 20(3));
2. remove or alter an existing physical feature (or provide the means to avoid it) where it puts the disabled person at a substantial disadvantage compared with persons without the disability (EA 2010, s. 20(4));
3. provide an auxiliary aid/service (EA 2010, s. 20(11)) where a disabled person would (but for this aid) be put at a substantial disadvantage compared with persons without the disability (EA 2010, s. 20(5)).

p. 582 ↵ Reasonable adjustments are an essential feature of equality legislation as it imposes a requirement on employers to take positive steps to ensure people with a disability can have access to the job market and progress in their employment (EA 2010, s. 20).

### Consider

Chitra's immediate line manager has changed her work to avoid causing problems to her back and enabling her to continue her employment. The general manager has disagreed and wishes for her to be dismissed or to resign—is this an actionable act of discrimination?

The key element here is for 'reasonable' adjustments. This will include facts such as the size of the employer, the resources available to them, and the needs of disabled persons coming into the business/and or premises. EA 2010 requires the employer to make reasonable adjustments for 'actual' persons with a disability rather than hypothetical persons, or to anticipate the needs of persons with disabilities. Therefore, the requirement is effective where the employer knew, or should have reasonably known of the existence of the disability, and where to take no action would likely have the effect of substantially disadvantaging the applicant to a job or an existing employee.

### *Ridout v TC Group* (1998)

#### Facts:

Ms Ridout applied for a job with the defendant and was shortlisted to attend an interview. She disclosed on her application that she suffered from 'photosensitive epilepsy' and this was 'controlled by epilim'. The lighting in the room was problematic to her, a point she raised on entering the room, and it was suggested by the panel that she wear her dark glasses if needed rather than hold the interview in another room. When she failed to be appointed, Ridout brought her claim for breach of the DDA. The employer contested that Ridout had a very rare form of epilepsy which no reasonable employer could be expected to know without an explanation by the applicant.

#### Authority for:

The EAT remarked: 'It would be unsatisfactory to expect a disabled person to have to go into a great long explanation as to the effects that their disablement had on them merely to cause the employer to make adjustments, which he probably should have made in the first place. On the other hand, a balance must be struck. It is equally undesirable that an employer should be required to ask a number of questions about a person.'

In *HJ Heinz Co. Ltd v Kenrick* and *Rothwell v Pelikan Hardcopy Scotland Ltd* an employer's failure to enquire about an employee's medical condition that led to his dismissal on health grounds, constituted a breach. This provision is now contained in EA 2010, Sch. 8, para. 20(1)(a). However, for the purposes of disability discrimination, an employer will not be treated as knowing that an employee has a disability where medical evidence wrongly identifies the employee as not being disabled (*Donelien v Liberata UK*).

p. 583 ↵ Employers are also under a duty to make reasonable adjustments in recruitment and the selection process for job applicants.

### 22.9.1 A Comparator

In instances of direct discrimination based on a person's disability, the use of a comparator is the same as the other types of direct discrimination. But, here the comparator must be a person who does not possess the same disability as the claimant, but who has the same abilities and skills. Hence, it is the circumstances relevant to the less favourable treatment that is the focus.

### 22.9.2 Pre-employment Health Questionnaire

EA 2010 provides limited conditions where health questions may be asked (by an employer or their agent or employees) of an applicant before a job offer is made (EA 2010, s. 60). This ensures persons with a physical/mental impairment are not discriminated against. However, common sense must prevail, and the exceptions noted below to the general rule about pre-employment health questionnaires being unlawful are to be construed narrowly. Consequently, questions regarding an applicant's health may be asked to determine the following:

1. any reasonable adjustments that may be required for the person to do that job/attend interviews (EA 2010, s. 60(6)(a));
2. an applicant's ability to perform an intrinsic aspect of the job (EA 2010, s. 60(6)(b));
3. to monitor equality and diversity information for the organization (EA 2010, s. 60(6)(c));
4. to enable a positive action policy to be pursued (EA 2010, s. 60(6)(d));
5. to demonstrate an occupational requirement of the person required for the job (EA 2010, s. 60(6)(e));
6. where such questions are necessary in relation to national security (EA 2010, s. 60(14)).

The 'pre-employment' element of the protection is important as, once the person has been offered employment, an employer *is* permitted to ask health questions. (Note that a person applying for a job does not have the right to complain to a tribunal if they believe a pre-employment health question was asked, but they may complain to the Equality and Human Rights Commission.)

## 22.10 Discrimination on the basis of gender reassignment

Under EA 2010, s. 7, gender reassignment refers to a person who is proposing to undergo, is undergoing, or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex (a transsexual person). The Act now protects a woman (e.g.) who wishes to live permanently as a man even though she does not intend to undergo any medical procedures (what used to be the medical supervision requirement for protection). Permanency is required, hence a cross-
p. 584 dresser would not be protected. Despite the change in gender, this will not allow the ↵ transsexual person

to ‘benefit’ from their change in areas such as marriage, parenthood, social security benefits, succession, peerages, and sport. However, they will be recognized as being of the gender reassigned to, they will be issued with a new birth certificate, and be able to marry.

## 22.11 Sex, marriage/civil partnership, and race discrimination

EA 2010 prohibits discrimination on the basis of a person’s sex or their marital/cohabitation status, or their race. In relation to the protected characteristic of sex, s. 11 identifies that a reference to a person who has this particular protected characteristic is a reference to a man or to a woman; or to persons of the same sex.

There are no changes to the protection already provided in relation to race. Section 9 defines race as including colour, nationality, and ethnic or national origins. The protected characteristic refers to a person of a particular racial group or persons of the same racial group. Section 8(4) continues that because a racial group comprises two or more distinct racial groups this does not prevent it from constituting a particular racial group. Section 8(5) is an important power granted to a Minister of the Crown to amend this section to provide for caste to be an aspect of race. However, following a review ending in 2018, the Government has decided not to legislate in the area, rather letting the law develop through case law.

EA 2010 provides protection against discrimination based on sex or race to a wide range of workers—those who carry out the employment personally. There is no qualification period necessary to qualify and, unlike claims for redundancy payments or unfair dismissal, there is no cap on the amount of damages that may be awarded. This has led to substantial sums being awarded to the victims of discrimination under the previous Acts.

Protection is afforded against each form of prohibited conduct. Acts of direct and indirect discrimination are outlawed, as is victimization of an individual as a result of exercising a statutory right or where they have given evidence in a hearing. Harassment suffered by a claimant is also actionable. Direct discrimination can be demonstrated in the following case.

### *Owen & Briggs v James* (1982)

**Facts:**

Ms Owen, a black woman, applied, but was rejected, for the position of secretary. The successful applicant was a white woman with less experience and fewer qualifications. Evidence was deduced that the employers stated ‘why should we appoint “coloured girls” when we could hire English applicants’.

**Authority for:**

The Court of Appeal held the employers had refused to hire Owens due to her race, and this was to her detriment.

p. 585 ↵ Where an employer applies a requirement that a significantly smaller proportion of persons from one racial group can comply with, and not complying is to their detriment, an indirectly discriminatory breach is committed.

### *Meer v London Borough of Tower Hamlets* (1988)

**Facts:**

Mr Meer who is of Indian origin applied for the position as a solicitor and was subject to the respondent's use of selection criteria. One criterion was that the applicant had previous experience in Tower Hamlets which Meer claimed was indirectly discriminatory.

**Authority for:**

The tribunal and EAT held there had been no breach of the relevant law (the Race Relations Act 1976) as the criterion was not a requirement or condition. Thus, it was not a bar to his selection (adhering to the Court of Appeal's ruling in *Perera v Civil Service Commission (No.2)*).

An important ruling was provided by the EAT in *Efobi v Royal Mail Group Ltd*. The long-held belief that a claimant had to prove the facts of their case of discrimination before the burden of disproving this shifted to the employer was an incorrect approach for tribunals to adopt. The reason for the confusion lay in the wording of the previous anti-discrimination laws before the enactment of the EA 2010 which, as well as consolidating the previous legislation, also used different wording. Thus, tribunals are to take the facts of a case as a whole without requiring the claimant to 'prove something' before the case proceeds for an employer's defence.

## 22.11.1 Discrimination Before Employment

It is possible for employers to fall victim to discrimination laws even before they have employed the worker. In relation to sex and race discrimination, this typically occurs when the employer places an advertisement for a job, or in the interview/selection procedure.

- *Advertisements:* An employer may not publish or cause to be published an advertisement which indicates or might reasonably be understood to indicate an intention to sexually or racially discriminate. This clearly has implications when an employer uses words to describe a vacancy such as 'manager' (rather than manager/manageress), 'waitress' (rather than waiting staff), and so on (and for anyone who

publishes it). This may be seen in terms of race discrimination where an employer states in an advert that the applicant must have 'English as their first language'. This may have been innocently included by the employer, to require high proficiency in the English language of the applicant, but its impact is to dissuade those members of groups from applying where English may not be their 'first' language. This, however, does not mean that they are less than proficient in the language. Employers, therefore, should be careful to ensure that advertisements do not transgress the law. It does not mean that the employer cannot seek to hire members of one ethnic group, or one sex. Occupational Requirements exist that enable discrimination where this is a particular requirement of the job. However, the employer would be advised to state this in the advertisement to remove any doubt.

p. 586

- *Interview/selection events:* An employer should not employ practices that are discriminatory, such as (e.g.) invoking a policy not to hire women of child-bearing age or people of ethnic groups. Such practices may be halted by the Equality and Human Rights Commission through the issuing of a non-discrimination notice.

It should be remembered that employers may not instruct someone else to perform the discriminatory practice on their behalf (a manager, human resources department, recruitment agency, and so on). They may not seek to influence someone to discriminate through, for example, bribes or threats, and it is unlawful to assist someone in the commission of discrimination.

### 22.11.2 A Comparator

To establish a claim of discrimination, the claimant must show that they were discriminated on the basis of their sex, marital/cohabitation status, or race. Hence, they must have been a victim of less favourable treatment attributable to the protected characteristic; and this is evidenced when compared with how a member of the opposite sex, marital/cohabitation status, or race was or would be treated. As such, a hypothetical comparator may be used. Where a hypothetical comparator is used, this could be evidenced from several people in the same employment whose circumstances are somewhat similar to that of the claimant, but not the same. The Code of Practice provides for another way to approach the application of hypothetical comparators as 'but for the relevant protected characteristic, would the claimant have been treated in that way?'

Note that a comparator is not needed in cases of racial segregation (EA 2010 s. 13(1)). Employers must not seek to segregate workers based on their race, regardless of any policy reason surrounding this, or else they face falling victim to a potential claim for discrimination: *Pel Ltd v Modgill*).

Section 23(1) requires that (in relation to direct discrimination) there must be no material difference between the circumstances of the comparator and claimant. But this need not mean that the two people are identical, rather it is circumstances which are relevant to the treatment of the claimant and the comparator.

In direct discrimination in employment related to marriage/civil partnership, the direct discrimination only covers less favourable treatment because the worker is married or a civil partner. Single people or those in relationships outside of these protected characteristics are not protected.

## 22.12 Equality in Pay

EA 2010, s. 66 imposes an equality clause in the terms of a contract of employment, even where one is not included. The law relating to sex equality in pay (ss. 66–70) is based on a person employed on work that is equal to that of a comparator of the opposite sex. This ensures that (e.g.) a woman's terms of employment are no less favourable than a man's (the comparator). If the man's contract contains a term that benefits him, and it is not present in the contract of the woman, s. 66(2)(b) provides that the woman's contract is modified (equalized) to include this term (*Hayward v Cammell Laird Shipbuilders*). The legislation is applicable to workers regardless of age, there is no qualification period to gain protection, the law is applicable to those employed full-time and part-time, and there is no exemption for small businesses. See **Figure 22.1** for an
p. 587 overview of claims for sex discrimination in pay. ↵

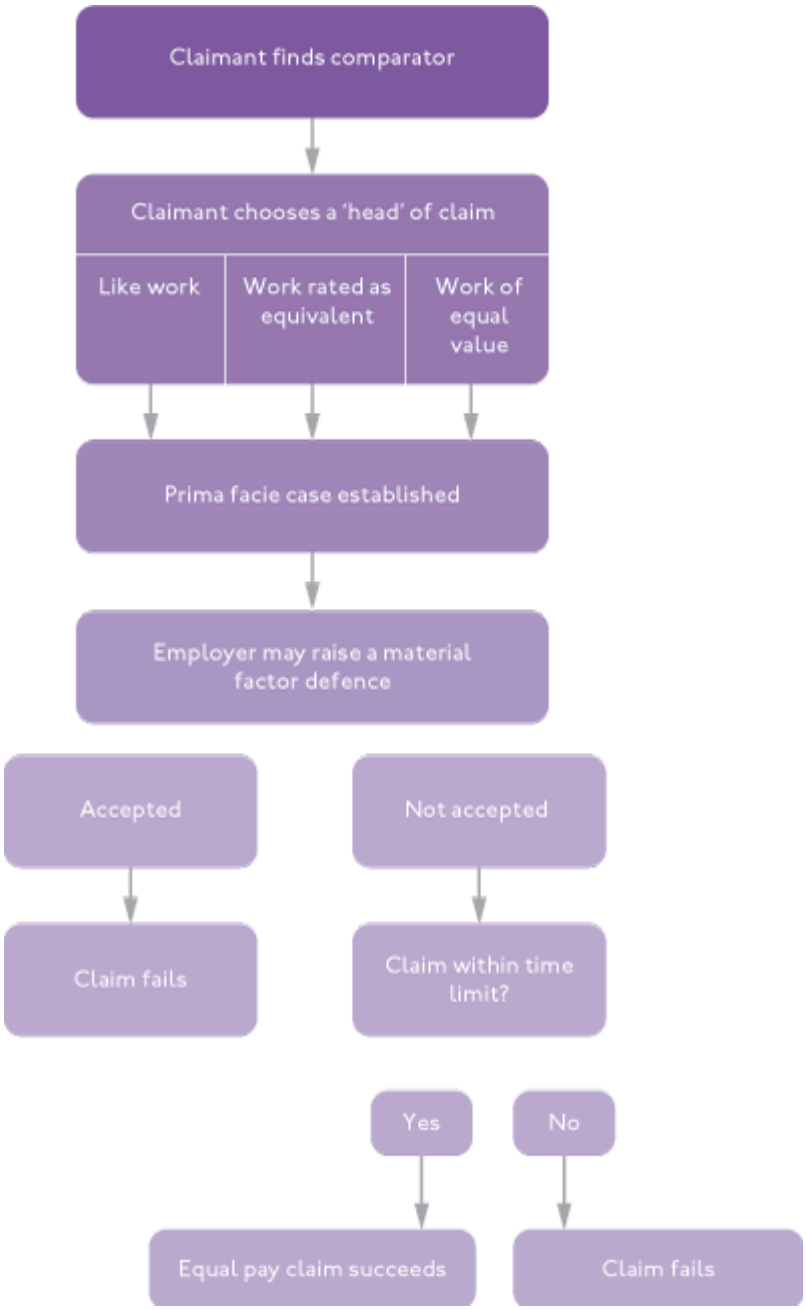

**Figure 22.1** Claims for sex discrimination in pay

### 22.12.1 'Pay'

The term 'pay' has to be interpreted in conformity with EU law (The Equal Pay Directive and Art. 157 TFEU). Pay is defined in Art. 157 TFEU as any 'consideration whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'. It therefore not only includes wages, but all terms and conditions of pay in employment including occupational benefits (*Griffin v London Pension Fund Authority*), sick pay (*Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH*), bonus payments, pension contributions (*Barber v Guardian Royal Exchange Assurance Group*), and compensation for unfair dismissal (*R v Secretary of State for Employment ex p Seymour-Smith*).

p. 588 ↵ The pay received by men and women must be equal in relation to the **heads of claim** identified at **22.12.4**. If pay is different between a man and woman, but this is due not because of the worker's gender but, perhaps, because of qualifications, length of service, or some other 'material factor' not applicable to gender, the difference may be objectively justified.

### 22.12.2 A Comparator

To establish an action of equal pay the claim must be that the reason for the difference in pay is due to the gender of the claimant. The legislation is not designed to give fair pay or enable the claimant to bring an action because someone in another job has better pay and the claimant believes they should be provided with the same. Rather, EA 2010 requires a claim between a woman and a man, and this involves establishing a comparison between workers. The previous law regulating sex equality in pay (the EPA 1970) required the claimant to produce an actual comparator of the opposite sex, working in the same employment as the claimant by the same employer, an associated employer, or at an establishment where common terms and conditions are observed (*British Coal Corporation v Smith*). The Court of Appeal has recently confirmed the meaning and extent of the concept of 'same employment'.

#### *Asda Stores Ltd v Brierley and Others* (2016)

**Facts:**

A case was brought on the basis of (predominantly female) retail store workers who wished to compare their pay with that of (predominantly male) distribution depot workers.

**Authority for:**

The tribunal held that in the specific facts of the case, in spite of some geographical and organizational distinctions between the two sets of workers, they were in the same employment for the purposes of the law and their pay could be compared. A single source was responsible for the alleged inequality and this was therefore able to remedy the treatment of the individuals affected.

Cases brought after 1 October 2010 involving direct gender pay discrimination may involve the use of a hypothetical comparator rather than an 'actual' comparator (and the problems associated with this). In all other instances, an actual comparator will still be required. Section 78 identifies that (apart from excluded groups) employers are required to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees.

An actual comparator may consist of a person employed at the same time as the claimant, but not successors
p. 589 of the claimant. ↵

### *Walton Centre for Neurology v Bewley* (2008)

**Facts:**

Ms Bewley claimed equal pay and compared herself with male employees who were engaged after she had left the employer.

**Authority for:**

The EAT said that the tribunal had erroneously applied an aspect of the CJEU's ruling in *Macarthys Ltd v Smith* that a comparator could include the person who succeeds the claimant. The use of a successor was too speculative and enters the realm of hypothetical comparators.

However, predecessors may be used (as the time limits and extensions to back-pay enable greater access to claims)—*Macarthys Ltd v Smith*. A further improvement to equality effected through EA 2010 has been the introduction of pay transparency. EA 2010, s. 77 provides for discussions about pay. Where a person's contract of employment prohibits them from disclosing or seeking to disclose information about their terms of work, insofar as this relates to a relevant pay disclosure, such a term is unenforceable. This is an interesting step in promoting equality in pay. Previously, establishing the most appropriate comparator in equal pay claims was difficult as many workers (particularly those in the private sector) were subject to a confidentiality clause regarding their employment. It was possible for a potential claimant to require the employer to identify a comparator through an order for discovery (*Leverton v Clwyd County Council*), but this was difficult in practice.

Indeed, one of the reasons for the general lack of success of the legislation in this area was often the practical problems associated in making a claim of sex discrimination in pay. EA 2010 should help alleviate some of these difficulties.

Having established an actual/hypothetical comparator who is paid more than the claimant, the next stage is to demonstrate which form the discrimination in pay takes: the claimant bases the claim for equal pay on one of the 'heads' of claim.

### 22.12.3 Preparing a Claim—Pay Disclosure

Where a worker wishes to bring an equal pay claim, due to the complexity in establishing such actions, advice from a trade union, or local not-for-profit advisory agency may be very beneficial. Section 77 requires that a term of a person's work that purports to prevent or restrict the person from disclosing or seeking to disclose information about the terms of their work is unenforceable against them in so far as the person makes or seeks to make a relevant pay disclosure. Colleagues and former colleagues may also seek a relevant pay disclosure (if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is a connection between pay and having (or not having) a particular protected characteristic). The Act protects against victimization by protecting those who make, seek, or receive information disclosed in a relevant pay disclosure.

p. 590

### 22.12.4 The Heads of Claim

The claimant has to select the most appropriate 'head' under which they are to base the claim. There are three heads—like work, work rated as equivalent, and work of equal value. The tribunal is not entitled to choose the head and it is important for the success of the claim that the claimant selects the most appropriate head based on their circumstances.

#### 22.12.4.1 Like work

Section 65(1)(b) of EA 2010 identifies that a claimant is performing 'like work' with their comparator, if the work is the same, or broadly similar work. The work being undertaken does not have to be exactly the same, and any minor differences that are of no practical importance may be ignored (s. 65(2)(b))—*Electrolux Ltd v Hutchinson*. If the comparator is actually taking on additional duties that do differentiate the role performed by the claimant and the comparator, then this can justify a difference in pay and the 'like work' claim will fail (*Eaton Ltd v Nuttall*—the male workers had greater responsibility than their female colleagues and the consequences of losses occurring during their work would have been significantly more serious). However, EA 2010 requires regard to the frequency of differences between the claimant's and comparator's work in practice and the extent and nature of these. Even prior to EA 2010, the courts had looked to the roles of the claimant and comparator being undertaken at work, rather than focusing on the (stated) terms of the contract when determining their responsibilities and duties.

### *Shields v E Coomes (Holdings) Ltd* (1978)

**Facts:**

Ms Shields was employed in a betting shop and compared herself with a male colleague being paid at a higher rate. The employer stated that, although the male and female workers performed largely the same role, the reason for the higher pay to the men was because they acted as a deterrent to the risk of attack on the premises.

**Authority for:**

The male employees had never had to act in the capacity identified by the employer. Therefore the women and men were performing like work and the claim for equal pay should succeed.

#### 22.12.4.2 Work rated as equivalent

To avoid potential claims against the employer, and in the interests of transparency, the employer may perform a job evaluation study that seeks to rate the pay provided to workers on the basis of the roles and responsibilities that are undertaken (EA 2010, s. 65(1)(b)). However, an employer cannot be forced to conduct this study, but where they have, the claimant may use the findings in any claim (in the same way as the employer can use the findings to defend a claim). Clearly, to have any value the study must be appropriate and objective. It must not be based on a sex-specific system (s. 65(4)(b)) where values are set differently between men and women.

A fair rating system will satisfy the following:

1. it must be analytical;
2. the work undertaken must be objectively assessed (identifying the value of the work in terms of skill, responsibilities, and so on—factors such as strength may be discriminatory between male and female workers and hence should be avoided: *Rummler v Dato-Druck GmbH*);
3. both the claimant's and comparator's jobs must have been part of the study;
4. the study must have been conducted at the undertaking where the claimant is employed.

p. 591

It should also be noted that even though a job evaluation study may rate a man's job as *lower* than that of a woman while the employer pays the man a higher wage, this will not prevent a successful claim from the woman, despite the fact that the legislation provides for a claim when the jobs are rated as 'equivalent' (*Bainbridge v Redcar and Cleveland BC*).

### 22.12.4.3 Work of equal value

In the past, employers often used to employ men and women in different jobs (therefore restricting claims under 'like work'), and they would refuse to undertake a job evaluation study (hence preventing 'work rated as equivalent' claims). The result was an impasse in successful actions on the basis of equal pay. As such, following action by the EU Commission that the UK was in breach of its EU law obligations, legislative action was taken to introduce a 'third head' of complaint of sex discrimination in pay—'work of equal value' (the Equal Pay (Amendment) Regulations 1983). This increased the possibility of claims and provided access to the right for many more claimants. Further, it was held in *Pickstone v Freemans Plc* that an equal value claim is possible even where a 'token' man is employed in the same job as the claimant. This prevents an employer from employing the tactic of hiring a man in order to prevent the claimant pleading under this section of the Act.

EA 2010, s. 65(1)(c) enables claims that (e.g.) a woman's work is equal to a man's (the comparator) where it is neither like the man's work, nor rated as equivalent to his, but it is nevertheless equal in terms of the demands made upon her by reference to factors such as effort, skill, and decision-making (EA 2010, s. 65(6)(b)).

The previous case law further requires that all of the individual terms and conditions of the contract have to be equalized, rather than looking at the broad aspects of the contracts of the claimant and comparator.

#### *Hayward v Cammell Laird Shipbuilders* (1988)

**Facts:**

The case involved a woman engaged as a cook at the shipyard who claimed equality in pay based on her assertion that her work was of equal value with comparators performing jobs as a painter, engineer, and joiner. The employer's defence was that when viewed as a whole, the claimant's contract was as favourable as the comparators. The claimant's contract provided for better holiday pay and meal entitlements (among others) not enjoyed by the comparators, although her pay and overtime rates were lower. The House of Lords held that all the terms of the claimant's contract had to be as favourable as those of the comparator, including the pay.

**Authority for:**

A claimant who is engaged on work of equal value with the comparator is entitled to equality of pay in relation to each element of the contract.

p. 592 ↵ When faced with a claim that, prima facie, demonstrates the claimant and comparator are being paid on different rates, and this is due to sex discrimination in pay, the employer may mount a defence of a genuine material difference justifying the difference.

### 22.12.5 Material Factor Defence

Once the claimant has established their claim under one of the previously discussed three heads, the employer may be in a position to avoid equalizing the pay between the claimant and the comparator under EA 2010 (s. 69). The employer is entitled to demonstrate that the difference in the pay is not based on the sex of the parties, but rather it is based on a **material factor**, that can be objectively justified on the needs of the business, and is a proportionate means of achieving that aim. For the factor to be 'material' it must be a material difference between the claimant's case and the comparator's. This argument is available to be pleaded at the preliminary or full hearing.

- *Responsibility:* An employer may attempt to justify differences in pay based on the additional responsibilities undertaken. Where this is relied on, the employer must demonstrate that the responsibilities are frequently required, and are based on the conduct of the parties rather than what is included in the contract (*Shields v E Coomes Ltd*—see **22.12.4.1**).
- *Market forces:* It may be necessary for an employer to provide pay at different rates between jobs, which would otherwise enable a 'work of equal value' claim, because of the nature of the market that the jobs are in (*Rainey v Greater Glasgow Health Board*).
- *Collective bargaining agreements:* It may be possible for an employer to rely on agreements between workers' representatives and the employer regarding collective bargaining agreements or pay structures, although they cannot provide an automatic defence (*Enderby v Frenchay Health Authority*).
- *Experience:* The general rule has been that those workers who have longer service at an employer's business will, generally, be paid higher wages due to their seniority. The employer can (generally) justify this on the basis of rewarding loyalty, providing motivation to stay with the organization, reflecting experience, and so on.
- *Regional variations:* An employer may seek to justify differences in pay because the claimant and comparator's work exist in different locations (*NAAFI v Varley*).
- *Red-circle agreements:* A **red-circle agreement** is where an employer has performed, for example, a job evaluation study and the result of which has led to groups of workers being downgraded. The agreement protects the affected workers' salaries at the current rate, despite being moved to a lower grade. The agreement, and its application, must be performed in a non-discriminatory way—the employer's intentions are irrelevant (*Snoxell v Vauxhall Motors Ltd*).

#### *Rainey v Greater Glasgow Health Board* (1987)

**Facts:**

Ms Rainey was a prosthetist who worked under the control of the Health Board. Due to its expansion, the Health Board had to recruit more staff and due to shortages in the public sector, these recruits had
p. 593 to be selected from the private sector. Even though the new ↵ recruits had comparable skills and

experience, they were paid approximately 40 per cent more than those recruited on the NHS scale. The new recruits were predominately men which led to the claim for equal pay.

### Authority for:

An employer can avoid a finding of discrimination on the basis of pay where the reason for the difference between the men and women is something other than sex. Here the 'material' difference in pay (which means the difference must be significant and relevant) was due to the sector from where the recruits were selected. Those from the private sector just happened to be men whilst those from the NHS happened to be women. Had women been recruited from the private sector to facilitate this expansion, they would have received the same pay as the men.

## *Enderby v Frenchay Health Authority* (1994)

### Facts:

Dr Enderby, a speech therapist, complained on the basis of equal pay when she compared the value of her work with that of (largely male) pharmacists and clinical psychologists employed in the NHS. The employers, denying that the comparators and Enderby were engaged in work of equal value, argued that the difference in pay was due to a collective bargaining agreement (a material factor which is not the difference of sex).

### Authority for:

Following a reference to the CJEU it was held that even if the bargaining agreements were non-discriminatory this did not satisfy a sufficiently objective justification for the difference in pay between the roles of the men and women.

## *NAAFI v Varley* (1976)

### Facts:

Ms Varley was employed in Nottingham on the same grade as a comparable male worker in NAFFI's London office although staff in Nottingham worked slightly longer hours than those in London. Varley argued her hours should be equalized with the male comparator to avoid discriminatory conduct by NAFFI.

**Authority for:**

In a claim to have her hours equalized with staff in London, the EAT refused. It held the variation to be otherwise than to do with the sex of the workers. It was a custom in London for workers to work shorter hours. On appeal, again it was held there was no discrimination on the basis of sex—it was simply that one group of workers were based in Nottingham, the other in London, and region variations would exist.

p. 594

### 22.12.6 Time Limits for a Claim

A claim for equal pay may be made at any time while the worker is employed under a 'stable employment relationship' (*Preston v Wolverhampton Healthcare NHS Trust*) although this can also include a succession of consecutive contracts (see the Court of Appeal ruling in *Slack and others v Cumbria County Council* and *Equality and Human Rights Commission sub nom Cumbria County Council v Dow (No. 2)*). If they do not wish to bring an action whilst working, they can wait until the employment is terminated, and bring a 'rolled up' claim within six months of leaving (as held by the Court of Justice). However, in circumstances where the employer has deliberately misled a worker or concealed facts that would have assisted with their claim, and the worker could not have been reasonably expected to be aware of this; or where the worker is suffering a disability during the six-month period when they left the employment where the claim would have been presented, the time period is extended. In cases of concealment, the six-month period does not begin until the worker discovered (or should have discovered) the concealment; and in cases of disability, the period begins when the worker is no longer under the disability.

Equal pay claims may be backdated for a six-year period.

### 22.12.7 'Good Practice'

Due to changes in the legislation, and in an attempt to assist employers in complying with their legal responsibilities, Codes of Practice have been created to offer practical help with implementing the provisions of EA 2010. The Codes (on equal pay; employment; and services, public functions and associations) were laid before Parliament on 12 October 2010 and came into force on 6 April 2011 in the form of the Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment, and Equal Pay) Order 2011. Further, the Enterprise and Regulatory Reform Act 2013 has provided for an employer to be required to complete an equal pay audit, at the discretion of the Employment Tribunal, where an employer has breached equal pay laws on or after 1 October 2014. An employer can be required to publish the results of the audit on its website for a period of three years (unless it can justify that to do so would be to breach a legal obligation).

### 22.12.8 Gender Pay Gap Reporting

On 6 December 2016 the Government released the latest version of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. In an attempt to allay fears and criticism of the previous drafts, this (probably final) draft has incorporated computational details regarding individuals' hourly pay, applicable bonus

payments, working hours, and so on. The result is a very complex set of requirements to comply with the law.

#### 22.12.8.1 Who is covered

The important aspects of the Regulations are: All employers in Great Britain with at least 250 employees will be required to publish information regarding differences in pay between male and female employees (some public authorities will be exempt from this requirement). The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 apply to public sector employers and these Regulations largely reflect The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 which apply to private sector employers with 250 or more employees. The main differences between the two Regulations are that the public sector
p. 595 duty takes effect as part of the existing public-sector equality ↵ duty. As such it does not establish a standalone requirement. Further, the pay information 'snapshot' date is 31 March for public sector employers and 5 April for those in the private sector. The reporting requirements will affect those individuals in 'employment' according to the definition provided in the Equality Act 2010—therefore employees, workers, casual workers, and the self-employed (where they provide the services personally) will be covered. An interesting exception to the reporting requirements is where the employer does not have, nor is it reasonably practicable for them to collect, those individuals who are required to personally complete the work (workers and some self-employed individuals).

#### 22.12.8.2 What information is reported

Employers will be obliged to publish the following information:

- The mean and median pay differences between male and female 'full-time relevant employees'. This will exclude employees absent from work and not in receipt of their full pay.
- The proportion of male and female 'relevant employees' who received bonus pay. The time period for the calculation is difference in mean and median pay between male and female 'relevant employees' during the period of 12 months, ending with a snapshot on 5 April.
- The proportions of these 'relevant employees' in the lower, lower middle, upper middle, and upper quartile pay bands.
- Overtime payments will be excluded from the calculations.

#### 22.12.8.3 Compliance

- The relevant information will have to be published within a 12-month period beginning with the 5 April snapshot date.
- The data will have to be signed off by a senior person in the organization and published on its website for a period of not less than three years. Further, the data will have to be uploaded to a government-sponsored website. This may incentivize employers to avoid the 'naming and shaming' that will likely be reported when this information enters the public domain.

- A failure to provide the data will be considered an 'unlawful act' and thereby enable the Equalities and Human Rights Commission to commence enforcement proceedings against the recalcitrant employer.

Finally, employers will be able to provide a narrative/commentary on any differences and the data presented generally. This may include details of any pay gap to put the information in context, explain any difference in pay, and if so, what the employer plans to do to remedy the difference.

## 22.13 Discrimination on the basis of religion or belief

Legislation to prevent discrimination based on an individual's religious belief was extended following the enactment of the Employment Equality (Religion or Belief) Regulations 2003. This legislation has been repealed following EA 2010 and its provisions are contained within that legislation.

p. 596 ↵ EA 2010 protects workers against discrimination based on their choice of religion, religious beliefs (or non-belief), or other similar philosophical belief—be that a real or perceived belief, although note that Vegetarianism may not considered a belief for the purposes of protection under the EA 2010. There is no discrimination based on philosophical belief where the employee is the only person to hold such a belief (here it was the sanctity of copyright law!—*Gray v Mulberry*). In *Conisbee v Crossley Farms Ltd* the EAT gave instruction as to what a philosophical belief is: 'The belief must have a similar status or cogency to religious beliefs. Clearly, having a belief relating to an important aspect of human life or behaviour is not enough in itself for it to have a similar status or cogency to a religious belief.' Thus, it is not sufficient to hold an opinion based on logic. Section 10 identifies that religion means any religion and a lack of religion. Belief means any religious or philosophical belief or a lack of belief.

It is not directly discriminatory for a Christian baker to refuse to bake a cake containing a message in support of gay marriage (*Lee v Ashers Baking Company Ltd*). The Supreme Court held that the baker's refusal was not due to the sexual orientation of the customer nor was there evidence of associative discrimination. Simply because the message on the cake had something to do with the sexual orientation of some people was not sufficient to meet the threshold of discrimination.

It is important to note that the discriminator and the person discriminated against may hold the same religion or belief.

### *Eweida and Others v UK* (2013)

#### Facts:

This case was discussed at **2.7.2.2**.

Four cases were joined in issues surrounding Art. 9 of the European Convention on Human Rights which provides the right to freedom of thought, conscience and religion, and a qualified right to manifest one's religion or beliefs. The cases involved: 1. Ms Eweida who was employed by British

Airways (BA) and 2. Ms Chaplin who was employed as a geriatric nurse. They both wished to wear a crucifix visible over their uniforms. This action was in breach of their employers' dress code; 3. Ms Ladele who was a registrar required to perform civil partnership ceremonies but refused to do so for same-sex couples; and 4. Mr McFarlane who was employed to provide counselling services for Relate (a relationship counselling service). He refused to provide sexual counselling for same-sex couples. In all the cases the question was whether the individuals had the right to manifest their religious views at work.

### Authority for:

Regarding the dress codes in questions 1 and 2, BA's uniform policy was designed to establish an 'image' for its members of staff. However, as the nature of the crucifix was discreet and had not attracted any complaints or negative impact on the BA brand, a refusal to allow Eweida to wear it at work had breached Art. 9. Chaplin was lawfully refused to wear her crucifix as this was to do with hygiene rather than her religious freedom. In both 3 and 4 the refusal to perform the services required of their job due to discrimination on the basis of sexual orientation was not permitted.

p. 597 ↵ The *Eweida* cases demonstrate the power of European Convention rights and how they may impact on employment policies. It also shows the difficulties employers may face when choosing to ban items of clothing, hairstyles, or displays of a person's faith. Any such ban must satisfy the test of being a proportionate means of achieving a legitimate aim.

The CJEU has also provided direction on the wearing of Islamic headscarves at work and the extent to which employers may seek to control their use.

## *Case C-157/15 Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* (2017)

### Facts:

The case involved a reference from the Court of Cassation (Belgium). Samira Achbita worked as a receptionist for G4S. This is a private organization was there was an unwritten rule at the time of Achbita's employment that prohibited employees from wearing visible signs of their political, philosophical, or religious beliefs in the workplace. In April 2006, Achbita informed her employer that she intended to wear an Islamic headscarf at work, and the employer responded that such action would not be tolerated. Between April and June (including some time away for a period of sick leave) a conflict existed between the employer and Achbita, who insisted on wearing the headscarf. On 12 June 2006, Achbita was dismissed.

### Authority for:

The Belgian court referred the matter to the CJEU as the matter raised the compatibility between the national law, the employer's actions, and the Equal Treatment in Employment and Occupation Directive (Council Directive 2000/78/EC). The CJEU held that there was no breach of EU law. Equal treatment, as a matter of EU law, means that there can be no direct or indirect discrimination on the grounds of religion. But, the employer's action was to promote a sense of neutrality of the organization with its customers and its rule did not introduce a difference of treatment that was directly based on religion or belief. This rule was justifiable by promoting a legitimate aim and the means of doing so were proportionate, appropriate, and necessary. A key aspect here was that Achbita interacted with customers, and this was directly associated with the purpose of achieving the aim of the employer.

The CJEU considered that the willingness of an employer to take into account the views of a customer who did not wish to interact with a worker wearing an Islamic headscarf would not amount to an occupational requirement. It would, however, avoid a finding of discrimination.

## *Case C-188/15 Bougnaoui and Association de defense des droits de l'homme (ADDH) v Micropole Univers* (2017)

### Facts:

p. 598

Prior to her employment with the private sector company Micropole, Ms Bougnaoui had met with one its representatives at a student fair. The representative had said that ↵ her wearing of an Islamic headscarf might pose a problem when she was in contact with customers of the company. During her internship, Bougnaoui wore a bandana but was subsequently hired and she wore an Islamic headscarf for work. This continued until a customer for whom Bougnaoui had been assigned complained about the headscarf. Micropole reaffirmed the need for neutrality when dealing with customers and when Bougnaoui objected to its instruction, she was dismissed. At her hearing, the French court referred questions to the CJEU as to the lawfulness of an employer taking into account the wishes of a customer and whether it constituted a 'genuine and determining occupational requirement'.

### Authority for:

The CJEU remarked that it was not sure of the reasoning for the difference in treatment of Bougnaoui. If the dismissal was based on non-compliance with an internal rule prohibiting the visible wearing of signs of political, philosophical, or religious beliefs, the decision in *Achbita* should be followed. However, if the reason for the dismissal was the willingness of an employer to take account the wishes

of a customer to have no dealings with a worker wearing an Islamic headscarf (and essentially dismissing her because of that reason), it would not be considered a genuine and determining occupational requirement within the meaning of the Directive.

### Consider

Whether Clara can argue that the employer's dress code has disproportionately affected the female staff may be open to question. However, given the nature of the job, the safety implications of wearing trousers, and the employer's duty in relation to protecting the health and safety of their staff, it is likely she would succeed in an action for damages.

It is important to recognize that protection is afforded to an individual's beliefs and not necessarily the manner in which they express those beliefs. In *Page v NHS Trust Development Authority* the claimant had been dismissed because he expressed his Christian views on adoption of children by same sex couples to the media. This adversely affected the ability of his employer to engage with sections of the community. His subsequent dismissal was on the basis of the expression of his views and not his religious beliefs.

As with the other protections from discrimination outlined earlier, protection is afforded against direct and indirect forms of discrimination, against victimization, and against harassment.

### 22.13.1 Occupational Requirements

There exist situations where an otherwise directly discriminatory act is allowed, and hence not a transgression of EA 2010, where it is an OR for the job. In relation to where an employer has an ethos based on
p. 599 a religion or belief, the employer can rely on the OR ↵ if it can be demonstrated that, in relation to that ethos and the nature of the work to be undertaken:

1. the requirement of possessing that particular region or belief is an occupational requirement;
2. the application of the requirement is a proportionate means of achieving a legitimate aim;
3. the person (claimant) fails to meet the requirement or the employer possesses reasonable grounds to believe that they do not meet the requirement.

## 22.14 Discrimination on the basis of sexual orientation

A worker may not be discriminated against on the basis of their sexual orientation following the EU Framework Directive (Council Directive 2000/78/EC) that was transposed and given effect in the UK through the Employment Equality (Sexual Orientation) Regulations 2003 (now replaced by EA 2010, s. 12). An individual's sexual orientation is defined as their orientation towards persons of the same sex (homosexual),

opposite sex (heterosexual), or both sexes (bisexual)—EA 2010, s. 12. EA 2010 prohibits unwanted conduct (either based on the individual's sexual orientation or on their perceived orientation). To exemplify, on a monetary basis at the very least, the importance of preventing discrimination based on a person's sexual orientation is the following case:

### *Ditton v CP Publishing Ltd* (2007)

**Facts:**

The claimant, a gay man, was subject to offensive comments about his sexual orientation by a company director. This continued for the first eight days of his employment before he was dismissed.

**Authority for:**

The tribunal (in Scotland) held he had been discriminated against, he had been harassed, and as the employer had failed to follow the (then applicable) statutory dispute resolution procedures, the award was uplifted to £118,000.

EA 2010 allows for the OR defence of an employer where being of a particular sexual orientation is a genuine and determining occupational requirement (and it is proportionate to those ends); and in the case of organized religions where the sexual orientation contradicts the beliefs of the members of the particular religion.

## 22.15 Discrimination against part-time workers

Before the enactment of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, a claimant who considered that they had been discriminated against due to their employment status had to
p. 600 initiate a convoluted claim under indirect sex ↵ discrimination. However, since July 2000, provision is provided for part-time workers not to be treated less favourably than their full-time counterparts. This may be with regard to the contracts of employment or being subjected to any other detriment through an employer's act or omission (reg. 5(1)).

The Regulations provide the part-time worker with the right to the relevant proportion of pay, access to pension schemes, holiday leave, sick leave, maternity leave, training, and access to promotion on a pro-rata basis, as are the full-time workers. There may be some difference between the full- (s. 2(1)) and part-time (s. 2(2)) workers with regard to overtime pay (the part-time workers would have to work beyond the 'normal' contracted hours of the full-time workers to benefit from this additional rate of pay).

It should be noted that whilst the Regulations protect part-time workers, the employer would only be acting unlawfully in treating the workers differently if this is due to the employment status. An employer may also treat the groups of workers differently if there is some objective reason for the distinction. However, reg. 6

enables an affected part-time worker to request from the employer a written statement regarding the reasons for any difference in the way the groups of workers are treated, and this information may be used in a tribunal against the employer.

The part-time worker may compare how they are treated with those working under full-time contracts, if the work is of 'broadly similar' nature so as to provide a fair comparison.

### *Matthews v Kent and Medway Towns Fire Authority* (2006)

**Facts:**

Retained part-time firefighters argued that they were employed on the same or broadly similar work as their full-time colleagues (for the purposes of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000).

**Authority for:**

The issues raised were assessment of levels of qualification, skill, and experience when determining the similarity of the work undertaken. However, this is only relevant in respect to the actual job the person is engaged to perform. The test of similarity was one that had to be considered in light of the Directive and interpreted purposively.

Workers may compare each other's treatment to identify evidence of less favourable treatment where they are employed under the same type of contract; they are performing broadly similar work (and where relevant have similar levels of qualifications, skills, and experience); and the part-time worker and full-time worker are based at the same establishment; or, where no full-time worker is based at the establishment who satisfies the above criteria, works or is based at a different establishment, and satisfies the criteria (s. 2(4)).

## 22.16 Discrimination against workers on fixed-term contracts

Those employees engaged on fixed-term contracts have been protected against discrimination based on their contracts (from July 2002) through the Fixed-term Employees (Prevention of Less Favourable Treatment)
p. 601 Regulations 2002. A worker employed on such a ↵ contract has the right not to be treated less favourably due to their status than a comparable employee on a permanent contract. Regulation 3(1) provides that the fixed-term employee should not be treated less favourably in relation to the terms of their contract, or through acts or omissions of the employer unless there exist objective grounds for such treatment. Affected employees can request a written statement from an employer where they have been treated less favourably and this information may be used in tribunal proceedings.

Less favourable treatment includes disadvantageous terms of the contract when compared to permanent employees. The Regulations further provide that following four years of successive fixed-term contracts, the contract will become permanent, and a breach of the Regulations enables a damages action for compensation. As with the protection of part-time workers, any attempt by the employer to dismiss a worker for using the Regulation's provisions, or dismissing an employee under a fixed-term contract due to this status, is automatically an unfair dismissal.

## 22.17 Enforcement and remedies for discrimination claims

The claimant must bring their claim within three months of the discriminatory act (or within three months of the discrimination ending) for work-related claims (EA 2010, s. 123). The tribunal is empowered to extend the three-month period where it would be just and equitable to do so (EA 2010, s. 123(1)(b)), but before the claim is brought before a tribunal, a conciliation officer is appointed to attempt to resolve the matter between the employer and the claimant. However, if this attempt is unsuccessful, following a finding of discrimination the tribunal can provide the following remedies:

1. declare the rights of the complainant;
2. award damages;
3. make a recommendation that the employer eliminates/reduces the effect of the discrimination for all employees not just the claimant (EA 2010, s. 124). This does not apply to claims of sex discrimination in pay.

### Consider

Clara has received physical injury because of the employer's potential breach of equalities law. Chitra will likely have sustained psychiatric injury in the way she has been treated. Are damages recoverable in each instance?

When awarding damages, the tribunal is entitled to compensate for injury to feelings:

### *O'Donoghue v Redcar Borough Council* (2001)

**Facts:**

O'Donoghue was a barrister at the local authority who was dismissed. The tribunal held this to be unfair and to also constitute victimization. In assessing the quantum of ↵ damages, it awarded £8805 for the dismissal and included £2000 for injury to feelings. It stopped at these figures as the

p. 602

company established that it was going to (fairly) dismiss her within six months due to her very poor attitude at work.

### Authority for:

The Court of Appeal upheld the award of damages but insisted that there is no 'cut off' point when determining awards for distress and humiliation due to victimization (as this would be a breach of the Sex Discrimination Act). Therefore, the award for injury to feelings was increased to £5000.

The Court of Appeal had held in *Simmons v Castle* that a 10 per cent increase should be made to awards in (non-pecuniary) damages for personal injury and similar cases. Non-pecuniary damages are those where the damage does not have a quantifiable value (the most common example would be where goods which have a sentimental value have been destroyed. The goods themselves may have no real (commercial) value but are of significant value to the owner). In *De Souza v Vinci Construction (UK) Ltd* the Court of Appeal held that the *Simmons v Castle* uplift in award should also apply to injury to feelings in discrimination cases.

Awards may even extend to include damages for personal injury and psychiatric injury:

## *HM Prison Service v Salmon* (2001)

### Facts:

Ms Salmon was one of three women prison officers of 120 in total at a prison where male colleagues engaged in sexual harassment. This included openly reading pornographic materials, engaging in sexual conversations and banter, and ultimately writing offensive comments about Salmon in a dock book.

### Authority for:

Salmon's claim was that this situation had led to her suffering from depression and retirement on medical grounds. The EAT agreed and awarded her damages in heads of a psychiatric injury, injury to feelings, and loss of earnings. It did note that future tribunals should be careful not to double compensate claimants in situations involving psychiatric injury and injury to feelings.

**Note:** in cases of discrimination there is no limit to the compensation that may be awarded, and interest is charged on compensation payments not made in the time of the order:

### *Marshall v Southampton and South West Hampshire Area Health Authority (No. 2)* (1994)

#### Facts:

p. 603

Ms Marshall had been employed by the Authority until, in 1980, she was dismissed due to her passing the (then) retirement age. The retirement age between men and women ↵ was different and, having successfully argued this was a breach of EU law, she claimed in the second case that the national limit on the compensation that may be awarded in sex discrimination cases was unlawful.

#### Authority for:

The national compensatory limit contravened the EU Directive. As such, the national law which limited the damages that may be awarded in sex discrimination cases was held unlawful as it breached superior EU law.

## 22.18 Maternity rights

A pregnant employee gains protection against discrimination on the basis of her pregnancy or childbirth (considered under ERA 1996 to be the birth of a child after 24 weeks of pregnancy (whether alive or dead)). To ensure she receives the protection, the employee must inform her employer of her pregnant state to enable them to comply with the relevant health and safety obligations, and she must also issue the employer with the certificate of pregnancy provided through the hospital or doctor. This identifies the employee's pregnancy, and may also be used by an employer to reclaim any Statutory Maternity Pay (SMP) issued to the employee.

Under health and safety legislation, an employer may have to suspend an employee from work if the job could endanger her or the unborn baby (as required by legislation, a code of practice, and so on). The employer must continue to pay the employee during this suspension, and her continuity of service and other benefits continue to accrue. However, the employer may offer the employee suitable alternative work. If the employee unreasonably refuses, then the employer may cease paying the wages.

Beyond the protection afforded to pregnant women, and those who have given birth, EA 2010 provides specific protection for pregnant employees, such as the right not to be dismissed, the right to attend doctor's appointments, and the right not to be treated less favourably because of pregnancy or maternity leave (EA 2010, s. 18). Section 55(1) of ERA 1996 specifically enables a pregnant employee to have paid time off work to attend the appointment—insofar as it was made on the advice of a doctor, registered midwife, or registered health worker. The protection afforded to women due to their protected characteristic of pregnancy or maternity leave begins when the woman becomes pregnant and continues until the end of her maternity

leave or until she returns to work (if this is earlier)—the 'protected period' (EA 2010, s. 18(6)). Outside of these times, unfavourable treatment because of her pregnancy may be considered sex discrimination rather than pregnancy and maternity discrimination (EA 2010, s. 18(7)).

### *Lyons v DWP JobCentre Plus* (2014)

#### Facts:

p. 604 Miss Lyons had been employed for over 10 years and had a history of depression. Following the birth of her child in February 2010 Lyons was diagnosed with post-natal ↵ depression and she did not return to work. In March 2011 the employer dismissed her on the basis of capability and Lyons brought an action for unfair dismissal and discrimination on the grounds of pregnancy and sex.

#### Authority for:

The EAT dismissed Lyons's claim for discrimination although upheld the unfair dismissal. This was not a breach of either EA 2010, s. 18 (dismissal due to a pregnancy-related illness) as the unfavourable treatment occurred outside of the protected period, nor was it a breach of EA 2010, s. 13 (direct sex discrimination) as a pregnancy-related absence *after* maternity leave is judged according to how a comparable sick man would be treated (applying *Brown v Rentokil*).

Consequently, if the employer would have dismissed the man for (in)capability to do the job due to his illness, he may also treat a woman (once beyond the protected period) in a similar fashion.

There is further protection for pregnant workers through EU initiatives which prohibit, *inter alia*, the dismissal of pregnant workers/those on maternity leave, other than in exceptional circumstances not related to their pregnancy or maternity leave status (e.g. the Pregnant Workers Directive (92/85/EEC) and the Equal Treatment Directive (2006/54/EC)).

## 22.18.1 Breastfeeding

There is no obligation on an employer to give breastfeeding workers time off work to perform this activity, but employers are under a duty to reasonably accommodate such a request. A woman may provide the employer with written notice that she is breastfeeding and the employer may, where it is reasonable to do so, adjust the employee's conditions or hours of employment to comply. If this is not possible or would not avoid risks identified in a risk assessment conducted by the employer, the employer should suspend the employee for as long as is necessary to avoid the risk. Employers are under a duty to provide suitable facilities at work for women who are breastfeeding, and a refusal to allow a breastfeeding mother to breastfeed (through a change of her hours of work) or to express milk, may result in unlawful sex discrimination. Employers must also undertake an appropriate risk assessment for breastfeeding workers (as required under EU Directive 92/85/EEC). Where, as in the case of *Otero Ramos v Servicio Galego de Saude*, a (breastfeeding) woman working

in the accident and emergency department of a hospital considered that the employer's conclusion that her job was 'risk free' was in breach of the Directive, a prima facie case of discrimination is established. In such a situation the employer would then have to demonstrate that the required risk assessment had been completed in compliance with the law.

## 22.18.2 Parental Leave

The Maternity and Parental Leave Regulations 1999 allow all employees with one year's continuous employment, to take a period of up to 50 weeks of leave and up to 37 weeks of pay (shared between the parents) to care for their children (including adopted children). Following this period, the employee may take
p. 605 13 weeks' unpaid leave for each child ↵ insofar as this is taken before the child's fifth birthday (eighteenth birthday in respect of children with a disability). The employee must, as a minimum, give at least four weeks' notice before any leave is taken, and they must further provide double the notice period in relation to the time taken (up to the 13 weeks). An employer is entitled, where this is reasonable in relation to the needs of the business, to postpone the leave for a period of up to six months.

The employer must allow the employee to return to their job following the leave (or a similar job if more than four weeks of leave is taken) on the same basis and hours that are no less favourable than when they left. To enable the employer to run the business effectively and with certainty of staffing levels and so on, the Regulations require that employees may take leave in 'bundles' rather than one continuous block, but these must be in blocks of one week and not exceed four weeks' leave if taken in this manner.

Individuals taking parental leave receive pay if they pass the eligibility criteria. Where the individual or their partner ends their maternity or adoption leave and pay (or Maternity Allowance) early, they may take the remainder of the 52 weeks of maternity or adoption leave as Shared Parental Leave and take the rest of the 39 weeks of maternity or adoption pay (or Maternity Allowance) as Statutory Shared Parental Pay during that time. Note, however, that paying men on shared parental leave less than an enhanced rate of pay on maternity leave (paid to women) is not discriminatory. The Court of Appeal in the joined cases *Ali v Capita Customer Management Ltd and Chief Constable of Leicestershire v Hextall* held that an exception to a comparison between employees for 'special treatment afforded to a woman in connection with pregnancy or childbirth' was sufficiently broad to include enhanced maternity pay. Further, the contractual basis upon which the difference in pay was based was permitted because whilst the EA 2010 implies an equality clause into all contracts of employment, it does not apply where the discrimination in question is specifically excluded: 'A sex equality clause does not have effect in relation to terms of work affording special treatment to women in connection with pregnancy or childbirth.' (para. 2 of Schedule 7).

## 22.18.3 Maternity and Paternity Leave

ERA 1996 provides pregnant employees with a right of 26 weeks of Ordinary Maternity Leave, and a further 26 weeks of Additional Maternity Leave. During the leave, the employee is entitled to receive any contractual benefits as if she were at work. Whilst the woman may take all of this period of leave, some may wish to return to work sooner. She is entitled to do so, following a period of two weeks' compulsory maternity leave (four weeks if she works in a factory) following the birth of the child, when she has provided the employer

with at least eight weeks' notice of her wish to return. The woman must inform her employer no later than the fifteenth week before the expected due date of the child that she is pregnant, the expected due date of the child (evidenced through the maternity certificate called MATB1—a specimen form is included with the online resources), and when she wishes to start maternity leave (and the employer should notify her, in response, of the date for the leave, within 28 days of the employee's notification). If the employer fails in this obligation the employee may have protection against any dismissal or less favourable treatment by not returning to work on time.

Where the employee has accrued one year's continuous employment before the eleventh week of the expected due date of the birth, she has the right on return to have her rights of employment intact. She is also entitled to the terms and conditions of her employment to accrue during the leave (such as pension contributions),
p. 606 except for her wages—and the employee is also bound by the terms of her contract during this period. ↵ A further extension to the employee's rights was the introduction of 'keep in touch' days where an employee on maternity leave can return to work (and be paid) for up to 10 days without losing her right to SMP. If the employee has taken more than four weeks of maternity leave, she is entitled to return to a suitable alternative position if it is not reasonably practicable for her to return to the same job she left. In *Blundell v St Andrew's Catholic Primary School* a primary school teacher was returned to a job teaching different pupils in a different year to when she left. The EAT stated that a consideration of returning to the same job involved consideration of the nature, capacity, and place of employment.

Whilst she is not entitled to be paid her wages during the leave (although many employers provide such a scheme—on varying bases), the employee will receive SMP for the first 39 weeks of the leave if she qualifies. To qualify the employee must have been employed by the same employer continuously for at least 26 weeks into the fifteenth week before the week of the due date (called the qualifying week); and be earning on average at least an amount equal to the average weekly earnings lower earnings limit (for 2019–20 this is £118). If the employee does not qualify for SMP, the employer must inform her of this, and the reasons, by issuing her an SMP1 form, which will help her to claim Maternity Allowance.

The Paternity and Adoption Leave Regulations 2002 provides the father of the child with the right to take one or two weeks' paid leave (although the two weeks' leave must be taken consecutively) to be taken within 56 days of the child's birth. The man's continuity of employment and other benefits continue to accrue during this time. In order to receive the leave the employee (the man) must have responsibility for the child's upbringing (or expect to have this responsibility), he must be the child's biological father or the husband/partner of the child's mother, and he must have accrued 26 weeks' continuous employment 15 weeks before the expected due date. To qualify for the pay during the leave, the man must have been making NICs.

Fathers of children due on or after 3 April 2011 who satisfy the qualification criteria are entitled to Additional Paternity Leave (APL)—but this was abolished from 5 April 2015 after the introduction of the Children and Families Act 2014 discussed in the next section.

## 22.18.4 Extension of Rights to Parents Adopting Children

Rights for parents who are to adopt children were provided in the Paternity and Adoption Leave Regulations 2002. At the time of writing, the members of the couple seeking to access the rights provided in the Regulations must have worked for the employer continuously for at least 26 weeks and be 'newly matched' with a child through an adoption agency, and this can be a domestic adoption or an inter-country adoption following the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) (No. 2) Regulations 2007. The 2007 Regulations extended the definition of an adoption agency to include private foster care and a residence order. However, as of April 2015, statutory adoption leave will apply from the first day of the employee's engagement with no qualifying criteria as above being required, and statutory adoption pay is being equalized with that of statutory maternity pay—90 per cent of the primary adopter's pay for the first six weeks of leave.

The Children and Families Act 2014 (along with several implementing statutory instruments) provides qualifying employees with several extensions to the right to request flexible working. These will make important changes to employment including:

- *Right to attend antenatal appointments:* With effect on or after 1 October 2014, the partner of the pregnant woman (the father-to-be) is allowed (unpaid) time away from work to attend up to two antenatal appointments with the woman.

p. 607

- *Shared parental leave and pay:* Very significantly, and a genuine boost to combat the historic discrimination faced by women of childbearing age, with effect from 5 April 2015 (applying to babies born on or after this date), the right to 52 weeks' maternity leave (39 paid weeks) will remain for women but those with partners (defined as husband, partner, and same-sex civil partner), who have at least 26 weeks' continuous service by the fifteenth week of the expected week of confinement, will have the ability to end their maternity leave and share the remaining leave, and pay, with their partner as shared parental leave and pay. The expectation is for the leave to be taken in one continuous period of time, but the employee may request it to be taken over a period of shorter blocks of time (of at least one-week duration) with the agreement of the employer. Following introduction of the shared parental leave provisions, ordinary paid paternity leave will continue but additional paternity leave and pay is to be abolished.
- Both parents are entitled to 20 keeping-in-touch days in addition to the existing 10 days that women on maternity leave currently have access to.

## 22.18.5 Family-Friendly Policies

When elected to government, the Labour Party sought to introduce protective rights for those at work and to cooperate with the EU in the extension of rights for workers. One such measure was to facilitate family-friendly working practices, and enable those with child care and other dependants' responsibilities to work, but also to be able to take leave or change their work when required. As such, employees may take reasonable time off work to provide assistance to a dependant (who may be a child, parent, spouse, or partner and extends to any other person who reasonably relies on the employee to make arrangements for the provision of care). ERA 1996, s. 57A provides the employee with a right to a 'reasonable' amount of (unpaid) time off to look

after a dependant who is ill, has given birth or is injured, in relation to an unexpected incident at a school involving a child of the employee, due to unexpected problems in the provision of care for a dependant, or where a death occurs to an employee's dependant. An employee unreasonably denied the right to leave may claim within three months of the refusal to a tribunal, which can award compensation.

## Conclusion

This chapter has considered the enactment of the new legislation to promote equality in the workplace and beyond. EA 2010 has repealed and refocused previous legislative provisions, and in codifying the principles from the European and domestic courts, it has aimed to simplify equality laws. The increased rights of workers, extension of these to consumers, and new obligations on employers to promote equality at work will present interesting challenges in the future. Many trading partners and customers require businesses to be seen to be following equality laws as a symbol of their being a good and ethical employer and the type of firm with whom they wish to do business. Promoting equality is not just a legal requirement. Purposely adopted into an organization's culture, it can instil respect, transparency of decision-making, and a better working environment for all.

The book now continues to examine the regulations placed on employers through contracts of employment and statute, such as to protect the health and safety of workers.

p. 608

## Summary of main points

## Protected characteristics

- The protected characteristics in the codified Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

## Discrimination law

- EA 2010 prohibits discrimination in certain areas before employment (at advertising/interview stage), during employment, and following employment (providing/refusing to provide references, equal pay claims).
- Employers may be liable for acts of harassment against their employees by third parties.
- English law is subject to interpretation in conformity with EU laws and decisions of the Court of Justice.
- Discrimination may be 'direct' or 'indirect', involve victimization, and harassment.
- A comparator is required to establish a claim.
- Claims have to be lodged at a tribunal within three months of the last complained of act of discrimination.

## Sex discrimination in pay

- All contracts of employment are deemed to include an equality clause. Claims have to be made on the basis of discrimination based on the claimant's sex.
- English law must be interpreted in conformity with EU laws and decisions of the Court of Justice of the European Union.
- The term 'pay' includes all consideration the worker receives from the employer.
- A claim must be made under one of three 'heads' of complaint—like work, work rated as equivalent, and work of equal value.
- Claims have to be made with reference to a comparator from the same employment and in claims of direct sex discrimination in pay, a hypothetical comparator may be used.
- Equal value claims can include a claimant who has been rated as performing 'higher' work (not equal work) than the comparator.
- The employer can raise a 'material factor' defence that a difference in pay is not due to the sex of the claimant but due to reasons such as responsibility, market forces, experience, and regional variations.

## Pregnant workers

- Dismissal of a pregnant employee for anything to do with her pregnancy is automatically unfair dismissal.
- The woman has to demonstrate unfavourable treatment due to her pregnancy.
- The woman must inform her employer of her pregnancy and the employer is required to perform a risk assessment of the workplace to ensure it does not place the woman, or her unborn child, at risk.

## Maternity rights

- Employees with one year's continuous employment may take 13 weeks' unpaid leave for each child (to be taken before the child's fifth birthday—eighteenth birthday where the child has a disability).

p. 609

- An employee who has given birth has the right to 26 weeks of Ordinary Maternity Leave (OML) and a further 26 weeks of Additional Maternity Leave (AML).
- Statutory Maternity Pay, Maternity Allowance, Statutory Paternity Pay, and Statutory Adoption Pay are available where appropriate.
- The father, or employee with responsibility (or expected responsibility) for the child's upbringing, is entitled to take two weeks' Statutory Paternity Leave and may, after 5 April 2015, qualify to share the mother's (right to) paid leave.
- Rights to leave have been extended to adopting parents.

## Family-friendly policies

- Employees may take reasonable time off from work to provide assistance to a dependant (child, spouse, parent, partner, or someone who relies on the employee for care); or to take time off when the dependant is ill, has given birth, been injured, has an unexpected problem relating to the dependant's care, or in the event of the death of a dependant.

## Summary questions

## Essay questions

1. The sex discrimination laws in the UK have offered increasing levels of protection to women workers. Some commentators have suggested that this is unfair and should be restricted, particularly in matters to do with pregnancy. With specific reference to the Equality Act 2010, explain how the law protects women workers and whether these Acts have been successful.
2. 'Despite a rather benign interpretation by the judiciary, and judicial development over the last 40 years, the practical impact of the Equal Pay legislation has been very disappointing in securing equality of pay between men and women.'

Critically analyse the above statement.

## Problem questions

1. All Bright Consumables (ABC) Ltd has placed an advertisement in the local newspaper for the recruitment of a new member of staff to act as assistant manager in a new shop it is opening. Due to the high proportion of immigrants from Poland living in the area, the advert specifies that the applicant must be able to speak Polish. Margaret, who has several years' experience in management, applies for the position but is rejected as she only speaks English. Despite this shortcoming, she satisfies each of the essential characteristics identified in the job specifications.

   Sofia also applies for the position of assistant manager at ABC. Sofia is a wheelchair user and is informed at the interview that whilst she satisfies the criteria for the position, the office where the management team are based is on the second floor of the building and the only access is via stairs. The toilets in the building are also located on the second floor and ABC has no plans to move either the office or the toilets. As such, Sofia's application is rejected.

   Lena is appointed to the position of assistant manager having satisfied all the relevant criteria and performing well in the interview. She lives in a same-sex relationship with Carla. ABC has a policy of providing its staff with a travel discount for flights in Europe, and this extends to the spouse of the staff. When Lena claims the discount for herself and Carla she is informed that ABC only recognizes marriage or cohabitation between persons of the

p. 610 opposite sex, and therefore ABC refuses to provide the discount to Carla. Soon after ↵ this request, Lena begins to receive abusive notes on her desk and on the staff notice board about her sexuality. When she complains to senior management, Lena is told to 'grow thicker skin' and there is nothing ABC can do about it.

Advise each of the parties as to any legal rights they have.

2. Consider Redmount Borough Council's (RBC) potential liability in the following circumstances:

Benny applied for an advertised post in the parks department of RBC as a delivery operative. Following his rejected application for a post he considered himself to be qualified for, he asked RBC for the reason and any other feedback. Benny was informed that RBC had recently adopted a policy, following discovery of an under-representation in the workforce of women and persons from ethnic minority groups, that these groups would be given priority of appointment and promotion. Any person not from these groups would not be considered for the position.

Dora was recently appointed as a speech therapist for RBC. She was appointed at the top of the pay scale. Diego is employed by RBC as a consultant and is paid £10,000 per annum less than Dora although he considers his job as being of equal value to RBC as the speech therapists. Further, most of the speech therapists are women whilst most of the consultants are men. RBC state that the reason for the difference in pay is to facilitate the recruitment of speech therapists from the private sector where salaries are higher. There are very few speech therapists in the public sector so RBC has to match/improve on the salaries paid in the private sector to entice the therapists to work for the Council.

RBC employed Isa, a lesbian, five months ago as a care assistant at a home for delinquent girls which is under the control of the Council. When Isa's sexual orientation was discovered, she was dismissed as it was considered that she would be an 'inappropriate role model for troubled teenagers'. The dismissal letter to Isa read 'Given that these are highly impressionable girls, often from broken homes, your lifestyle choice makes you unsuitable for continued employment.'

Advise each of the parties as to their legal rights.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-22-indicative-answers-to-end-of-chapter-questions?options=name>*.

## Further Reading

### Books and articles

Bennett, M., Roberts, S., and Davis, H. (2005) 'The Way Forward: Positive Discrimination or Positive Action?' *International Journal of Discrimination and the Law*, Vol. 6, No. 3, p. 223.

Oliver, H. (2004) 'Sexual Orientation Discrimination: Perceptions, Definitions and Genuine Occupational Requirements' *Industrial Law Journal*, Vol. 33, No. 1, p. 1.

Pigott, C. (2002) 'Knowledge and the Employer's Duty to Make Reasonable Adjustments' *New Law Journal*, No. 152, p. 1656.

Riley, R. and Glavina, J. (2006) 'Sexual Orientation Discrimination—Adequate Investigation of Employee Grievance' *Employer's Law*, November, p. 10.

Steele, I. (2010) 'Sex Discrimination and the Material Factor Defence under the Equal Pay Act 1970 and the Equality Act 2010' *Industrial Law Journal*, Vol. 39, No. 3, p. 264.

p. 611

### Useful websites, Twitter, and YouTube channels

http://www.acas.org.uk *<http://www.acas.org.uk>*

@acasorguk

https://www.youtube.com/user/acasorguk *<https://www.youtube.com/user/acasorguk>*

The website of the Advisory, Conciliation and Arbitration Service, which offers practical guidance and assistance on all forms of employment matters.

https://www.gov.uk/browse/business *<https://www.gov.uk/browse/business>*

Information, forms, and ideas for businesses to comply with the law, expand their business, develop networks with others in the locality, and so on. It is a national organization, but has information specific to regions throughout the UK to ensure relevance and the practical approach that many businesses want.

https://www.gov.uk/government/organisations/government-equalities-office *<https://www.gov.uk/government/organisations/government-equalities-office>*

@Govt_Equality and @Govt_Women

Government Equalities Office is the body established to formulate the equality and legislative strategy of the Government. These are excellent sources of easily accessible materials and explanations of the legislation. The second Twitter link is the Government Equalities Office focusing on issues faced by, and specifically related to, women.

http://www.legislation.gov.uk/ukpga/2010/15/contents *<http://www.legislation.gov.uk/ukpga/2010/15/contents>*

The Equality Act 2010.

Telephone advice

ACAS runs a helpline for businesses of all sizes (whether in the public or private sector) providing practical help on equality and diversity issues. It is available on the following number: 0845 600 34 44.

## Online Resources

**Visit the online resources** *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-22>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

## Related Links

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Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/marson-and-ferris-concentrate4e-resources/marson-and-ferris-concentrate4e-diagnostic-test>*

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