

Redundancy and discrimination



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In the [previous article](#), we examined how redundancies might be being used to mask unfair dismissals, for example when an employee is dismissed for the wrong reason, or when the correct procedure was not followed. Whilst only those who have been with the same employer for two or more years are legally entitled to fair redundancy procedure, protection against discrimination is broader. This means that if an employer's reasons for dismissal or the process used were discriminatory, employees may be able to make a discrimination claim, regardless of how long they have been employed or whether their redundancy was [voluntary](#) or not .

What is discrimination?

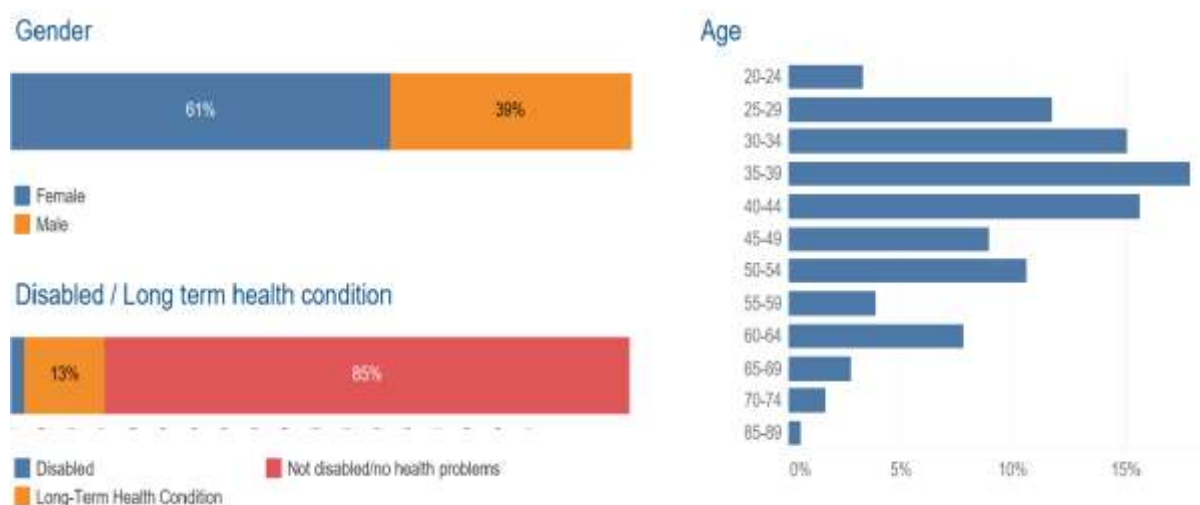
Under the Equality Act 2010, direct [discrimination](#) is defined as treating a person less favourably as a result of a protected characteristic: age, disability, sex, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sexual orientation and gender reassignment. Of course, being in one of these categories does not automatically make a dismissal or redundancy discriminatory, as long as the characteristic was not the reason for it. There are some exceptions to this, for instance when a person's age or capability no longer meet the specific requirements of the job and the employer can use this as a legitimate reason for dismissing them.

Indirect discrimination

The Equality Act also covers indirect discrimination, which is when a certain practice or policy affects people with a relevant protected characteristic in a less favourable way, even if it may not appear overtly discriminatory.

In the context of redundancies, certain selection criteria may be challenged as being indirectly discriminatory. For example, using factors such as length of service may indirectly discriminate against young people, whilst looking at a person's absence record and working hours might have a disproportionate impact on people with health conditions or caring responsibilities. Similarly, only offering alternative jobs with inflexible hours or difficult locations could be unfair to single parents or those with disabilities. Not keeping employees updated about new roles has also been a problem that our local office has seen negatively affect women on maternity leave, as well as those on furlough.

Client profile for people seeking advice on redundancy issues (Barnet) in 2020



Local statistics for the period of 1st January to 31st December 2020 show that 61% of clients calling our advisers about redundancy issues were female, compared to 57% for employment related issues more generally. Although this may be due to a variety of factors, it is also possible that the way redundancy procedures are being carried out is indirectly discriminating against women, who are more likely to work part time and have breaks in their employment history.

Our data for this period also shows that 30 to 44 year olds were more likely to call about redundancy related issues. This may be linked to the fact that many people in this age bracket have children under the age of 18, often making them more at risk of redundancy, as shown by [research carried out by Citizens Advice \(National\)](#).

Other forms of discrimination

In the context of redundancies, discrimination can also come in other forms (apart from direct or indirect discrimination).

- **Victimisation** – when somebody is treated badly as a result of them trying to assert their rights under the Equality Act. For example, selecting a woman for redundancy because she has complained about sexual harassment.
- **Discrimination Arising from Disability** - For example, selecting a disabled employee for redundancy because they have had a lot of disability-related sick leave.
- **Failure to make [Reasonable Adjustments](#)** to make sure workers with disabilities, or physical or mental health conditions, aren't substantially disadvantaged.

Client testimony 1

Client A was made redundant after being employed as a hospitality team member for 11 years. As the only female bartender, she felt that she was unfairly selected for redundancy on the basis of her gender and a health condition that forces her to work part time and take frequent toilet breaks when on duty. She feels that her employer failed to make reasonable adjustments by making her work at the bar alone and unable to get to the bathroom, and giving her a low score on her employer's staff grading 'flexibility' selection criteria.

Speaking to our advisers gave her an understanding of the high level of evidence required for a discrimination claim, and she is now drawing up detailed accounts of her interactions with managers past and present, and previous highly scored performance reviews. Our advisers also made her aware of her eligibility for Personal Independent Payment (PIP), a welfare benefit that helps with some of the extra costs of having a long term ill-health or disability, and that is unaffected by employment status, savings, income or National Insurance contributions.

Making a claim

In practice, discrimination can often be difficult to prove, particularly if it is indirect. Employers generally have discretion over which employees are selected for redundancy, as long as they can justify their choice and show that they have used several objective selection criteria. The employee would need to find evidence of discrimination, for instance that others with the same protected characteristic were also selected while others who did not have it retained their job.

In some cases, those employed for two years or more can also make an unfair dismissal claim to increase their chances of success, although the reward at tribunal is generally lower than for discrimination, depending on the circumstances of the case. Dismissing someone because of their

pregnancy or maternity/ paternity/adoption leave would also count as an [automatically unfair reason](#), which could be the basis of an unfair dismissal claim no matter how long the employee has been employed.

Client testimony 2

Mrs S had worked at a hair salon for 5 years. When she became pregnant, she and her employer agreed that she could reduce her hours to three days per week in the final three months of the pregnancy, as Mrs S was finding it difficult to be on her feet for 8 hours per day full-time. However, the employer refused to make a corresponding reduction to Mrs S' sales target. This meant that - no matter how hard Mrs S work - she could never earn commission as she was trying to reach a full-time target while working only three days per week.

When Mrs S went on Maternity Leave in early 2018, she was paid only around half of her Statutory Maternity Pay (SMP). When she complained, her employer became angry. Unable to resolve the dispute by negotiation, Mrs S approached Citizens Advice Barnet. We drafted and submitted Claims to the Employment Tribunal, alleging Pregnancy/Maternity Discrimination, Part-Time Worker Discrimination, Unlawful Deductions from Wages and Breach of Contract.

When the employer received a copy of Mrs S' Tribunal Claim, he informed the CAB that his salon had gone out of business and that Mrs S was therefore redundant. CAB staff were suspicious, and went to the salon only to find it functioning very much as normal and taking bookings online. We filmed the employer at work in his salon, took screenshots of the salon's booking page and submitted a second Claim to the Tribunal on Mrs S' behalf, alleging, amongst other things, Victimisation and Automatic Unfair Dismissal. Our CAB represented Mrs S at a series of preliminary hearings, and Mrs S' Claims are scheduled for a full hearing in August 2021.

Before issuing a claim

- If your workplace has a **trade union** representative, talk to them. If not, consider getting in touch with a trade union, particularly if there is one that oversees your industry specialism.
- If have been selected for redundancy or made redundant and wish to challenge the fairness of the dismissal, you should appeal against the dismissal in writing. If one of the grounds of challenging the dismissal or redundancy selection is that it was allegedly discriminatory, then – in addition to the appeal – you should lodge a formal written grievance over that discrimination.
- If you wish to pursue legal action, you have to apply to the **Advisory, Conciliation and Arbitration Service (ACAS)** first, within 3 months less 1 day of the act of discrimination. ACAS will try to resolve the issue through early conciliation, for example by facilitating dialogue through meetings etc.
- If this does not work, they will issue you a certificate and you can make a claim to the employment tribunal. Please see our [website](#) for more information about employment tribunal procedure, including time limits, fees and costs, as well as the different awards available.

General recommendations

Whether a case is taken to the tribunal or not, there are several things that employees are entitled to if they are made redundant. Regardless of how long you have been employed for, it is worth checking the following:

- 1. Check how much redundancy pay you get.** You're entitled to statutory redundancy pay, which is the minimum the law says you're entitled to, if you've been employed continuously for at least two years. The amount you will get depends on your age and how long you have worked for the company. You won't get statutory redundancy pay if you've worked for the company for less than two years, are self-employed or are in certain professions such as the armed forces or police.
You may also lose out on statutory redundancy pay if you turn down a suitable alternative job from your employer without a good reason. Your employer may also pay extra money on top of the statutory amount you're entitled to - this is called contractual redundancy pay. Some employees may be entitled to contractual redundancy pay even though they are not entitled to statutory redundancy pay.
- 2. Furloughed? Make sure you get 100% redundancy pay.** If you were furloughed and then made redundant, your redundancy pay should be based on your normal wage. If you were paid 80% of your wages while on furlough, your redundancy pay should be based on your full wage.
- 3. Check your notice period.** If you've worked for your employer for at least a month you're entitled to a paid statutory notice period. If you've worked there for more than a month but less than two years, you have to be given a week's notice. For two years or more, it's a week for each full year you have worked, up to a maximum of 12 weeks. You may be entitled to a longer notice period as part of your employment contract.

Your notice period only starts when your employer says you'll be made redundant and gives you a finishing date - not when your employer says you're at risk of redundancy.

Your employer might decide to give you notice pay instead of your notice period - this is called 'pay in lieu of notice' and will be legal if the employer's right to do so is set out in your employment contract.

- 4. Check other forms of pay you may be owed:**

Holiday pay: You'll be paid for any holiday you have left over when you leave. This should be at your normal rate's pay, even if you're currently furloughed on 80% of your pay. You can ask to take holiday during your notice period, but it's up to your employer to decide if you can take it then. Your employer can also tell you to use up any holiday you have left over, but they must give you your notice. The notice must be at least twice as long as the holiday they want you to take.

You might also be entitled to accrued **sick pay, arrears of wages** or **lost pension** contributions.

- 5. If your employer is insolvent,** you might be able to apply to the government [Insolvency Service](#) for certain kinds of pay owed by your employer.

6. You might be entitled to paid time off to look for work. If you've worked for your employer for two years at the end of your notice period, you're likely to be entitled to 'reasonable' time off to apply for jobs or go on training. You can take the time off at any time in normal working hours and your employer can't ask you to rearrange your work hours to make up the time off. When taking time off to look for work, you'll be paid at your normal hourly rate, but only for up to 40% of a week's work - for instance for up to two days if you work a five day week. See [preparing for after redundancy](#) for more information.

7. Check if you've got legal help via your home insurance. Often people get 'legal expenses cover' as part of their home insurance package, but many don't realise they can get free legal help to challenge their redundancy if they think it's discriminatory or unfair.

Other forms of insurance (such as "unemployment insurance" or "mortgage protection insurance") might be able to cover certain repayments for a limited period of time if the policyholder becomes unemployed unintentionally. It's worth checking the terms and conditions and speaking to your insurer if unsure.

If you have a **trade union** at work, you could also contact them. Your union can help you work out if you've got a claim, and support you through the process, for example by going to meetings with you or negotiating on your behalf.

8. Check if you are eligible for [benefits](#). If you have paid tax and national insurance contributions for two completed tax years, you may be eligible for New Style Job Seeker's allowance (JSA). This also requires registering with a job centre that will be responsible for monitoring your search for a new job.

If you do not meet the requirements for JSA, you may still be eligible for Universal Credit. There are also other benefits available for a range of specific circumstances (e.g. Personal Independent Payment (PIP) for disabilities, Carer's allowance....)

More information

If you need specific advice please contact one of our advisers:

<https://barnetcab.org.uk/contact-us/> 0300 456 8365

In certain limited circumstances, there is still some [legal aid](#) available for discrimination cases.

The Equality Advisory and Support Service also offers free information and advice on issues relating to equality and discrimination:

<https://www.equalityadvisoryservice.com/app/help> 0808 800 0082

ACAS offers free information and advice on problems relating to the workplace and employment more generally:

<https://www.acas.org.uk/contact> 0300 123 1100

Support us

Since the closure of the Barnet Law Service in 2014, Citizens Advice Barnet is one of the only sources of free legal advice in Barnet and relies on donations from local residents. If you'd like to support us, visit <https://barnetcab.org.uk/support-us-2/>

