

# Challenging Discrimination

HOW TO BUILD AN  
EFFECTIVE CASE

A TOOLKIT FOR  
UCU MEMBERS

# Time limits

**TIME LIMITS** in this guidance refers to the legal time limits (also referred to as limitation) for bringing an employment tribunal claim.

Generally the time limit is three months less one day from the act of discrimination.

If you or your UCU representative believe you have a case for discrimination, please make sure you inform your regional office who can confirm time limits and advise on the strategy for going through the internal procedures.

Working out when the time limit runs from is important and as a first step you will need to identify the act of discrimination which can be a one off act, a series of acts or an omission.

**A. ONE OFF/SINGLE ACT OF DISCRIMINATION** The deadline is three calendar months less one day from the date of the discriminatory act or from when a decision is taken which results in a discriminatory act. Where an employee claims that the decision to dismiss was discriminatory, the time limit runs from the date of dismissal, not when notice of dismissal was given.

**B. CONTINUING ACTS OF DISCRIMINATION** A continuing act is where there is a continuing state of affairs such as a policy or practice of discrimination or a campaign of ongoing harassment. The time limit for lodging a complaint is the last act. Where there are a series of distinct acts which are unrelated, the time limit is treated as if each act in the series is a single act and, as such, the time limit is three calendar months less one day from each act.

**C. DISCRIMINATORY OMISSIONS** This occurs where there has been a failure to do something, such as a failure to promote someone or a failure to make a reasonable adjustment. In the case of a failure to promote, the time limit is three calendar months less one day from when the decision was made. Where the employer has failed to make a reasonable adjustment, the time limit is three calendar months less one day from when it would have been reasonable for the employer to have made the adjustment.

For more detailed information on time limits you should refer to the UCU Guide to Employment Tribunals.

[https://ucu.custhelp.com/app/answers/detail/a\\_id/301/~-/time-limits-for-employment-tribunal-claims](https://ucu.custhelp.com/app/answers/detail/a_id/301/~-/time-limits-for-employment-tribunal-claims)

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## INTRODUCTION

UCU is committed to eliminating discrimination in the workplace. UCU ensures equality is embedded in campaigns, policy, pay negotiations and how we organise and consult.

Being subject to discrimination can be incredibly upsetting and undermining. It can feel like a personal attack, and those subject to it can feel isolated and vulnerable. It is important that UCU representatives and members work together to identify what treatment is discriminatory and challenge employers where that is the case.

Identifying and pursuing a claim for discrimination is incredibly challenging for both UCU members and UCU representatives because employers either deny that there has been different treatment or point to an 'innocent' explanation for the different treatment.

Discrimination takes many forms and people respond differently to how they have been treated in a variety of circumstances.

This toolkit is designed to help you and your UCU representatives identify that what you have experienced amounts to discrimination, how to gather relevant evidence and the practical steps and procedures to be followed through internal processes and, if applicable, to the employment tribunal stage. Not all cases will result in an employment tribunal claim. Many claims of discrimination can be resolved through the internal procedures and this guide will ensure that you and your UCU representatives have put your best case forward.

As a trade union, UCU achieves its greatest change when it works collectively whether this is at local, regional or national level. An individual case may expose a discriminatory culture within an institution, for example, homophobia or misogyny which has resulted in a lack of promotion for lesbians and gay men and women. This can be addressed collectively and may result in improvements to the employer's practice, policies or procedures which benefit all workers.

This toolkit should be read alongside other UCU guidance (see Resources). The UCU Guide to Employment Tribunals gives full details of time limits as well as advice on how to obtain further information from the employer. The UCU guide to handling casework, provides advice and guidance for UCU representatives including preparing for the first meeting with a UCU member, identifying and understanding the member's concerns and how to support the member in seeking a resolution.

The sooner you discuss your concerns about how you have been treated with your UCU representative, the sooner they can support you. There are also very tight time limits in the event that your concerns are not resolved internally and a legal claim needs to be pursued (see [Time Limits](#) on the inside cover).

## Overview of the law

This section provides an overview of the main legal principles, it is not a definitive statement of the law nor is it intended to amount to legal advice. Rather it is an aide to assist UCU members and representatives in identifying and challenging discrimination. Please also refer to UCU legal help which is available at <https://www.ucu.org.uk/legal>

The right not to be discriminated against applies from day one of employment. The right applies to most people in the workplace including job applicants, employees (including ex-employees), workers employed on a contract personally to do work (for example hourly-paid staff or those on zero-hours contracts), and contract workers including agency workers and apprentices.

## When can discrimination occur?

In summary employers must not discriminate against a worker:

- when choosing whether to employ them
- when choosing whether to promote them
- in the terms and conditions offered to a worker and on which they are employed
- in relation to access to benefits and services
- when offering training opportunities
- by dismissing or disciplining
- by subjecting the worker to any other detriment (for example in the way in which their grievance is dealt with).

## FORMS OF DISCRIMINATION

The Equality Act 2010 (EqA) protects those who have a protected characteristic from discrimination. A protected characteristic is age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (a full definition of the protected characteristics in the EqA is set out in [Appendix 1](#) of this toolkit).

In this section we examine the different forms of discrimination and the most common responses by employers. This will help to identify the evidence needed to show that different treatment amounts to discrimination and to challenge employers who deny that there has been different treatment or who try to offer a credible alternative reason for the treatment.

The main forms of discrimination are:

- direct discrimination
- indirect discrimination
- harassment
- victimisation
- failure to comply with the duty to make reasonable adjustments
- discrimination arising from disability.

### Direct Discrimination

#### THE LEGAL DEFINITION

This is defined in Section 13 of EqA 2010 which provides that it is unlawful for an employer to treat a worker less favourably because of a protected characteristic than the employer treats or would treat a person who does not have that protected characteristic in the same or very similar circumstances.

Direct discrimination therefore requires that the reason someone has been treated differently is because of the protected characteristic. The best way of showing this is by comparing how others who do not have the same protected characteristic have been or would have been treated (the comparator).

#### EXAMPLE

**A woman senior lecturer applies for the post of professor. A man who is less qualified and has less experience than her is appointed to the post.**

#### CHALLENGING THE EMPLOYER

An employer cannot argue that direct discrimination is justified.

It will be rare for an employer to admit that the reason someone has been treated differently is because of a protected characteristic. In the example above, the

employer may say that the reason she was not promoted was because she was not as experienced or that the other candidate had a better interview on the day.

In order to find out if the employer's reason was discriminatory it will be necessary to examine the employer's explanation. You can do this by comparing the woman's skills, qualifications and experience and how she meets the criteria for the promotion with that of the successful male candidate (the comparator). This will usually mean asking the employer some questions using the ACAS Guidance, 'Asking and responding to questions of discrimination in the workplace', which, is a very useful guide. An example is included at [Appendix 2](#) of this toolkit.

Evidence of how a comparator is treated is crucial to establishing evidence in support of a claim for direct discrimination. In some cases it will not always be possible to find an exact comparator. For example, where a black tutor is disciplined for unauthorised absence because he attended an international conference without permission, evidence of a white tutor who was not given a warning because they took unauthorised leave of absence from work may still be relevant. Although the circumstances are not exactly the same, it does provide some evidence of the different way unauthorised absence has been dealt with. The bigger the difference between the circumstances, the easier it is for the employer to provide a non-discriminatory reason for the difference in treatment.

Where there is no actual comparator, there may be other evidence. In the example in the box, if no-one had been appointed to the post, evidence which shows her obvious ability to do the job and which exposes the employer's explanation as simply not credible is relevant. Evidence could also include the fact that the woman met all the criteria for the promotion, that she had been recommended for promotion, any positive feedback she had during the interview and evidence of the lack of women in the job to which she would have been promoted.

In the absence of strong directly-related evidence, an employer is likely to be able show that the reason she was not promoted was because she was not suitable for the job and not because she is a woman no matter how unfair she may feel the decision was.

### GATHERING EVIDENCE

Evidence that will help to prove direct discrimination could include the following:

- **Evidence of stereotypical views** for example assuming a black male lecturer will take responsibility for supervising difficult students.
- **Evidence of overtly discriminatory or hostile comments** Unless there is a witness to them it can be hard to prove as the employer will usually simply deny that the remarks have been made. In such a situation it is best to record those comments either by sending an email to the person who made the discriminatory comments asking them to retract them or keep notes, such as a diary of comments or action taken.

- **Evidence of irrational treatment of an individual** For example, giving an unjustified low score in a redundancy situation.
- **Trends in employment can also be useful evidence** For example, the institution may publish equality statistics including a breakdown by protected characteristic of those who are promoted, dismissed and have submitted a grievance in order to comply with the public sector equality duty. (See [Appendix 3](#) for a summary of the public sector equality duty)
- **Failure to comply with equal opportunities procedures** A failure to apply good equal opportunities practice or follow provisions of the Equality and Human Rights Commission (EHRC) employment code (see [Resources](#)) can be helpful background evidence.
- **The employer's explanation is not credible** Evidence the employer relies on which it says supports its explanation is crucial. It will be necessary to scrutinise the employer's reason for the treatment and the basis on which they rely on that reason. This can be done by asking the employer 'Why did you act the way you did and on what basis?' and also considering if the employer has acted that way with others who do not have that protected characteristic.
- **Evidence of more than one of the above** is more likely to support an overall picture of discriminatory treatment.

## Indirect Discrimination

### THE LEGAL DEFINITION

Indirect discrimination is defined in Section 19 of the EqA 2010. This occurs where an employer applies a provision, criterion or practice equally to everyone but which puts those with a protected characteristic at a particular disadvantage and the employer cannot justify that disadvantage. In order to justify a disadvantage the employer must show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

The purpose of indirect discrimination is to prohibit unjustified group disadvantage.

### EXAMPLE

**A requirement that all tutors have to work full time. Although the requirement to work full time applies to all tutors, it may put a woman returning from maternity leave at a particular disadvantage because she is not able to work full time due to child care commitments. In that case the employer would need to show that the requirement to work full time is a proportionate means for undertaking the duties of a tutor. Whether a requirement to work full time is proportionate will depend on a number of factors, for example, the nature of the job of the tutor, the student intake and/or the teaching timetable.**



## CHALLENGING THE EMPLOYER

In some cases the aim the employer relies on may not be a legitimate one. For, example, where the employer insists someone has a driving licence or a specific membership of a professional body when it is not necessary for the job.

Even where the employer is able to identify a legitimate aim, the discrimination will not be proportionate if there is a less discriminatory way of achieving that aim. For example, insisting on full time working when there is evidence that the work can be done just as well as a job share.

## GATHERING EVIDENCE

### What is the PCP and who does it affect?

Central to establishing a claim of indirect discrimination is identifying the provision, criterion or practice (known as the PCP) which the employer applies to everyone.

There are lots of different practices and procedures (the PCP) in the workplace which are barriers to recruitment, promotion and good working conditions. Set out below are some examples:

- an expectation to work overtime and/or long hours
- a requirement to have previous acting up experience
- being on a permanent contract
- having obtained a specialist qualification when it is not necessary to do the job
- an ability to drive when it is not necessary to do the job
- membership of certain professional bodies which is not necessary for the job.

When gathering evidence of indirect discrimination it is useful to consider the following key questions:

- What is the PCP and who does it affect?
- Is the aim a legitimate one?
- Is the PCP proportionate or is there a less discriminatory way of achieving the legitimate aim?

It is not always easy to identify the PCP. The worker must be unable to meet the particular requirement at the time it is imposed. For example, insisting a lecturer's full facial features are visible during lectures amounts to a requirement that Muslim women could not meet.

It is necessary to be able to show that other workers who have the same protected characteristic would not be able to meet the same requirement. It is not necessary to show that everyone with the same protected characteristic cannot meet the requirement. It is enough to show that many other workers with the same protected

characteristic would have the same difficulty meeting the requirement. In the example above, it could still be indirectly discriminatory even if there was evidence that some Muslim women choose not to wear the hijab. This is because a requirement which insists a lecturer's facial features are visible during lectures would mean far more Muslim women would still be excluded when compared to non-Muslim women, because non-Muslim women do not wear the hijab.

### **Is the aim legitimate?**

In the example above, the employer would need to be able to establish that the need for a lecturer's face to be visible during lectures met a legitimate aim. The employer may say that it is necessary to ensure better student engagement.

However, it is not enough for an employer to simply assert that better student engagement is achieved by a lecturer's face being visible during the lecture, there must be some other evidence to support this. The employer may rely on student attainment levels. If there is no evidence that student attainment levels are adversely affected the aim is unlikely to be a legitimate one.

Is the PCP proportionate or is there a less discriminatory way of achieving the legitimate aim?

The requirement must be proportionate as well as meeting a legitimate aim. In the case of a woman returning from maternity leave who has her request for part-time working refused, the employer may say that full-time working (the PCP) is necessary to meet the timetable of teaching for that particular subject.

However, if insistence on full-time working would result in the woman not being able to return to work at all the employer should consider if there is a less discriminatory alternative. This could include consideration of a job share, adjustments to the timetable which allow for condensed working (same hours in fewer days) or a review of teaching responsibilities to see if these could be shared.

Where there is a fairer way of achieving a legitimate aim it is likely that the employer cannot justify the PCP.

## **Harassment**

### **THE LEGAL DEFINITION**

Harassment is defined in Section 26 of the EqA 2010 and takes place where a person engages in unwanted conduct which is related to a protected characteristic (other than marriage/civil partnership and pregnancy/maternity) and has the purpose or effect of violating a worker's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Harassment needs only to be related to the protected characteristic. This means that witnesses to harassment are also protected where the conduct has the unwanted effect or purpose. Similarly harassment can also occur where offensive remarks are not directed at a specific individual but the effect amounts to

harassment. For example, during a training session of both men and women, a male tutor makes sexual remarks to the group as a whole which a woman finds offensive and humiliating.

A person can also be subjected to harassment because they are associated with someone who has a protected characteristic. For example, where a worker is subject to offensive remarks about their son who is gay.

Harassment also occurs where the unwanted conduct is of a sexual nature. UCU has produced a model policy and guide on dealing with sexual harassment. Examples of sexual harassment include upskirting, unwanted touching, promising you a promotion in exchange for sexual favours.

<https://www.ucu.org.uk/article/1940/Equality-advice-and-guidance>

Harassment also includes less favourable treatment of a worker because they submit to or reject sexual harassment or harassment related to sex or gender reassignment.

An employer has a defence to a claim of harassment related to a protected characteristic if it can show that it took all reasonable steps to prevent the harassment from occurring in the first place (known as the reasonable steps defence).

#### **EXAMPLE**

**A gay lecturer who is mimicked by a manager speaking in a high pitched voice and acting in a camp manner.**

#### **CHALLENGING THE EMPLOYER**

The employer may deny that the conduct amounts to harassment such as by describing the behaviour as 'banter' between colleagues. The employer may allege that the worker was complicit in the harassment because they engaged in 'banter'.

It will be important to challenge an employer who describes unwanted conduct as banter. Describing unacceptable behaviour as banter is designed to trivialise unwanted behaviour by treating it as 'just a bit of fun'. The employer should be reminded that the so-called banter amounts to unwanted conduct which violates a worker's dignity and/or creates an intimidating, hostile, degrading and humiliating environment. Case law has recognised that some people may engage in so-called 'banter' in an attempt to fit in and even though a worker may have participated in banter, there is a tipping point at which banter becomes unwanted conduct.

The employer may also argue that they did everything they could to prevent the harassment because they have a policy on harassment. Having a policy is not enough if no-one has been trained in it and which should include what is unacceptable behaviour. Generic policies such as dignity at work or bullying and harassment which do not specifically address sexual harassment are unlikely to be enough. Poor quality training or training which was given several years ago is also unlikely to amount to a defence. It will be important to keep a copy of any training in harassment, the dates of the training and details of the provider.

## GATHERING EVIDENCE

Conduct, however offensive, will not amount to harassment unless it is related to a protected characteristic. The conduct can be verbal, written or physical and includes one-off remarks. Evidence of harassment is particularly difficult to establish as most harassment takes place in private. The best evidence of harassment is where it is witnessed by others and those witnesses are prepared to support an individual.

Surrounding circumstances can provide evidence of harassment. For example, evidence of being excluded from social events will be relevant in the example in the box above. Evidence can also be obtained by asking the employer questions using the ACAS 'Ask and Respond' questionnaire (see [Appendix 4](#)). Where there is a joint employer/union equality committee, complaints of harassment may be monitored for trends. For example, there may be evidence of similar complaints against the same manager.

A contemporaneous record of the incident(s) of harassment, such as a diary of incidents recording the time, place, what was said or done and by whom at the time of the alleged harassment, is also important evidence in the absence of any witnesses. It is better that a record is kept at the time it happens or as near to the time of the conduct as possible.

The more credible the evidence given by those subject to harassment the more likely a tribunal will draw an inference that the harassment has occurred.

Where the employer has a policy on harassment consider whether managers and staff have been trained in the policy and if so, when the training took place and for how long. The further back in time the training was provided the less effective it may be as a preventative measure, particularly if there have been a lot of new staff since the training took place. Equally, training which lasted for a short time or was of poor quality will be less likely to be accepted as a reasonable steps defence.

## Victimisation

### THE LEGAL DEFINITION

Victimisation is defined in Section 27 of the EqA 2010. This occurs where a worker is subject to a detriment as a result of a protected act. A protected act includes:

- i. taking a tribunal case under the EqA 2010
- ii. bringing a formal grievance about discrimination or equal pay under the EqA 2010
- iii. making an informal allegation of discrimination
- iv. giving evidence in a colleague's claim or grievance, and

- v. alleging discrimination or doing anything else by reference to the EqA 2010 for example, contacting the Equality and Human Rights Commission (ECHR).

A false allegation is not a protected act if it is made in bad faith.

### **EXAMPLE**

**The employer refuses to give a researcher a reference because they lodged a grievance that they had been subject to racial harassment.**

### **CHALLENGING THE EMPLOYER**

The employer may deny that the worker did a protected act. In the example above the employer may simply deny that the grievance was about racial harassment at all. It will therefore be important to bring as much evidence as possible to the grievance hearing to show that the behaviour complained of amounted to harassment. For example, copies of emails showing that the researcher raised the complaint informally with the line manager first and/or diary notes of the harassment.

The employer may deny that the reason for not providing the reference is because the researcher lodged a grievance but because that they have a policy of not providing references. Alternatively, the employer may argue that they are not providing a reference until it is confirmed that legal proceedings are not being taken because they do not want to compromise the way in which they may defend a claim.

### **GATHERING EVIDENCE**

There will need to be evidence that the worker did a protected act. What is key is that the researcher can show that they believed they submitted a grievance of racial harassment. The fact that the grievance is not upheld is irrelevant. The clearer the wording in the grievance the better the chance of showing that the researcher did a protected act.

There must be a connection between the protected act and the detrimental treatment

Evidence of how the member was treated before and after the protected act may also be useful evidence. Evidence of how others have been treated who have not done a protected act may also be useful in order to establish that the reason why the member has been treated the way they have is because of their complaint. In this example evidence of others who have not done a protected act and who were given a reference will be key.

Similarly, evidence that the researcher does not intend to bring a legal claim can undermine the employer's argument that the reason for not providing the reference is to protect its position in the event of legal proceedings.

## Failure to make a reasonable adjustment

### THE LEGAL DEFINITION

This duty is set out in Sections 20 and 21 of the EqA 2010. The duty to make a reasonable adjustment arises where there is:

- a provision, criterion or practice
- a physical feature of the workplace
- a failure to provide an auxiliary aid (eg hearing loop, voice activated computer system etc)

which puts a disabled worker at a substantial disadvantage in comparison with those who are not disabled. (See [Appendix 1](#) for the definition of a disabled person).

Where one of these requirements applies, the employer is under a duty to take such steps as it is reasonable to take in order to avoid putting the disabled worker at a substantial disadvantage.

The purpose of the duty is to create a level playing field for disabled workers which means that the duty effectively treats those with a disability more favourably in order to create the level playing field.

### EXAMPLE

**A lecturer with lupus is put at a substantial disadvantage by being required to carry out the full teaching requirements**

### CHALLENGING THE EMPLOYER

The employer may argue that the requirement to carry out full teaching duties (the PCP) does not put the disabled worker at a substantial disadvantage when compared with other non-disabled workers.

The employer may argue that the adjustment(s) requested is/are unreasonable or too costly and will not remove the disadvantage. You and your rep will need to prepare arguments against this.

### GATHERING EVIDENCE

In order to establish evidence that the employer has failed to comply with the duty to make a reasonable adjustment it will be necessary to :

- 1 identify the provision, criterion or practice, physical feature or lack of an auxiliary aid
- 2 show that the PCP, physical feature or lack of an auxiliary aid puts the disabled worker at a substantial disadvantage

- 3 show the substantial disadvantage by comparing with an actual or hypothetical non-disabled comparator
- 4 identify what adjustments would remove the substantial disadvantage.

In the example above it is likely that the lecturer with lupus could be at risk of being subject to performance management and/or dismissed (the substantial disadvantage) because they are not able to carry out their full teaching duties (the PCP). Evidence of reasonable adjustments that could be made to ensure that the lecturer can still carry out the main duties, such as report writing from home, will be useful to show that the adjustment will remove the disadvantage.

The employer may argue that report writing cannot be done at home because there is no remote access to the university's secure computer record. In that case evidence that others have written reports remotely will be useful to show that the employer's refusal is unreasonable.

Where the employer argues that new computer software would be necessary to access the university's secure computer which is too costly, the lecturer can contact Access to Work (see [Resources](#)) to see what financial assistance is available and to show that the costs are not unreasonable.

In a case where a disabled tutor is not able to return to work full time following a period of lengthy sickness absence, there will need to be evidence to show that the tutor could for example, return to work on a phased basis for an agreed period. If the tutor could still not return to work on a phased basis consider whether they could return on flexible working. In that case there will need to be some evidence that the tutor's job can be done flexibly. This may include reconsideration of the timetable and evidence of other non-disabled tutors working flexibly.

If it was the case that the disabled worker would not be able to return to work flexibly, the employer is likely to be able to successfully argue that the adjustment is not reasonable. This is because the employer could show that flexible working does not have the prospect of removing the disadvantage because the worker is unable to return to work even if the work was offered on a flexible basis.

## Discrimination arising from disability

### THE LEGAL DEFINITION

This is defined in Section 15 of the EqA 2010. Under this provision it is unlawful for an employer to treat a disabled worker unfavourably because of something arising in consequence of their disability.

An employer has a defence if they can show either that they did not have knowledge of the person's disability or that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

This differs from direct discrimination because the reason for the unfavourable treatment is not the disability itself but for something related to the disability.

## EXAMPLE

Dismissing a member on grounds of capability for sickness absence which is related to their disability where the dismissal was not a proportionate means of achieving a legitimate aim.

## CHALLENGING THE EMPLOYER

The employer may say that they did not know that the member was disabled.

The employer cannot argue that a worker without a disability would have been treated equally unfavourably. This is because it is irrelevant how other non-disabled workers have been treated in a claim on this ground.

The employer may argue the unfavourable treatment was a proportionate means of achieving a legitimate aim. In this case, the employer is likely to argue that dismissal is justified. In particular, the employer is likely to argue that they have a legitimate aim of a reasonable expectation that the worker will carry out their job, that there is no prospect of the disabled worker returning to work and it is therefore proportionate to dismiss.

## GATHERING EVIDENCE

Where an employer denies knowledge of the person's disability, evidence that the member notified the employer of their disability will be necessary. This could be on the application form when they started employment, any subsequent email, a GP's letter sent to the institution and referral to occupational health (OH).

The employer may deny that the unfavourable treatment is as a consequence of disability. In that case it will be necessary to ask the employer why the worker was dismissed. In this case the employer is likely to argue that the reason for dismissal is on grounds of capability because there is no guarantee of full attendance at work. In that case it may be that there are reasonable adjustments that could be made to enable the member to return to work. These could include reallocating some duties and/or alternative working hours. The employer may say that they are not in a position to make adjustments until the member returns to work. In that case it is best to obtain evidence from the member's GP or specialist which says that they will be able to return to work with these adjustments.

Evidence of the employer failing to make a reasonable adjustment (see [Reasonable adjustments](#) above) is more likely to support a claim of discrimination arising from disability.

It is open for an employer to argue that the unfavourable treatment is a proportionate means of achieving a legitimate aim. In most cases, the employer is only likely to succeed in justifying unfavourable treatment if there are no reasonable adjustments it could make.



## Discriminatory dismissals

In some cases the reason for dismissal may also be discriminatory.

### THE LEGAL DEFINITION

An employee who is employed on a contract of employment and who has two years continuous service has a right not to be unfairly dismissed by his employer.

An employer can dismiss an employee for one of the following five fair reasons:

- capability
- conduct
- redundancy
- breach of a statutory duty
- some other substantial reason.

Where the employer has identified a fair reason it must act reasonably when dismissing on those grounds. What is reasonable will depend on the facts and circumstances of the case.

Generally an employer will act reasonably where:

- 1 it warns and consults the employee
- 2 it carries out a reasonable investigation
- 3 it considers an alternative to dismissal (except a claim for gross misconduct)
- 4 the decision to dismiss is a reasonable sanction.

In some cases the reason for the dismissal may not only be discriminatory but it may also be automatically unfair. For example, where it is because of pregnancy or maternity or because of taking maternity, paternity, shared parental leave or unpaid parental leave. In these cases it is not necessary to have two years continuous service.

### EXAMPLES

- dismissing an older tutor because of stereotypical assumptions about their abilities
- dismissing a lecturer with disability because of absence related to their disability
- disciplining a black tutor on grounds of capability where another white tutor with similar levels of capability has not been disciplined.

## CHALLENGING THE EMPLOYER

In most cases the employer will deny that a decision to discipline or dismiss is because of discrimination. Usually they will rely on one of the five fair reasons and argue that they have complied with their own procedures.

It will be important to challenge the employer's reason for dismissal by comparing how others in similar circumstances and who do not have the same protected characteristic have been treated.

It is important to make clear that the dismissal amounts to an act of discrimination at an early stage of the disciplinary or dismissal procedure. Although a claim that the decision to dismiss was discriminatory can be made at the appeal against dismissal stage, the later discrimination is raised the more likely the employer will argue that this is an afterthought. **Please seek advice from your regional official on unfair dismissal cases as soon as possible.**

Similarly resist the temptation to list different acts of discrimination, for example, that the dismissal was discriminatory on grounds of sex, race and disability as this will be used by the employer to undermine a claim that the dismissal is discriminatory at all. Focus on the claim which has supporting evidence to challenge the employer's reason rather than adopting a 'kitchen sink' approach and hoping one of them will work.

## GATHERING EVIDENCE

Evidence will be needed to discredit the employer's reason. This can include the following:

- no evidence which supports the employers reason, for example no issues of capability having been raised (eg from recent appraisals; one to one's, lesson observations, student feedback etc)
- inconsistent treatment with how others have been treated eg a lesser sanction or no sanction being given to someone who does not have the same protected characteristic for the same or similar offence
- witness evidence which shows that the member did not commit the offence.
- selection criteria which was applied in a discriminatory way. For example, a person with a similar attendance record is given a higher score
- a failure to follow the ACAS Code
- a failure to follow agreed disciplinary/dismissal procedure
- discriminatory comments by those who made the decision to discipline/dismiss
- statistics on staffing levels broken down by the protected characteristic
- statistics on disciplinary/dismissals broken down by the protected characteristic which shows a higher proportion of those with the protected characteristic being subject to disciplinary action/dismissal than those who do not hold the same protected characteristic.

## Common examples of discrimination and evidence needed to support a claim

Set out below are some examples of common complaints of discrimination in the workplace. The columns for member's evidence gives suggestions of the kind of evidence the member may have and the kind of evidence the union may have or be able to obtain, which would help to support a claim for discrimination.

The examples are suggestions only and provided as a guide. The evidence depends on the facts and circumstances of the particular case and other evidence may be necessary to support a particular case.

The examples given below are illustrative as are those who identify the evidence. So, for example, where the evidence is identified as being 'Member's evidence' it may in fact be the union representative who is able to gather that evidence and vice versa. As these are examples it should not therefore be taken to mean that a case will succeed.

COMPLAINT	MEMBER'S EVIDENCE	UNION REP'S EVIDENCE
Dismissing a fixed-term lecturer at the end of the term because she is pregnant.	Her contract has been renewed for the last five years.	She has been replaced by another fixed-term contract lecturer.
	The course she teaches is continuing.	The employer failed to follow its fixed-term employee policy and procedure for ending fixed-term contracts eg failed to warn and consult and offer suitable alternative employment.
	Other fixed-term employees teaching the same subjects have had their contracts renewed.	

COMPLAINT	MEMBER'S EVIDENCE	UNION REP'S EVIDENCE
Refusing flexible working for a disabled worker.	What disadvantage are you put to by your current working hours?	Are there are other workers who do not have a disability doing the same job working flexibly?
	What hours do you want to work and why?	Are there other workers who do not do the same job but who have the same disability and work flexibly?
	How will the hours remove the disadvantage?	Are there any proposals to change the timetable?

*continued overleaf*

# Challenging discrimination

	How will the students' needs be met?	Are there any proposals to change the job?
	Are there any other options that would also remove the disadvantage?	Is there a disability policy on flexible working?
	Is there evidence of other adjustments given to other workers?	

COMPLAINT	MEMBER'S EVIDENCE	UNION REP'S EVIDENCE
Sexual harassment	What are the acts of harassment? Give details of the conduct you have been subjected to as well as the name of the person who subjected you to the treatment (or their position if you do not know their name) when (date or approximate time of year), where (in the lecture, staff room, social event etc).	Is the harassment related to a protected characteristic?
	Have you kept a diary of the conduct and other details as above?	Does the employer have a harassment policy and procedure? If so, and a complaint was lodged, was it followed?
	Did anyone witness the harassment? If so, are they willing to be a witness? Even if they are not willing to be witnesses, will they speak to your UCU representative?	If a grievance was lodged, was grievance policy and procedure followed? If not, keep a clear note where the procedure was not followed, eg denied a right of appeal.
	Did you inform your manager or HR of the harassment. If so how did they respond?	Are there any other incidents of harassment you are aware of from other members or staff by the same person? If so record details of the conduct, when and where it took place and if the alleged harasser has been subject to previous disciplinary (formal or informal).
	Did you lodge a grievance? If so what was the outcome? If not upheld did you appeal? If so what was the outcome?	

*continued overleaf*

	Did you lodge a bullying and harassment complaint? If so was this in addition to or instead of a grievance? What was the outcome?	
	If you did not make a complaint why not? (this is not a criticism but to understand your case)	

COMPLAINT	MEMBER'S EVIDENCE	UNION REP'S EVIDENCE
Failure to promote after raising a complaint of discrimination.	What reasons were you given why you were not promoted? Is this in writing?	If the reasons the member was not promoted are not clear consider sending an ACAS Ask and respond questionnaire to the employer?
	Who was promoted? Give the protected characteristic of the person, length of service and post held (prior to promotion).	If the member does not know who was promoted do you or other union members know?
	Provide details of the complaint of discrimination including when it was made and who to?	How have other internal candidates who have not made a complaint been treated in the promotion exercise?
	How were you treated before the complaint? How does that compare with how you have been treated since? (consider appraisals, one-to-ones etc)	

## Obtaining further information

In most cases of discrimination the employer will have information which is relevant to your case. The starting point is to request information from your employer.

If the employer does not respond or you believe that the employer holds more information relevant to your case you can request further information by way of the following:

- ACAS Ask and respond questionnaire which is available on <http://www.acas.org.uk/index.aspx?articleid=4971>
- Subject Access Request under the Data Protection Act 2018,
- Freedom of Information requests under the Freedom of Information Act 2000

You can find details of these in the UCU Guide to Employment Tribunals which is available on the UCU website.

## RECOGNISING YOUR SITUATION AND WHAT TO DO ABOUT IT

If you feel you are facing discrimination, it can be an upsetting and undermining realisation. What is key is that you approach your UCU representative as soon as a problem arises.

Discrimination often feels like it is a personal attack and those discriminated against often question themselves rather than the behaviour of others.

Raising an issue of discrimination in the workplace can be personally stressful even before taking a case to an employment tribunal and can be a long process. UCU is here to support you and help resolve your case whether it is through local negotiations or through a legal route.

It is important that you are able to provide as much information and evidence as possible to support your case.

The checklist below is designed to help you record what has happened to you and help you and your UCU representative gather evidence to take your case forward. You can refer to the section on the law to help you identify the kind of discrimination you have been subject to and the evidence you need to support your case.

### Checklists

It is important that for each act you set out the date, what was said or done and by whom and if there are any witnesses. Unfortunately, a vague generalised act such as 'I have been discriminated against on numerous occasions' will not be enough to progress your issue. The employer will simply argue that they do not fully understand your complaint and are unable to address it.

An example of how to use the checklists is given in the first box to assist you.

#### CHECKLIST 1 – WHAT HAS HAPPENED?

DATE	DETAILS OF WHAT HAPPENED	WITNESS DETAILS
<i>EXAMPLE</i>	<i>EXAMPLE</i>	<i>EXAMPLE</i>
12 June (date of interview )	My application for a senior lecturer post in X department was not successful. The person who was appointed is white and does not have as much experience as me.	X who is a colleague who worked with the person who was appointed.

CHECKLIST 1 – WHAT HAS HAPPENED?

DATE	DETAILS OF WHAT HAPPENED	WITNESS DETAILS

# Challenging discrimination

## CHECKLIST 2 – HOW DOES THE WAY YOU WERE TREATED COMPARE WITH OTHERS?

Consider how someone who does not have the same protected characteristic is, or was, treated differently in the same or very similar circumstances? Keep a record. An example in a case of promotion is given in the first box as a guide.

NAME	POSITION	WHAT ABOUT THEIR CIRCUMSTANCES IS THE SAME?	WHAT ABOUT THEIR CIRCUMSTANCES IS DIFFERENT?
<i>EXAMPLE</i>	<i>EXAMPLE</i>	<i>EXAMPLE</i>	<i>EXAMPLE</i>
Person A	Lecturer in X subject	Person A is a lecturer in the department in the same subject area	Person A has fewer years experience and has had no recent publications which is one of the key criteria for the post whereas I have had two recent publications



### CHECKLIST 3 – WHAT DOCUMENTARY EVIDENCE IS THERE?

It will be important to ensure paperwork is relevant to the issue. If you are unsure what is relevant, your UCU representative can help you. Please tick those you have provided to your union representative. This list is an example of what kind of paperwork is relevant.

- 1 Record/diary of acts of discrimination (eg Checklist 1 above)
- 2 Your narrative (a short statement of factual circumstances and how it has impacted on you)
- 3 Details of comparators (eg Checklist 2 above)
- 4 Copies of employer policies relevant to your case
  - a sickness absence procedure
  - b harassment policy and procedure
  - c dignity at work procedure
  - d redundancy selection procedure
  - e job description/person specification
  - f recruitment and promotion policy and procedure
  - g grievance procedure
  - h disciplinary and dismissal procedure
  - i any other procedure (please describe)
- 5 Copies of all relevant correspondence (email and letters)
- 6 Relevant telephone notes
- 7 Meeting notes - your own and the employers
- 8 Text messages
- 9 Any other documents (please list)

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## First meeting with your UCU representative

Use the checklist and narrative above to help you organise your thoughts about what has happened to you before meeting your UCU representative.

Inform your UCU representative of any relevant developments in your case (eg if you become ill, change jobs, move house, accept an offer of suitable alternative employment or the employer offers a settlement payment etc).

If you need reasonable adjustments or other assistance such as an interpreter, documents in large print, a hearing loop, regular breaks etc inform your UCU representative in advance of your meeting. Your contacts can be found on the UCU website: <https://www.ucu.org.uk/yourcontacts>

If you do not get a response from your UCU representative within three days, please contact your regional office <https://www.ucu.org.uk/regionalofficials>

Your UCU representative will commit to keeping you informed in accordance with the guidance for UCU representatives 'Handling Case Work' (see [Resources](#)) including responding in good time and treating you with due consideration and respect.

### Remember

- Your case may be one of many that your UCU representative is dealing with so keep to deadlines and meetings.
- Keep your UCU representative up to date.
- Your UCU representative may test your evidence by asking probing questions. This doesn't mean they don't believe you or are siding with the employer they are doing what any good union rep would do – anticipate what arguments the employer may make so they can present your best case.
- Don't overload your UCU representative as this can result in your best points getting lost. Less is often more.
- Listen to your UCU representative's advice and consider it carefully.
- Keep an open mind and consider all options.
- Don't lose your sense of perspective – health, happiness, friends and family are important too, as are you.
- Your UCU representative cannot do everything for you; it is your case.

## Progressing your case/seeking a resolution

### INFORMAL RESOLUTION

Most UCU members who are subject to discrimination just want the discrimination to stop.

In some cases your complaint may be able to be resolved informally, either by you or your UCU representative raising it with your line manager or HR.

In other cases your UCU representative can provide assistance. For example, where the complaint is of harassment your UCU representative may be able to approach the harasser directly and ask them to stop. Your UCU representative will consult with you about any proposed resolution.

Note that the time limit for lodging a legal claim continues to run during the informal process. (Refer to **Time Limits**).

## **PURSUING A GRIEVANCE**

If your case cannot be resolved informally, your UCU representative may advise you to pursue your concerns through the formal grievance procedure.

Remember that pursuing a grievance does not stop the time limit for a legal claim. (Refer to **Time Limits**).

The ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code) applies to complaints of discrimination in the workplace and you should therefore let the employer know the nature of your grievance. The ACAS Code sets out the approach the employer should apply as a minimum where a grievance has been lodged. Namely:

- (i) hold a meeting to consider the grievance at which the member has a right to be accompanied
- (ii) decide on appropriate action
- (iii) allow the employee to appeal if the grievance is not resolved.

Most grievance procedures will follow the ACAS Code but include more detail such as identifying the personnel involved in dealing with a grievance, how documents relevant to your grievance will be dealt with, how witness evidence will be dealt with and the time limits for hearing and responding to your grievance and lodging any appeal.

Please also refer to the UCU Guide on Employment Tribunals which sets out pre-action steps.

## **WHAT SHOULD BE INCLUDED IN A GRIEVANCE?**

The grievance should succinctly set out all the complaints. Long rambling grievances can lead to a delay. It is therefore best to set out the nature of the grievance and refer to any supporting documents if necessary.

An example of a grievance is set out below which you can adapt according to your specific grievance.

## GRIEVANCE LETTER

[Insert name and email address of the appropriate person to whom the grievance letter should be sent, as per the grievance procedure. When sending an email use both the delivery and read receipt options and print off copies confirming it has been delivered and read. Remember to keep a copy of your grievance and give a copy to your UCU representative]

[Insert Date]

Dear [Name]

**Re: [Insert Name of Member and Workplace]**

Please treat this letter as a grievance on the ground that I have been unlawfully discriminated against contrary to the Equality Act 2010 because of [insert protected characteristic ie age/disability/gender reassignment/marriage and civil partnership/pregnancy/maternity/race/religion or belief/sex/sexual orientation].

The details of my grievance are that – **select from the following:**

- [I have been subject to less favourable treatment]
- [I have been treated unfavourably because of pregnancy and/or maternity and/or as a consequence of my disability]
- [you have failed to provide a reasonable adjustment]
- [I have been subject to harassment]
- [I have been victimised]

**[Insert brief facts you rely on supporting your grievance. Remember that long and detailed grievances are less likely to be dealt with quickly and key points can get missed. Some examples are given below:]**

- 1 X made a racially offensive comment to me during my PDR on [date].
- 2 X failed to provide support to me in my role as programme leader on x date/s.
- 3 X set an inappropriate objective in my PDR which was not set for others in the same or similar post to me and which is demeaning because I have X experience and a male colleague with similar experience has not been set the same or similar objective.
- 4 X unreasonably and without grounds made derogatory comments including [insert comments said] on [date].
- 5 I was not appointed to the post of [insert post] on [insert date] because of my race. A white person was appointed to the post who is less qualified and experienced as me. X was a member of the panel who made the selection and has previously made derogatory comments on grounds of race.

*continued overleaf*

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I request that a grievance hearing be convened [at the earliest opportunity or within x days in accordance with the grievance procedure].

Please contact my trade union representative [insert name and contact details] to agree a mutually convenient date for the grievance meeting.

Please kindly acknowledge receipt of this letter.

Yours sincerely

[Name of UCU member]

cc UCU representative

**Remember to give your union representative a copy.**

**If you are close to the time limit for lodging a legal claim speak to your UCU regional office as soon as possible. Do not delay.**

## How should you prepare for the grievance hearing?

Good preparation for a grievance hearing will not only show the employer that you are serious about progressing the matter if your grievance is not resolved, but it will also provide the groundwork for any legal claim in the event a resolution is not reached.

You have a right to be represented at a grievance hearing and it is a good idea if you and your UCU representative agree how you will approach the hearing in advance. Remember your UCU representative cannot answer questions on your behalf. You should also be familiar with the grievance procedure. It is a good idea to take a copy with you to the hearing and flag the pages you may want to refer to during the hearing with post-it notes.

You and your UCU representative should agree how you will approach the hearing. For example,

- decide who will send copies of documents in support of your grievance to the employer
- who will notify the employer if there are witnesses who will be attending
- who will present the case, and
- raise issues that are unclear or outstanding (eg no reply to the ACAS Ask and respond questions, missing documents etc).

Most importantly make sure you and your UCU representative are clear about what outcome you are seeking.

A good starting point for presenting your case is the completed checklist (above) and your narrative from your first meeting.

You should organise your documents in strict chronological order (oldest first) as it helps you to show the employer what you have been through from the beginning and is easier to follow

Keep your own record of the hearing using the blank sheet below and make sure there is a record of:

- what was agreed
- what was denied
- what the outcome was (eg a response within 14 days).

Remember, if there is anything which is not clear or which you do not agree with, you should follow this up with an email.

## RECORD OF GRIEVANCE HEARING HELD ON [INSERT DATE]

IN ATTENDANCE: [Record the names of those attending and the positions held]

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### WHAT WAS AGREED?

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### WHAT WAS DENIED?

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### WHAT WAS THE OUTCOME?

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## What to do after the grievance hearing

- Diary the date a response is due.
- Send a chaser if it has not arrived and agree with your UCU representative who will do this.
- Where the employer sends a copy of the grievance minutes/notes, review these to make sure they are an accurate record.
- If the grievance notes are not an accurate record, write/email the employer with your amendments. If the employer will not amend the notes send an email with what has not been agreed and ask this to be kept with the notes/minutes of the grievance hearing. This may be important later if there is a dispute about what has been agreed/disputed.
- Diary a date to chase the employer and agree with your UCU rep who will do this.
- On receipt of the employer's response contact your UCU rep and discuss the outcome.
- Record what you have agreed to do on the action sheet provided.
- Where your grievance has been upheld, check and agree dates for action to be taken by the employer if these are not included in the response to your grievance.
- Where your grievance has not been upheld or upheld in part, discuss with your UCU rep and decide if you will appeal (see notes on appealing below).

## ACTION SHEET FOLLOWING GRIEVANCE HEARING

ACTION	WHO WILL DEAL?	COMPLETION DATE	DONE ✓

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## Pursue an appeal

If your grievance has not been upheld you should appeal. This is important for two reasons:

- 1 It shows the employer that you do not accept the outcome.
- 2 It is really important in the event a legal claim is pursued because any compensation awarded if a legal claim is successful can be reduced by up to 25% for an unreasonable failure to comply with the ACAS Code.

The same applies where an employer unreasonably fails to comply with the ACAS Code. If that is the case and a legal claim is successful, compensation can be increased by up to 25%.

Consider what grounds you will appeal on and discuss and agree with your UCU representative.

Remember to check the grievance procedure for the time limits for lodging an appeal and that it is within time for a legal claim (see **Time Limits**). If it is short you can send out a holding appeal letter but first check with your UCU representative if the employer will accept a holding appeal. A template letter is set out overleaf.

## **HOLDING APPEAL LETTER/EMAIL – ONLY USE IF UP AGAINST TIME LIMIT OTHERWISE SEE FULL GROUNDS OF APPEAL LETTER**

[Insert name and email address of the appropriate person to whom the grievance appeal letter should be sent, as per the grievance procedure. When sending an email use both the delivery and read receipt options and print off copies confirming it has been delivered and read. Remember to keep a copy of your appeal and give a copy to your UCU representative]

[Insert Date]

Dear [Name]

**Re: [Insert Name of Member and Workplace]**

I refer to the grievance hearing held on [insert date] and a copy of the outcome received on [insert date].

Please note that I wish to appeal against the outcome of my grievance.

Full details of the grounds of appeal will be sent under separate cover on [insert date or within 7/14 days].

Please kindly acknowledge receipt.

Yours sincerely

[Name of UCU member]

cc UCU representative

**Remember to give your union representative a copy.**

**If you are close to the time limit for lodging a legal claim, speak to your UCU regional office as soon as possible. Do not delay.**

Make sure you set out the full grounds of your appeal as soon as possible in accordance with your grievance procedure. Seek your UCU representative's advice on the terms.

Set out below is a template letter of appeal which you can adapt to the particular facts of your case.

## APPEAL AGAINST OUTCOME OF GRIEVANCE LETTER

[Insert name and email address of the appropriate person to whom the grievance appeal letter should be sent, as per the grievance procedure. When sending an email use both the delivery and read receipt options and print off copies confirming it has been delivered and read. Remember to keep a copy of your appeal and give a copy to your UCU representative]

[Insert Date]

Dear [Name]

**Re: [Insert Name of Member and Workplace]**

Please treat this letter as an appeal against the outcome of my grievance on [insert date of the grievance outcome]

I appeal on the grounds that:

1. You failed to hold a grievance meeting within a reasonable period of time which meant that relevant evidence in support of my grievance was not taken into account [for example, in a promotion case the selection matrix was destroyed].
2. You failed to carry out a reasonable investigation into the grounds of my grievance [insert brief details, eg you failed to obtain the panel's individual scores].
3. You failed to take into account the following evidence [eg the fact that my high scores in four out of six of the essential criteria for the post had been reduced/the comments do not correlate to the low scores given to me] which supports my claim that [eg the reason I was not selected for the post was because of my race].
4. You failed to interview the following relevant witnesses [this is unlikely in a claim for promotion but may be relevant in an harassment case or other claim of discrimination under the Equality Act 2010].
5. You failed to provide me with a copy of the evidence you relied on [insert the evidence which the employer relied on, eg performance appraisals which were not part of the selection process, witness statements you have not seen].
6. You took into account irrelevant evidence [eg performance appraisals which were not part of the selection process].

I request that a grievance appeal hearing be convened [at the earliest opportunity or within x days in accordance with the grievance procedure].

Please contact my trade union representative [insert name and contact details] to agree a mutually convenient date for the grievance meeting.

*continued overleaf*

-2-

Please kindly acknowledge receipt of this letter.

Yours sincerely

[Name of UCU member]

cc UCU representative

**Remember to give your union representative a copy.**

**If you are close to the time limit for lodging a legal claim, speak to your UCU regional office as soon as possible. Do not delay.**

## The appeal hearing

Prior to the appeal hearing follow the same preparations as for the grievance hearing as set out above but this time focus on the grounds of appeal.

Record the outcome of the appeal on the record sheet overleaf.

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## APPEAL HEARING HELD ON [INSERT DATE]

IN ATTENDANCE: [Record the names of those attending and the positions held]

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WHAT WAS AGREED?

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WHAT WAS DENIED?

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WHAT WAS THE OUTCOME?

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## Non-legal resolutions

Even though an appeal against the outcome of a grievance may be unsuccessful your UCU representative may still be able to negotiate a resolution. This may include a collective resolution. For example, if, during the process, failings in the employer's procedures have been identified.

## Legal resolution

If a resolution cannot be reached through the formal procedures, your branch may suggest you take legal advice. Your branch will raise this with the regional office who will discuss with you whether legal advice will support your case. If legal advice is sought and it is positive, your case will then become part of UCU's legal scheme.

Please keep all your documents and evidence. Legal advice will rely on your evidence and the documents from the internal processes.

**UCU legal scheme** sets out your rights and obligations. When accepting an offer of legal services, it is important that you read these and, in particular, understand the criteria for offering legal services (1.4) and how UCU runs employment claims (5.5)

[https://www.ucu.org.uk/media/5929/UCU-Legal-Scheme-Regulations-October-2017/pdf/ucu\\_legalscheme\\_oct17.pdf](https://www.ucu.org.uk/media/5929/UCU-Legal-Scheme-Regulations-October-2017/pdf/ucu_legalscheme_oct17.pdf)



## Resources

### UCU INFORMATION ([www.ucu.org.uk](http://www.ucu.org.uk))

- Guide to employment tribunals
- Handling case work: A guide for UCU reps  
[www.ucu.org.uk/caseworkers](http://www.ucu.org.uk/caseworkers)
- UCU legal scheme
- Guidance on reasonable adjustments  
[www.ucu.org.uk/equality](http://www.ucu.org.uk/equality)
- Model policy and guide on dealing with sexual harassment  
[www.ucu.org.uk/equality](http://www.ucu.org.uk/equality)

### OTHER/GOVERNMENT RESOURCES

- ACAS Code of practice on disciplinary and grievance procedures
- ACAS Asking and responding to questions of discrimination in the workplace (referred to in the toolkit as the ACAS Ask and respond questionnaire)
- ACAS Code of practice, Handling in a reasonable manner requests to work flexibly
- ACAS Guide discipline and grievance at work
- EHRC Code of practice on employment
- EHRC Code of practice on equal pay
- Government Equalities Office guidance for employers on recruitment and retention of staff
- Information commissioner – Data Protection Code
- Information commissioner – Employment Code
- Information commissioner – Subject Access Code
- Secretary of State guidance on matters to be taken into account in determining questions relating to the definition of disability

[www.acas.org.uk](http://www.acas.org.uk)

[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

<https://ico.org.uk>

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

## Glossary

**ACAS** Advisory conciliation and arbitration service which is a statutory body who has a duty to promote settlement of workplace disputes collectively and individually.  
<http://www.acas.org.uk>

**Access to Work** is a publicly funded employment support programme that aims to help disabled people start or stay in work <https://www.gov.uk/access-to-work>

**Claimant** the person bringing an employment tribunal claim

**Conciliation** the process used to reach a settlement

**COT3** the name of the form used to record a settlement agreement reached through ACAS

**Early conciliation** the first stage in a tribunal process which requires a prospective claimant in an employment tribunal claim to contact ACAS

**ET1** an employment tribunal claim form

**ET3** an employer's response (defence) to an employment tribunal claim

**EHRC** Equality and Human Rights Commission – the body which has overall responsibility to work towards the elimination of discrimination. It has limited enforcement powers.

Other functions of the EHRC include conducting formal investigations, limited casework on specific areas and inquiries.

At the time of going to press, the EHRC launched an inquiry to understand the types of racial harassment experienced at publicly funded higher education institutions (HEIs), such as universities or higher education colleges.

<https://www.equalityhumanrights.com>

**FOI** Freedom of Information Act 2000 – sets out a right of access to information held by public authorities

**GEO** Government Equalities Office – government department responsible for government policy on equality matters  
<https://www.gov.uk/society-and-culture/equality>

**Inference** a conclusion which is drawn from the facts that have been established.

**Liability** where a legal wrong has been done

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**Limitation** the legal deadline for submitting an employment tribunal claim

**Mitigation** action taken by a claimant or respondent to reduce the loss arising from the legal claim

**NDA** Non-disclosure agreement – an agreement not to disclose confidential information sometimes used in settlement agreements in harassment or other cases

**Respondent** the individual or body against whom an employment tribunal claim has been lodged. Most claims are lodged against the employer. In some cases, such as claims for harassment, an individual may also be named as they too can be liable

**SAR** Subject access request – a request under the Data Protection Act 2018 for personal data

**Without prejudice** a phrase used to indicate that discussions or correspondence is intended to achieve a settlement and are not therefore disclosable to an employment tribunal or court

## APPENDICES

### Appendix 1 – Definition of the protected characteristics in the Equality Act 2010

#### AGE

A person who has the protected characteristic of age refers to a person of a particular age group. This means that someone discriminated against on grounds of age can define which age group the person considers applies. For example, this could be a specific age such as 21 year olds; a particular group, such as the 50 to 55 age group or wider group such as 'under 50' which would include all those over 21 and up to the age of 49.

#### DISABILITY (S.6)

A person is disabled if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities.

The act also applies to persons who have had a disability in the past but have recovered.

An effect is long term if:

- it has lasted for at least 12 months
- it is likely to last for at least 12 months
- it is likely to last for the rest of the life of the person affected
- it has not lasted for 12 months but it is likely to recur.

In assessing the effect of an impairment, medical treatment is to be disregarded. In [Bessell v Chief Constable of Dorset Police ET Case No 1400313/16](#) a tribunal held that a person who was colour blind did not have a disability as defined because it did not create a substantial adverse effect on their day-to-day activities.

Cancer, HIV infection and multiple sclerosis are to be treated as a disability. In [Lofty v Harris \(t/a First Café\) UKEAT 0177/17](#) the EAT held that a worker who had been diagnosed with pre-cancerous cells in relation to skin cancer was to be treated as being disabled in the same way as someone who has cancer. Note though that the EAT also held that it is not sufficient that someone may develop cancer in the future to fall within the definition.

Progressive conditions which are likely to lead to a substantial effect on a person's ability to carry out normal day-to-day activities are to be regarded as a disability as soon as the condition has an effect on normal day-to-day activities.

#### GENDER REASSIGNMENT

Reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment. A person has the protected characteristic

of gender reassignment if they are undergoing the process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex. There is no requirement for a person to be under medical supervision in order to fall within the definition. The Employment Code states that gender reassignment is 'a personal process, that is moving away from one's birth sex to the preferred gender rather than a medical process'. This means that an individual who was born a woman and decides to live as a man will be protected. Transvestites are only protected if they are subject to direct discrimination and harassment because they are perceived to be undergoing gender reassignment.

### **MARRIAGE AND CIVIL PARTNERSHIP**

Marriage covers any formal union which is legally recognised as a marriage. The Marriage (Same Sex Couples) Act 2013 provides for equality between same sex couples.

Civil partnership covers registered civil partnerships under the Civil Partnership Act 2004 including those registered outside the UK. This means that in some cases those in same sex relationships registered under the laws of other countries are deemed to be in civil partnerships and are covered.

Only those who are married or in a civil partnership are covered. A person cannot bring a claim of discrimination because they are single, divorced or in a cohabiting relationship on the basis that they have been treated less favourably than a person who is married. This protected characteristic is designed to protect those who are subject to less favourable treatment because they are married or in a civil partnership. For example, in **Boswell v Ministry of Defence ET/1401879/12**, a tribunal held a claim of direct discrimination because of marriage when the man was refused single accommodation after he became married. The MOD had an accommodation policy which required those in a service couple marriage to nominate one of them as head of household. The tribunal found that this policy was directly discriminatory because it assumed that service-couple marriages operated on the basis of having a dependent partner in order to have a family home.

In **Gould v Trustees of St John's Devonshire Hill EAT 0115/17** the EAT held that a church minister who was dismissed because of marital difficulties may be protected. In that case the EAT found that the employer held marriage in particular regard. The case returned to the tribunal to determine whether an unmarried vicar would have been dismissed. In reaching its decision the EAT held that divorce or bigamy would not be protected under the provisions of marriage discrimination.

### **PREGNANCY AND MATERNITY**

These are not defined in the EqA. However, S18 which concerns pregnancy and maternity discrimination, provides that an employer discriminates against a woman if, during the protected period, they treat her unfavourably because of pregnancy or an illness resulting from it; because she is on maternity leave or

because she exercises or seeks to exercise her right to ordinary or additional maternity leave. The protected period is the period from her pregnancy until she returns from maternity leave. Note that in order for a woman to be protected from pregnancy and maternity discrimination, the employer must be made aware she is pregnant.

## RACE

This applies to race, colour, nationality, ethnic or national origin and applies throughout the Act. The courts have held that discrimination because of immigration status does not amount to race discrimination on grounds of nationality (see **Onu v Akwinu and anor and Taiwo v Olaigbe [2016] ICR 756**). The Government commissioned research to identify whether caste discrimination and harassment exists. The study by the National Institute of Economic and Social Research published in December 2010 found evidence of caste discrimination and harassment in relation to work (bullying, recruitment, promotion, task allocation).

However, following the decision of the **EAT in Chandhok and anor v Turkey [2015] IRLR 195** which held that caste discrimination is a form of discrimination on grounds of descent and therefore falls within the definition of race, the Government has decided that it will not introduce legislation specifically outlawing caste discrimination. Any claims of caste discrimination will therefore need to rely on the case of Chandhok.

## RELIGION OR BELIEF

Religion is defined as any religion and any belief, including lack of religion and lack of belief. The explanatory notes to the Equality Act 2010 indicate that political beliefs and beliefs in scientific theories are not covered. Case law has held (**Grainger plc –v– Nicholson [2010] IRLR4**) that a belief in manmade climate change was capable of being a genuinely held belief, while the EAT held that spiritualism amounted to a belief under these provisions (**Greater Manchester Police Authority –v– Power UKEAT 0434/09**).

Whether a belief will be protected will depend on whether:

- It is genuinely held
- It is believed rather than an opinion or viewpoint on the present state of information available
- It is a belief as to a weighty and substantial aspect of human life and behaviour
- It is worthy of respect in a democratic society not incompatible to human dignity and not in conflict with the fundamental rights of others.

Applying the test above an employment tribunal held in **Hawkins v Universal Utilities Ltd t/a Unicom ET/2501234/12** that a belief that ‘it is wrong to lie under any circumstances’ amounted to a philosophical belief. However, in **Harran v Chief Constable of Dorset Police [2016] IRLR 481** the EAT held that a belief in ‘the proper and efficient use of public money in the public sector’

did not satisfy the above test and so was not a philosophical belief. It considered that it amounted to a set of values principally operating in the workplace.

Note that the Employment Rights Act 1996 provides for an employee to claim unfair dismissal if the reason for the dismissal is, or relates to, the employee's political opinions or affiliations.

### **SEX**

This is defined as applying to both men and women.

### **SEXUAL ORIENTATION**

This applies to gay men, lesbian women, heterosexuals and bisexuals.

## Appendix 2 – ACAS Ask and Respond Questionnaire - Failure to be selected for the post/promotion

### STEP 1 – QUESTIONER’S AND RESPONDER’S DETAILS

For the Claimant:

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*[Insert name of address of claimant or UCU representative]*

For the Respondent:

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*[Address to Vice Chancellor/Principal/Governing Body  
Name and address of the institution]*

### STEP 2 – PROTECTED CHARACTERISTICS AFFECTED

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*The protected characteristic is [insert the protected characteristic]*

### STEP 3 – DESCRIPTION OF WHAT HAPPENED TO YOU (SET OUT BELOW IS AN EXAMPLE)

- 1 I have been employed as [insert post employed in] since [insert date you started employment]
- 2 At my last appraisal on [insert date] my line manager considered that I was now at the point to progress to the next level and encouraged me to apply for promotion to the post of [insert the post applied for].
- 3 On or around [insert date] I applied for the post of [insert post applied for].
- 4 I was shortlisted for and attended an interview on [insert date].
- 5 The panel consisted of [insert names and positions if you have these].
- 6 Notwithstanding that I met all the essential criteria, I was informed by letter/email dated [insert date] that I had not been successful following the recent selection process.



- 7 On or around [insert date] I asked for feedback as to why I had not been successful.
- 8 This was provided by X [insert the name of the person and their position who gave you the feedback] on [insert date] by [email/telephone call/at a meeting] where I was informed [insert details why you were told you were not selected for the post eg there was a better candidate].
- 9 The other candidate does not meet all the essential criteria and/or has less experience, skills and qualifications than I do.
- 10 [Insert other details e.g. no women/persons of the same age as me/person who has a disability/person of the same race as myself/person of the same religion or belief as myself/person of the same sexual orientation as myself/person who has not undergone gender reassignment] holds the position which I applied for.
- 11 [Insert other details for example:
  - I have previously acted up in this post.
  - I was asked questions which related to [insert the protected characteristic eg questions related to age/disability/gender reassignment/race/religion or belief/sex/sexual orientation].
  - X [insert name of the person on the panel] has previously made discriminatory comments about [insert details eg women/those of the same race as me/those who have the same disability as me/those who are of the same age/those who hold the same religion and belief/those who have undergone gender reassignment/those who have the same sexual orientation]. These include [give details of the comments made].
- 12 I consider the reason I was not selected was because of [insert protected characteristic ie age/disability/gender reassignment/race/religion or belief/sex/sexual orientation].

#### STEP 4 – TYPE OF DISCRIMINATION YOU EXPERIENCED

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*Please refer to Step 3 above*

## STEP 5 – WHY DO YOU THINK WHAT HAPPENED WAS UNLAWFUL

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*Please refer to Step 3 above*

## STEP 6 – ADDITIONAL QUESTIONS YOU WOULD LIKE TO ASK

- 1 Please supply a copy of the advertisement for the post of [insert the post applied for].
- 2 Please supply a copy of the (a) job description and (b) person specification for the post.
- 3
  - a) Please send copies of all the application forms /curriculum vitae from applicants for the [insert post applied for]. Their names may be redacted in order to preserve their confidentiality.
  - b) Please specify in relation to each of the above applicants whether they are [male or female their race/religion or belief/sexual orientation/have undergone gender reassignment/have a disability/their age].
  - c) With reference to each of the above applicants, please indicate which were shortlisted for interview/promotion.
- 4 What criteria were used to select the successful candidates for interview/promotion?
- 5 What other information was taken into account in the selection process?
- 6 Why was I not successful?
- 7 Please explain in relation to each criteria why each of the successful candidates was thought more suitable than me.
- 8 Please give the names and job titles and [insert protected characteristic eg age/disability/race/religion or belief/sex/sexual orientation/gender reassignment] of the person/s responsible for selecting the successful candidates for interview.

- 9 Please supply copies of all notes made by those who were involved in the selection process.
- 10 Please state if anyone else was consulted about my application for the post. If so, please explain why they were consulted and provide their name and job title as well as [insert the protected characteristic in issue e.g. age/disability/race/religion or belief/sex/sexual orientation/gender reassignment].
- 11 Please also provide copies of all notes including notes of telephone conversations, meetings or other discussions with that person regarding the selection process. Please also advise if they underwent Equal Opportunities training and/or training on selection.
- 12 Please give details of equal opportunities training undertaken by the person/s involved in the selection process specifying in respect of each, the nature of the training, the dates it was undertaken and enclosing copies of training materials used.
- 13 If you have an Equal Opportunities Policy, please supply a copy.
- 14 If you do not have an Equal Opportunities Policy please explain why.
- 15
  - a) Please provide a copy of the [name of the Institution]'s recruitment policy and procedures.
  - b) If you do not have a recruitment policy and procedure please state why not.
- 16 How many staff are employed by the [insert the name of the Institution]?
  - b) How many of these are women and how many are men [are of a particular age/have a disability/are of a particular race/are of a particular religion or belief/have undergone gender reassignment/their sexual orientation]?
  - c) Please supply a breakdown of all those employed by the [insert the name of the Institution] by reference to [insert relevant protected characteristic eg age/disability/race/religion or belief/sex/sexual orientation/gender reassignment], job title and department and start date.
- 17 Please describe the steps that the [insert the name of the Institution] has taken to implement the Equal Opportunities Commission's Code of Practice for Employment.

## Appendix 3 - Public Sector Equality Duty

The public sector equality duty (PSED) is set out in S.149 of the Equality Act 2010. It applies to public authorities listed in Schedule 19 (as amended) to the Equality Act 2010. Most further and higher education institutions are public authorities.

### WHAT IS THE GENERAL DUTY?

The general equality duty is set out in section 149 of the Equality Act and states that a public authority must when carrying out its functions, have due regard for the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act
- advance equality of opportunity between those who share a protected characteristic and those who do not
- foster good relations between people who share a protected characteristic and those who do not, by tackling prejudice and promoting understanding.

The overall aim of the general equality duty is to ensure further and higher education institutions address inequality and discrimination by taking equalities into account as an integral part of their decision making processes.

The key point is that the duty is proactive in the sense that it puts a positive obligation on public authorities to take steps to prevent discrimination on all protected grounds before a decision is taken.

The Equality and Human Rights Commission recommends that in order to comply with the general duty the public authority should assess the impact of its policies and procedures for equality.

In relation to advancing equality section 149(3) provides that 'due regard' means:

- removing or minimising disadvantages suffered by anyone with a protected characteristic
- taking steps to meet the needs of people who share a protected characteristic that is different from those who do not have it, and
- encouraging people with a protected characteristic to participate in public life, or other activities where participation is low.

There is a specific provision (section 149(4)) which provides that public authorities need to have due regard to the steps involved in meeting the needs of disabled persons that are different to the needs of non-disabled persons, i.e. public authorities must consider the need to make reasonable adjustments.

### HOW IS THE GENERAL EQUALITY DUTY ENFORCED?

The public sector duties do not give rise to a claim in private law and an individual cannot therefore take a claim in the Employment Tribunals against a public body for failing to comply with its public sector duty. Claims against failing public bodies can only be brought by way of

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Judicial Review proceedings by interested bodies such as the Equality and Human Rights Commission and trade unions.

### **SPECIFIC DUTIES**

In addition to the general duty, public authorities including most further and higher education institutions are subject to specific duties.

These are different for England, Wales and Scotland and are set out in separate regulations.

Broadly the specific duties require public authorities to publish information to show their compliance with the general equality duty. The information that the public authority is required to publish differs for England, Scotland and Wales. For more details please see the guidance provided by the Equality and Human Rights Commission which is available from.

<https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-duties>

You can also check the institutions own website by searching for public sector equality duty.

## Appendix 4 ACAS Ask and Respond Questionnaire: Harassment

### STEP 1 – QUESTIONER’S AND RESPONDER’S DETAILS

For the Claimant:

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*[Insert name of address of claimant or UCU representative]*

For the Respondent:

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*[Address to Vice Chancellor/Principal/Governing Body  
Name and address of the institution]*

### STEP 2 – PROTECTED CHARACTERISTICS AFFECTED

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*The protected characteristic is [insert the protected characteristic]*

### STEP 3 – DESCRIPTION OF WHAT HAPPENED TO YOU (SET OUT BELOW IS AN EXAMPLE)

- 1 I have been employed as [insert post employed in] since [insert date you started employment]
- 2 [Insert the incidents of harassment that you have been subjected to in date order, for example:
  - On or around [x date] x [name the person subjecting you to harassment] said or did the following. [insert details]
- 3 I reported the above incident(s) to X [insert the name of the person whom you reported to].
- 4 The person whom the incident(s) of harassment was referred confirmed that the following action will be taken [insert the action that the person whom you reported

to said would happen] or [insert the person’s response whom you reported to eg ‘I am sure no harm was meant by it’] or No action was taken to address my complaint of harassment

- 5 As no action had been taken to address the harassment I was subjected to by [insert date e.g. after one month/two months/three months/four months etc.] I raised the matter with [insert the name and/or position of the person whom you reported to].
- 6 The person I reported to advised that they would take the following action [insert the action that the second person whom you reported to said they would do] or [they said that they would deal with the matter/they advised there was no action they could take] OR No action was taken.
- 7 I lodged a grievance on [insert the date].
- 8 A grievance hearing was held on [insert date].
- 9 I received the outcome of the grievance on [insert date] or [I have still not received the outcome of my grievance].
- 10 I appealed the outcome of the grievance on [insert date].
- 11 The grounds of my appeal were [insert details].
- 12 I attended an appeal against the grievance hearing on [insert date].
- 13 My appeal against the grievance outcome was not upheld. I consider that the acts set out in paragraphs [X to X] above amount to harassment as defined in section 26 of the Equality Act 2010. X [the name of the harasser] was acting in the course of their employment and the [insert the name of the Institution] is liable for the acts of harassment pursuant to section 109 of the Equality Act 2010.
- 14 Further, I consider that the [name of the Institution]’s failure to find that [X – the name of the person who committed the harassment] amounted to harassment amounts to a further act of harassment/discrimination/victimisation.

**STEP 4 – TYPE OF DISCRIMINATION YOU EXPERIENCED**

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*Please refer to Step 3 above*

## STEP 5 – WHY DO YOU THINK WHAT HAPPENED WAS UNLAWFUL

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*Please refer to Step 3 above*

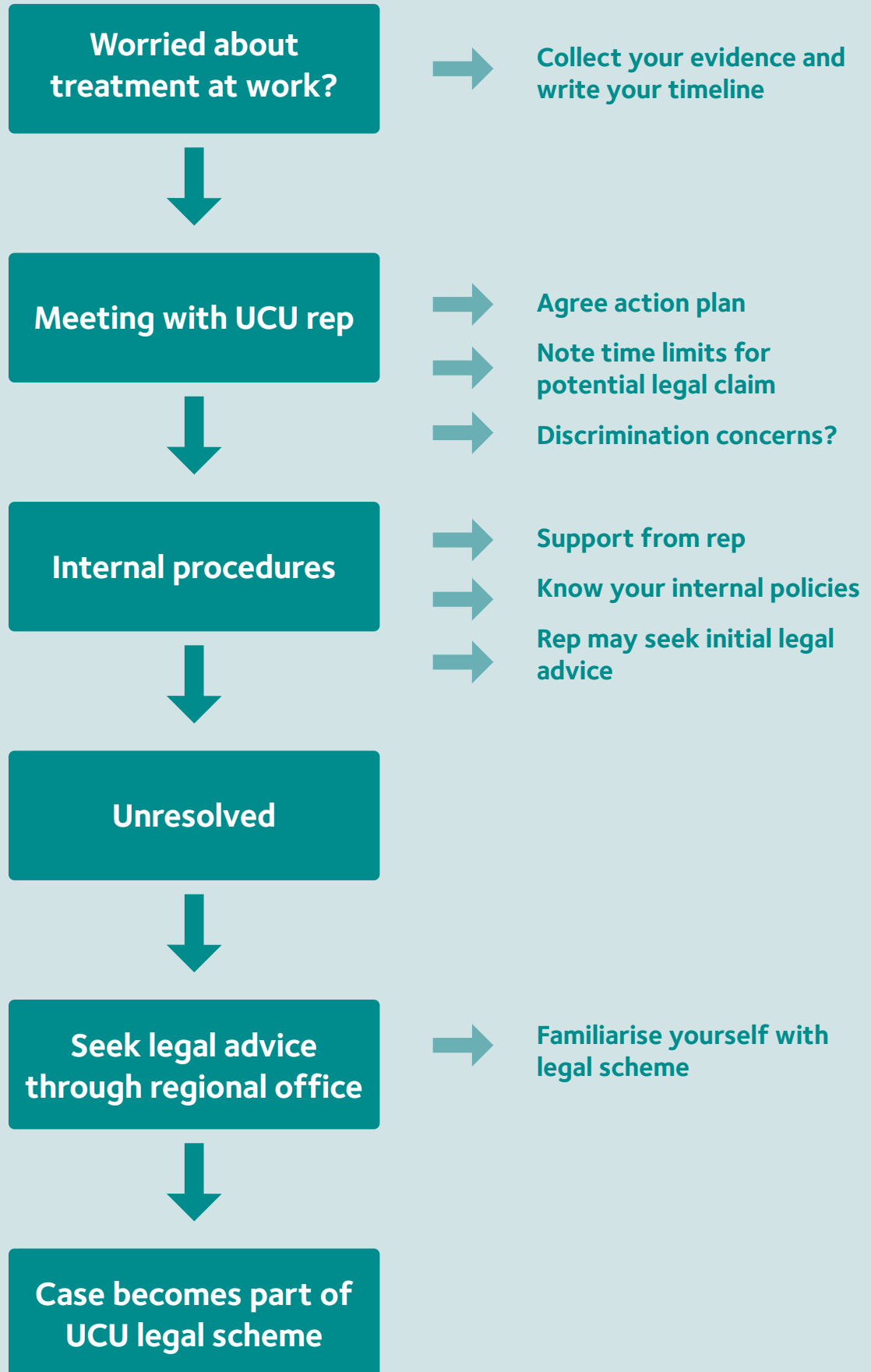
## STEP 6 – ADDITIONAL QUESTIONS YOU WOULD LIKE TO ASK

- 1 a) Please confirm that following the incident(s) on [list each and every act of harassment complained of with dates] amounts to acts of harassment as defined in the Equality Act 2010.  
b) If not please state why not.
- 2 I reported this incident to [insert the name of the manager who you reported the act of harassment(s) to] on [date].
- 3 [Please explain why no action was taken after I reported the harassment as per 2. above?]
- 4 Please provide full details of the investigation that was carried out into the acts of harassment listed above.
- 5 If [insert the name of the harasser] was approached following my reporting of this incident(s). Please let state what was said, by whom and when.
- 6 If a meeting was held to discuss the above harassment please let me have details of that meeting in particular:
  - i) The date of such meeting
  - ii) The identities of those attending the meeting
  - iii) Notes of the meeting
  - iv) Action taken following that meeting.
- 7 Please give full reasons as to why my grievance was not responded to [only insert this question if it is relevant].



- a) In the last three years, how many complaints have been made against [name of harasser]? Of these how many of the complainants were by [insert the protected characteristic e.g of x age/with x disability/had undergone gender reassignment/ x race/x religion or belief/men/women/gay men/lesbian women/was bisexual]
  - b) In relation to the complaints referred to above, please give full and specific details of each complaint, giving the date of the complaint, the nature of the complaint and action taken by the [insert the name of the Institution] in response to the complaint.
- 9 a) If the [insert the name of the Institution] has an Equal Opportunities Policy please send me a copy.
- b) If there is no Equal Opportunities Policy, please state why not?
- 10 a) If the Institution has a policy on harassment in the workplace please send me a copy.
- b) If there is no policy on harassment in the workplace, please state why not?
- 11 a) If the [insert the name of the Institution] has a Dignity at Work Policy please provide a copy.
- b) If the Institution does not have a Dignity at Work Policy, please state why not.
- 12 Please state the steps taken to implement the Equality Opportunities Policy/ Harassment Policy/Dignity at Work Policy.
- 13 a) Please describe all training in equal opportunities and harassment undertaken by the date it was undertaken and enclosing copies of the training materials.
- b) Please describe all training in equal opportunities and harassment undertaken by [the manager(s) to whom the acts of harassment were reported to] specifying the nature of the training undertaken, the date it was undertaken and enclosing copies of the training materials.
- 14 Please describe what steps [insert the name of the Institution] has taken over the last three years to prevent harassment from occurring in the workplace.
- 15 [Please describe what steps if any have been taken to comply with the Equality and Human Rights Commission Code of Practice on Sexual Harassment – Note this is not yet in force but it is a Government proposal as at March 2019].
- 16 Please describe what steps, if any, have been taken to comply with the European Commission’s Code of Practice on measures to combat sexual harassment.

## CHALLENGING DISCRIMINATION AT WORK





## YOUR NOTES

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KEY DOCUMENTS  
THAT WILL SUPPORT  
MY CASE

**UCU**

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**T** THOMPSONS  
SOLICITORS