

EQUALITY & DIVERSITY IN THE WORKPLACE: RECRUITMENT ISSUES / COMPLEX IDENTITIES

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Understanding law, understanding you



Hello

Agenda

- Potential pitfalls when recruiting new employees, from an equality and diversity perspective
- What the law says and what should be best practice
- Complex gender identities, recent case law in this area and practical tips

Discrimination – Brief Overview



Discrimination	
Equality Act 2010	
Prohibits discrimination & harassment in recruitment	Age
	Disability
	Gender Reassignment
	Marriage and Civil Partnership
	Pregnancy and Maternity
“Protected Characteristics”	Race
	Religion or Belief
	Sex
	Sexual Orientation

Discrimination – Brief Overview



Discrimination	
Direct	Indirect
Because of a protected characteristic, A treats B less favourably than A treats or would treat others.	Acts, decisions or policies which are not intended to treat anyone less favourably, but which in practice have the effect of disadvantaging a group of people with a particular protected characteristic.
No direct discrimination to treat a disabled person more favourably than a person who is not disabled, or to afford women special treatment in connection with pregnancy or childbirth.	Can be objectively justified.

Discrimination – Brief Overview

Discrimination	
Harassment	Victimisation
<p>A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either:</p> <ul style="list-style-type: none">• violating B's dignity, or• creating an intimidating, hostile, degrading, humiliating or offensive environment for B.	<p>Victimisation occurs where a person (A) subjects another person (B) to a detriment because either:</p> <ul style="list-style-type: none">• B has done a protected act.• A believes that B has done, or may do, a protected act.

Discrimination in recruitment



An employer (A) must not:

- Discriminate against or victimise a person (B)
 - in the arrangements (A) makes for deciding to whom to offer employment;
 - as to the terms on which (A) offers (B) employment;
 - by not offering (B) employment *[Section 39 Equality Act 2010]*.
- In relation to employment by A, harass a person (B), who has applied for employment *[Section 40 Equality Act 2010]*.

What are the arrangements?



Concept of “arrangements” is construed broadly

- In a recruitment context, it is likely to include:
 - Format and content of application forms
 - Physical arrangements, location and timing of interviews
 - Job and person specification
- Theoretically, a discrimination claim can also be brought by someone who has not even applied for the job
 - Based on the content of the job advertisement
 - Statement made by the employer or recruitment agent

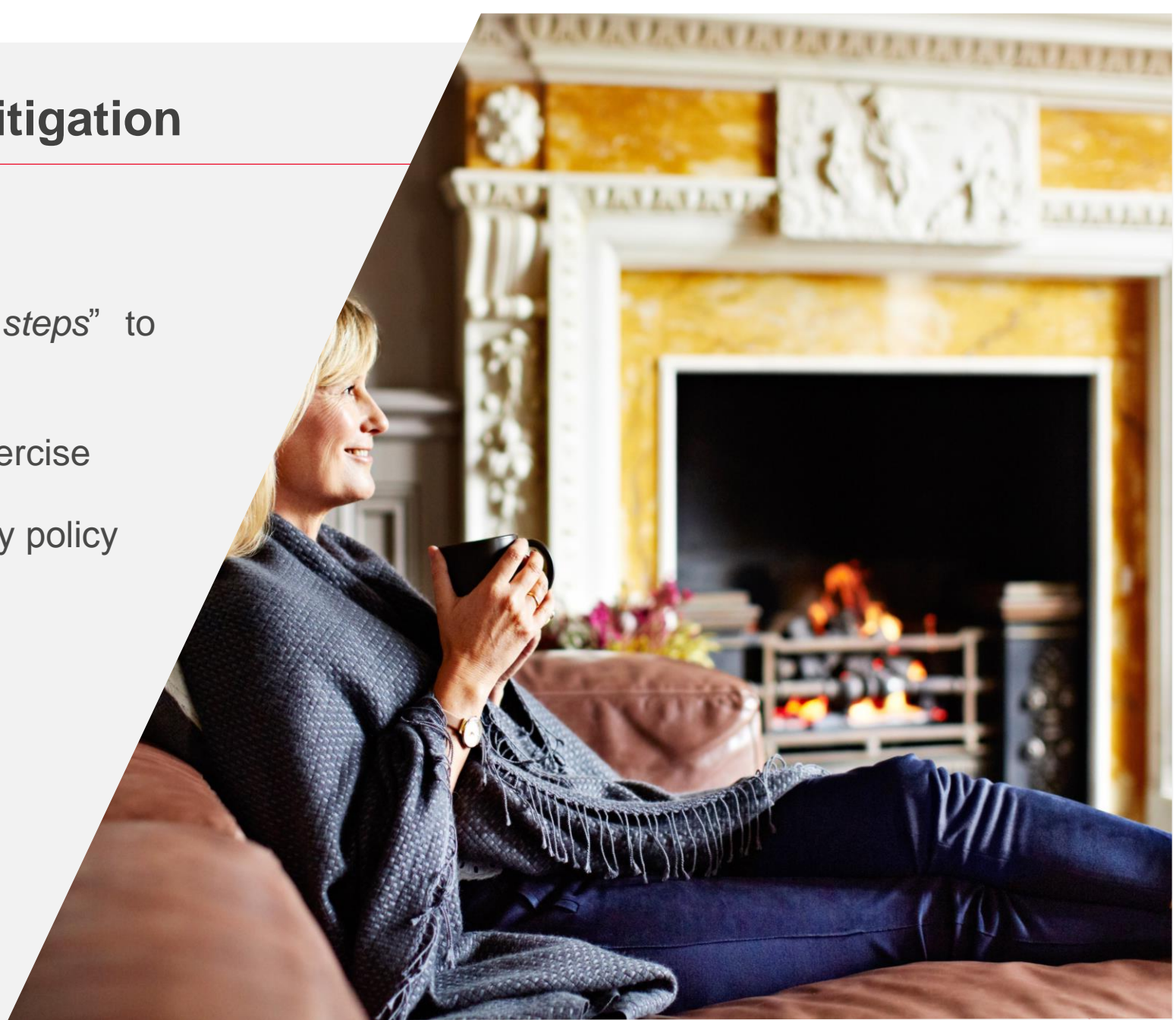
Who can be liable for discrimination in recruitment

- You!
- Other employees (responsible for discrimination)
- Employer is
 - Vicariously liable But there is...
 - *“All reasonable steps”* defence
 - Acts of recruitment agents



Avoiding Discrimination Litigation

- Employer took “*all reasonable steps*” to prevent the discriminatory act
- Preparation for the recruitment exercise
- Training on the employer’s equality policy and its application to recruitment



Occupational Requirements / Positive Action

- Some exceptions to discrimination that is otherwise unlawful
 - OR exceptions
 - Where, having regard to the nature or context of the work, being of a particular protected characteristic (or not being a transsexual, married or in a civil partnership) is an OR
 - Application of the requirement must be a proportionate means of achieving a legitimate aim
 - Positive Action
 - Where an employer reasonably believes that persons with a particular protected characteristic are disadvantaged or that their participation in an activity is disproportionately low, the employer can treat a person with the relevant characteristic more favourably than others in recruitment or promotion, as long as the person with the relevant characteristic is “as qualified as” those others
 - The action taken is a proportionate means of achieving the aim of overcoming or minimising the disadvantage

Employment Statutory Code of Practice

Equality and Human Rights Commission Employment Code of Practice

- Statutory Codes of Practice:
 - ♦ can be used in evidence in tribunal proceedings; and
 - ♦ taken into account by tribunals when deciding claims
- Produced to support the EqA 2010
- Sets out recommended practice for employers
- Part Two, Chapter 16 specifically considers avoiding discrimination in recruitment

Best Practice Tips

- General Points
 - Training managers
 - Document the process: create a paper trail
 - Disclosable record of decision-making
 - Applies to each step from shortlisting to appointment
 - Records should demonstrate decisions based on objective evidence of each candidate's ability to do the job

Best Practice Tips

- Job Description/Person Specification
 - Should accurately describe the duties and responsibilities of the post
 - Focus on skills and experience required for the post
 - Consider whether the job can be done flexibly or on a part-time basis
 - Consider equivalent qualifications
 - Criteria and attributes should be capable of being tested objectively

Best Practice Tips

- Advertising the vacancy
 - All forms of job advertisement are covered by the EqA 2010
 - An employer must not discriminate:
 - In its arrangements for advertising (or not advertising) a job
 - Through the content of the advertisement
 - By inducing third parties, such as recruitment agencies, to discriminate
 - EHRC Code cautions against recruitment based on recommendations
 - Wording of job advertisements could give rise to discrimination claims and evidence a discriminatory culture
 - Use gender neutral terms

Best Practice Tips

- Selection – Shortlisting
 - For consistency, same staff should be responsible for selection decisions in any given recruitment exercise
 - Using more than one person reduces the risk of an unbalanced or overly subjective decision
 - Agree a marking system and a cut-off score for selection in advance
 - Mark separately before agreeing a final mark
 - Weighting given to items in the person specification should not be changed during shortlisting to manipulate the process

Best Practice Tips



- Written/psychometric tests
 - Ensure arrangements for holding tests, interviews, or using assessment centres, do not put any candidates at a disadvantage in connection with a PC
 - Such tests should not be the sole method of assessment
 - Advance notice should be given to candidates if these testing methods are to be used

Best Practice Tips

- Arrangements for interview
 - Be as flexible as possible
 - Consider reasonable adjustments or other necessary changes
 - Wheelchair user access
 - Assistance for candidates with sight or hearing impairments
 - Timing of interviews
- EHRC Code
 - Ask candidates in advance, and again on the day, if they need any reasonable adjustments

Best Practice Tips

- Interview
 - Panel should be trained to reduce the possibility of unlawful discrimination
 - Training should help them:
 - Recognise when they are making stereotypical assumptions
 - Apply a scoring method objectively
 - Prepare questions based on the job description/person specification
 - Avoid irrelevant questions
 - ♦ Assumptions should not be made about who will “fit in”

Best Practice Tips

- Feedback
 - Good practice, if requested
 - Can be written or verbal
 - Any negative or critical feedback should be directly related to the candidate's failure to meet the requirements of the role or person specification
 - Can be a crucial document in any tribunal proceedings
 - Comments should be capable of being supported objectively
 - Refusal to give feedback may be taken into account

Pre-Employment Health and Disability Enquiries

- Except in specific circumstances, it is unlawful to ask about a disability or health until the applicant has been offered a job
- Questions relating to previous sickness absence – relate to disability or health
- Unlawful for an agent of the employer to ask such questions
- Limited exceptions
 - Ascertain if reasonable adjustments needed prior to an assessment/interview
 - Purposes of monitoring the diversity of applicants
 - Enable a person to benefit from positive action measures
 - Occupational requirement for a person with a specific impairment for a job
 - National security
 - Relates to person's ability to carry out an intrinsic function of the job

Sam Smith excluded from gendered categories at 2021 Brit awards

Solo male and solo female categories mean no room for chart-topping non-binary singer, who calls for awards to reflect society

Calls for 'X' gender option in UK passports to be raised in Commons

Lib Dem MP who is bringing private member's bill says move would make a big difference

Census 2021: England and Wales gender question 'a good first step'

By Nicola Bryan
BBC News

The law in practice

- Direct gender reassignment discrimination (*Section 13(1) EqA*)

“Direct discrimination occurs where, because of gender reassignment, a person (A) treats another (B) less favourably than A treats or would treat others”

- Saleswoman informs her employer that she intends to spend the rest of her life living as a man. As a result of this, she is demoted to a role without client contact. The employer increases her salary to make up for the loss of job status. Despite the increase in pay, the demotion will constitute less favourable treatment because of gender reassignment. (Paragraph 3.6, EHRC Code.)
- *Sheffield v Air Foyle Charter Airlines Ltd ET/1200389/97*
- Association and perception
 - Friend or family member
 - A masculine-looking woman applies for a job as a sales representative, and the sales manager thinks that she is transsexual because of her appearance and for that reason does not offer her the job (paragraph 3.21, EHRC Code).
- Indirect discrimination

The law in practice cont'd

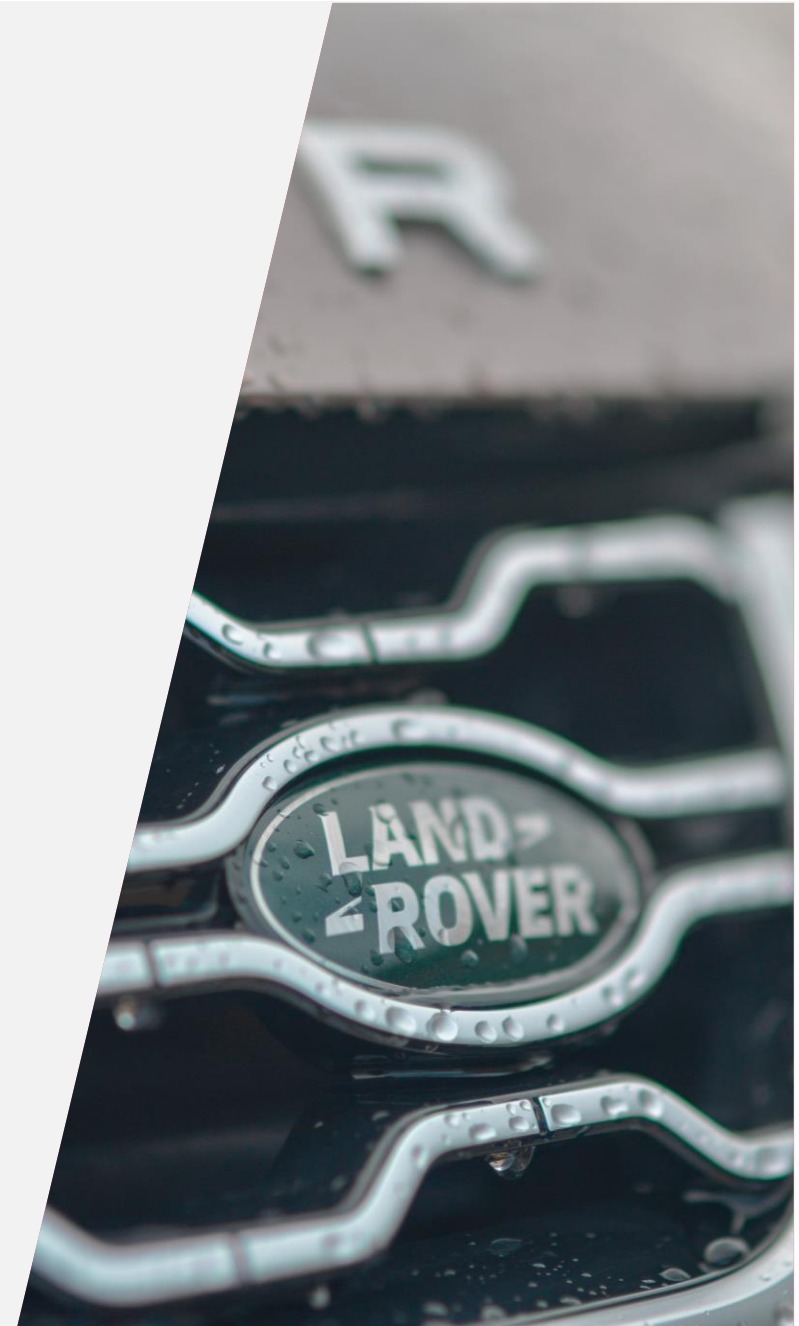
- Gender reassignment harassment (*Section 26(1), EqA 2010.*)
- Harassment related to gender reassignment takes place when both:
 - A engages in unwanted conduct related to gender reassignment.
 - That conduct has the purpose or effect of:
 - violating B's dignity; or
 - creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - In deciding whether the conduct has the effect referred to above, the following are taken into account:
 - B's perception.
 - The other circumstances of the case.
 - Whether it is reasonable for the conduct to have that effect.
- *Chapman v Chief Constable of Essex Police ET/3200488/13*

Section 7 Equality Act 2010

- (1) A person has the protected characteristic of gender reassignment if the person 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.
- (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
- (3) In relation to the protected characteristic of gender reassignment—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
 - (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

Taylor v Jaguar Land Rover Ltd

- On 14 September 2020, an employment tribunal upheld claims for harassment, direct discrimination and victimisation on the ground of gender reassignment brought against Jaguar Land Rover Ltd by one of its engineers, Ms Taylor, who, having identified as gender fluid/non-binary, usually dressed in women's clothing.
- Ms Taylor claimed that she was subsequently subjected to insults and abusive jokes at work, suffered difficulties with the use of toilet facilities and managerial support.
- The Claimant's claims for harassment, direct discrimination and victimisation on the ground of gender reassignment were all upheld. The Tribunal awarded £180,000 in compensation in October 2020. Jaguar Land Rover has apologised to the Claimant and has stated that it will use the outcome to inform its diversity and inclusion strategy.





Practical tips

1. Facilities
2. Bespoke policy / careful policy drafting
3. Training
4. Dealing effectively with complaints from trans employees
5. Confidentiality and privacy
6. Non-gendered dress codes/uniforms
7. Use correct pronouns/preferred name

Any Questions?



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