

# Fairness at work

A guide for healthcare managers

An eBook written by Roger Kline, exclusively for the IHM



## This guide is published with the help of an educational grant from

### The Fab-O-Meter

The Fab-O-Meter App was developed by the [Academy of Fabulous Stuff](#), the free to use repository for all that is good in the NHS. Sharing best practice and ‘showing us what good looks like...’ is our mission but it is only part of the story.

Our experience is; where morale is at its highest, organisational performance is at its best. Keep up with the ‘mood swings’ of large organisations is one of management’s most challenging tasks.

The Fab-O-Meter App is free for staff to download and say, confidentially how ‘they are feeling today’. The anonymised votes are aggregated into a dashboard for senior management to benchmark their morale performance with other Trusts using the system and national trends.

More important it gives an up-to-date measure of morale in different parts of the organisation and staff groups... an early warning of trouble ahead.

We are pleased to be associated with Roger Kline’s report in the hope that it helps support NHS managers in their difficult task of managing fairly, sensitively and still getting the job done.

They are not mutually exclusive!



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**Roger Kline** is a Research Fellow at Middlesex University Business School and is the author of a number of papers and articles on the topic of discrimination at work.

His seminal report ‘Snowy White Peaks’ a survey of discrimination in governance and leadership and the potential impact on patient care in London and England is [available here](#).

**T**his is an important book, written about a difficult subject, by a real expert.

It is specially relevant at a time when workplace behaviour is, rightly, under such scrutiny.

Uniquely, it explains the law, helps employers know how to behave, managers how to manage what can be a tricky topic and shows all of us what to expect and how to make sure the system, policy and the law is working fairly, in the interest of everyone.

This is an excellent guide-book, full of experience, advice, references and practical approaches that I am sure will appeal to Boards, people managers and all of us working in organisations small and large.

Roy Lilley  
London 2018

*“ ... a powerful book, with powerful messages for us all recognising there is much more to do across the NHS”*

.... Sam Jones, former Trust Chief Executive and head of  
New Models of Care NHS England.

*“Roger’s report is an excellent insight into how simply treating people as people and for their contribution to the purpose of the NHS would lead to better health and care outcomes for us all”*

... Ed Smith,CBE,FCA,CPFA,Hon DUniv,Hon LLDs  
Formerly Chair NHS Improvement.

## Preface

The research is clear. Treating healthcare staff fairly and with respect improves the health and well-being of staff, improves how organisations work and enhances patient care and safety. Ensuring that the talent of all who work in the NHS is recognised and developed is essential.

Equality and diversity are enshrined in the NHS Constitution. They are statutory obligations for healthcare employers. They are written into your contracts of employment.

Yet despite this the IHM receives a steady stream of inquiries from members asking for advice on how to...

- look after yourselves as employees and
- look after the colleagues and staff they manage
- influence their employer

This guide starts to answer some of those questions.

It signposts the framework employers must work within, the approaches that are more likely to work, and where to find more information.

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## Before we get started....

As we went to press with our guide the results of the [2017 NHS staff survey](#) were reported...

The proportion of NHS staff who felt that their organisation...

*"acts fairly with regard to career progression or promotion, regardless of ethnic background, gender, religion, sexual orientation, disability or age"*

... fell for the fourth consecutive year. 16% of all staff disagreed.

The proportion of Black and Minority Ethnic staff, and disabled staff, who agreed was significantly worse.

The proportion of NHS saying they had experienced discrimination from patients or service users, their relatives or other members of the public in the last 12 months rose slightly, again.

The proportion of NHS staff saying they had experienced discrimination from their manager or team leader or other colleagues in the last 12 months also rose.

The levels of discrimination experienced by Black and Minority Ethnic staff, disabled staff, and LGBT+ staff were much higher than for "White-British" staff, as were the levels of discrimination reported by "White-Irish" "White-other" staff... who include European staff.

**... looks like we have a lot of work to do!**





# 1. Introduction

*"We have found it great, having a team of staff from so many different backgrounds and experiences, where we all listen to and respect each other. I'd say we are convinced we make better decisions for, and provide better care to patients. We've had to work at that but it's really paid off."*

## A multidisciplinary team in a local hospital

**T**he NHS is an extraordinarily diverse organisation. One hundred and ninety nine nationalities work in the NHS. 58,000 staff are from the EU (including Ireland). More than one in six staff are from Black and Minority Ethnic (BME) backgrounds whilst almost three quarters are women. There are large numbers of staff with disabilities but we don't have reliable data because this information is not always recorded or disclosed. The same is true for LGBT staff. Not treating staff fairly and with respect can have a heavy cost.

*"Eventually, when you realise people really are not going to change their behaviour and attitudes, you either leave or you end up doing the minimum necessary to get through each day, counting the months to retirement. It is demoralising and falls so far short of your hopes and aspirations for yourself and patients"*

This quote is from a 40 year service, 8a IT manager, once identified as a "high flier," but ostracised after she raised concerns about being repeatedly turned down for promotion without good reason.

We know that when staff work together in diverse teams at every level they can be especially effective and innovative. We also know that when staff are discriminated against or not treated with respect there is a significant risk it will impact on the quality of care and the effectiveness of their organisation or the health of their staff.

**Nevertheless, from its formation in 1948, the NHS has struggled to treat some staff fairly. Almost one in four staff (24%) reported last year that they were bullied by managers and colleagues last year with more than 30% of LGBT and staff with disabilities reporting they were bullied.**

Recruitment systems are often unfair. 24% of nurses and midwives at Band 5 (entry grade) are from BME backgrounds, but the numbers steadily fall as grades get higher so that only 3% of Bands 8C and 8D are from BME backgrounds. Whilst 73% of NHS staff are women, 77% of Very Senior Managers are men.

Significant numbers of LGBT staff and staff with disabilities are sufficiently concerned about the consequences of declaring their sexuality or disability that they don't do so at all. Irish and EU staff experience higher levels of bullying than many other staff groups.

Analysis of NHS workforce and NHS staff survey data across England shows that for BME staff (a group where we have comprehensive data (1) WRES Data analysis):

- Black and Minority Ethnic (BME) shortlisted job applicants are 1.57 times less likely to be appointed than are shortlisted White applicants; and they are much less likely to believe that their trust provides equal opportunities for career progression;
- BME NHS staff members are more likely to be investigated under disciplinary procedures than White staff members are;
- BME staff are more likely than White staff to experience harassment, bullying or abuse from other staff (but not from patients, relatives or the public);
- BME staff are more likely to experience discrimination at work from colleagues and the proportion of NHS board members and senior managers from BME backgrounds is significantly smaller than the proportion in the NHS workforce or local communities:

The new NHS leadership development strategy emphasises inclusion is important to patient care:

“Compassionate and inclusive behaviours are the key to creating cultures that engage and support all staff and teams, so that continuous improvement in performance becomes the norm.....The talents of many staff who differ from the majority of leaders in race, gender, or other characteristics are frequently overlooked. As a result, the pool of people equipped to lead continuously improving teams, organisations and systems is neither big enough nor diverse enough to fill critical leadership roles. (*Developing People: Improving Care 2016*).

So, helping staff challenge discrimination and promote equality is not an optional extra. It is indispensable element of good patient care.



## 2. The legal framework

### NHS Constitution

The NHS Constitution (*which is part of NHS staff contracts*) summarises the rights and obligations of NHS staff. Employers must ensure (Section 4a)

- “protection from less favourable treatment by fellow employees, patients and others (e.g. bullying or harassment);
- “a working environment (including practices on recruitment and promotion) free from unlawful discrimination on the basis of gender, race, disability, age, sexual orientation, religion, belief, gender reassignment, pregnancy and maternity or marital or civil partnership status.”;
- “fair treatment regarding leave, rights and flexible working and other statutory leave requests relating to work and family, including caring for adults with whom you live.”

Staff themselves must (Section 4b):

“Not discriminate against patients or staff and to adhere to equal opportunities and equality and human rights legislation.” of the NHS Constitution)

[Handbook to the NHS Constitution](#)

Staff contracts of employment will set out the ways in which their own employer implements these rights and duties.

**All staff should have been made aware of where these rights applied in local policies and procedures, many of which draw on the national agreements set out in the [Agenda for Change handbook](#).**

NHS employers have statutory equality duties set out in broad principle within their Public Sector Equality Duty (Section 149 (1), the Equality Act 2010) which requires a public authority to do more than simply respond to cases of discrimination that may occur or be alleged.

They must have “due regard” to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

There are nine of these “protected characteristics”:

1. Age, Disability,
2. Gender assignment,
3. Marriage and civil partnership,
4. Pregnancy and maternity,
5. Race,
6. Religion and belief,
7. Sex, Sexual orientation.

National NHS contractual frameworks refer to equality and in England, there are also two specific contractual requirements for NHS providers... to implement the Workforce Race Equality Standard (WRES) and the NHS Workforce Disability Equality Standard.



### 3. Why does equality at work matter?

Workforce discrimination undermines staff well-being, organisational effectiveness and patient care and safety.

#### a. Discrimination damages staff well being

Race discrimination causes elevated risk of diabetes, breast cancer incidence, uterine fibroids, subclinical carotid artery disease, substance use (smoking, alcohol, other drugs), delays in seeking treatment, lower adherence to treatment regimes, lower rates of follow-up. (Williams DR, Mohammed SA *Discrimination and racial disparities in health: evidence and needed research. J Behav Med.* 2009 Feb;32(1):20-47).

Bullying and discrimination undermine staff respect and dignity. US patient safety expert Lucien Leape explained that “disrespect causes the recipient to experience fear, anger, shame, confusion, uncertainty, isolation, self-doubt, depression, and a whole host of physical ailments, such as insomnia, fatigue, nausea, and hyper tension. These feelings diminish a person’s ability to think clearly, make sound judgments, and speak up regarding questions or concerns. (Leape LL, Shore MF, Dienstag JL, et al. *Perspective: a culture of respect, part 1: the nature and causes of disrespectful behavior by physicians. Acad Med.* 2012;87(7):845-852).

#### b. Organisational effectiveness

If recruitment is influenced by whether candidates “fit in” or are “like us” as the evidence suggests is the case (CIPD. *A Head for hiring 2015, NHS data analysis 2017*) then there must be a risk that candidates will be chosen on the basis of their ethnicity, gender, sexuality, disability, age and so on, rather than their skills and competence - risking patients not getting the best available staff.

Moreover, we also know that “the percentage of staff reporting their Trust provides equal opportunities for career progression was related to CQC ratings of quality of care

provided and use of resources as well as with levels of staff absenteeism". (West, M and Dawson, J. *NHS Staff Management and Health Service Quality*. 2011)

**Organisations which have a diverse leadership are likely to be more successful and innovative than those who do not.**

Companies in the top quartile for racial and ethnic diversity were found to be 35 percent more likely to have financial returns above their respective national industry medians. (Hunt, V. *Diversity Matters*. McKinsey 2015). Other research has demonstrated the benefits of diverse teams and leadership (Hunt, E. Yee, L; Prince, S. Dixon-Fyle, S. *Delivering through diversity and* (McKinsey 2018); Hewlett, S A. Marchall, M Sherbin, L. *Diversity and market growth*. Centre for Talent innovation (2013))

Organisations that don't reflect local communities in their own leadership may fail to be sensitive to local health needs, including those linked to reducing health inequalities linked to ethnicity. (Salway, S. *Towards equitable commissioning for our multi ethnic society: a mixed methods qualitative investigation of evidence utilisation by strategic commissioners and public health managers*. Salway, S et al 2013).

The importance of diversity to future leadership and talent management was sufficient for the new NHS leadership strategy *Developing People: Improving Care* (2016) to affirm that diversity is "one of the five conditions common to high quality systems that interact to produce a culture of continuous learning and improvement" and to explain that the NHS needs:

*"Compassionate, inclusive and effective leaders at all levels". Leaders demonstrate inclusion and compassion in all their interactions. They develop their own and their staff's skills and capacity to improve health services. They also have the specific management skills they need to meet today's challenges. Leadership is collective, in the sense that everyone feels responsible for making their bit of the system work better. Leadership development and talent management systems are sufficiently inclusive and organised to make the pool of people equipped to lead continuously improving teams big enough and diverse enough to fill critical leadership roles. Leadership at every level of the system truly reflects the talents and diversity of people working in the system and the communities they serve.*

### c. Patient care and safety

Research shows that “managing staff with respect and compassion (is important) since doing so correlates with improved patient satisfaction, infection and mortality rates, CQC ratings and trust financial performance.” <http://qualitysafety.bmj.com/content/early/2013/08/28/bmjqs-2013-001947> West et al found that bullying, discrimination, and overwork lead to disengagement and “are likely to deprive staff of the emotional resources to deliver compassionate care.”

There is [a strong negative correlation](#) between NHS staff reporting harassment, bullying or abuse from managers and colleagues, and whether patients reported being treated with dignity and respect. (Michael West and Jeremy Dawson NHS Staff Management and Health Service Quality. DH) .

NHS staff survey and patient survey results suggest that “the experience of BME NHS staff is a good barometer of the climate of respect and care for all within the NHS. Put simply, if BME staff feel engaged, motivated, valued and part of a team with a sense of belonging, patients were more likely to be satisfied with the service they received.

Conversely, the greater the proportion of staff from a BME background who reported experiencing discrimination at work in the previous 12 months, the lower the levels of patient satisfaction.” (*West, M et al 2012 NHS Staff Management and Health Quality Results from the NHS staff survey and related data*). Dawson, J found that “the staff survey item that was most consistently strongly linked to patient survey scores was discrimination, in particular discrimination on the basis of ethnic background”. (*Dawson, J. Does the experience of staff working in the NHS link to the patient experience of care? 2009*).



## 4. What do good employers do about equality and diversity?

1. **They see equality as a matter of improvement not just “compliance.”** It is a means of improving patient care and safety, organisational effectiveness, staff well-being and making the best of everyone’s talent.
2. **They face up to the facts.** They seek out information that might flag up potential opportunities to improve services and avoid the temptation, on equality, to “*ascribe more weight to positive information about the service than to information capable of implying cause for concern*” (Francis 2013); They don’t go looking for information that provides “comfort and reassurance.”
3. **They use data and staff intelligence effectively.** Workforce data from employee staff records and staff survey data exists and can be very useful especially when disaggregated by department, site, service and occupation.

Good employers have a system for presenting such data in real time to managers making decisions, often building on “pulse” surveys or [Apps](#) that can track issues almost in real time.

Timely data on grades and seniority, the patterns of recruitment and promotion, who has access to development opportunities, turnover data, disciplinary data, bullying data and staff surveys is invaluable and can be used proactively to both anticipate problems and find good practice.

**Incidentally, if self-reporting rates for ethnicity, sexuality or disability, or staff survey response rates, are low, it’s almost certainly the tip of a wider problem.**

4. **They understand the need for root cause analysis.** Whilst data can identify patterns and hotspots of good and poor practice, root cause analysis may be needed to understand more precisely the problem that needs solving. For example, if BME staff, or staff with disabilities, are being disproportionately



disciplined good employers seek to understand where the main problem is (probably in the inability to have informal discussions at a really early stage).

5. **They use evidence not bad habits.** Many approaches to poor treatment of staff in the NHS and elsewhere have relied excessively on policies, procedures and training, which [research shows](#) will not work in isolation.

Relying on individual members of staff to challenge discrimination or bullying by raising concerns, complaints or grievances is not a strategy that is going to work. Nor should employers assume that giving all staff "diversity training" will do the trick – evidence suggests it is the least effective way of hastening equality

(Justine Evesson Sarah Oxenbridge David Taylor Seeking better solutions: tackling bullying and ill-treatment in Britain's workplaces (Acas) (2015)).

*"Unconscious bias training" has become fashionable as a response to discrimination and whilst it can be useful where people want to learn, the literature suggests it is actually counterproductive for those who do not want to learn. (Duguid MM, Thomas-Hunt MC (2014). Condoning stereotyping? How awareness of stereotyping prevalence impacts expression of stereotypes'. Journal of Applied Psychology, vol 100, pp 343–59 ); (Dobbin, F and Kalev, D 2016 Why Diversity Programs Fail. Harvard Business Review. July-August 2016).*

6. **They lead.** Good organisations, take prime responsibility, starting with the Board but involving all leaders at every level, for promoting good practice, setting appropriate standards of behaviour, being proactive in developing staff, and challenging discrimination.

As on many other issues, authenticity is crucial. Staff must see that managers and leaders mean what they say on equality. Some problems can't be solved immediately but staff are entitled to see measurable progress.

7. **They ask “why do you think this will work?”** Specific interventions must be evidence driven and able to answer the question “why do you think this will work?” since unless that question can be answered there is a risk of lots of activity but little progress.

Make sure the rationale and expectations are properly shared and discussed with staff and managers (and preferably piloted) not bulldozed through – more haste less speed.

8. **They listen to front line staff and managers.** They will know what the problems are. They will also know who does things well. If a particular team, occupation, or department has high or low staff survey scores on equality, engagement or high turnover find out why.

Some discussions with staff will be uncomfortable but such conversations can galvanise action if responded to with authentic leadership.

Alongside formal social partnership arrangements with trade unions, it can be really helpful for staff to have resourced staff networks for specific groups (eg BME staff or disabled staff).with access to senior leaders to flag up concerns and they be a powerful sounding board.

9. **They know that accountability is crucial.** Good leaders model the behaviours expected of others. They face uncomfortable truths and seek to understand them.

They insist on evidenced interventions with locally developed targets since the best intentions alone will not bring about change.

They set equality and diversity goals and expect (and support) staff to meet them and hold themselves accountable if the goals are not reached.

When things go wrong (They will sometimes!) then place the emphasis on learning not on blame or denial. Research makes it clear that accountability is crucial to success on equality. (*Priest et al (2015) (28) (Promoting equality for ethnic minority NHS staff—what works? BMJ 2015;351:h3297doi: 10.1136/bmj.h3297 (2015)).*)

## 10. They understand that “inclusion” is important, too.

**Equality** enables us to create a fairer workplace where everyone can participate and has an equitable opportunity to fulfil their potential. It is not about treating everyone the same way since we may have different needs to be able to achieve the same outcomes.

**Diversity** is about recognising and valuing individuals as well as group differences. It also means placing positive value on the diversity individuals bring as a result of them belonging to a certain personal protected characteristic or their cultural background.

**Inclusion** refers to individual staff members’ experience at work and whether they feel valued and included. This is especially important for effective team working and to ensure that diverse staff, once appointed get the support they need and are welcomed for what they bring to the team rather than being simply expected to “fit in”. Diverse and inclusive teams are likely to be more effective and innovative.

If you want to find out more [this guide](#) summarises how employers should comply with equality and human rights legislation.



## 5. Top tips for managers and employees.

**H**owever tricky or personally challenging it may be, always try to deal with issues of equality and discrimination as you would approach other problems.

### 1. Be professional.

#### You raising concerns

- Always be thoroughly professional in every aspect of how you approach the issue Do not allow the way you raise or respond to a concern to get in the way of addressing the real issue. The questions below are pretty obvious but often get lost in a fog of disagreement
- Letters intended to initiate, or respond to a grievance or a formal complaint must be very carefully written. You should take advice before sending them. A first letter setting out a complaint must set out very clearly what your complaint is, summarise the evidence underpinning your complaint, and what action you are seeking in response.
- If you are writing (for whatever reason) make sure the purpose or subject of your letter is clear. A long and rambling letter which gives even a sympathetic recipient no idea what you want them to do is completely counter-productive Letters should have short paragraphs and numbering may be helpful.
- Never send emails in haste or anger – or late at night. Always write in a low key and understated manner. Assume every email might be subject to later scrutiny.
- If you make a statement it is absolutely essential it is correct. If you are not sure say so. One unqualified assertion can undermine an otherwise well-argued point.

### You responding to concerns

- Try to deal with issues informally and quickly but recognise that some are more serious and may need a more formal response and inquiry involving input from a HR professional
- Any letter responding to concerns raised (or a formal complaint) should summarise the concern raised and what the response is – which will depend upon whether the concern is a new one, has been discussed, has been investigated or a formal grievance
- Think really carefully about meetings – what is the purpose and the intended outcome? Think through every detail including where people sit and any documents needed (in advance) to assist the meeting. Are you clear what your role is? Can you anticipate dead ends and red herrings and legitimate awkward questions? Who do you need to talk to before the meeting? If you are charging don't drift into answering every point everyone else makes.
- Before the meeting ends get joint agreement on what will happen next and what (if anything) has been agreed and that that will be confirmed in an email confirming the outcome of the meeting.
- Never, ever, raise your voice, be sarcastic or use language that might offend.
- Remember. Asking questions can be more effective than making statements

## 2. What's the issue we're trying to solve?

**The right approach to the wrong problem is as pointless in equality as any other issue.**

- **What** data might be relevant? What does the data say? Are there patterns which are relevant to your issue?
- **What** do front line staff and managers say? Is there a safe space for them to say it? Listen and don't make assumptions. Some of the conversations might be uncomfortable
- **What** does the literature say about this issue – who might know within or outside your employer?
- **Is** a root cause analysis needed – what appears to be the problem might be the tip of a deeper or wider problem
- **Have** other parts of your organisations – or other organisations in the NHS – had similar problems and if so do we know what good practice works?
- **What** do your organisation's policies and procedures, and staff contracts of employment say?
- **If** it is one person's word against another, what other information might be useful to know. Remember just because there are no witnesses or other information does not mean something serious has not happened.

### 3. Policies and procedures.

#### **Know and understand your employer's policies and procedures but remember what their purpose is.**

- Policies and procedures are important. They may form part of contracts of employment and set standards expected of staff (and the employer).

If issues can be understood and resolved quickly and informally that will generally be better unless the allegations are serious in which case they should be taken seriously and not fudged.

For example, when a member of staff makes a mistake, think very carefully about whether launching a disciplinary investigation is really a better approach than an informal learning discussion and consideration as to whether working arrangements and human factors may have contributed to the error.

- Policies and procedures should be implemented fairly and consistently – not in ways that are open to claims of discriminatory treatment.
- Do you model the behaviours - often set out in policies and procedures – that you expect of others?

#### 4. Anticipate problems wherever possible

- Try to be proactive not reactive, whether it is your own issue, or that facing someone you manage, or a wider organisational problem.
- Try to have “early warning” systems in place – data, informal discussion, team meetings, appraisals – that can enable you to say

*“I did everything reasonably possible to be proactive and spot potential equality challenges as early as possible”.*

- Intervene asap – the longer issues are left to fester the harder they are to solve



5. **Equality, diversity and inclusion should underpin everything you and your employer do**

**Treating staff fairly and developing their potential should not be an optional extra or a tick box.**

- Whenever changes are being considered at work, part of the employer's due diligence should include any potentially adverse impacts on equality.

Restructures, for example, often end up disadvantaging staff who already do less well because of discrimination.

Changing policies and procedures can inadvertently discriminate. Using Equality Impact Assessments (EIA) are one way organisation can help ensure their policies, practices and decisions are fair, meet the needs of their staff and are not inadvertently discriminating against any protected group.

Your employer will almost certainly use them and should you be asked to manage, or be subject to, significant change then you should expect one to be undertaken and published.

- Your employer will collect and analyse significant amounts of information which should be used to help ensure fairness and equality in all aspects of its work – both in respect of staff and patients. Your organisation's lead on equality should be able to tell you what information exists and

hopefully how to use it. Particularly useful should be:

- Annual equality and diversity reports (they may be partially contained in the annual workforce report)
  - The annual Workforce Race Equality Standard report and action plan
  - The latest report on the Equality and delivery Scheme (EDS2)
  - The annual Workforce Disability Standard report
- 
- Remember that equality issues should be covered by your “speaking out” policy and that some equality issues would certainly constitute “protected disclosures”

**Note.** *If you are a temporary worker or contractor then your employer and the organisations which has contracted you have equality responsibilities. More information is available [HERE](#)*



## First steps in responding to potential discrimination

**You may be immensely capable and competent in managing your work and that of the staff you are responsible for, but nevertheless may feel unsure of how to handle issues concerning your own treatment. You may find the following two grids helpful in focussing your approach.**

It is essential that you think through your situation in a methodical manner using the same skills you would in the rest of your working life. In particular:

- Find out what local policies and procedures may say about your situation
- If necessary check you are clear about the contractual framework impacting on your issue – which may well necessitate taking advice
- Find friends and colleagues at work (or outside) to talk the issue through, especially if it is upsetting. If HR, or another manager you know, are sympathetic and can keep a confidence talk to them. Take advice from a trade union or professional organisation colleague.
- Construct your case in a simply but methodical way. Be clear what the issue is. Then put your evidence together in an organised way and try to make sure you have as much evidence as possible rather than it being your word against someone else's.

A table along the following lines (it can be adapted to be a chronological one, or by topic) is essential. It forces you to organise your evidence, see the gaps, think about your strong points and any weak points.

<b>What</b>	<b>When</b>	<b>Who</b>	<b>Evidence</b>
Raising concerns about impact of staffing levels	Date	Me	Copy of email and acknowledgement of receipt
Meeting with manager to discuss letter	Date	Myself and colleague/rep	Note of meeting
Corridor argument with more senior manager	Date	Myself and (name) witness	Note to manager after argument and diary note

**You may find it useful to use this example table to structure a statement of case.**

<b>Points to make</b>	<b>Evidence</b>
Summary setting out the main points you wish to make	
Your concerns – list them in order of importance	Records, emails, diary notes, documents, witness statements etc
Why these concerns have led you to write this statement of case	The policies that may be breached Advice from professional bodies Employer protocols
What your professional code says (and requires you to do)	Quotes relevant clauses
List previous occasions when you or others have raised these or similar concerns	Dates, details if possible e.g. informal, supervision, meetings, formal letters
Set out what you think should happen	Where appropriate reference your proposals
Respond to any previous response from management that your concerns do not warrant management action or have been dealt with	List each response and explain why nevertheless you feel it is necessary to still raise this concern
Ask for clarification on timescale on how your concerns will be dealt with	



## 6. Case Studies

The cases that follow draw on real cases. They are written to give a “taster” of the ways in which workplace issues of discrimination and equality should be tackled.



**They do not constitute legal advice and for that you should take specialist advice.**

The [Agenda for Change handbook](#) contains the national agreements on pay and conditions of service for NHS staff other than very senior managers and medical/dental staff and summarises the principles that your employer should follow for all staff.

<http://www.nhsemployers.org/tchandbook/part-5-equal-opportunities/section-31-recruitment-promotion-and-staff-development>.

The case studies which follow are separated into cases affecting you as an individual employee and as a manager but most of the advice is interchangeable.



# 1. Disability and bullying

“

**I am registered disabled (partially sighted) and work as a project manager in estates. I have worked in the NHS for 19 years and have had three promotions and have always had excellent appraisals.**

**I have a new manager and am conscious that for the first time in my career I feel I am being marginalised and undermined. I noticed I was starting to be left out of meeting invites and significant emails.**

**I then heard from a colleague that my new manager thinks my disability is “problem” and occasionally makes sarcastic remarks referencing my partial sightedness such as “Tom doesn’t see the point I’m trying to make” and if anyone queries him, they’re told he is only joking.**

**At my first appraisal with him I told I felt he was treating me quite differently to how previous managers had. He became defensive and ended the meeting saying he was offended at what I was saying.**

”

What should I do?

## The law and your contract of employment

The [Agenda for Change handbook](#) states

32.9 Harassment is defined as “any conduct based on age, gender, pregnancy or maternity, marriage or civil partnership, sexual orientation, gender reassignment, disability, HIV status, race, religion, or belief political, trades union or other opinion, national or social origin, association with a minority, domestic circumstances, property, birth or other status which is unreciprocated or unwanted and which affects the dignity of men and women at work.”

32.10 Bullying is defined as “the unwanted behaviour, one to another, which is based upon the unwarranted use of authority or power.”

ACAS include as examples of bullying and harassment <http://www.acas.org.uk/index.aspx?articleid=797>

- spreading malicious rumours, or insulting someone by word or behaviour (particularly on the grounds of age, race, sex, disability, sexual orientation and religion or belief)
- ridiculing or demeaning someone - picking on them or setting them up to fail
- exclusion or victimisation
- unfair treatment
- overbearing supervision or other misuse of power or position

Your treatment appears to be a form of both harassment and bullying.

**Moreover, if you are a disabled person, your employer must not treat you unfavourably because of something connected to your disability where they cannot show that what they are doing is objectively justified if they know, or could reasonably be expected to know, that you are a disabled person.**

Failure to do so is likely to be discrimination on the grounds of disability and will be something which is a breach of your contract, a breach of the contract of the person engaged in this behaviour, and a significant risk to the employer if they fail to act when they know of this behaviour.

### **What could you do?**

The NHS has tens of thousands of disabled staff who undertake invaluable work. Start by keeping a record of every incident. These may be emails or witness evidence or just a diary record. Find out if anyone else has had similar treatment from this manager – whether or not they are disabled.

When you think you have enough evidence to demonstrate a pattern of behaviour you have two choices.

Either again raise your concerns directly with the manager, explaining that you find his behaviour offensive, undermining, discriminatory and unwarranted and that you would like him to stop.

Or, raise the issue with HR, or an equality lead, or a trade union representative. If it can be resolved quickly and informally but on the record, that may be enough. But if that can't immediately be done, then raising it formally may be the only option, keeping a careful record of a possible retaliatory response.

**If mediation is offered it may work but only if you are convinced that the perpetrator accepts they are culpable and wants to try to rebuild a working relationship.**

Your employer has a duty to act to stop the discriminatory actions complained of. You should take advice at every stage and attend no meetings on your own. Mediation is normally undertaken as individuals but it may be appropriate for support through a representative or friend to be present representative and that this should be addressed in the preparations for mediation.





## 2. Carers and job applications

“

**I am a female manager and work four days a week, having done so for several years as I have an elderly parent to help look after.**

**I have worked my hours flexibly within the four days (I can move the day) and have very good appraisals.**

**A job has just been advertised following a restructure which I am confident I could do.**

**I approached the manager of the post who said that unfortunately the post would require the post holder to work five days.**

**This doesn't feel right or fair but the manager is a strong character and won't budge.**

”

What can I do?

## **The law and your contract**

It is unlawful for an employer to take a decision which has (or would have) a worse impact on people who share your protected characteristic than on people who do not have the same characteristic.

Unless your employer can show that the requirement to work five days is objectively justified, they may well be indirectly discriminating against you on grounds of gender because part time workers (and carers) are more likely to be female

In addition, employees have a statutory right after 26 weeks employment to request flexible working and ACAS sets out guidance on how such requests should be handled. <http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf>. Once they have done so an employee has a right to appeal. The [Agenda for Change handbook](#) states (and you will have local policies which are similar):

33.1 All NHS employers must have a carer's policy to address the needs of people with caring responsibilities and to meet the requirements of the 'right to request' flexible working legislation for carers of children and dependent adults. This policy should emphasise the benefits of flexible working arrangements, balancing work and personal life and employment breaks as set out in Section 34 to 36.

33.2 The policy should seek to balance the requirements of delivering a first-class service with the needs of employees, to find the most effective means of supporting those with carer responsibilities as part of a wider commitment by the NHS to improve the quality of working life.

34.8 Flexible working arrangements should be available to all employees. All jobs should be considered for flexible working; if this is not possible the employer must provide written, objectively justifiable reasons for this and give a clear, demonstrable operational reason why this is not practicable.

Your employer must not treat you worse than another worker because of a protected characteristic (direct discrimination). Women are much more likely to taking on caring responsibilities and your employer is therefore at risk of engaging in sex discrimination.

### **What could you do?**

You should set out in writing why you believe there is a statutory and a contractual right to seek flexible working in the post and expressing your concern that refusing to allow to apply might constitute indirect sex discrimination.

You should ask the employer (through HR) to set out in writing the objective reasons why they believe the job cannot be done in four days a week, especially given your flexibility, past track record of working in this way, and meanwhile submit your job application.

**You should ask HR for advice but also take advice from your union or professional body. If a meeting is offered to discuss your concerns you ask to be "accompanied" by a colleague or a TU representative.**

If the employer still refuses to agree you can apply for the post, agrees that the "conditions" will dropped you will need to take formal advice.



### 3. Bullying of an LGBT colleague

“

**I manage part of the Trust IT team.**

**A number of staff have told me that an LGBT colleague on Band 7 is being bullied.**

**He won't raise a concern for fear of the consequences.**

”

What could I do?

### **The law and staff contracts**

The [Agenda for Change handbook](#) (Para 32.7) contains the national agreements on pay and conditions of service for NHS staff other than very senior managers and medical staff. It summarises the principles that your employer should follow.

It sets out the definition of bullying and makes clear that both are potentially serious or gross misconduct. You will have local policy that says the same.

**Moreover, an employer can be held legally responsible for harassment by people who work for them unless they can show that they took all reasonable steps to prevent the worker harassing someone.**

The staff who may be bullying have a contractual duty not to discriminate. You as a manager, once you know such bullying may be taking place, must make sure you cannot be accused of being silent when you know of a risk to a member of staff and to the employer.

## **What can you do?**

LGBT staff report higher levels of bullying across the NHS. Your employer should have a policy and process for responding if any employee says he or she have been harassed or bullied. This should include:

- Having a policy clearly defining harassment and bullying, making clear there is zero tolerance for such behaviour, explaining managers' responsibilities and the consequences for staff and managers
- This should have been drawn to every employees' attention with managers having been trained in how to respond.
- Staff and managers should know that bullying is bad for staff health and wellbeing, is likely to affect turnover and absenteeism, and can put patient care at risk because research shows that bullied staff are less likely to raise concerns, admit mistakes or work in effective teams
- You should take advice from HR, making clear you are aware of the policy.
- You should consider asking to have an informal discussion with the member of staff who is apparently being bullied to ascertain the impact and their views on which could be done – and advise the member of staff on their contractual rights
- You should consider calling staff together, or writing to all your team to set out clearly the trust policy and explaining that there will be zero tolerance for bullying. You should do so in ways that may need to respect the staff members' wishes to not be identified as having made a complaint.
- If there is an LGBT staff network within the employer you should encourage the member of staff to talk to them for moral support and advice

Since bullying has wider impact on the service, you then need to keep a close eye on the situation and, should you become aware of who is bullying, then you should act to warn the individuals of serious consequences if there is any repetition – or any victimisation of the LGBT member of your team. Your intervention should be as timely as possible.

In addition to being bullied, it may well be that the member of staff is being subjected to discrimination on the basis of his sexuality.

Remember though, that the person(s) who is said to have harassed the worker are entitled to know the details of what they are said to have done so they can defend themselves. See also Case 4 below.



## 4. Victimization following sexual harassment

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**A very senior male manager has been regarded as someone women should never sit next to or be left alone in a room with as he has a reputation for inappropriate behaviour.**

**Now someone else has alleged he has repeatedly asked her to have an affair but she is very clear she doesn't want to, and as a result she believes she has found herself marginalised and excluded from meetings, emails and opportunities.”**

**The relevant Trust Board director (the Board equality champion) has offered to speak to him informally but has suggested the complainant might, in return, want to drop the formal complaint.**

**I am in the same team as the person making the complaint and she has asked my advice.**

”

What could I do?

## The law and contracts of employment

What is harassment? The legal definition is clear

Sexual harassment takes place when a person does something of a sexual nature (which might be verbal, non-verbal or physical) which has the purpose or effect of:

- violating a person's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. <http://www.acas.org.uk/index.aspx?articleid=797>

Even if the person carrying out the unwanted behaviour does not intend to violate someone's dignity or create a hostile environment, the behaviour will amount to harassment if it has the effect of creating such an environment and if it is reasonable to consider that the behaviour would have that effect.

An employer can be held legally responsible for harassment by people who work for them. If the person who harasses you works for your employer, then the employer will not be held legally responsible if they can show that they took all reasonable steps to prevent the worker concerned harassing someone.

Your employer will almost certainly have a policy that refers to harassment and bullying and sets out the reasonable steps they have taken to avoid that happening. They are likely to include:

- Making sure all staff, and especially managers, are aware of the policy and providing training
- Put in place a harassment policy (possibly in a wider dignity at work policy)
- Make clear that any harassment of workers related to any protected characteristics will not be tolerated.
- Make it clear that harassment will be treated as a disciplinary offence.
- Make it clear that complaints of harassment will be dealt with within a reasonable time, treated seriously and confidentially, and that someone complaining will be protected from victimisation.
- Describe what support is available to a worker if they think they are being harassed, for example, counselling or a worker assistance programme.
- Describe how the policy will be implemented, reviewed and monitored.

In addition to being harassed, it may well be that the member of staff is being subjected to discrimination on the basis of her sex. An employer must not treat someone unfavourably because of something connected to their sex.

**Should they do so it would be a breach of their contract, and a significant risk to the employer if they fail to act when they know of this behaviour.**

As a member of staff, and as a manager, you would be entitled to make a "protected disclosure" setting out your concerns using the local Freedom to Speak Up policy – or be a witness for the person themselves.

Remember though, that the person(s) who is said to have harassed the worker is entitled to know the details of what they are said to have done so they can defend themselves.



### **What could you do?**

An “informal word” is almost certainly not appropriate, especially given the history you describe and the Board member should know that.

You could ensure your colleague:

- keeps a careful note of what has happened,
- collects witnesses and evidence such as emails, notes of meetings, and statements from witnesses
- alerts HR, setting out the concerns in writing and drawing attention to the relevant parts of the policy, in particular what support is to be provided, protection from any victimisation for raising a concern. It may be necessary to seek to have the manager moved pending the complaint being dealt with
- contacts the women’s staff network if there is one as they may be able to offer support and advice

She should take advice from her trade union and/or a senior manager she trusts.

### **Some concerns at work are best dealt with informally.**

Persistent sexual harassment is very unlikely to be one of them.



## 5. Fairness in disciplinary processes

“

**I have just been told that one of my managers is starting a disciplinary investigation involving a nurse of Jamaican heritage.**

**I know from our WRES report that the data on the pattern of disciplinary hearing investigations and outcomes for the trust appears to disproportionately impact on BME staff.**

”

### ***What should I do?***

Employers must avoid unlawful discrimination in the way that they discipline their workers, In healthcare, it is equally important that where mistakes or poor behaviour take place that how they are dealt with is focussed on learning, not on blame.

That doesn't mean there will never be disciplinary action but it does mean that whatever is done should be focussed, wherever possible, on learning not blame. Most disciplinary processes state this but do not always apply it.

We now know in the NHS that it is much more likely on average that staff from black and ethnic minority backgrounds are likely to be subject to investigations and disciplinary processes so it is especially important that employers consider their own data and seek to ensure that their BME staff in particular are not being disproportionately disciplined through unfair processes.

Your trust data should be published on your Trust web site whilst WRES data can be found on the excel spreadsheet here [can be found here](#) .

### **ACAS have set out the principles employers must follow if they are to adopt a fairer approach to discipline.**

In healthcare, we now know that one key cause of disproportionate discipline of BME staff is that some managers find it difficult to have the same informal discussions about performance or behaviour with some BME staff that they would normally expect to have with white staff.

Employers must be careful to be able to demonstrate that they are applying the same standards to all workers.

## **What could I do?**

A number of NHS employers have adopted an approach to mistakes, performance and behaviour that draws on the research evidence and seeks to focus on learning and avoid discrimination.

At the heart of their approach is a form of "triage" which asks any manager considering a disciplinary investigation to consider (and explain) why an investigation is the appropriate response to whatever has happened.

In such a triage, the local manager is asked (or required) to consider whether an informal discussion would be more appropriate and more likely to lead to learning to prevent a repetition of the alleged act.

The local manager is asked to consider whether, in the light of "human factors" science which predicts mistakes will be made, a formal disciplinary investigation is really the best way to prevent repetition.

The local manager is specifically asked to consider whether they would take a similar approach if the member of staff was from a White background.

You should consider asking these questions of the manager prior to any investigation beginning. Once an investigation of anyone starts, it is likely that some shortcoming will be found but it doesn't mean that was the best way to proceed. It is likely that if anyone is investigated in sufficient detail, an eventual shortcoming will be found

**Of course repeated mistakes or poor behaviour may warrant disciplinary action, but many investigations may not be necessary, are very costly, are demoralising for staff and damaging to working relations.**

This does not mean people with protected characteristics should be immune from the usual performance and conduct standards in your workplace but this can be a way of preventing unintended (and sometimes intended) bias in decision making.

Asking such questions may be the best solution for all concerned.



## 6. Discrimination in development opportunities and appointments”

“

**Our trust wants to improve the diversity of the trust leadership but decisions about access to leadership programmes, acting up, secondment and the outcome of interview panels all combine to mean there is no real sign of progress at all.**

**75% of our senior leadership team are male, 95% are white, and I have no idea if any have a disability or are or LGBT.**

**Staff in one of the two departments I have responsibility for are informally complaining about the way in which “acting up” and secondment opportunities are not fairly distributed but seem to go to the senior manager’s “favourites.”**

”

What should you do?

**What should myself and colleagues who are concerned about this do, given the two concerns are similar?**

**The law and your contract**

Your employer must offer opportunities for promotion, transfer or other career development without unlawful discrimination.

This includes development opportunities that could lead to permanent promotion – for example, ‘acting up’ or temporary promotion, deputising or secondment.

Your employer should carefully analyse (and publish) data on shortlisting, appointment, staff development, and look for patterns disproportionately affecting staff with protected characteristics and try to understand what causes those patterns.

Where that happens Board level leadership will be needed to ensure that managers are expected to explain or change such patterns.

Employers are also allowed to take “positive action which means an employer can take measures to encourage people from groups with different needs or with a past track record of disadvantage or low participation to take up training, development, promotion or transfer opportunities.

## What could you do?

As a manager you could start checking whatever data for your department exists on recruitment and development. Then talk to your HR or equality colleagues and fellow managers to understand what it means. You could then suggest a departmental meeting to discuss the concerns some staff are raising (which are likely to match what workforce and staff data is saying). Trust staff networks and trade unions ought to be pressing this issue.

A good summary of some of the ways in which discrimination (often unintentionally) impacts on recruitment, development and promotion decision is contained in the CIPD publication "A Head for Hiring", you can find it [here](#).

Strategic decisions about recruitment, development and promotion practices will be agreed at Board level but within that framework it may be possible to influence Board decisions through the BME or other staff networks or via your own departmental discussions.

Following publication of *Developing People: Improving Care* (2016) there is a more focussed effort to tackle inequality in recruitment, development and promotion across the NHS which stated:

*The talents of many staff who differ from the majority of leaders in race, gender, or other characteristics are frequently overlooked. As a result, the pool of people equipped to lead continuously improving teams, organisations and systems is neither big enough nor diverse enough to fill critical leadership roles. As noted above, inclusive leadership is not only right but essential to making the most of resources available to local health and care systems.*

Data on staff development will be collected by your employer (it is a requirement because of the NHS Workforce Race Equality Standard) for staff. Research suggests employers should be wary of "informal" means of filling acting up posts, secondments, membership of project teams and other opportunities which research suggest are the most important ways in which staff develop. *Developing People: Improving Care* (2016) reports that according to research, senior executives report their sources of key development as learning from experience in role and on the job (70%), learning from others, especially mentors, coaches and learning sets (20%), and formal coursework and training (10%).

Good employers monitor

- outcomes of appraisals to spot any patterns of disadvantage
- whether those appraisals are used to help identify who should go on courses and get development opportunities or whether it is done on an informal way prone to unfair treatment.
- whether access to acting up, secondments, involvement in projects is monitoring and subject to formal processes – if not they will inevitably be likely to discriminate as managers do "what comes naturally" and rely on their biases to select staff for them
- whether when staff go on courses, their learning consolidated and stretched when they return?

You could talk to colleagues informally, at management meetings, with staff networks, HR and trade unions about a collective effort to change things that would be good for the organisation.



## 7. Return from maternity leave

“

**I am due to return from maternity leave in two months' time.**

**A two day course which would be invaluable to my work and which only takes place once a year is due to be held the week before I am due to return to work.**

**I have approached my manager about attending but he says that whilst he agrees it would be a good course to attend, I cannot attend as it is whilst I am still on maternity leave.**

**He mentioned “health and safety” concerns.**

**Not going on this course could adversely affect my future career when I return from maternity leave.**

”

What should I do?



### **The law and your contract**

Your employer cannot prevent you doing training because you are pregnant, on maternity leave or due to take maternity leave, or on pregnancy - or maternity-related sickness absence.

**To do so would almost certainly be unlawful sex discrimination as it would mean denying you training for a reason related to your pregnancy (or impending maternity leave).**

Your employer cannot try to justify this by saying they are protecting you from a health and safety risk, unless a specific risk has been identified.

**What you could do**

Set out in writing why you want to go on the course.

Say that having taken advice and since he agrees that going on the course is relevant and useful, you believe that you are entitled to attend – and why.

Ask him to clarify what the “health and safety” issues are and ask for a quick response since the deadline for applying for the course is imminent.

Say you believe that it would be likely to be regarded as discriminatory if you are not allowed to attend.

If you do not get a timely response, seek HR advice and advice from your professional body or union.



## 8. Questionable job appointments

“

**A very good friend of mine who is also a manager in our Trust has not been shortlisted for interview, even though he is exceptionally well-qualified for the job.**

**When he asked why he was simply told that the other applicants were better qualified or had more experience.**

**The universal view in the department is that he was not shortlisted because last year he said he thought the employer had discriminated against a female worker who was not shortlisted for a job that she had been “acting up” very well into, and where she clearly met the job specification.**

**Instead someone known to be a male friend of the manager from his previous job was appointed.**

**It was the second time a male friend of the manager had been appointed rather than apparently equally qualified female staff.**

”

What could he do?

## **The law**

An employer must not treat someone badly or victimise them because they have complained about discrimination or helped someone else complain or have done anything to uphold your own or someone else's equality law rights. You have a contractual right to not be discriminated against on the basis of your gender (or any other "protected characteristic").

Just because someone has been "acting up" into a job obviously does not mean they can assume they will be appointed but it would be surprising if they were not shortlisted if they had been doing the "acting up" well.

So there may well have been an issue to justify raising a concern about potential discrimination.

Whether the concern was correct is irrelevant as long as it was raised in good faith.

If she were not shortlisted because she raised a concern about potential discrimination that is unlawful. Your employer will have policies and procedures which comply with legal requirements and which may go further. The [Agenda for Change handbook](#) also states

*31.34 Action should be taken by employers to analyse data on recruitment, promotion and training in partnership with local staff representatives.*

*31.35 Records on recruitment and promotion, including reasons for decisions to employ or not, should be kept for a minimum of twelve months.*

## **What could you do?**

For individuals to prove discrimination in recruitment and promotion processes is difficult. In this case you may have suffered sex discrimination and/or victimisation because you raised a concern about discrimination.

He should have been given reasons why he was not appointed by a member of the panel. If he remains dissatisfied with the reasons given, he should request written reasons why he was not appointed including a copy of the scoring sheets that should have been filled in at the time of the interviews by all panel members.

He should also have a look at your employer's data on whether there is a pattern of men being more likely to be appointed from shortlisting.

If your employer is an NHS trust or other NHS body then it should hold that information and may well publish it on an annual basis on its web site, though if it is a small organisation (as many CCGs) are the data may not be published and may not be conclusive due to small numbers. Ask HR for the data.

If this is not the first time the manager you are concerned about has appointed someone they know well then you should certainly raise the matter, especially if other women applied and men were appointed, if only to deter future similar behaviour.

**If you remain dissatisfied you need to take advice as to whether take the matter further – from a trade union, or a lawyer. You have a contractual right to do so and sometimes that can be a way of bring wider issues about recruitment processes into the open for yourself and others in the future.**

Your employer's recruitment and selection policy/procedure will set out how to do that – and any timescales.

The employer could remind staff that when a member of staff raises concerns about discrimination it is unlawful to subsequently treat them less favourably and that it is a risk to the employer if this happens once the employer learns of this.



## 8. Interviews and mental health history

“

**Two years ago I was off sick for several weeks with severe depression. Since then I have returned to work and excelled at my job.**

**As a result I applied for a job at a neighbouring NHS Trust and was shortlisted. I was surprised to be asked at interview if there were any health issues I should declare.**

**I became very agitated and confirmed that I had been off work with depression in my current job for several weeks following bullying but that this was 21 months ago, that I had not missed a day's work since then and my work record and both appraisals were impeccable.**

**I realised in the interview that one of the panel members knows my current manager. I was not appointed and am concerned that it was that question which prevented my being appointed.**

”

What can I do?

## **The law**

The Equality Act 2010 bans employers from asking questions about candidates' health before a job offer is made. This includes occupational health questionnaires and questions about a candidate's previous sickness absence record before a job offer is made.

The only exceptions to this are if a candidate is disabled when certain questions may be asked.

Where a candidate declares a disability, the employer should consider a disabled person's suitability for a job only once any reasonable adjustments are made, not prior to such adjustments being made.

**A person is considered disabled under the Equality Act if they have a physical or mental impairment that substantially affects their ability to do normal day-to-day activities over the long term.**

The effect of the impairment is long term if it has lasted or is likely to last for at least 12 months or if it is likely to last for the rest of the life of the person affected.

### **What could you do?**

You are entitled to ask for the reasons for not being appointed since you were good enough to be shortlisted, so you should ask for those reasons in writing.

When you get a reply you should then explain why you are concerned that you were asked about your health at the interview since that is unlawful and it both adversely affected your performance and may well have influenced the panel decision and asking why the question was asked, and whether any other candidates were asked.

**You should then seek advice because this is likely to have been unlawful discrimination.**

You should beware time-wasting responses by your employer since these may be a means of depriving you of employment rights which will have a time limit attached to them.

Remember you do not have to exhausted local procedures before lodging any legal claim





## 9. Disability and shortlisting

“

**A friend has mild arthritis which they know will slowly get worse.**

**They have applied for a post within the same directorate which they are sure they can do, albeit with some relatively cheap workplace adjustments being made.**

**He had not been shortlisted despite meeting the job specification and having excellent references.**

**He is not in my department but has asked me for advice as a friend.**

”

What should he do?

## The law and his contract

The Equality Act 2010 (section 149) makes clear that having due regard to the need to advance equality of opportunity between disabled people and non-disabled people includes consideration of the need to take steps to take account of disabled people's disabilities (section 149 (4)).

Under the Act, an employer has a duty to make reasonable adjustments to things like their premises, equipment, job tasks or employment policies to remove anything that places a disabled person at a substantial disadvantage. This recognises that often for disabled people things have to be done differently to give them the same access and opportunities to work as others have.

The reasonable adjustment duty applies only to people who can show they meet the definition of disability under the Act. It does not apply if the employer did not know and could not reasonably be expected to know that a disabled person was disabled and was likely to be placed at a disadvantage.

If a disabled person (who meets the definition of disability under the Act) is treated unfavourably because of something arising out of their disability then this could give rise to a complaint of discrimination. This applies only where the employer knows or could be reasonably expected to know that the worker is disabled. If a disabled

The questions an employer needs to ask themselves are whether:

- the way they do things
- any physical feature of their workplace
- the absence of an auxiliary aid or service

...puts a disabled worker or job applicant at a substantial disadvantage compared with a person who is not disabled. Anything that is more than minor or trivial is a substantial disadvantage. If a substantial disadvantage does exist, then the employer must make reasonable adjustments.

Your employer must consider not only whether they are discriminating directly or indirectly because of your disability, but also:

- Whether they are treating you in a particular way which, because of something connected with your disability, puts you at a disadvantage and they cannot justify this way of doing what they are doing ('discrimination arising from disability').
- Whether reasonable adjustments are required to enable you to take up a training, development, promotion or transfer opportunity.

**Finally, your employer may have a guaranteed interview scheme for disabled people. In this case, if you meet the minimum criteria for the job then the employer should shortlist you for interview.**

Equality law does not say an employer has to have a guaranteed interview scheme. If an employer does not, they must still take account of how reasonable adjustments could enable you to do the job, if they know or could reasonably be expected to know that you are a disabled person

**What could you do?**

Your friend should first seek the written reasons why he was not shortlisted.

Since it is within the same trust and there is a potential issue of disability discrimination he should press for it.

He should collect the evidence suggesting discrimination and then take advice.

That advice might come from a disabled staff network, from their union, from a specialist disability organisation or HR

Your friend should then write to the employer setting out his case, and referencing the legal framework which suggests there is a problem.

Good HR advice will confirm he is right to raise a concern. If not he should take advice from his union or professional body.



## 10. Discrimination in interview panels

“

**Last week I was part of an interview panel where the chair of the panel “jokingly” asked an interviewee if she was planning to have more children.**

**She refused to answer but after the interview was over the chair referred to the question and answer and said we really can’t afford to have another manager we know is going to take maternity leave soon.**

**This candidate was the person I had marked as the best one but I was outvoted by my two panel members. I expressed my concern about his statement in our deliberations but it was shrugged off. I am extremely uncomfortable about what has happened.**

**The interviewee has now asked for the reasons she was not appointed, specifically referring to this “joke”.**

**The chair is a powerful person in our organisation so I am anxious what might happen if I confirm that “joke” may have influenced the panel decision.**

”

What should I do?

## **The law and your contract**

NHS organisations are bound by the laws on unlawful discrimination that apply to all employers. In addition, as public bodies, they have duties in carrying out their functions, to have due regard to the need to promote equality of opportunity and to eliminate unlawful discrimination.

As a matter of good practice, your organisation should have a clear policy on equality and diversity, enabling people from the widest range of backgrounds to join and progress through the organisation, and a zero-tolerance approach to unlawful discrimination, bullying and harassment.

Your organisation should also be knowledgeable about equality and diversity (with staff training available on these issues), and be committed to working towards best practice for inclusive recruitment and development.

That would include panel members (especially the chair) knowing that discriminating on the basis of maternity (current or potential) is unlawful.

Staff, including yourself as a manager, and including the chair, also have a duty not to discriminate.

**If you do not confirm that this comment did (or may have) influenced the panel decision then you are likely to be in breach of your contract as well and colluding in creating a significant financial and reputational risk to the employer.**

If the interviewee takes the case further, as seems likely, you will be asked to swear an affidavit about what happened.

If you do confirm that the comment was made, that you raised a concern about it, and that you believe it may have influenced the outcome then that will be a protected disclosure and fall within your employer's freedom to speak up policy.

### **What could I do?**

You should write down your recollection of the event as soon as possible and send it as an email to yourself.

You should take advice from your trade union or professional body.

**Since this is a potentially serious financial and reputational risk to the employer you may wish to informally speak to the Board member responsible for equality or to the Board member responsible for the Freedom to Speak up policy.**

There is a potential risk to yourself in doing what is contractually and morally the right thing.

...but, the alternative is potentially worse for you and self-evidently unfair to the interviewee.



## 11. Gender reassignment

“

**A colleague has had a number of days off work over the last three months for counselling and advice on gender reassignment prior to considering surgery.**

**Although he has been employed with the NHS for 3 years and therefore has a three month entitlement to full pay (and then three months at half pay), the manager meets the member of staff informally, reminds him that he had 5 months off work a few months ago following a serious car crash and suggests that the time off he is taking (and plans to take) could be taken as annual leave to ease staffing problems in the department.**

**My colleague is a well-regarded member of staff with excellent appraisals and no other sick leave in his three years' NHS employment. He says he does not want to do that.**

**The manager then becomes agitated and warns my colleague in a raised voice that he *“will be keeping a very close eye on his time off and any other days off”*.**

**My colleague then hears from two workmates that the manager has subsequently made sarcastic comments about my colleague *“using his condition to wangle time off”*.**

**My colleague is very upset.**

”

What can he do?

## The law

The Equality Act 2010 protects anyone who proposes to start, starts or completes a process to change his or her gender from discrimination.

**This can be at any stage in the transition process – from proposing to reassign your gender, to undergoing a process to reassign your gender, or having completed it.**

Absences for medical reasons and other appointments associated with the transition process should be recorded, but not used in relation to any absence management process i.e. they should be regarded as a short-term reasonable adjustment.

If the absences are counted as sick leave, then it could be discriminatory if that led to disciplinary procedures.

Employers must be careful not to treat individuals less favourably because of such time off linked to gender reassignment.

Gender reassignment is a process that can take an extended period.

Assessment and exploration of an individual's feelings and needs can take several months and a number of consultations before any final decision is reached. Department of Health guidance states;

*"... any reasonable absence linked to advice, or treatment should not normally be taken into account for the purposes of formal action for unsatisfactory attendance."*

(*Trans. A practical guide for the NHS* <http://www.ncuh.nhs.uk/about-us/equality-and-diversity/documents/transgender-nhs-guide.pdf> ).

The manager will also risk placing the Trust at risk of victimising the member of staff by his behaviour.





### **What could he do?**

He should take advice from the LGBT+ network in the Trust if one exists and if he feels confident about doing so.

Together with a network member or his trade union representative he should consider approaching the manager to discuss his concerns and ask him to stop as his actions are upsetting and risk being an act of victimisation.

If the member of staff does not feel confident about taking such a step he should, with a member of the network or his union, approach HR and ask for a formal meeting to discuss the issue.

It is likely that HR will advise the manager (most Trusts have a local policy that they can refer to) that his actions were not acceptable.

**If the manager is unwilling or unable to change his behaviour then a more formal response will be needed.**

At that point he should take careful advice from his union representative or a senior network member

Gender reassignment discrimination includes harassment and victimisation.

An inclusive workplace, in which managers lead by example on equality and diversity issues, should help to create a supportive environment for all forms of gender identity and expression.

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....and

The Equality and Human Rights Commission web site has a wealth of useful authoritative guidance which may supplement some of the advice provided in this report  
<https://www.equalityhumanrights.com/en>

**You may also find the ACAS guides to discrimination at work useful**

<http://www.acas.org.uk/index.aspx?articleid=1363>

