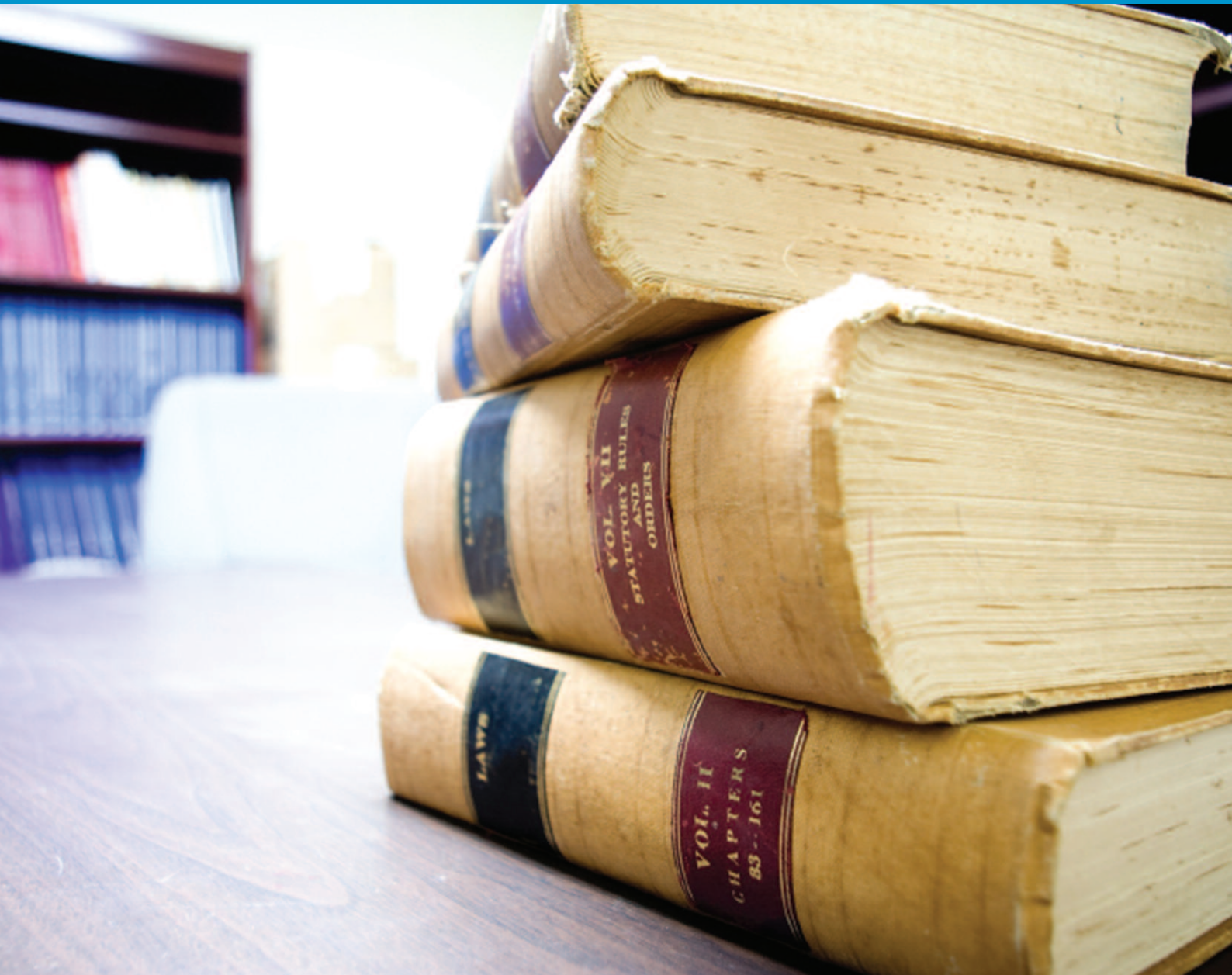


An overview on employment protections for lesbian, gay and bisexual people



A guide on how gay people are protected from discrimination, harassment and victimisation at work.



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Do you work for a gay-friendly employer?

Stonewall's Diversity Champion Programme supports over 600 employees in creating inclusive workplaces free from discrimination and harassment, where all their employees can reach their full potential. For more details go to www.stonewall.org.uk/at_work or email info@stonewall.org.uk



Stonewall

DIVERSITY CHAMPIONS

1. Chapter one - How are lesbian, gay and bisexual people protected by the law?



Some terms you may need to know:

Sexual orientation: refers to a person's attraction to people of the same sex, the opposite sex or either sex. It does not cover particular sexual practices or preferences for particular types of sexual activity.

Direct Discrimination: refers to situations where someone is treated less favourably than someone else because of their sexual orientation, their perceived sexual orientation or the sexual orientation of someone you they are close to.

Indirect discrimination: refers to situations where a workplace policy, provision, criteria or practice puts people of a particular sexual orientation at a particular disadvantage when compared to others of a different sexual orientation.

Harassment: refers to unwanted conduct which violates someone's dignity or creates an intimidating, degrading, humiliating or offensive environment.

Victimisation: refers to treating someone badly because they have complained about any of the above situations at work.

The Equality Act 2010 protects lesbian, gay and bisexual people from direct discrimination, indirect discrimination, harassment and victimisation at work. These rules apply to anyone who is perceived to be lesbian, gay or bisexual or experiences discrimination because they associate with gay people.

These rules apply to all employers, regardless of the number of staff they employ or the amount of money they make.

These rules apply in all stages of employment including:

- Application
- Interview
- Any probation or notice period
- Any incident during your employment; you will be protected from your very first day on the job until the day you leave
- Any promotion, training or support opportunity

The rules apply to all paid employees including:

- Those with full time contracts
- Those with temporary contracts
- Contract workers (unless they are genuinely self-employed)
- Partners
- In most cases, agency staff
- Vocational trainees
- Work experience students

Responsibility for ensuring these rules are not breached lies with the organisation that you feel has acted unlawfully. This means that agency staff placed with an organisation which acts unlawfully or employs someone who acts unlawfully should follow this up with that particular organisation. If the agency acts in a discriminatory way this should be followed up directly with them.

2. Chapter two - Direct Discrimination



How you are protected

Seb applied for a training post as a nursing assistant but was unsuccessful. When he asked why his manager said it was due to concerns that, as he was openly-gay, elderly male residents would be uncomfortable with him carrying out the personal care duties the role required.

The Law

Under the Equality Act 2010 an employer cannot refuse a job, promotion or any training opportunity to an employee on the basis of their sexual orientation. In the example above the employer is not considering whether Seb is the best candidate because he offers the right skills, experience or qualifications but purely on the basis that he is gay. This is unlawful.

The only time it would be possible for this to be justified is when there is a reason why, considering the nature or context of the work, being of a particular sexual orientation is an occupational requirement. In Seb's case, it is very unlikely that the employer would be able to demonstrate a genuine occupational requirement. In fact, there will be very few cases where an occupational requirement exception could be used in cases involving sexual orientation.

An employer would usually have sought legal advice before including a genuine occupational requirement as part of a role description. They would need to include these details in the initial application information.

Kira is not gay but her brother is, they are very close and Kira often talks about him at work. Sometimes he meets her when she finishes her day as a classroom assistant in a primary school. Kira recently found out that she had been turned down for a promotion because of concerns about her brother and the impact that Kira talking about him being gay would have on the children.

The Law

Direct discrimination also refers to unfair treatment due to being associated with someone who is lesbian, gay or bisexual. This can include a friend, relative or colleague. An employer cannot refuse a job, promotion or any training opportunity to an employee on the basis of the sexual orientation of someone they know.

Jane works for a hotel. It is common for staff to invite their friends and family to visit them whilst they're at work as long as they sit in the bar area. All staff talk openly about their partners and children to each other and to their customers. Jane has been told by her manager that it would 'not be wise to talk about her girlfriend at work' and that he would 'rather she did not invite her gay friends to see her at work'.

The Law

Under the Equality Act 2010 an employer cannot offer different employee benefits or treat staff differently on the basis of their sexual orientation. If heterosexual staff are able to talk openly about their personal lives and can invite their partners to work events or work related activities then there should be no reason why a lesbian, gay or bisexual employee cannot be open about their personal life.

Direct discrimination can be measured by comparing the situations of two employees. These employees should be in comparable situations except one is gay and the other is heterosexual. In the case above Jane would need to ask her manager why he has made this request. If the reason given is equally applied to both employees it would be difficult to show discrimination. If the reason will clearly affect the gay employee and not the heterosexual employee this will be discrimination.

All employers, regardless of how many people they employ, should work to ensure their policies and procedures are inclusive and the language used within them reflect this. If certain privileges are offered on the basis that an employee is married then this must extend to those in civil partnerships.

An employer advertises a vacancy for a community support worker. The employer employs ten community support workers already, all of whom are heterosexual. Simon, (who is bisexual) and Steve (who is heterosexual), both apply for the role. Steve and Simon perform equally well in the interview process and have the same scores on the psychometric tests. The employer wishes to employ Simon to promote diversity in its work force, to more properly reflect the diversity of the community it serves, and because it has no community support workers who are lesbian, gay or bisexual.

The Law

On the face of it, the employer's actions in selecting Simon ahead of Steve would appear to be unlawful and constitute direct discrimination against Steve. However, the employer's actions may be permissible if it can justify it as 'positive action'.

The recently introduced rules on positive action in recruitment are very strict. It is only justified when an employer has two candidates of equal merit; and can show that a particular group is underrepresented in the workplace or faces a particular disadvantage in it. To justify such a decision, the employer would need to carefully monitor diversity in the workplace and engage in positive action on a case by case basis. A blanket policy of recruiting from particular groups would be unlawful.

Direct Discrimination Case Law

Hubble v Brooks (2005)

In this case Mr Hubble applied for a job running a pub and when he told the owner he was gay and had a long term partner, the owner said that there was 'no way' he could employ a gay couple, that he 'had nothing against gays' but employing a gay couple would be disastrous for his business. The employment tribunal decided that this amounted to direct discrimination, as both Mr Hubble and his partner were experienced bar managers and had a right to be considered for the job. Mr Hubble was awarded £3,500 in compensation.

Ditton v CP Publishing Ltd (2006)

Mr Ditton was dismissed from his employment with CP Publishing after only eight days. In the interview process he was asked if he was gay and he was subjected to homophobic insults during his training. Following his dismissal, he was prevented from returning to work to collect his belongings and he was subjected to further insults, including the threat of violence. He was awarded £76,937 in compensation, £10,000 in injury to feelings and additional awards for breaches of procedures and interest on the award.

Direct Discrimination and Religious Organisations

A religious organisation would be able to specify that an applicant must be heterosexual as long as they can clearly show that by allowing someone who is lesbian, gay or bisexual to take that particular role the employer would go against the doctrines of that religion, or with the strongly held religious convictions of a significant number of the religion's followers. There are very few roles which would satisfy these criteria and it would only be applicable to job roles which require an individual to teach or advocate these convictions, such as a priest.

Case Law

Reaney v Hereford Diocesan Board of Finance (2007)

Mr Reaney applied for a youth worker's post with the Diocese of Hereford. He was successful at interview stage but was later turned down after a meeting with the Bishop of Hereford. The Bishop quizzed Mr Reaney about his sexuality and his commitment to comply with the Church's teachings that he should remain celibate whilst being employed in this role. Despite Mr Reaney's assurances to the contrary the Bishop concluded that he would not do so and turned him down for the job.

Whilst the Employment Tribunal found that it had been reasonable for the Bishop to ask Mr Reaney questions about his sexual orientation and for the Church to put in place requirements for the role in order to adhere to the Church's doctrines and to avoid conflict with the strongly held convictions of its parishioners, it found that the panel had been unreasonable in deciding not to recruit him because prior to this he was the preferred candidate for the role. Mr Reaney was awarded £47,345.

3. Chapter three - Indirect Discrimination



Rachel works in a call centre which offers 24 hour customer service. Her employers promote a work policy which expects staff without young family and children to work more unsociable shifts, for example night shifts and bank holidays. Rachel has noticed that this has led to more of her lesbian, gay or bisexual colleagues working these shifts as they don't have children.

The Law

Under the Equality Act 2010 it is unlawful for an employer to follow a policy, criterion or practice which places lesbian, gay or bisexual people at a particular disadvantage. As it is less likely for lesbian, gay or bisexual people to have children or young families it means they are more likely to be given the unsociable shifts. Whilst the policy appears to treat all employees equally in practice it places lesbian, gay and bisexual staff at a particular disadvantage.

As this conduct amounts to indirect discrimination rather than direct discrimination, in certain circumstances, such a policy may be justified. The employer would need to show that it is a proportionate means of achieving a legitimate aim, such as encouraging women returning from maternity leave to come back to work. In these types of cases, the rights of different groups need to be considered alongside each other to deliver the fairest outcome.

4. Chapter four - Harassment



Tony works in a restaurant and jokes are often made about him being gay or about gay people. These are made in Tony's presence and often in front of the company manager who fails to challenge it. The general view amongst staff is that the jokes are meant in fun and are all part of the work culture where everyone is teased about something.

The Law

Some people may say this is 'just banter' and not meant to upset anyone but if an employee feels they are being targeted because of their sexual orientation or their perceived sexual orientation and this makes them feel intimidated, degraded, humiliated or offended then this behaviour can be defined as harassment and would be unlawful under the Equality Act 2010.

Harassment can include:

- Jokes or banter
- Insults or threats
- Unnecessary and degrading references to someone's sexual orientation or their perceived sexual orientation
- Excluding someone from activities or social events
- Spreading rumours or gossip including speculating about someone's sexual orientation or outing them
- Asking intrusive questions

Jason is bisexual but not out at work. A colleague recently saw him leaving a gay bar in town and since then he has found homophobic graffiti written about him on the walls of a toilet. He has also overheard snide comments being made about gay people but he feels he can't challenge this directly without coming out.

The Law

The rules made under the Equality Act 2010 protect people from discrimination and harassment on the basis of sexual orientation even if that person's sexual orientation is not known or if that person is wrongly perceived to be gay. The key elements to look at are the behaviour and the motivation for that behaviour. His employer should have in place a confidential mechanism by which he can challenge this kind of behaviour with his management without having to come out.

Harassment Case Law

Brooks v Findlay Industries UK Ltd (2004)

In this case Mr Brooks was subjected to name calling and impersonations at work. His manager disclosed details of, and spread rumours about, his sexual orientation. Mr Brooks refused to submit a formal grievance, but senior colleagues were aware of the conduct. He went on sick leave and informed his employer he could not work with his colleagues. He was dismissed and won his claims of discrimination, harassment and unfair dismissal. He was awarded £15,727 for discrimination and harassment and £7,500 for unfair dismissal. As part of its judgement, the Employment Tribunal decided that the fact the employer's equal opportunities and disciplinary policies made no reference to sexual orientation was an important factor. It also decided that the fact that another employee, who was openly gay, engaged in the banter did not prevent this from being harassment of Mr Brooks.

Martin v Parkam Foods Ltd (2006)

Mr Martin, a quality assurance officer at Parkam Foods Ltd, was awarded over £17,000 by an employment tribunal which found that he was the victim of discrimination and harassment. Martin was suspended after complaining about pornographic and homophobic graffiti containing his name on a toilet wall. Martin resigned in protest when Parkam Foods failed to take his complaint seriously by refusing to investigate and repeatedly telling him to forget about his grievance and move on. The tribunal found that Parkam Foods did not appropriately deal with Martin's grievance due to 'inbuilt prejudice' and the failure to take his complaint seriously 'completely humiliated' Martin and aggravated the situation.

Yahiaoui v Aramark Ltd (2009)

Mr Yahiaoui worked as a Chef de Partie for Aramark Limited. He was dismissed for gross misconduct after throwing a bowl at a work-station.

Mr Yahiaoui claimed his behaviour was the result of a series of incidents of harassment he had suffered from his manager and other members of kitchen staff on the basis of sexual orientation. The employment tribunal found that Aramark had failed to take Mr Yahiaoui's claims seriously and failed to investigate them. The investigating manager even referred to his complaints as 'kitchen banter'. The tribunal found that harassment had taken place, including sexual and homophobic banter directed at Mr Yahiaoui, in the months preceding his dismissal. The tribunal also ruled that direct discrimination had taken place because Aramark did not take these claims as seriously as they would claims of harassment on the grounds of race or gender.

5. Chapter five - Victimisation



When Jason raised a grievance about homophobic comments being made in his office his manager took action. He informed all employees that these comments would not be tolerated and as a result they stopped. However, he has noticed that his team are treating him differently than they were before; they no longer invite him to any work socials which were a regular weekly event. They noticeably stop talking when he enters the staff room or start speaking in hushed voices when he's around them.

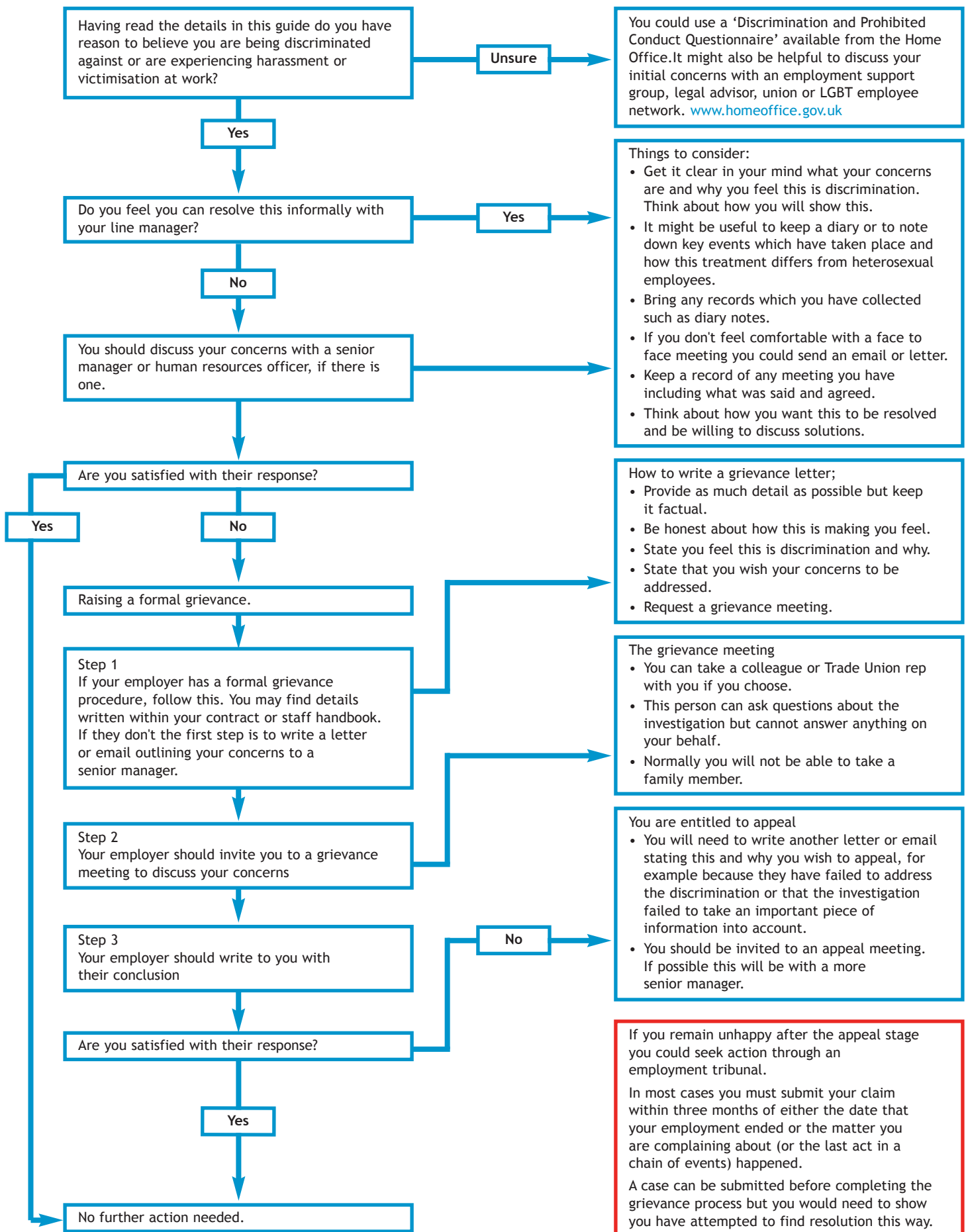
The Law

If an employee can show that they are being treated differently because they have issued a grievance and that treatment is less favourable compared to other employees, this could be classed as victimisation and would be unlawful.

Complaints of victimisation need to be made separately to any previous or on-going grievances. Due to the nature of victimisation it can feel difficult to challenge or prove. However, employers have a duty to look into complaints and address behaviour. It may be best to try and address victimisation directly or informally with a manager. If this is unsuccessful it is possible to follow a formal grievance and tribunal action. See chapters 6 and 7.

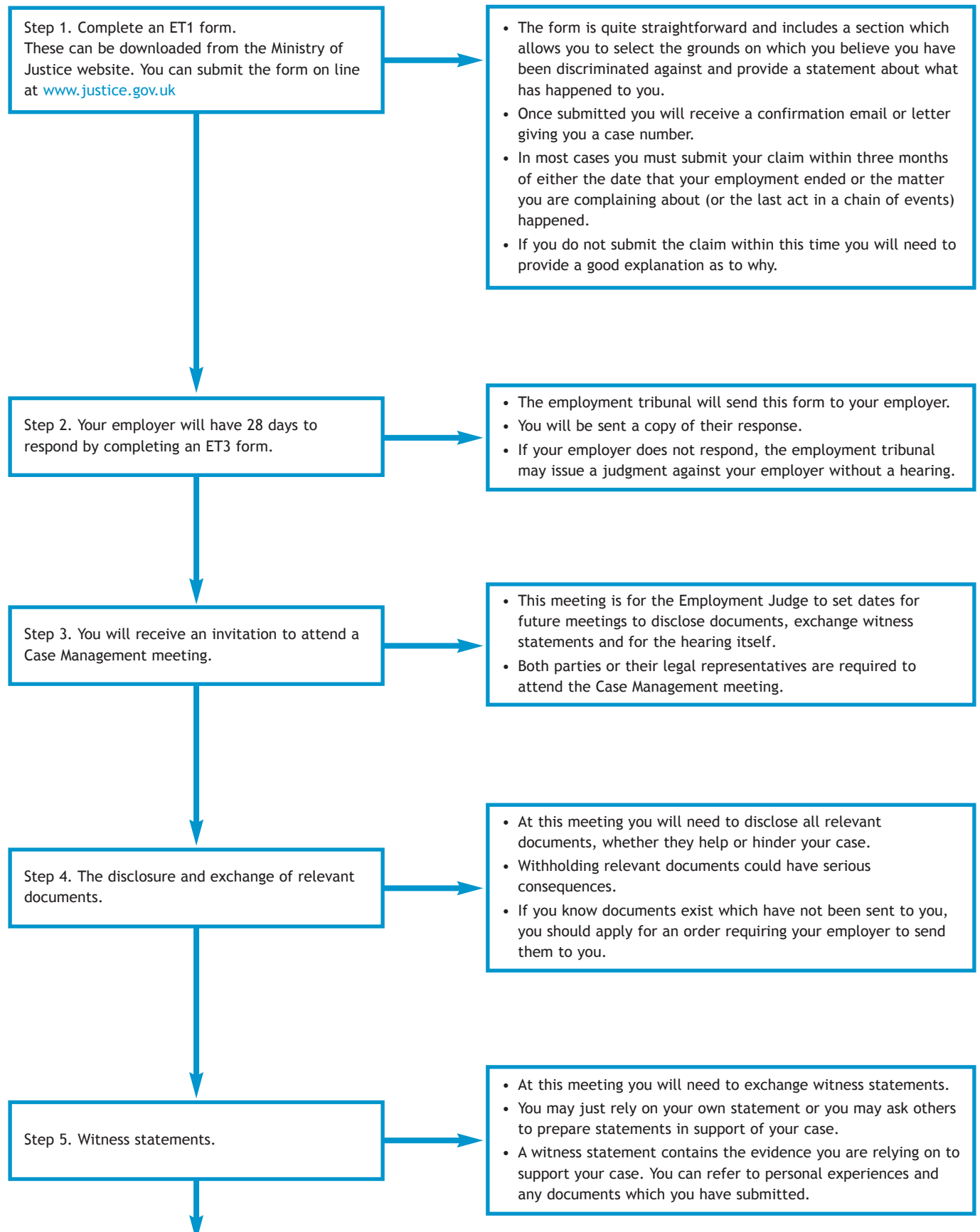
6. Chapter six - The Grievance Process

How to challenge sexual orientation discrimination and harassment in the workplace

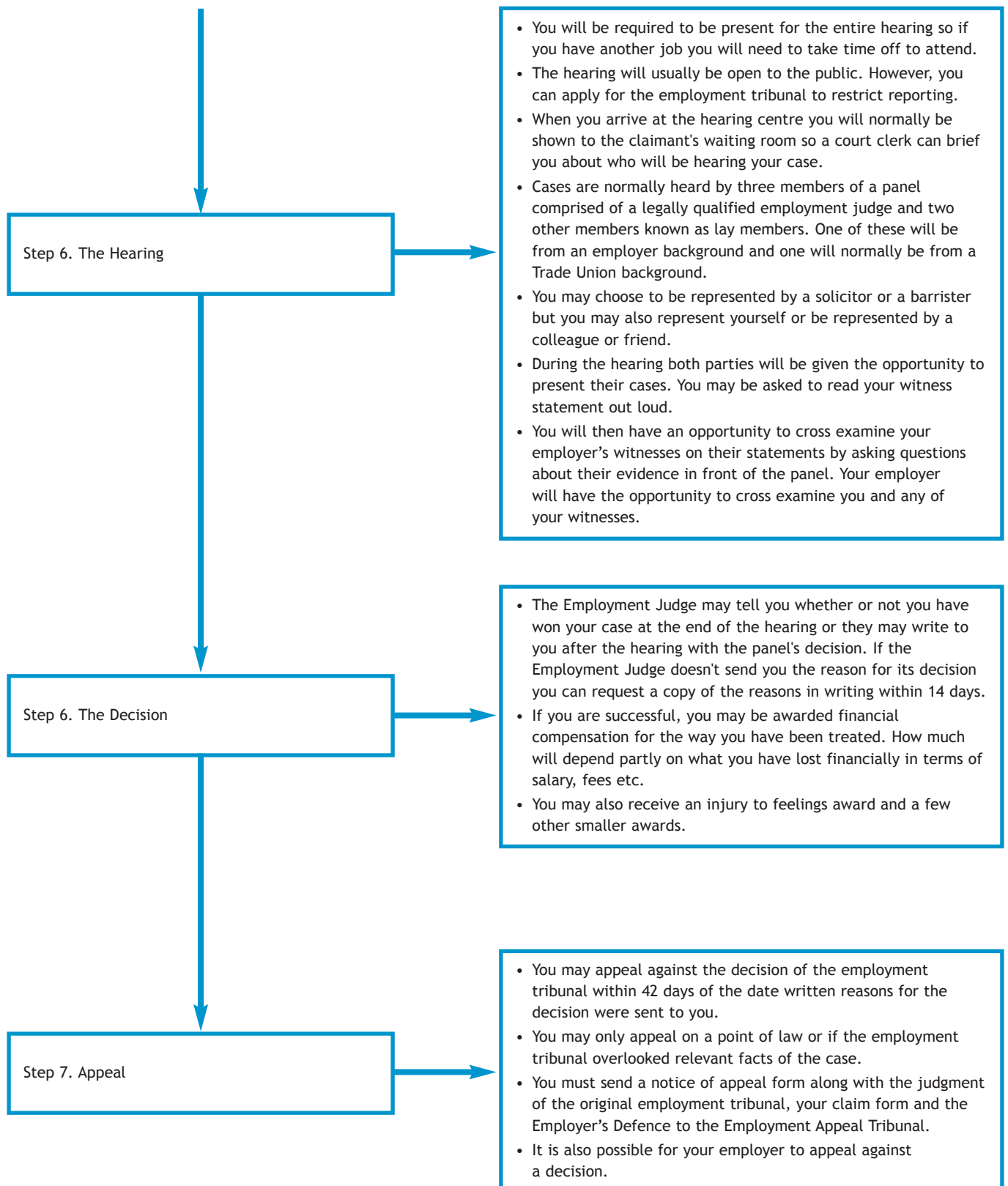


7. Chapter seven - Employment Tribunal

How to bring a discrimination claim to employment tribunal



employment tribunals continued...



Other Considerations

How much does it cost?

- At the current time it doesn't cost anything to issue a claim in the employment tribunal. Charges are due to be introduced from summer 2013.
- The normal rule in the employment tribunal is that, win or lose, both parties must bear their own costs. This means that, even if you are unsuccessful you won't have to pay your employer's costs.
- There are exceptions to this rule, where the employment tribunal can make a costs order. For instance, if the employment tribunal considers that one party has been unreasonable in pursuing or defending the claim, they may be ordered to pay costs.
- If your employer fails to pay the award you may have to pay a court fee in the civil courts to enforce your award.

How long will it take?

- It normally takes around 6-9 months for a claim to be processed all the way to a final hearing, however it can take longer depending upon how busy the employment tribunal is and how long it will take to hear your case.

8. Where to go for further help and advice



Stonewall

Stonewall's Information Service can point you in the right direction for helpful contacts and legal advisors. Contact us Monday-Friday from 9.30am to 5.30pm.

08000 50 20 20 (freephone)

info@stonewall.org.uk

www.stonewall.org.uk/info

Queen Mary Legal Advice Centre

Queen Mary's Pink Law Advice Centre can offer free legal advice on all areas covered in this booklet.

Contact us Monday to Friday on 020 7882 3931

lac@qmul.ac.uk

www.advicecentre.law.qmul.ac.uk

LawWorks

LawWorks is the operating name of the Solicitors' Pro Bono Group which provides details of free legal advice centres available to those who cannot afford to pay for legal advice. They are sometimes able to provide casework assistance and application forms are available on their website. Please find further details at

www.lawworks.org.uk.

IBar Pro Bono Group

This is a barristers group which matches barristers willing to give free legal advice to individuals who cannot afford to pay for such advice. However referrals are only made via

legal advice centres. There are numerous centres across the UK. You can find information about your nearest centre from the 'Do you need help' section of their website (www.barprobono.org.uk).

Free Representation Unit (FRU)

FRU is a charity that provides legal advice, case preparation and advocacy in areas including employment tribunal cases. Again referrals must be made via a legal advice centre and only after you have received a date for your hearing. You can find further information at www.thefru.org.uk.

Community Legal Advice

Paid through legal aid this service provides free and confidential advice for people on a low income.

Call their helpline 0845 345 4 345.

ACAS - Advisory, Conciliation and Arbitration Service

ACAS have a helpline for those facing problems at work - 08457 47 47 47. Their helpline provides free, impartial and confidential advice. Pursuing a claim in the employment tribunal can be a stressful experience. You may therefore want to explore the possibility of settlement through ACAS either before or after you have issued a claim. ACAS has a statutory duty to assist the parties in agreeing settlement terms and an ACAS officer will be assigned to your case for this purpose.

Stonewall would like to thank the students from Queen Mary University of London School of Law and legal advisors from Mishcon de Reya who researched this guide.



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We ask that you contact Stonewall through one of the above methods as we do not run a drop in service.



Mishcon de Reya Solicitors

