

Asking and responding to questions of discrimination in the workplace

Acas guidance for job applicants,
employees, employers and others
asking questions about discrimination
related to the Equality Act 2010

inform

advise

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with you

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Asking and responding to questions **of discrimination in the workplace**

For advice on asking and replying to questions covering Goods and Services, refer to the Government Equalities Office website

www.gov.uk/government/organisations/government-equalities-office

Asking questions referred to in this guide in good faith means generally you are protected under the Equality Act 2010 should you subsequently be victimised because of this action.

Contents

Introduction	2
Discrimination	2
Resolving disputes	4
Asking questions of discrimination at work – six step guidance for questioners	6
Responding to questions of discrimination at work – three step guidance for responders	10
Asking questions about issues to do with equal pay and contractual terms and conditions	15
Asking Questions – Three step guidance for Questioners	17
Responding to questions of pay and benefits – guidance for responders	18
Annex 1 – Questioner’s template: organising your questions	21

Introduction

Issues of discrimination can be complex. A written question and answer process can be particularly helpful in establishing what has happened and can help in trying to resolve concerns, avoiding claims and disputes. This good practice guidance explains how people, such as jobseekers and employees who think they may have been discriminated against under the Equality Act 2010, can ask questions about what may have happened to them and how people or organisations such as employers that receive an information request can respond appropriately.

Resolving disputes in the workplace can be assisted if people can ask and respond appropriately to questions about the issues at the core of the dispute.

Sometimes a simple question and answer will clear up a misunderstanding; sometimes an acknowledgement that things have gone wrong or that there may have been discrimination and an offer to put matters right will be all that is necessary to nip a problem in the bud.

If someone thinks they've been discriminated against and asks questions, this guide refers to them as the **questioner**. The person or organisation they are asking questions of is called the **responder**. Although the guide refers to employees and employers, it also covers Trade Unions and their members, partnerships and other workplace relationships.

Discrimination

The Equality Act 2010 makes it unlawful to discriminate against someone because of one or more protected characteristics. The protected characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Discriminatory conduct under the Equality Act 2010 covers:

- Direct discrimination: when someone is treated less favourably than another person because of a protected characteristic they have or are thought to have (perceptive discrimination) or because they associate with someone who has that characteristic (associative discrimination). Note – perception

or association discrimination do not cover marriage and civil partnership and pregnancy and maternity, see Acas guidance at www.acas.org.uk/equality for further information;

- Indirect discrimination: a rule, policy or practice which is applied more widely but has a disproportionately adverse effect on particular groups of people and furthermore this rule policy or practice cannot be objectively justified (see page 12);
- Victimization: treating a person badly because they have made, or people think they have made, a complaint about discrimination or have given evidence in a discrimination case;
- Harassment: unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual, relevant protected characteristics are limited to race, sex, disability, religion or belief, sexual orientation, age, and gender reassignment;
- Discrimination arising from disability. This means unfavourable treatment because of something arising in consequence of a person's disability;
- Failure to make reasonable adjustments in relation to disability.

Guidance on your rights and responsibilities under discrimination law can be found on the Acas website www.acas.org.uk, the website for the Commission on Equality and Human rights at www.equalityhumanrights.com and the Government Equalities Office at www.gov.uk

The Equality Act 2010 also requires men and women to have equal pay for the same job or jobs of equal value or rated as equal by analytical job evaluation (see page 17 for specific questions relating to equal pay issues).

The Act applies to the workplace, to the provision of services, exercise of public functions, managing or letting premises, in education, and for associations including private clubs.

Resolving disputes

Before taking a claim to an employment tribunal or civil court, an employee or job applicant should normally use the employer's grievance procedure, or other internal dispute resolution mechanism – these should be the first port of call. If internal procedures do not result in an acceptable outcome in circumstances that might result in an employment tribunal claim, Acas will provide a free conciliation service 'Early Conciliation' which may avoid the need to make a claim.

Early Conciliation is voluntary but anybody wishing to bring a tribunal claim will first need to notify Acas of their intention to claim. Following this, the prospective claimant's limitation period is put on hold or paused for up to one calendar month to allow for conciliation to take place without the need for the prospective claimant to take any legal steps to protect their rights. This gives time to explore settlement. The pause can end before the calendar month is up if either party makes it clear that they are unwilling to conciliate, or it can be extended by up to 14 days if the parties are still actively working towards settlement with their conciliator. If Early Conciliation doesn't conclude matters, a Certificate will be issued without delay and the claimant will be able to lodge a tribunal claim if they wish to.

Example:

Nilam applies for an internal promotion as a sales manager. She isn't invited for interview. This isn't the first time she has been unsuccessful in getting promotion with her current employer and she asks for reasons why she didn't get an interview. Her employer declines to give this feedback leading Nilam to think she is the victim of racial discrimination. She decides to notify Acas of her intention to make a claim but when the issue of feedback arises during the early conciliation process, the employer explains the reason for not providing it was down to the company policy and applied to all employees. The employer agrees to review this policy and discuss with Nilam her unsuccessful application and how she could improve her chances of promotion through developmental roles within the company to raise her profile. Nilam is persuaded that she was not discriminated against and doesn't make a claim to an Employment Tribunal. The employer changes their policy to automatically give feedback to unsuccessful job or promotion applicants.

Mediation can also be a useful technique in resolving equality and discrimination based disputes before they become Tribunal cases. Further information on mediation and other alternative dispute resolution can be found on: www.acas.org.uk

Whilst these steps can help resolve a dispute, an employee or job applicant must keep in mind that there is normally a time limit of three months from the day that gave rise to the complaint to making a claim at an employment tribunal (six months if the issue is dealt with by a county court – or sheriff court in Scotland).

Note: Asking questions referred to in this guidance in good faith means employees are protected under the Equality Act 2010 should they subsequently be victimised because of this action.

Asking questions of discrimination at work – six step guidance for questioners

It is always helpful to resolving a dispute to establish the facts about conduct which may have led to an employee or job applicant thinking that it may be discriminatory. The following six steps set out how to prepare for and seek information from the responder. The template at annex 1 can help organise or frame questions or a questioner could seek legal advice, or advice from a trade union or local advice centre.

Step 1 – Questioner's and responder's details

The questioner should set out their name and address and that of the person or organisation and others who the questioner thinks may have discriminated against them.

Step 2 – Protected characteristic under the Equality Act 2010

The questioner needs to identify which protected characteristic(s) may have been the subject of the unfairness they've experienced. There are nine protected characteristics. It may well be that more than one protected characteristic is relevant to the treatment experienced.

Step 3 – Description of treatment

The questioner should set out a brief factual description of the treatment, or lack of treatment, or the failure to make a reasonable adjustment in the case of a disabled person to which the complaint relates and the circumstances leading up to that treatment. The description should aim to give key factual details, such as the date, time, place and number of instances of the treatment [or failure] that are central to the complaint.

When describing the events relating to the treatment, the questioner should also think if other people were involved. It would be helpful to name them and any reasons why these individuals were acting in the way that they did.

Example of Step 3:

(by Sheila who applied for a supervisory job on promotion)

I attended an interview on 8 February with Mike Ross my boss and another manager, Anne Smith. After some questions about my current job and why I think I'd make a good supervisor, I was asked if I could "put in the hours" required of the job and what arrangements I'd made to care for my child. Even though I gave satisfactory answers both Mike and Anne returned to this issue later in the interview with other questions like "how would I cover school holidays?" and "Is my child sick a lot?"

I felt uncomfortable as they didn't appear to want to discuss what qualities I could bring to the job and I didn't get the promotion. I was told I was very good but was just piped at the post by Brian Jenkins.

A few days later, some friends told me they'd heard Mike Ross saying that I might let the business down with time off work to care for my kids and so he couldn't give me the job. I don't know if this is true but my work has been regarded as exemplary as well as my timekeeping and reliability.

I've raised a grievance and appealed against the decision on 1 March as I think it so unfair; I've not heard anything back despite sending reminders for over a month.

Do you agree with my description of events? If you do not, please would you set out your reasons?

Tip: A questioner should always ask if the responder agrees with the statement at Step 3 and if not, why not.

Step 4 – Type of discrimination you experienced

To help the responder answer the questions, the questioner needs to identify the type of discrimination they believe might have occurred. These are listed on page 2. A questioner can get help with identifying the form of discrimination from Citizen's Advice Bureau as well as the Equality Advisory

Support Service helpline at 0808 800 0082. Trade Unions can also offer advice for their members. In Scotland advice can be obtained through legal aid advice and assistance.

Step 5 – Why do you think your treatment was discriminatory?

This step allows the questioner to set out why they think the treatment or disadvantage described in Step 3 above might be unlawful. It can help identify some of the areas of disagreement and can help the responder address the concerns more accurately. If able, the questioner should set out in what context or capacity they experienced the unfavourable treatment being enquired about.

Example of Step 5:

I think the treatment I experienced at the interview was unlawful because I was asked questions around childcare that would not have been asked of a man applying for the job. I think I was turned down for the supervisor job because my boss had apparent concerns about my childcare arrangements judging by the questions I was repeatedly asked. He would not have asked these questions if I were a man applying for this role.

I believe I was treated this way because I am a woman. I consider this sex discrimination.

Step 6 – Additional questions about treatment

The questioner can ask any appropriate questions of the responder that they consider might be important to the events they feel have affected them. Many organisations have policies to ensure fair practice in the workplace such as for equality, discipline and grievance, bullying and harassment and questioners might want to ensure they have been treated consistently with them. A questioner can ask for statistical information to show how people with their protected characteristic are treated within the organisation.

Example of Step 6:

To better understand the context of what has happened Sheila asked to see the questions put by the interviewers to all the candidates for the job. She asked if the company has trained the two managers in equality and recruitment and selection procedures, and if so, when. Sheila also asked for statistics to see how many other women had been promoted to a supervisory role compared to men to check there is no bias or unlawful barrier to women progressing in this organisation.

Always aim to keep questions as short and as relevant as possible.

On completion of step six, the questions should be sent to the responder. This can be done in any format either in the form of a letter, email or questionnaire to the responder.

- The documents can be delivered in person or send by post, fax or email. If the questioner decides to send by post it would be appropriate to use the recorded delivery service, so that, if necessary, evidence can be produced to show the questions were delivered.
- If using email or fax the questioner should request a “read” receipt on emails or check the fax delivery status.
- Whatever method chosen, the questioner should make clear that the documents will require action by the responder.
- Remember that it is the questioner’s responsibility to make sure the documents are received by the respondent.
- The questioner should ask the responder to reply by a set date especially given the time limits for filing a Tribunal claim.
- The questioner should keep a copy of the documents in a safe place.
- The questioner should tell the responder where to send their answers; it might be a home address or their legal or trade union representative.

Responding to questions of discrimination at work – three step guidance for responders

Questions about potential discrimination at work should be dealt with seriously and promptly by the responder. The responder should consider carefully the most appropriate way to respond given the possible implications of any response. If a responder chooses not to answer then a claim may be lodged at Tribunal that may have been avoided by providing clear answers in the first place. Further, a Tribunal may order that the responder provide answers in any event as part of a claim. Receiving questions about discrimination doesn't mean that a responder will have to appear before an employment tribunal or county court – sheriff court in Scotland.

The responder should talk to the questioner or their representative about ways to resolve the dispute. It is not necessary to wait until legal proceedings are taken to ask for help from Acas if the issue is to do with a workplace to explore a practical way to a solution; see the example on page 5. From April 2014 Acas will be involved before a claim is lodged. Acas will not ask for any jurisdictional information on the Early Conciliation request form and will talk to the parties direct about their issues so that they can explain them on their own terms as a basis for possible resolution.

Example:

As the owner of the business Jackie received questions from an employee Paul concerning harassment related to his sexual orientation by his line manager. Although aware of an unresolved grievance from Paul, Jackie didn't know he was considering taking his grievance to a tribunal. The line manager is shocked by this turn of events and Jackie suggests mediation as a way of possibly resolving this dispute. Both Paul and the line manager agree to try. They eventually find a resolution that enables them to work together without the need to take a claim to a tribunal.

Many disputes can be resolved before a tribunal so the responder should seek to deal with questions as quickly as reasonably practicable.

Tip: In any event do not ignore these questions.

The following steps set out the main issues for a responder to consider when deciding on how to answer the questions.

Step 1 – Agree/disagree with questioner’s statement

The responder should consider if they agree, agree in part or disagree with the description of the treatment the questioner alleges they received at step 3. The responder should do some appropriate investigation then set out their version of the events. If a responder doesn’t wish to answer all the questions raised, see Step 3 below.

Step 2 – Do you consider treatment was justified

The questioner is suggesting that the behaviour they experienced was unlawful in that it amounted to discrimination. Although under the Equality Act 2010 direct discrimination is not justifiable unless it is because of age, it is possible to justify indirect discrimination in certain limited circumstances. If a responder considers their actions were justified, some indicators to what could amount to objective justification are set out on page 12.

Step 3 – Responding to other questions

In addressing the questioner’s specific issues raised, the responder needs to consider and answer as appropriate. If a responder thinks some other questions are not relevant or unclear, they should clarify their purpose with the questioner to help them to reply appropriately. If a responder decides not to answer a question, they should explain why.

A responder is not under a legal obligation to answer questions. However a tribunal or county/sheriff court may look at whether a responder has answered questions and how they have answered them as a contributory factor in making their overall decision on the questioner’s discrimination claim. A Tribunal or court may also order a responder to provide such information as part of legal proceedings in any event. These are issues a responder would need to weigh up when considering if to reply and what to say.

Tip: It is good practice for a responder to share as much information in the answers as they feel able to do since this can help a speedier resolution of the dispute, or prevent escalation into a formal complaint because the questioner has become frustrated.

Where the relevant information is considered to be commercially sensitive or confidential, for instance being asked to name other employees who have complained about an individual in a bullying and harassment case, information can be presented in a non-specific way. A responder should give reasons where they are unable or unwilling to provide answers to a question because of these issues. Confidential information is protected by both the Data Protection Act 1998 and the common law duty of confidence. Where information is confidential, it can only be disclosed with the consent of the individual in question, unless there is a legal obligation to do so or there is a strong public interest in favour of disclosure.

The Equality Act 2010 allows for objective justification of indirect discrimination and also sometimes where there is direct age discrimination. Indirect discrimination can occur when you have a condition, rule, policy or even a practice in your company that applies more widely but particularly disadvantages people who share a protected characteristic. Indirect discrimination can be justified if a responder can show they acted reasonably in managing the business, ie that it is 'a proportionate means of achieving a legitimate aim'. A legitimate aim might be any lawful decision made in running a business or organisation. However, if there is a discriminatory effect the sole aim of reducing costs is unlikely to be lawful.

Tip: Being proportionate means a responder has really looked at the options including showing that it was not possible to take 'less or non-discriminatory' alternatives to any decision made.

Example:

A small finance company needs its staff to work late on a Friday afternoon to analyse stock prices in the American finance market. The figures arrive late on Friday because of the global time differences.

During the winter Jack asks to be released early on Friday afternoons in order to be home before sunset – a requirement of his religion. He proposes to make the time up later during the remainder of the week. The company is not able to agree to this request because the American figures are necessary to the business, they need to be worked on immediately and the company is too small to have anyone else able to do the work.

Jack raises questions with the company about potential religious discrimination. The company responds and it is able to show that the requirement to work on Friday afternoon is not unlawful indirect discrimination because of religion. The requirement meets a legitimate business aim and there is no alternative means available.

Tip: If a responder considers their actions may be justified it would be sensible to discuss this with a colleague or a legal adviser first to try and avoid assumptions or making a mistake.

The responder needs to return the answers to the questioner. The following pointers may help:

- The questions sent and the responder's reply should be kept in a safe place.
- A responder can send their answers either by delivering them in person to the questioner, email or by sending it by post.
- If using the post it is good practice to use the recorded delivery service, so that, if necessary, evidence can be produced that the answers were delivered.

- If a responder decides to send the documents by email or fax they should request a “read” receipt on emails or checking the fax delivery status.
- A responder should send the answers form to the address indicated by the questioner.
- It is important to respond in a reasonable time. If a responder cannot meet any deadline set by the questioner they should let them know and agree an alternative date.

A responder must not treat the questioner badly for asking these questions, for example by denying them promotion or refusing to provide them with a service. To do so could give rise to a claim of victimisation under the Equality Act 2010.

Further Help and Information

Acas Helpline 08457 47 47 47

Equality Advisory Support Service provides information, advice and support on discrimination and human rights issues to individuals in England, Scotland and Wales – 0808 800 0082

Asking questions about issues to do with equal pay and contractual terms and conditions

This guidance is concerned with gender pay discrimination and is intended to help questioners to obtain information about whether they have received equality of contractual employment terms from their employer. The information should help to establish key facts early on and make it easier to resolve the matter without needing to go to an employment tribunal.

The questions below enable the employer to consider if the questioner is receiving less favourable pay and/or other contractual terms and conditions than the stated comparator and whether the employer agrees that the people being compared are doing “equal work”. It also gives an opportunity for the employer to explain the reasons for any difference in terms between people doing equal work. Equal pay issues can be complex, especially as they usually involve many people in the workplace. Accordingly a questioner should get advice from their trade union if appropriate or legal advice before asking questions.

Terms Used

Questioner means the person who thinks they have not been given equal contractual terms with a person of the opposite sex who does equal work (the **comparator**). If the case reaches an employment tribunal, this person will be referred to as the “claimant”.

Employer means the person or organisation responsible for the contractual terms of the questioner. If the case goes to tribunal the employer will be referred to as the respondent.

Comparator means the person the questioner is comparing themselves with. A comparator must be an actual person of the opposite sex who is receiving more favourable contractual terms and is shown to be in the same employment doing “like work”, “work rated as equivalent”, or “work of equal value”.

Same employment means that the comparator should be employed by the questioner’s employer or an associated employer.

Equal work means work that is the same or broadly similar (known as “like work”); work that has been rated as equivalent under a job evaluation study; or work of equal value.

Work rated as equivalent is where a woman's work is rated as equivalent to her male comparator. The value of the work will be measured by looking at the demands made on the workers, using factors such as effort, skill and decision-making. Because the focus is on the demands of the job rather than the nature of the job overall, jobs which may seem to be of a very different type can be rated as equivalent.

Work of equal value means that the jobs done by a woman and her male comparator are different but can be regarded as being of equal worth, having regard to:

- the nature of the work performed
- the training or skills necessary to do the job
- the conditions of work, and
- the decision-making that is part of the role.

In some cases, the jobs being compared may appear fairly equivalent (such as a female director of personnel and a male director of finance). More commonly, entirely different types of job (such as manual and administrative) can turn out to be of equal value when analysed in terms of the demands made on the employee.

Material factor includes:

- personal differences between the employees concerned such as experience and qualifications
- geographical differences, for example, London weighting
- unsocial hours, rotating shift work and night working.

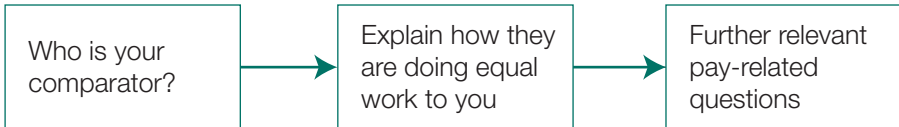
The material factor must not itself be directly or indirectly discriminatory.

Objective justification can allow an employer to show they have good reason for the difference in treatment on the basis of a protected characteristic. They must, however, show that the reason for the difference in treatment pursues a 'legitimate' aim and is proportionate to that aim.

If you would like further help with understanding these descriptions or would like to discuss the matter further you can get help from Acas Helpline 08457 47 47 47.

Asking Questions – Three step guidance for Questioners

The following steps set out how a questioner prepares for and asks questions of the responder. A questioner can do this themselves or they can seek legal advice from a lawyer or a trade union representative if appropriate.



Step 1 – Comparator/s

The questioner must set out who is receiving better terms and conditions than they are. This is the comparator and they must be working for the same employer as questioner and doing equal work. They must also be real people. If there is no real person comparator, the Equality Act 2010 allows a claim of direct pay discrimination if a questioner can show they would have received better pay if they were of a different sex. This would be a claim under sex discrimination.

A questioner can ask other employees about their employment and benefits package if they think it would help identify whether they may be being paid unfairly, however, other employees do not have to discuss this issue if they do not wish to. If the employer took action against the questioner for trying to find out this type of information, their treatment might be unlawful under the Equality Act 2010.

Step 2 – Identification of equal work

The questioner should explain why the comparator is doing equal work to their job. This may be because the job is the same as the questioner's or has been rated as equivalent under a recent job evaluation; or perhaps because both jobs require similar skills.

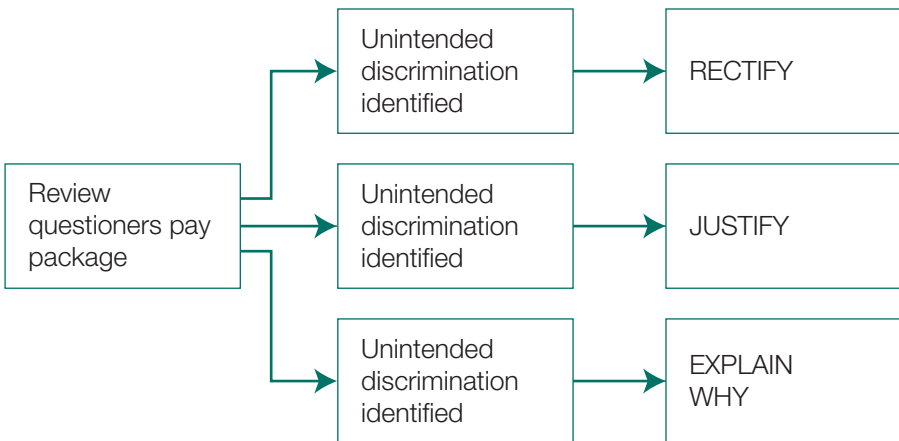
Remember

These questions relate to contractual pay and benefits, not discretionary payments such as a discretionary bonus payment. If the worse treatment is in connection with a discretionary payment then the issue may be to do with sex discrimination.

Steps 3 – Further relevant pay related questions

A questioner can also ask further questions such as how pay is determined by the employer (responder) and what is in the comparator's job description that could explain any difference in pay.

After sending the questions to the employer (see page 9 for advice on how to do this) they should reply in a reasonable time either agreeing that there is pay discrimination and taking steps to put this right, or to challenge the selection of comparator or provide some material reason which would be a justification of why the questioners pay and benefits are different.

Responding to questions of pay and benefits – guidance for responders

A responder should deal as soon as practicable with any request for information regarding pay and benefits, however, before doing so the responder should consider page 10 of this guidance. Sometimes there will be a case for reviewing the questioner's pay package to rectify any unintended discrimination; other times the responder can explain that the difference is due to a material factor that can be justified.

For example, in some circumstances different geographic locations may justify a difference in pay or other terms, or the operation of market forces, such as the need to recruit for particular jobs or the need to retain employees occupying particular jobs.

The responder should be able to explain the differences in terms are genuinely attributable to that factor. If the factor used applies to both men and women doing equal work but affects a greater proportion of workers of one sex than the other, then the responder would have to show that the factor is "objectively justified".

Objective justification is a high hurdle and the responder would need to show that not only was the reason for the difference a legitimate business one but also that it was a proportionate means of achieving a legitimate business aim.

Tip: It is good practice for an employer to keep their pay systems under review.

Case Study

RKS Components manufacture car engine parts and employ 200 people. The firm are keen to show they value employees, because they have evidence to show this encourages lower turnover of staff and helps with skills retention.

RKS review their pay and benefits systems and examine the proportion of men and women in the workforce by job role to see if each role is equally accessible to men and women. They also decide to compare basic pay to take home earnings, to explore if working arrangements favour one group over another in terms of overtime and bonus payments.

They find that the difference in the proportion of male and female job roles is small and within acceptable limits. However RKS do discover that men appear to have higher earnings compared to basic pay within these roles compared to women. The company find out that volunteers for overtime are often called late in the working day and women employees with caring responsibilities say they cannot easily change their child care arrangements at such short notice.

The Company were unaware this informal policy was having such an effect on women's earnings and decide to act. They decide there is no strong reason why overtime should be arranged so late, and improve management practices so that they can give employees 48 hours notice of overtime. After a few months the number of women doing overtime increases quite markedly and supervisors report anecdotal feedback from male employees saying they feel less stressed at no longer feeling they had to do overtime to ensure the company delivered on its orders.

Further Help

The Equality and Human Rights Commission (EHRC) website contains comprehensive guidance on gender equality and tackling pay discrimination. www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/tools-equal-pay/

Acas produce a guide on analytical job evaluation, go to www.acas.org.uk/publications

Annex 1 – Questioner’s template: organising your questions

The template below is designed to help the questioner draft and develop questions to the responder so they are better able to answer the matters identified.

Step 1 – Questioner’s and responder’s details.

Step 2 – Protected Characteristics affected.

Step 3 – Description of what happened to you.

Step 4 – Type of discrimination you experienced.

Step 5 – Why do you think what happened was unlawful.

Step 6 – Additional questions you would like to ask.

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the Acas website www.acas.org.uk.

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

Acas aims to improve organisations and working life through better employment relations. We provide up-to-date information, independent advice, high quality training and we work with employers and employees to solve problems and improve performance.

We are an independent, publicly-funded organisation and many of our services are free.

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