



University of Strathclyde  
**LAW CLINIC**

# 9A Types of claim: (1) Direct discrimination

A guide for the general public

# DISCLAIMER

The information on these slides is for general guidance only and is not legal advice. *It should not be regarded or relied upon as a complete or authoritative statement of the law.* The Law Clinic does not represent or warrant that the information on the website is accurate, complete or up to date.

Please see the full disclaimer available [here](#).

# Outline

- ▶ Introduction
- ▶ What is direct discrimination?
  - ▶ Meaning of 'because of'
  - ▶ Meaning of 'treated less favourably'
- ▶ How do I choose a comparator?
- ▶ Examples of comparators
- ▶ Hypothetical comparators
- ▶ Burden of proof
- ▶ Examples
- ▶ Occupational requirements
- ▶ How to prove a disability discrimination claim

# Introduction

When completing your ET1, you will be asked to identify which claims you are making. This is at Section 8.1 of the ET1.

You will be ticking the box that says discrimination and then the box below that identifies 'disability'. **This may be alongside other complaints.**

However it will also be necessary to be able to identify which type of disability discrimination you are claiming. The earlier you can this the better so that you can be sure that the type of discrimination you are complaining of is included within the time limit.

You can do this at Section 8.2 of the ET1 where you are asked to set out the background and details of your claim. For more information about completing the claim form see slideshows 3A and 10D.

# Types of disability discrimination

There are six possible claims for disability discrimination. These are:

- ▶ Direct Discrimination
- ▶ Indirect Discrimination
- ▶ Discrimination arising from disability
- ▶ Harassment
- ▶ Victimisation
- ▶ Failure to make reasonable adjustments

You can claim for any combination of these six claims. This series of slideshows aims to explain what these six possible claims are so that you can work out which ones might apply in your case.

# What is direct discrimination?

Direct discrimination occurs when your employer treats you less favourably than a person who does not have that particular disability is or would be treated, and this is because of your disability.

The relevant legislation is Section 13 of the Equality Act 2010 and it reads as follows:

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

# Meaning of ‘because of’

In a direct discrimination claim, you have to prove that the reason you were treated unfairly was your disability. This might be implied, for example, if you experienced no problems at work prior to diagnosis with a disability. Then your employer became aware of the diagnosis and after this you were treated less favourably. The Tribunal could infer that this was because of your disability in the absence of any reasonable alternative explanation.

Your disability does not need to be the only cause of the less favourable treatment, but it should have had a significant influence on the outcome.

You could also have a claim for direct discrimination if you were treated unfairly because your employer perceived you to have a disability (even if in fact you did not) or if you were treated unfairly because of your association with a disabled person (e.g. discriminated against because your child or partner has a disability).

# Meaning of ‘treated less favourably’

The last part of the legislation reads ‘A treats B less favourably than A treats or would treat others.’ This suggests an element of comparison.

Being treated badly is not enough to prove discrimination. If it can be shown that your employer would have treated everyone equally unfairly, there will be no discrimination. What is necessary is that you were treated worse than other employees and this can be shown, even by a process of inference, to be **because** of your disability.

# How do I choose a comparator?

Because you have to show that you were treated less favourably than others, you need to have what is known as a ‘comparator’ with whom to compare how you were treated.

A comparator can be real or hypothetical.

The key thing to remember when choosing a comparator is that their circumstances should be the same or not materially different to yours. However, they should not share the protected characteristic you have, i.e. they should not have your disability.

Some examples are provided in the following slide to illustrate this.

# Examples of comparators

The Claimant is a woman with a disability who works as a receptionist. Here are some of her colleagues, along with an explanation of whether each would make a good comparator.

## **Joe**

Male

Receptionist

Disabled

Joe could not be a comparator because he also has a disability, so he shares the relevant protected characteristic with the Claimant.

## **Tina**

Female

Receptionist

Not disabled

Tina would make a good comparator because she is in the same or not materially different circumstances to the Claimant but she does not share the protected characteristic of disability.

# Hypothetical comparators

It can be difficult to choose a real comparator, particularly if you work for a very small company and there are few employees to choose from. In this case, you can create a hypothetical comparator. When using a hypothetical comparator, the following approaches could be useful:

- ▶ Looking at how other workers were treated in situations that were not identical but bore some similarity with your circumstances. In other words, where the workers could not be comparators due to material differences but there is sufficient similarity to draw inferences as to how a hypothetical comparator might have been treated.
- ▶ Looking at other behaviour in the workplace that tends to make the possibility of discrimination more likely, e.g. if a workplace is rife with sexist comments about women, it is arguable that this adds weight to the probability that a male worker would have been treated more favourably.

# Burden of proof

At the outset, the burden is on you to prove your employer has discriminated against you.

Because of the difficulties of obtaining direct proof of discrimination, once you have proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that there has been discrimination, the burden shifts to your employer to prove that it did not discriminate against you.

This is set out in s.236(2) of the Equality Act 2010:

*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

But the Tribunal does not have to make a finding of discrimination if your employer can show that they did not discriminate against you. This is summarised in the diagram at the end of this slideshow.

# Examples of direct discrimination

A disabled worker's appraisal duties are withdrawn while her non-disabled colleagues at the same grade continue to carry out appraisals. Although she was not demoted and did not suffer any financial disadvantage, she feels demeaned in the eyes of those she managed and in the eyes of her colleagues. The removal of her appraisal duties may be treating her less favourably than her non-disabled colleagues. If the less favourable treatment is because of her disability, this would amount to direct discrimination.

A lone father caring for a disabled son has to take time off work whenever his son is sick or has medical appointments. The employer appears to resent the fact that the worker needs to care for his son and eventually dismisses him. The dismissal may amount to direct disability discrimination against the worker by association with his son.

# Occupational requirements

There are some cases in which direct discrimination is permitted, if it can be shown that the discrimination is because of an occupational requirement. The requirement must not be a sham or pretext and there must be a link between the requirement and the job.

For example, a church employing a person of a particular faith to be their priest/minister. They could say that it is an occupational requirement for that person to be a member of that faith.

# How to prove a direct discrimination claim

