

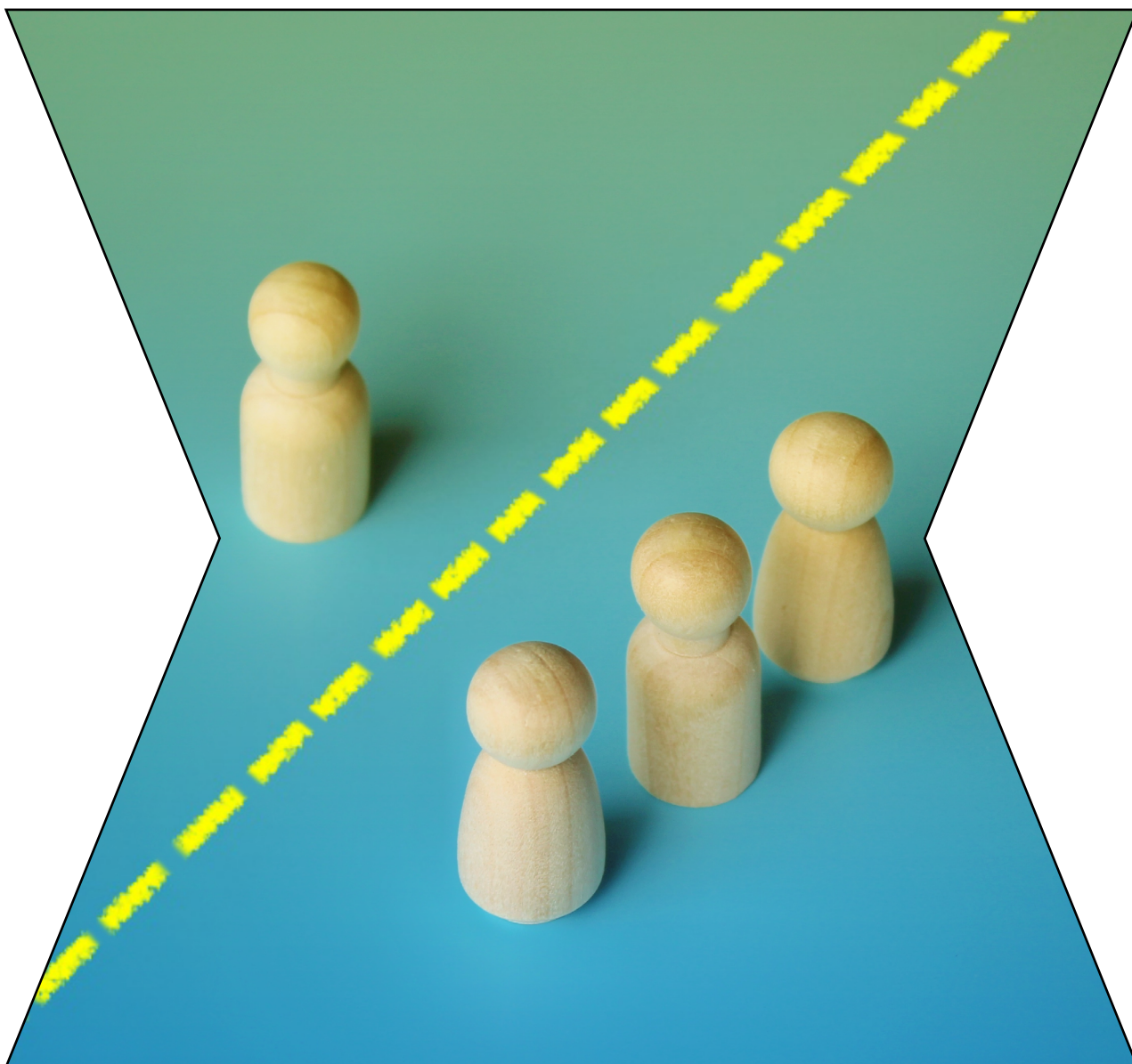


# Policing prejudice

Enforcing anti-discrimination laws in the workplace

Hannah Slaughter

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The figures covering reported experience of workplace discrimination are derived from a survey by YouGov Plc. Total sample size was 4,434 adults, of whom 3,316 were aged 18-65; all figures cited in this report are based on this latter group. Fieldwork was undertaken between 22-23 September 2022. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+). All figures have been analysed independently by the Resolution Foundation and are not the views of YouGov.

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## Summary

Laws prohibiting discrimination in the workplace have existed in the UK since the 1960s. Today, the rules are clear: workers have a right not to be discriminated against at any stage of employment – from the recruitment process, through pay and benefits, training and promotion opportunities, to dismissal and redundancy – on the grounds of age, sex, ethnicity/race, disability, sexual orientation, religion/belief, being pregnant or on maternity leave, gender reassignment, or being married/in a civil partnership (what are known as the nine protected characteristics). But from gender, ethnicity and disability pay gaps that cannot be explained by observable characteristics, to experiments showing that recruiters are more likely to turn down CVs they perceive to be from ethnic minority applicants, discrimination in the labour market clearly remains a reality.

In this briefing note we investigate the scale and nature of workplace discrimination, and consider how anti-discrimination rules can be enforced to greater effect. To begin, we ask how big a problem workplace discrimination is in Britain today? Using a new survey of 3,000-plus working-age adults fielded in September 2022, we find one-in-five (20 per cent) of 18-65-year-olds reported experiencing some form of discrimination either at work or when applying for a job over the last year. The most common way in which discrimination manifests in the labour market is being turned down for a job, reported by almost 13 per cent of working-age adults. In addition, around one-in-twelve people say they have been turned down for a promotion or denied training opportunities because of a protected characteristic (8 per cent and 7 per cent, respectively).

Unsurprisingly, workplace discrimination is not faced equally by all groups. Discrimination on the grounds of age (3.7 million people) and sex (2.7 million) were most commonly-reported in absolute terms. But other forms of discrimination are worryingly prevalent among sub-groups of the population. Over one-fifth (21 per cent) of people from ethnic minority backgrounds say they have faced workplace discrimination because of their ethnicity alone in the last year, for example, and 15 per cent of disabled people report encountering disability discrimination in the labour market. But not only do disabled people report being discriminated against on the grounds of disability, they are also far more likely than those without a disability to say they have been discriminated against in the workplace for other protected characteristics such as ethnicity, age, and sex.

Moreover, low-paid workers are more likely to be anxious about discrimination at work than their higher-paid peers (20 per cent of those in the lowest quartile of hourly pay, compared to 11 per cent of the highest paid quartile). In part, this is because employees in customer-facing (and other low-paid) roles such as retail and hospitality are particularly anxious about discrimination (22 per cent and 20 per cent respectively), compared with less-exposed (and higher-paid) sectors such as manufacturing and finance (both 14 per

cent). In addition, low-paid jobs employ higher proportions of women, ethnic minority workers and those with a disability. But when we look at the independent effect of all these different elements, occupation and sector still both have an important explanatory role in and of themselves.

The Equality and Human Rights Commission (EHRC) is the state body tasked with tackling discrimination in the workplace and beyond. It largely takes a compliance-based approach to enforcement, educating firms about their responsibilities and raising awareness about discrimination. This model is sensible for theoretical reasons (focusing efforts on improving employer understanding about their obligations is generally viewed as the best strategy when non-compliance stems largely from ignorance). But a combination of resource constraints (the EHRC's budget has been cut by four-fifths in real terms since 2008-09) and a limited powers (the EHRC cannot issue fines directly or conduct proactive inspections, for example) mean that this approach is also practical: the EHRC can only take limited enforcement action in a small number of cases that are of strategic importance (those that involve large numbers of workers, for example, or that will set a legal precedent).

As a result, workers experiencing discrimination largely have to rely on the employment tribunal (ET) system to seek redress. This route, however, favours higher earners, who are more likely to have the resources (financial and otherwise) to see through a legal case that can be complex and harrowing, as well as having more to gain if awards are related to earnings. In 2017, for example, workers earning £40,000 or over were almost twice as likely to take their employer to court as those earning under £20,000, despite the lowest earners being twice as likely to report anxiety about discrimination. Cases can be long (the average ET case takes a year to be heard), and discrimination cases have a higher out-of-court settlement rate (between 66 and 80 per cent for discrimination cases, compared to 66 per cent for all ET cases), in part due to the stress involved for the claimant. And discrimination cases have a lower success rate among cases that do make it to a full hearing (from 20 to 43 per cent), than the average among all ET cases (61 per cent).

Improvement, then, is clearly needed. Despite robust laws, discrimination in the workplace is widespread, the state has limited capacity to enforce the law and individual action is often not an option for many, particularly those on low incomes. Given the complexity of discrimination cases, however, individual adjudication is arguably more important than for other forms of labour market enforcement (underpayment of the minimum wage is relatively easy to prove or disprove, for example). Yet the ET system could be both more accessible and efficient, however, through providing more financial help (especially for low-paid workers); allowing workers six months after discrimination

takes place to take a claim to court as opposed to the current three; and clearing the backlog of cases that has more than doubled since 2018.

Even if such improvements to the ET system were made, however, many (and especially lower-paid workers) are still unlikely to take a case to court. Improving state enforcement of anti-discrimination laws remains critical as a result. With discrimination not set to be part of the forthcoming single enforcement body (SEB) for labour market rights, the Government must take steps to bolster the EHRC instead. First, it should pass legislation to give the EHRC stronger powers such as financial penalties when it finds non-compliance, and the ability to proactively inspect businesses where it suspects discrimination. Second, and relatedly, the EHRC should be resourced to investigate more cases of workplace discrimination, widening the scope and number of cases they currently can take. Third, there must be better join-up between the EHRC and other enforcement bodies (including the SEB when established) so that employers who fail to meet their legal requirements on multiple counts can be dealt with fairly but firmly, providing redress for workers and deterring other employers in the process.

## Despite being outlawed since the 1960s, one-fifth of working-age adults report experiencing discrimination at work recently

Discrimination in the workplace can have profound effects on people's lives, on their living standards, and on the wider performance of the economy. There is a wealth of evidence that shows experiencing discrimination in any form is linked to poor mental and physical health;<sup>1</sup> being disadvantaged in the labour market will affect earnings and living standards;<sup>2</sup> and discrimination can hold back macroeconomic performance by reducing workers' productivity and preventing them from finding the best job for their skillset.<sup>3</sup>

Laws prohibiting discrimination in the workplace (and elsewhere) have existed in the UK since the 1960s, and have been progressively strengthened over the years.<sup>4</sup> Today, the law is clear: workers have a right not to be discriminated against at any stage of employment – from the recruitment process, through pay and benefits and training and promotion opportunities, to dismissal and redundancy – on the grounds of age, sex, ethnicity/race, disability, sexual orientation, religion/belief, being pregnant or on maternity leave,

<sup>1</sup> See, for example: R Rhead et al., [Impact of workplace discrimination and harassment among National Health Service staff working in London trusts: Results from the TIDES study](#), December 2020; American Psychological Association, [Stress in America: The Impact of Discrimination](#), March 2016; D Williams et al., [Understanding how discrimination can affect health](#), Health Services Research 54(S2), December 2019.

<sup>2</sup> F Rahman, [Tackling structural inequality should sit at the heart of boosting living standards](#), Resolution Foundation, October 2019.

<sup>3</sup> See, for example: R Fibbi, A Midtbøen & P Simon, [Consequences of and Responses to Discrimination](#), Springer, April 2021; K Huber, [How Discrimination Harms the Economy and Business](#), Chicago Booth Review, July 2020; D Stempel & U Neyer, [The macroeconomic damage from gender discrimination](#), LSE Business Review, May 2021.

<sup>4</sup> This report considers discrimination in a legal sense, which is distinct from the broader category of unfair treatment (which also includes bullying, harassment and victimisation) as well as other laws around equality and fairness, such as equal pay laws and the Public Sector Equality Duty. See: Acas, [If you're treated unfairly at work](#), accessed 24 October 2022; EHRC, [What is equal pay?](#), accessed 24 October 2022; EHRC, [Public Sector Equality Duty](#), accessed 24 October 2022.



gender reassignment, or being married/in a civil partnership (what are known as the nine protected characteristics).<sup>5</sup> Exceptions apply only if necessary for the ways an organisation works: for example, it would be legal to employ only women at a refuge for women fleeing domestic violence.<sup>6</sup>

So, how prevalent is workplace discrimination today? Indirect evidence abounds that employers do not treat their workforce fairly. For example, sizeable gender, disability and ethnicity pay gaps exist that cannot be explained by the data we have available (at least some of which is likely to be related to bias, if not outright discrimination, in the labour market).<sup>7</sup> Likewise, field experiments have consistently found that CVs with traditionally Black names, for example, or where a photograph depicts a job applicant wearing a hijab, are less likely to receive call-backs from recruiters than otherwise-identical CVs that are perceived to come from White workers.<sup>8</sup>

However, direct evidence of discrimination across the workforce as a whole is harder to come by. To understand the overall prevalence of workplace discrimination better, in September 2022 we fielded a survey of over 3,000 working-age adults.<sup>9</sup> In it, we asked about people's experience of different forms of workplace discrimination in the last twelve months – for example, being turned down for a job or denied training – based on each of nine protected characteristics.

Figure 1 presents the headline findings from this survey (Box 1 provides a more detailed explanation of how we present the results). As this makes clear, among the 18-65-year-olds surveyed, one-in-five (20 per cent) report experiencing some form of discrimination in the workplace over the last 12 months. The most reported form of discrimination is being turned down for a job (13 per cent of the working-age population). Around one-in-twelve people say they have been turned down for a promotion or denied training opportunities (8 per cent and 7 per cent respectively), and one-in-twenty (5 per cent) report being dismissed or made redundant due to discrimination.

<sup>5</sup> Government Equalities Office and EHRC, [Equality Act 2010: guidance](#), June 2015. See also: HM Government, [Discrimination: your rights](#), accessed 24 October 2022.

<sup>6</sup> HM Government, [Discrimination: your rights](#), accessed 24 October 2022.

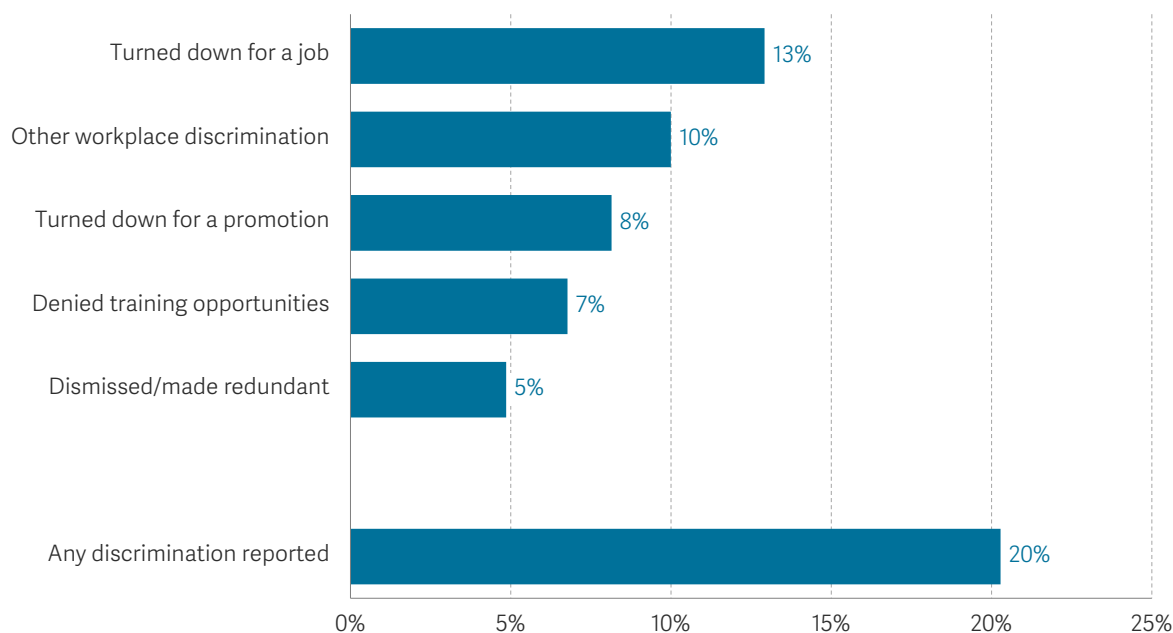
<sup>7</sup> ONS, [Gender pay gap in the UK: 2022](#), October 2022; ONS, [Ethnicity pay gaps: 2019](#), October 2020; ONS, [Disability pay gaps in the UK: 2021](#), April 2022.

<sup>8</sup> See, for example: Centre for Social Investigation, [New CSI research reveals high levels of job discrimination faced by ethnic minorities in Britain](#), January 2019; M Bertrand & S Mullainathan, [Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination](#), NBER Working Paper 9873, July 2003; M Fernández-Reino, V Di Stasio & S Veit, [Discrimination Unveiled: A Field Experiment on the Barriers Faced by Muslim Women in Germany, the Netherlands, and Spain](#), *European Sociological Review*, July 2022; M Mileo Gorsuch, [Gender, Sexual Orientation, and Behavioral Norms in the Labor Market](#), *ILR Review* 72(4), February 2019.

<sup>9</sup> Total sample size was 4,434 adults, of whom 3,419 were aged 18-65; all figures cited in this report are based on this latter group. Fieldwork was undertaken between 22-23 September 2022. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+).

### FIGURE 1: One-in-five workers report experiencing some form of discrimination in the workplace over the past twelve months

Proportion of 18-65-year-olds who report experiencing workplace discrimination in the past 12 months, by form of discrimination: GB, 22-23 September 2022



NOTES: People could give multiple responses. Includes people reporting discrimination based on any of the following protected characteristics: age, sex, ethnicity/race, disability, sexual orientation, religion/belief, being pregnant or on maternity leave, gender reassignment, or being married/in a civil partnership. Base = all 18-65-year-olds (n=3,316). These figures have been analysed independently by the Resolution Foundation.

SOURCE: RF analysis of YouGov, Workplace discrimination; ONS, Labour Force Survey.

### BOX 1: Measuring the experience of workplace discrimination

Throughout this report, our analysis of people saying that they have experienced discrimination in the labour market is expressed as shares of the whole working-age population, not just those in work. We do this because the group that could have experienced the forms of discrimination listed in Figure 1 are wide-ranging: those that are currently working, have worked in the past year, or have applied for a job in the past year.

This means, however, that the figures presented here are a lower bound for the share of workers experiencing discrimination in the labour market in the sense that if we were to remove all those who could not have experienced workplace discrimination because they had not been in recent contact with the labour market, the proportions who had experienced discrimination would rise. This consideration is particularly important when analysing different subgroups, as we do later in this

report. For example, given that people with disabilities are less likely to be in employment than those without a disability (itself partly due to structural inequalities and discrimination), a larger share of those with disabilities who report no workplace discrimination will be doing so because they are not in work at all.<sup>10</sup>

How do the results shown in Figure 1 compare to other data sources? Surveys asking about discrimination across the workforce as a whole are relatively rare and tend not to be consistent in terms of the questions asked. But we can compare our results to three previous surveys in the UK. First, a 2021 survey for CIPHR, an HR software company, found that 36 per cent of UK adults reported experiencing discrimination at any point in their working life.<sup>11</sup> Second, the 2015 wave of the British Social Attitudes Survey found that 12 per cent of working-age people had been discriminated against regarding work in the past five years.<sup>12</sup> And third, in a 2008 survey on behalf of the Department for Business, Innovation and Skills, 7 per cent of respondents reported experiencing discrimination from their current or a previous employer in the past two years; a higher share, 13 per cent, reported unfair treatment.<sup>13</sup> Finally, turning to international comparisons, a 2015 survey by the Federal Anti-Discrimination Agency, around 15 per cent of German people aged 14 and over reported experiencing workplace discrimination in the two years prior to the survey.<sup>14</sup>

The rate of labour market discrimination implied by our survey, then, lies towards the upper end of the range of the UK estimates (despite only asking about the past year) and is somewhat higher than the German estimate. Of course, the higher reported prevalence in our and other recent surveys is plausibly due at least in part to rising public awareness of discrimination.<sup>15</sup> However, the fact that the reported incidence of discriminatory dismissal or redundancy in our survey is higher than the share of all workers who have been dismissed or made redundant overall in the past year suggests that some respondents may either be basing their responses on longer time periods, or reporting

<sup>10</sup> C McCurdy, *Labour Market Outlook Q3 2022: The rise in employment of the disabled population*, Resolution Foundation, October 2022.

<sup>11</sup> CIPHR, *Workplace discrimination statistics in 2021*, accessed 24 October 2021.

<sup>12</sup> RF analysis of NatCen, British Social Attitudes Survey.

<sup>13</sup> R Fevre et al., *Fair treatment at work report: findings from the 2008 survey*, Department for Business, Innovation and Skills, September 2009.

<sup>14</sup> Specifically, 31 per cent of respondents said that they had experienced discrimination in the past two years, of whom just under half (49 per cent) said that the discrimination was in the context of access to employment or at the workplace. See: Federal Anti-Discrimination Agency, *Experiences of Discrimination in Germany*, April 2016.

<sup>15</sup> For example, the #MeToo movement raised awareness of sexual harassment and wider discrimination against women, while the Black Lives Matter movement increased awareness of structural racism in both the US and the UK. See, for example: H Szekeeres, E Shuman & T Saguy, *Views of sexual assault following #MeToo: The role of gender and individual differences*, *Personality and Individual Differences* 166, November 2020; J Worland, *America's Long Overdue Awakening to Systemic Racism*, *Time*, June 2020.



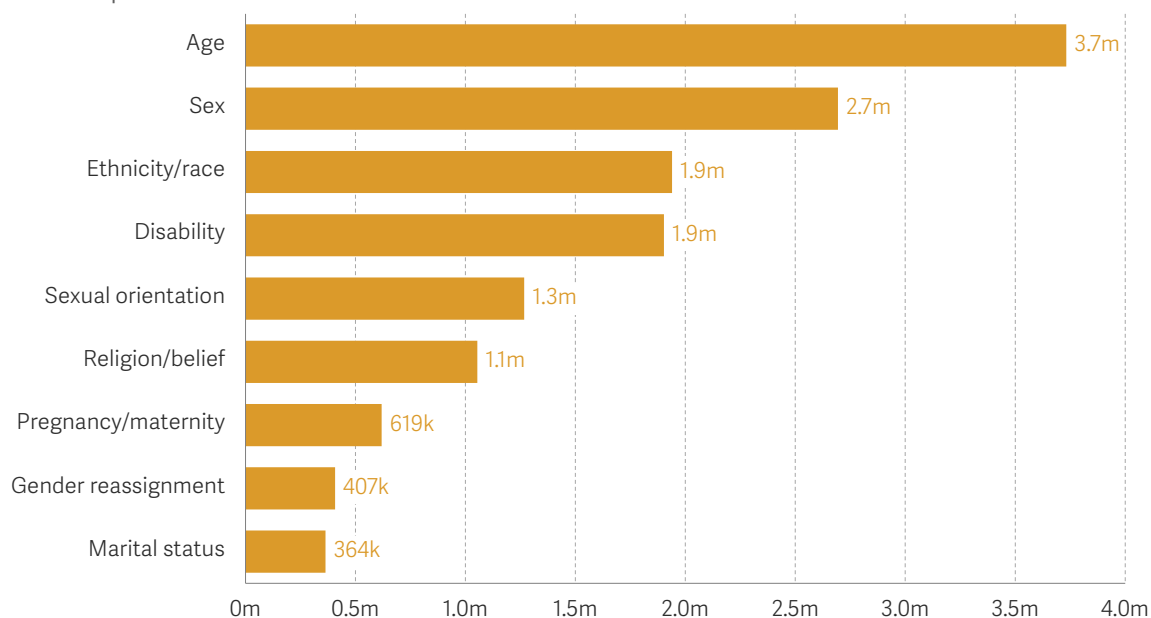
unfair treatment that may not meet the legal threshold for discrimination.<sup>16</sup> Even if this is the case, however, the scale of the responses makes clear that discrimination in the workplace is a serious issue affecting the lives of a large minority of the population in Britain today.

## Age and sex discrimination may be the biggest problem in absolute terms, but discrimination on the grounds of race is most prevalent

In Figure 2, we unpack our survey results further and show the grounds on which people report discrimination in the workplace occurring. The largest numbers of respondents report discrimination based on their age (equivalent to 3.7 million people aged 18-65) and their sex (2.7 million people). But the numbers of people reporting discrimination based on their ethnicity and disability are also extremely high, especially given that workers from ethnic minority backgrounds and with disabilities make up a minority of the working-age employed population (15 per cent in both cases).<sup>17</sup>

**FIGURE 2: Age and sex are the most common grounds for discrimination in absolute terms**

Proportion of 18-65-year-olds who report experiencing workplace discrimination, by protected characteristic on the grounds of which discrimination took place: GB, 22-23 September 2022



NOTES: People could give multiple responses. These figures have been derived by multiplying the proportion of 18-65-year-olds reporting discrimination by the total 18-65-year-old population in Q2 2022 according to the Labour Force Survey. Base = all 18-65-year-olds (n=3,359). These figures have been analysed independently by the Resolution Foundation.

SOURCE: RF analysis of YouGov, Workplace discrimination; ONS, Labour Force Survey.

<sup>16</sup> RF analysis of ONS, Labour Force Survey. People's interpretation of 'dismissal or redundancy' in our survey may, however, be broader than in the LFS: for example, someone whose temporary contract came to an end (which would be categorised separately in the LFS) and who feels that it was not renewed because of discrimination could plausibly put themselves in this category.

<sup>17</sup> C McCurdy, *Labour Market Outlook Q3 2022: The rise in employment of the disabled population*, Resolution Foundation, October 2022; Office for National Statistics, *A09: Labour market status by ethnic group*, August 2022.

Figure 3 shows the prevalence of selected forms of discrimination among the groups they are most likely to affect. First, around one-in-fifteen women in our survey (7 per cent) reported experiencing sex discrimination in the labour market over the past year. There is a U-shaped pattern across the age distribution in who experiences discrimination on the grounds of age: the youngest people in our survey are most likely to report discrimination (16 per cent of 18-24-year-olds), but the oldest respondents in our survey are close to twice as likely to say they have experienced discrimination than those towards the middle of their careers (11 per cent of 55-65-year-olds, compared to 6 per cent of those aged 35-54). It is important to note, however, that our survey misses workers aged over 65, who may face higher risk of discrimination on the basis of their age.<sup>18</sup> Moreover, research from the Centre for Ageing Better has found that although 50-69-year-olds faced substantial disadvantage in recruitment, they were less likely than younger age groups to identify with the term 'discrimination'.<sup>19</sup>

However, among the highest reported rates of discrimination in Figure 3 are on the grounds of ethnicity and disability. More than one-fifth (21 per cent) of people from an ethnic minority report experiencing workplace discrimination in the last year on the grounds of race/ethnicity. While sample sizes in the underlying data are too small to break out specific ethnic groups, this almost certainly means that workers from some ethnicities experience discrimination at a higher rate still. Elsewhere in the labour market, for example, there is evidence that Black workers with degrees earn 23 per cent less, on average, than White workers, and Black workers and those of Mixed ethnicity are substantially less likely than White workers to work as managers, directors and senior officials.<sup>20</sup> Finally, around one-in-seven people with a disability (15 per cent of those with a disability involving physical health, and 16 per cent of those with a disability involving mental health) experienced discrimination on the grounds of disability.<sup>21</sup> High rates of discrimination on the grounds of disability are consistent with research finding that one-in-five employers (22 per cent) would be unlikely to hire candidates with a disability.<sup>22</sup>

<sup>18</sup> For example, research from the ONS found that among older workers who had left their jobs since the start of the pandemic and had not returned, 60-70-year-olds were more likely than 50-59-year-olds to report experiencing age discrimination when looking for work. See: ONS, [Reasons for workers aged over 50 years leaving employment since the start of the coronavirus pandemic](#), March 2022.

<sup>19</sup> Centre for Ageing Better, [Too much experience: Older workers' perceptions of ageism in the recruitment process](#), February 2021.

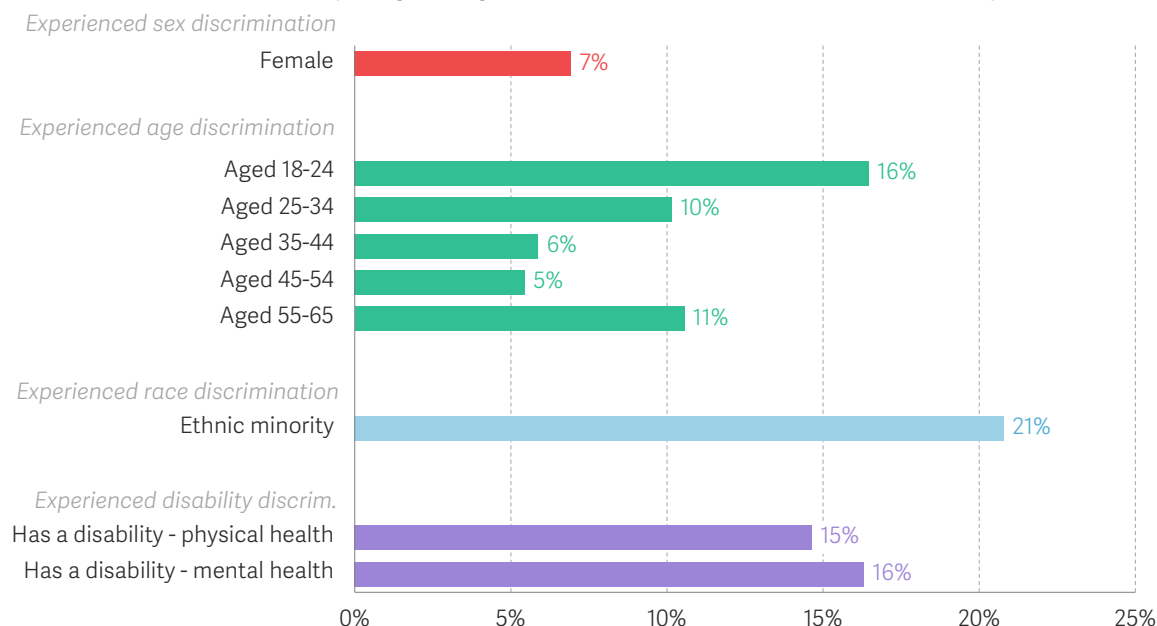
<sup>20</sup> EHRC, [Race report statistics](#), October 2020.

<sup>21</sup> More widely, negative attitudes in the workplace towards people with disabilities are rife: a recent report from the disability charity Scope found that 42 per cent of workers with disabilities had experienced discrimination from management and 41 per cent from colleagues, while 40 per cent of those who had used a recruitment agency had faced discrimination there. See: C Moss & A Frounks, [Attitudes and disability: The experiences of disabled people in 2022](#), Scope, September 2022.

<sup>22</sup> PageGroup, [Disability inequity at work: 22% of business leaders unlikely to hire candidates with known disabilities](#), FE News, December 2021.

### FIGURE 3: Workers with disabilities and those from ethnic minorities are most likely to face discrimination in the workplace today

Proportion of people who report experiencing different forms of workplace discrimination in the past year, by selected characteristics: GB, 22-23 September 2022



NOTES: People could give multiple responses. The disability categories related to physical and mental health are not mutually exclusive. The ethnic minority group includes those from Black, Asian, Mixed/multiple ethnic groups and Other ethnic backgrounds, but does not include White ethnic minority groups. Due to small sample sizes in the underlying data, we are unable to split this group out further. Base = all 18-65-year-olds with the relevant characteristics. Sample sizes are as follows: female n=1,767; aged 18-24 n=361; aged 25-34 n=619; aged 35-44 n= 808; aged 45-54 n=702; aged 55-65 n=826; ethnic minority n=287; has a disability – physical health n=445; has a disability – mental health n=503. These figures have been analysed independently by the Resolution Foundation.

SOURCE: RF analysis of YouGov, Workplace discrimination; ONS, Labour Force Survey.

These two findings are all the more concerning given that workers from almost every ethnic minority background and those with disabilities are less likely to be in employment to begin with (itself likely in part of a result of systemic barriers and discrimination in the labour market). As discussed in Box 1, this means that the rates would increase more than for other groups if we were to consider only those who had recently either been employed or applied for a job.

### Workers from more than one marginalised group face an elevated risk of discrimination in the workplace

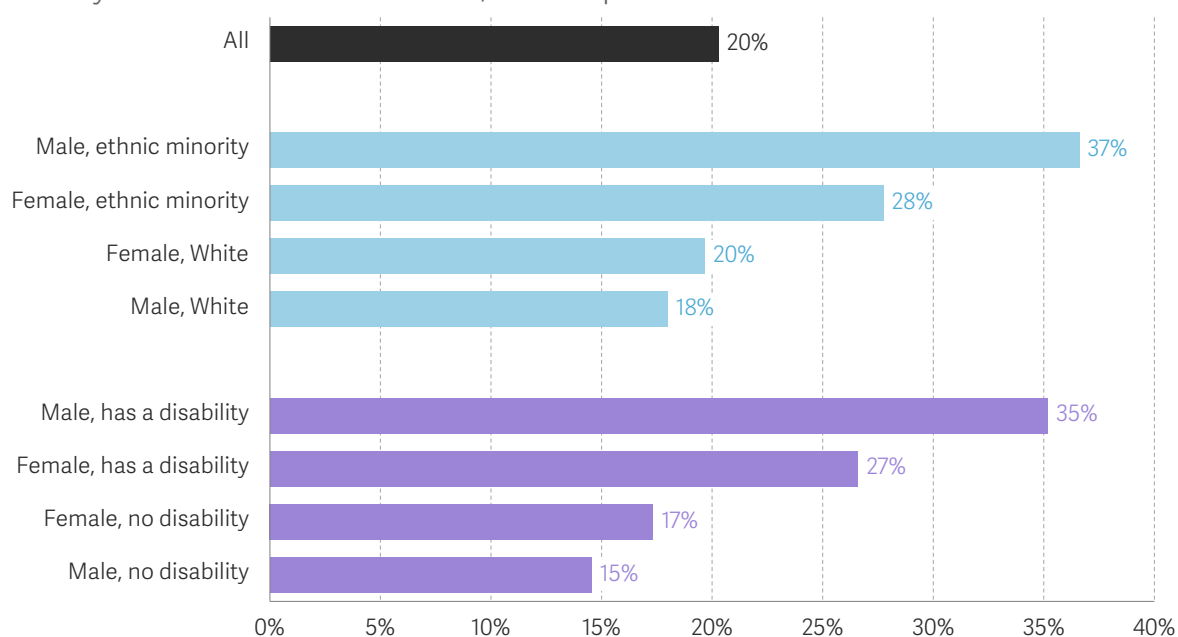
But even the breakdowns in Figure 3 only give part of the picture. In Figure 4, we combine gender breakdowns with ethnicity and disability to look at intersectionality – an important thing to consider given other evidence has shown that women of colour face particular barriers in the workplace.<sup>23</sup> In our survey, by contrast, men from ethnic

<sup>23</sup> See, for example: M Gyimah et al., *Broken Ladders: The myth of meritocracy for women of colour in the workplace*, The Fawcett Society & The Runnymede Trust, May 2022; R Thomas et al., *Women in the Workplace: 2022*, McKinsey, October 2022.

minorities are more likely to report discrimination than ethnic minority women (37 per cent and 28 per cent respectively). Again, small sample sizes unfortunately prevent us from being able to analyse intersectionality among specific ethnic groups – and it is also important to take these findings in the context of differing rates of labour market participation. In Q2 2022, women from ethnic minority backgrounds had a lower employment rate than both White women and men from either White or ethnic minority backgrounds, with particularly low rates (below 50 per cent) among women from the Pakistani and Bangladeshi ethnic groups, so rates of discrimination would increase by more for these groups when considering only those who have recently worked or applied for a job.<sup>24</sup>

**FIGURE 4: Men from ethnic minorities and men with a disability face the highest rates of discrimination**

Proportion of people who have experienced workplace discrimination in the past year, by selected characteristics: GB, 22-23 September 2022



NOTES: Includes people reporting discrimination based on any of the following protected characteristics: age, sex, ethnicity/race, disability, sexual orientation, religion/belief, being pregnant or on maternity leave, gender reassignment, or being married/in a civil partnership. Base = all 18-65-year-olds with the relevant characteristics. The ethnic minority group includes those from Black, Asian, Mixed/multiple ethnic groups and Other ethnic backgrounds, but does not include White ethnic minority groups. Due to small sample sizes in the underlying data, we are unable to split this group out further. Sample sizes are as follows: all n=3,316; male, ethnic minority n=134; female, ethnic minority n=153; female, White n=1,560; male, White n=1,362; male, has a disability n=383; female, has a disability n=511; female, no disability n=1,172; male, no disability n=1,067. These figures have been analysed independently by the Resolution Foundation. SOURCE: RF analysis of YouGov, Workplace discrimination; ONS, Labour Force Survey.

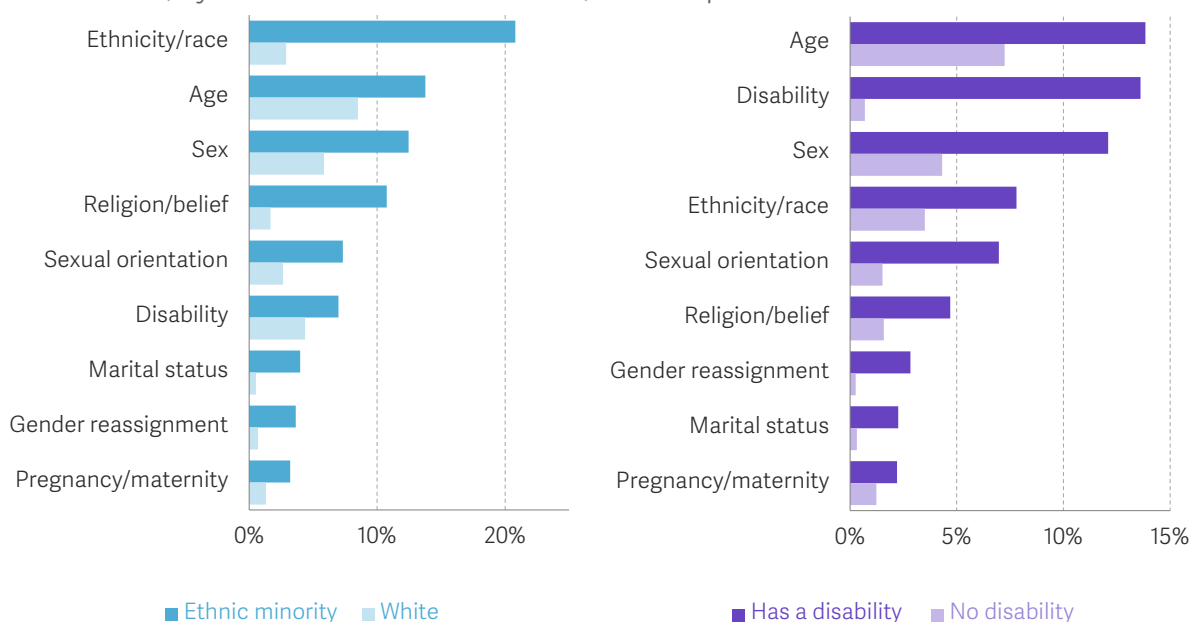
<sup>24</sup> Office for National Statistics, *A09: Labour market status by ethnic group*, August 2022.

Similarly, among those with a disability, men are more likely than women to report discrimination. The gender difference is the other way around for those from a White background and those without a disability: in both of those cases, women are more likely to report discrimination than men.

Looking at intersectionality from a different perspective, Figure 5 shows that not only are workers from ethnic minority backgrounds more likely to report discrimination on the grounds of their ethnicity, and those with disabilities on the grounds of their disability, but these groups of workers face a higher risk of discrimination more widely. The left-hand panel shows that workers from ethnic minority backgrounds are around twice as likely as White workers to face discrimination on the grounds of sex, for example (12 per cent vs 6 per cent), while workers with a disability are three times as likely to face sex discrimination than those without (12 per cent vs 4 per cent).

**FIGURE 5: Workers with disabilities and ethnic minority workers face high rates discrimination on the grounds of several characteristics**

Proportion of people who report experiencing workplace discrimination in the past 12 months, by selected characteristics: GB, 22-23 September 2022



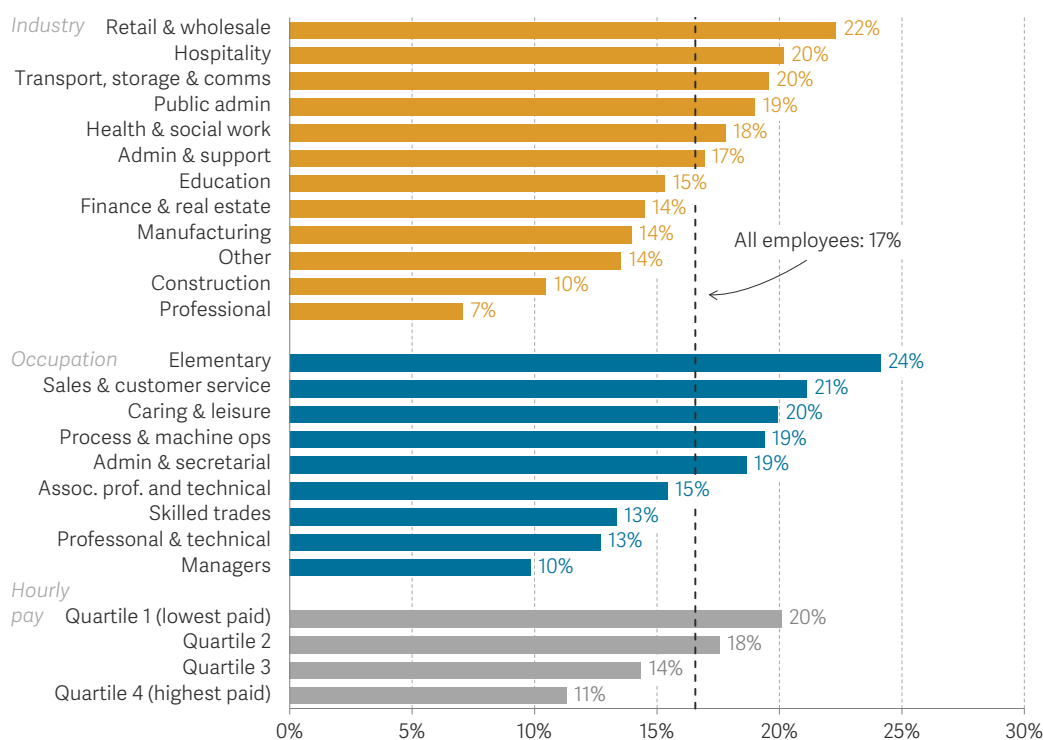
NOTES: Base = all 18-65-year-olds with the relevant characteristics. The ethnic minority group includes those from Black, Asian, Mixed/multiple ethnic groups and Other ethnic backgrounds, but does not include White ethnic minority groups. Due to small sample sizes in the underlying data, we are unable to split this group out further. Sample sizes are as follows: ethnic minority n=297; White n=2,922; has a disability n=894; no disability n=2,239. These figures have been analysed independently by the Resolution Foundation. SOURCE: RF analysis of YouGov, Workplace discrimination; ONS, Labour Force Survey.

## Lower-paid workers are almost twice as likely to worry about workplace discrimination than those on higher pay

Resolution Foundation research looking at other rights has found that those in lower-paid work are more susceptible to labour market violations.<sup>25</sup> Although our YouGov survey does not allow us to examine job characteristics, such as industry and pay, by using a different data source – the Skills and Employment Survey – we can get a sense of how the risk of discrimination varies depending on the job someone does.

**FIGURE 6: The lowest-paid workers are almost twice as likely as the highest-paid to say they are anxious about discrimination at work**

Proportion of employees who say that they are very or fairly anxious about discrimination affecting them at work, by selected job characteristics: UK, 2017



NOTES: Employees aged 20-60 only.

SOURCE: RF analysis of Cardiff University, UK Skills and Employment Survey.

In Figure 6, we look at the share of workers reporting that they are 'very anxious' or 'fairly anxious' about discrimination affecting them at work.<sup>26</sup> Workers in low-paying sectors (such as retail and hospitality) and the occupations that tend to require fewer formal qualifications (such as elementary occupations, which are those mainly involving

<sup>25</sup> N Cominetti & L Judge, *From rights to reality: Enforcing labour market laws in the UK*, Resolution Foundation, September 2019.

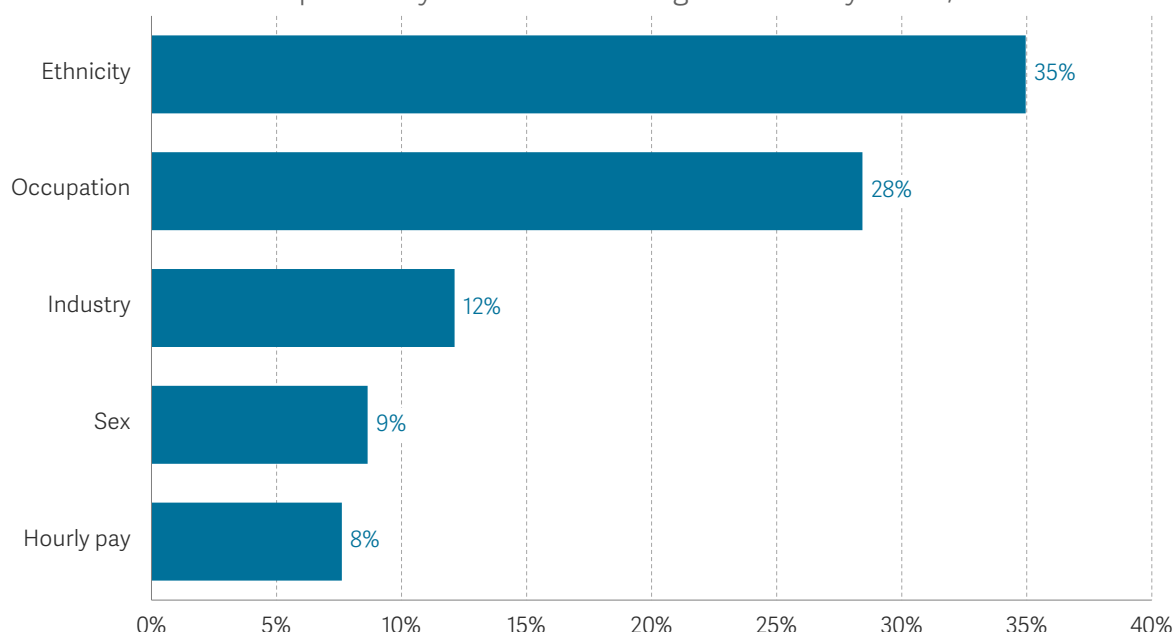
<sup>26</sup> While this is not quite the same as experiencing discrimination, the groups of workers most likely to experience anxiety about discrimination are strongly correlated with the groups of workers most likely to report experiencing discrimination in our YouGov survey, based on characteristics such as age, sex and ethnicity that appear in both datasets.



routine tasks) are the most likely to be anxious about work-related discrimination. And, looking directly at hourly pay quartiles, those in the lowest-paid quartile are almost twice as likely as those in the top quartile of hourly pay to report anxiety about workplace discrimination (20 per cent vs 11 per cent). And the same holds true when we look at weekly, not hourly pay: 21 per cent of those in the lowest quartile of weekly pay are anxious about discrimination at work, compared to 13 per cent of the top quartile.<sup>27</sup>

**FIGURE 7: Alongside ethnicity, job characteristics are an important driver of anxiety about discrimination**

Proportion of the variance in whether an employee reports anxiety about discrimination at work that is explained by each factor in a regression analysis: UK, 2017



NOTES: This chart uses a decomposition method called 'dominance analysis' from the Stata package 'domin' to assess the explanatory power of each factor. The method runs a regression with each possible combination of the explanatory variables and compares the change in the amount of variance explained. The regression is a logit regression, on the sample of employees, and the dependent variable is the binary outcome of did / did not say they were very or fairly anxious about discrimination at work. Age, whether working full or part time, job tenure (in years) and self-reported health were also included in the analysis but are not shown on this chart as their dominance statistic was very small (<2.5 per cent). The dataset does not include a disability flag; self-reported health was used as the closest possible alternative but should not be taken as a reliable proxy for disability status. All variables are categorical except age, pay and job tenure, which group together the continuous variable and its square.

SOURCE: RF analysis of Cardiff University, UK Skills and Employment Survey.

One possible explanation for the findings in Figure 6 could be that workers who are most vulnerable to discrimination (as shown in Figure 3) are more likely to be employed in low-paying sectors.<sup>28</sup> But this is only part of the story. Figure 7 presents 'dominance'

<sup>27</sup> Source: RF analysis of Cardiff University, Skills and Employment Survey.

<sup>28</sup> See, for example, Box 1 of: N Cominetti, C McCurdy & H Slaughter, *Low Pay Britain 2021*, June 2021, which shows that women, the youngest and oldest workers, workers with a disability, and those from ethnic minority backgrounds are all more likely than average to be in low-paid work.

analysis of the factors driving anxiety about discrimination – that is, how much each characteristic in our dataset can independently account for higher rates of anxiety. Ethnicity is the number one independent driver of anxiety about discrimination, accounting for just over a third (35 per cent) of all the variation our data can explain. (The dataset does not include a variable for disability, and the closest substitute – self-reported health – is an extremely imperfect proxy.) But as well as ethnicity, job-related characteristics are also important: occupation, industry, and hourly pay together account for close to half (48 per cent) of the variation explained by our model. Given that discrimination appears more prevalent in certain types of job, this information could provide important intelligence for enforcement bodies in detecting employers at high risk of non-compliance.

## The EHRC takes a compliance-based approach to enforcing anti-discrimination law

Workplace discrimination, then, is clearly a very real problem for today's workforce, with certain groups such as ethnic minorities, those with a disability and lower-paid workers at the sharp end. Tackling workplace discrimination in England, Scotland and Wales is the preserve of the EHRC, a non-departmental public body sponsored by the Government Equalities Office, part of the Cabinet Office. The EHRC was created in the 2006 Equality Act, which merged the Equal Opportunities Commission (which covered gender equality), the Commission for Racial Equality, and the Disability Rights Commission.<sup>29</sup>

When it comes to preventing discrimination, the EHRC largely takes a compliance as opposed to deterrence approach, putting most of its energies into educating firms about their responsibilities and disseminating information to the public. As the Director of Labour Market Enforcement has made clear, this approach is most suited to labour market violations which are considered to be largely accidental and born of employer ignorance, rather than intentional and the product of an economic calculus that the firm would be better off not abiding by the law.<sup>30</sup>

*“The focus of our regulatory role is to help organisations achieve what they should, not catch them out if they fall short. To help us do this, we have a range of powers. These include providing advice and guidance, publishing information and undertaking research.”*

**EHRC website<sup>31</sup>**

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<sup>29</sup> EHRC, *Who we are*, accessed 1 November 2022.

<sup>30</sup> D Metcalf, *UK Labour Market Enforcement Strategy 2018/19*, Director of Labour Market Enforcement, May 2018.

<sup>31</sup> EHRC, *Our powers*, accessed 22 August 2022.

In theory, this model is sensible: focusing efforts on improving employer understanding about their obligations is generally viewed as the best strategy when non-compliance stems largely from ignorance, and can help stop discrimination from happening in the first place.<sup>32</sup> This approach is somewhat similar to the Pensions Regulator, whose guidance has been lauded as one of, if not the, clearest of any labour market enforcement body.<sup>33</sup> But as we have argued in previous work, a compliance-based approach is not at odds with robust enforcement action: indeed, clear guidance and education campaigns mean there is little excuse for firms then found to be flouting the rules – and so there is a case for getting tougher, quicker, with firms who do not comply.<sup>34</sup>

The EHRC can act against non-compliant business using its enforcement powers. When it has reason to suspect that an organisation is behaving unlawfully, the EHRC can launch an investigation into its behaviour. If the organisation is found to be non-compliant, the investigation can culminate in an unlawful act notice, which can include an action plan detailing the steps that the organisation must take to rectify any breaches that the EHRC has uncovered.<sup>35</sup> If an organisation does not comply with the action plan, it can receive a (potentially unlimited) fine.<sup>36</sup>

*“When these [educational] methods are ineffective, we also have a range of enforcement powers. ... They range from guidance and assistance to investigations and court action.”*

**EHRC website<sup>37</sup>**

In practice, however, the EHRC uses its enforcement powers relatively rarely: in 2017-18, it agreed to use its powers only in two cases of formal agreements (where a person or organisation who is suspected of committing an unlawful act agrees not to do so), two injunctions and 14 judicial reviews, in addition to intervening in 26 existing court cases initiated by others.<sup>38</sup>

Issues raised by individuals are triaged twice – first by the Equality Advisory and Support Service (EASS), and then by the EHRC itself – so that the EHRC takes on only cases it judges to be in its ‘strategic interest’. This assessment is based on three key factors: the scale of the problem (for example, the number of workers affected, how long the problem has lasted, and the severity of the issue); the impact that the EHRC would have by taking

<sup>32</sup> D Metcalf, [UK Labour Market Enforcement Strategy 2018/19](#), Director of Labour Market Enforcement, May 2018.

<sup>33</sup> D Metcalf, [Labour Market Enforcement Strategy 2019 to 2020](#), July 2019.

<sup>34</sup> H Slaughter, [Enrol up! The case for strengthening auto-enrolment enforcement](#), Resolution Foundation, August 2020.

<sup>35</sup> EHRC, [Inquiries, investigations and wider powers](#), accessed 28 October 2022.

<sup>36</sup> HM Government, [Equality Act 2006, Section 22](#), accessed 27 October 2022.

<sup>37</sup> EHRC, [Our powers](#), accessed 22 August 2022.

<sup>38</sup> This data is not published routinely, and these figures come from an FOI request as part of a parliamentary inquiry into enforcing the Equality Act. See: UK Parliament, [The enforcement role of the Equality and Human Rights Commission](#), accessed 6 November 2022. For further details on these forms of enforcement, see: EHRC, [Inquiries, investigations and wider powers](#), accessed 28 October 2022; EHRC, [Court action](#), accessed 28 October 2022.

on the case (cases that will set a legal precedent for future cases, for example, are more likely to be taken on); and the views of external stakeholders, such as Parliamentary committees and United Nations treaty bodies.<sup>39</sup>

*“Individuals who wish to have their issue assessed for its strategic value, should call the Equality Advisory Support Service (EASS). The EASS receives calls from individuals and works collaboratively with advice agencies and other organisations who make referrals to it.*

*“If the EASS view the facts as being of strategic interest to the Commission, they will refer the matter to us for further scoping. We will then decide whether to offer support.”*

EHRC website<sup>40</sup>

## The EHRC lacks both the resources and the powers to enforce more than a handful of cases

The high bar that the EHRC sets for taking cases likely comes, at least in part, from the constraints that it faces. First, the EHRC, like any enforcement body, faces resource constraints. As Figure 8 shows, the EHRC has endured these more than most: its budget has fallen by four-fifths in real terms since its first full financial year in 2008-09. In the latest financial year, the EHRC's budget was £17.5 million – smaller than the individual budgets of two of its predecessor bodies, the Commission for Racial Equality and the Disability Rights Commission, and not much larger than the Equal Opportunities Commission. Moreover, the EHRC as a whole – including its non-enforcement activity and its responsibilities for non-workplace discrimination and wider human rights – has a smaller budget than HMRC has for National Minimum Wage enforcement (£27.4 million in 2020-21),<sup>41</sup> whose remit covers a far smaller group of workers (those paid near the wage floor, around 7 per cent of employees in 2019).<sup>42</sup>

<sup>39</sup> EHRC, [Our litigation and enforcement policy 2019 to 2022](#), November 2019.

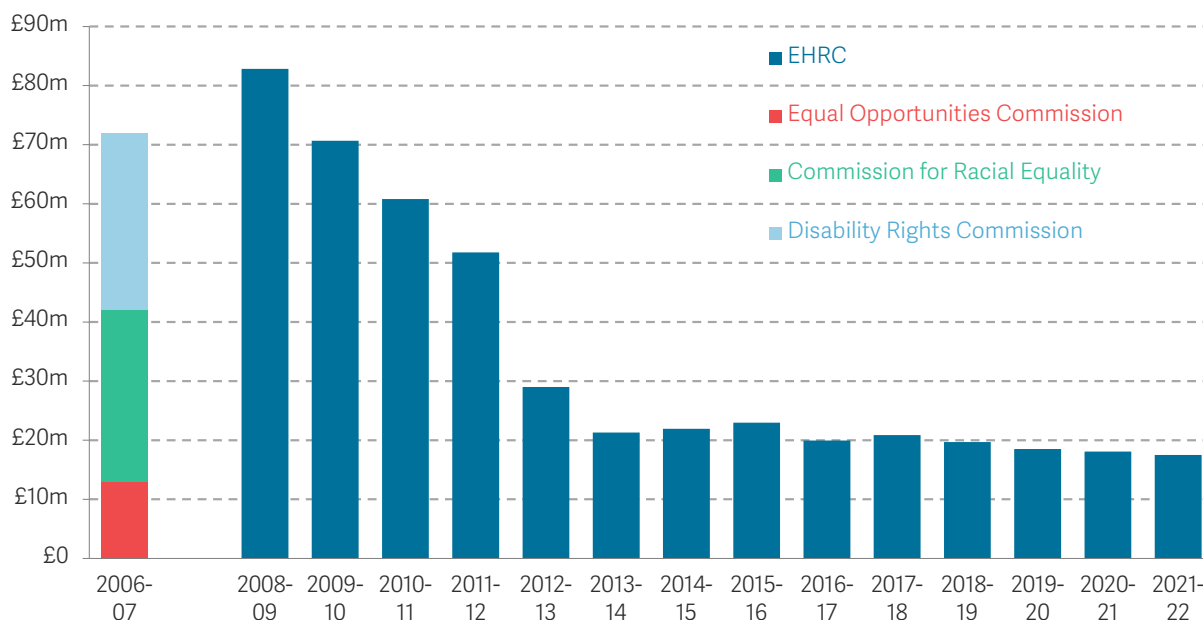
<sup>40</sup> EHRC, [Contacting us about a legal issue](#), accessed 22 August 2022.

<sup>41</sup> £26.4 million in cash terms, converted to 2021-22 prices using CPIH. Source: Freedom of Information request to HMRC, FOI2021/07125, May 2021.

<sup>42</sup> In 2019 (the latest available figures that are not affected by data issues linked to the Covid-19 pandemic), 1.9 million employees were earning at, below or up to 1 per cent above their age-appropriate minimum wage, equivalent to 7 per cent of all employees. See Annex 1 of: N Cominetti & H Slaughter, [Low Pay Britain 2020](#), Resolution Foundation, September 2020.

**FIGURE 8: The EHRC's budget has been cut by four-fifths in real terms since its creation in 2008**

Total operating expenditure of the EHRC and its predecessor bodies (2021-22 prices): GB



NOTES: Figures have been deflated using CPIH inflation.

SOURCE: EHRC, Annual report and accounts, various; Equal Opportunities Commission, Annual Report and Accounts: April to September 2007; Commission for Racial Equality, Annual Report and Accounts: April to September 2007; Disability Rights Commission, Annual Report and Accounts: April to September 2007.

The second constraint on the EHRC is that its powers, as defined by the Equality Act, are extremely limited compared to other enforcement bodies. The EHRC can investigate firms where discrimination has been reported, as outlined above, but it cannot conduct proactive inspections, for example where it deems there is a high risk of non-compliance. The EHRC's investigations rely heavily on the cooperation of the organisation in question, for example to provide documents or other forms of evidence – and clearly the most egregious firms have an incentive to hide this.<sup>43</sup>

Although an investigation can culminate in an unlawful act notice, which can eventually progress to a fine, the EHRC does not have the power to issue fines for non-compliance itself.<sup>44</sup> Instead, the EHRC must rely on well-publicised investigations having indirect commercial and financial consequences for the businesses involved (as well as potentially deterring other firms from unlawful behaviour).<sup>45</sup> But as previous Resolution

<sup>43</sup> A further challenge to this reactive approach, which in the workplace context means largely relying on workers to raise unlawful practice directly, is that some groups have lost trust in the EHRC. For example, the EHRC has faced trenchant criticism from LGBTQ+ rights groups over its stance on transgender rights. See: Stonewall, [Major LGBTQ+ organisations spark international review of the EHRC](#), February 2022.

<sup>44</sup> EHRC, [Inquiries, investigations and wider powers](#), accessed 27 October 2022.

<sup>45</sup> Recent high-profile examples include investigations into the Metropolitan Police and the Labour Party. See: EHRC, [Investigation into Metropolitan Police Service](#), accessed 27 October 2022; EHRC, [Investigation into the Labour Party](#), accessed 27 October 2022.

Foundation work has shown, reputation is only a weak deterrent for businesses, and financial penalties are likely to have far more of an effect.<sup>46</sup>

In addition, the EHRC is prohibited from sharing intelligence with other enforcement bodies except in very limited cases. While data protection is clearly important – not least given the sensitivity of discrimination cases – this means that the EHRC is unable to share information with other enforcement bodies (if, for example, it finds examples of unlawful practice that fall outside its own remit).<sup>47</sup>

## Discrimination law is enforced more stringently in Northern Ireland to address longstanding divisions

Interestingly, a very different approach exists not just internationally but elsewhere in the UK.<sup>48</sup> The EHRC covers only Great Britain; the Equality Commission for Northern Ireland (ECNI) takes a more proactive approach. The ECNI's responsibilities are wide-ranging: they provide free legal advice, support legal cases, and provide guidance to employers and other organisations for example.<sup>49</sup>

But in addition, all but the very smallest employers in Northern Ireland must register with the ECNI.<sup>50</sup> Then, every year, they must submit a monitoring return to the ECNI, describing the sex and community background (that is, whether a worker is from the Roman Catholic community or the Protestant community, or neither) of their workforce, job applicants, appointees, and apprentices. Large employers (with 250+ employees) must also collect data on workers who have been promoted and who have left the organisation and, although not a legal requirement, the ECNI recommends that employers also collect data on other protected characteristics. Failing to submit a return, or submitting one late, is a criminal offence.<sup>51</sup> Finally, as well as collecting data on workplace diversity, employers registered with the ECNI must also review their workforce composition and employment practices every three years. They must do this in the form of a written report (drawing on an ECNI-provided template), which the ECNI can request to see to ensure compliance. Employers are instructed to set out goals and timetables to improve their employment practices or implement affirmative action if necessary.<sup>52</sup>

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<sup>46</sup> H Slaughter, *No shame, no gain? The role of reputation in labour market enforcement*, Resolution Foundation, November 2021.

<sup>47</sup> HM Government, *Equality Act 2006*, accessed 27 October 2022.

<sup>48</sup> See Annex 2 of: National Audit Office, *Briefing for the Women and Equalities Committee: The Equality and Human Rights Commission*, January 2017.

<sup>49</sup> ECNI provides legal advice in cases where a case raises a question of principle, or where it deems it unreasonable to expect the individual to deal with the case unaided (for example, due to the complexity of the case or the balance of power between the applicant and others involved in the case), or in accordance with other special considerations. See: ECNI, *Policy for the Provision of Legal Advice and Assistance to Individuals*, March 2022.

<sup>50</sup> Employers must register if they have 11 or more employees working 16 hours or more per week.

<sup>51</sup> ECNI, *Registration, Monitoring and Article 55 Review*, accessed 31 October 2022.

<sup>52</sup> ECNI, *Article 55 Review*, accessed 31 October 2022.



The ECNI also benefits from a much larger budget relative to the population it covers than the EHRC. In 2021-22, the ECNI had a total operating expenditure of £6.6 million, compared to the EHRC's £17.5 million.<sup>53</sup> This means that the ECNI's budget was 13 times higher, on a per capita basis, than that of the EHRC.<sup>54</sup> This more interventionist enforcement approach stems in part from the fact that the ECNI was established by the Northern Ireland Act 1988, in the aftermath of the Troubles, when there was a clear political impetus to promote equality: the legislation covering it has specific provisions relating to religious belief and political opinion.<sup>55</sup> (It is worth noting that the ECNI has argued that equality law provides better protection in Great Britain – at least in theory – especially since the Equality Act 2010.<sup>56</sup>)

## Few workers reporting discrimination take individual action to seek redress

The compliance-driven approach of the EHRC leaves those seeking redress for workplace discrimination largely reliant on individual action through the employment tribunal (ET) system. Two-fifths of all ET applications involve discrimination, but this still means only a tiny minority of workers who report experiencing discrimination in the workplace taking action as a result.<sup>57</sup> In Figure 9, we show the absolute number of cases, with the solid bars showing the annual number of ET receipts (using 2019-20 data to avoid the pandemic period), and the dotted bars showing the number of cases that were submitted to the Acas early conciliation process (it has been a legal requirement since mid-2014 that all applicants at least consider conciliation before proceeding to an ET).<sup>58</sup> As the chart makes clear, by far the most common ground for discrimination action in England and Wales in that year was disability (at over 15,000 applications to Acas in 2019-20), followed by sex (8,800) and then ethnicity/race (7,000).

<sup>53</sup> ECNI, *Annual Report 2021-22*, July 2022; EHRC, *Annual report and accounts: 1 April 2021 to 31 March 2022*, July 2022.

<sup>54</sup> In mid-2020, the total population of Great Britain was 65.2 million and the population for Northern Ireland was 1.9 million. Source: ONS, *Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2020*, June 2021. We use total population here, not just working-age, as the responsibilities of both the EHRC and ECNI extend beyond the workplace.

<sup>55</sup> HM Government, *Northern Ireland Act 1998: Equality of opportunity*, accessed 2 November 2022.

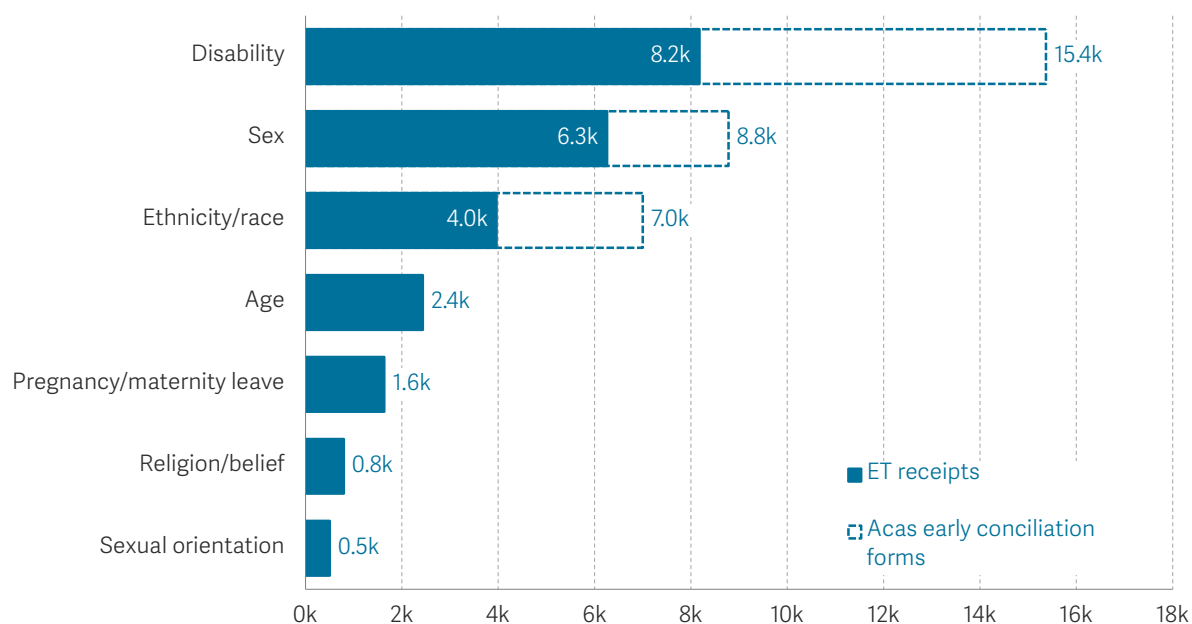
<sup>56</sup> ECNI, *Gaps in Equality Law between Great Britain and Northern Ireland*, accessed 2 November 2022.

<sup>57</sup> RF analysis of BEIS, *Survey of Employment Tribunal Applications*.

<sup>58</sup> Acas, *Early conciliation*, accessed 1 November 2022.

**FIGURE 9: Seeking redress through an employment tribunal is relatively rare**

Number of employment tribunal receipts and Acas early conciliation forms received (2019-20), by form of discrimination: England and Wales



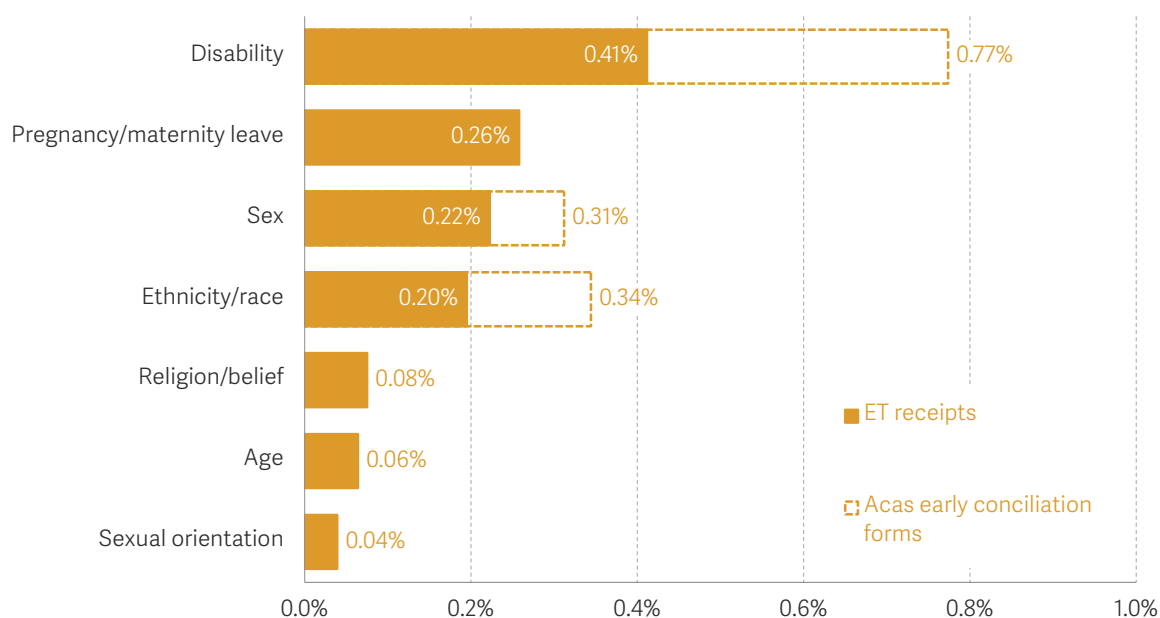
NOTES: Acas early conciliation form breakdowns are only available for disability, sex and race discrimination.

SOURCE: RF analysis of MoJ, Tribunal Statistics Quarterly: April to June 2022; Acas, Annual Report and Accounts 2019-20.

In Figure 10, we look at how these absolute numbers compare to the numbers of people reporting discrimination in the workplace in England and Wales from our own survey. This brings home just how few people are likely to be taking individual action in the face of discrimination. Across all forms of discrimination, only a tiny minority of reported cases go to tribunal. Even when it comes to disability discrimination, where action is most likely to be taken, we estimate 0.41 per cent of the discrimination cases reported in our survey would make it into the ET system, and 0.77 per cent go through the Acas early conciliation process. Put differently, this suggests that only 1 in every 130 people who believe they have experienced workplace discrimination on disability grounds go to early conciliation, and only 1 in every 243 proceed to an ET.

**FIGURE 10: A tiny minority of discrimination cases make it to an ET**

Number of employment tribunal receipts and Acas early conciliation forms received (2019-20) as a proportion of the number of workers reporting discrimination (22-23 September 2022), by form of discrimination: England and Wales



NOTES: Acas early conciliation form breakdowns are only available for disability, sex and race discrimination. This chart divides the number of ET cases and Acas early conciliation forms shown in Figure 9 by the number of people who said they had experienced workplace discrimination in the past year. Base = all 18-65-year-olds (n=3,359). These figures have been analysed independently by the Resolution Foundation.

SOURCE: RF analysis of YouGov, Workplace discrimination; MoJ, Tribunal Statistics Quarterly: April to June 2022

## Financial considerations are especially likely to deter lower-paid workers from taking a case to ET

Why, when discrimination in the workplace can cause real distress and loss of earnings, do so few cases proceed to an ET? To begin, it is clear that the introduction of ET fees in 2013 saw a near-instantaneous drop-off in the number of discrimination cases going through the courts (see Figure 11). This is unlikely to be because workers started experiencing less discrimination – calls to the Acas helpline relating to ‘diversity and discrimination’ (the most relevant category available) increased by almost half between 2011-12 and 2017-18, from 42,000 to 60,000, perhaps in part because people were searching for an alternative to ETs.<sup>59</sup> Despite the removal of fees in 2017 after they were found to be unlawful, cases for most forms of discrimination have not recovered to pre-2012 levels.<sup>60</sup> Although some of this reduction may be linked to the introduction of Acas

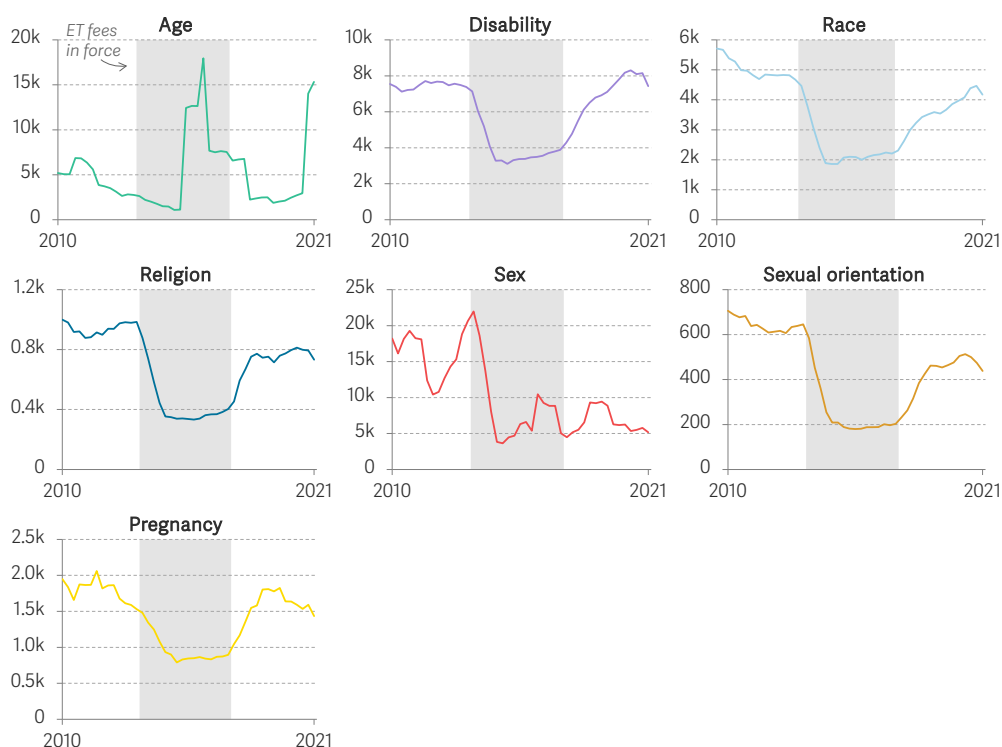
<sup>59</sup> Acas, [Advisory, Conciliation and Arbitration Service annual report and accounts 2011 to 2012](#), July 2012; Acas, [Acas annual report and accounts 2017 to 2018](#), July 2018.

<sup>60</sup> The spike in age discrimination claims around 2015 is linked to ‘two large multiple cases received in the South West in July to September 2015’. See: Ministry of Justice, [Tribunals and gender recognition certificate statistics quarterly: July to September 2015](#), December 2015.

early conciliation in mid-2014, it is plausible that the introduction of fees has had a long-lasting behavioural effect.

**FIGURE 11: Discrimination cases at ET fell dramatically when fees were introduced in 2013**

Annual number of employment tribunal receipts for selected forms of discrimination, by jurisdiction: England and Wales



NOTES: Each data point sums the number of cases in the four quarters to data shown. Latest data point is the year to Q1 2021. The shaded area on each chart denotes the period where ET fees were in force: these fees were introduced in July 2013 but were declared unlawful by the Supreme Court in July 2017, at which point ET claims no longer attracted a fee with immediate effect. The scale of the vertical axis differs on each chart so as to better show the trend in receipts for each jurisdiction. The 'Sex Discrimination' jurisdiction includes complaints made in relation to the protected characteristics 'Sex', 'Marriage and Civil Partnership' and 'Gender Reassignment'. The 'Pregnancy' chart shows the 'Suffer a detriment / unfair dismissal – pregnancy' jurisdiction.

SOURCE: RF analysis of MoJ, Tribunal Statistics Quarterly: April to June 2022.

Furthermore, as is the case with labour market rights more generally, higher earners are more likely to have the ability to assert their own rights through the tribunal system.<sup>61</sup>

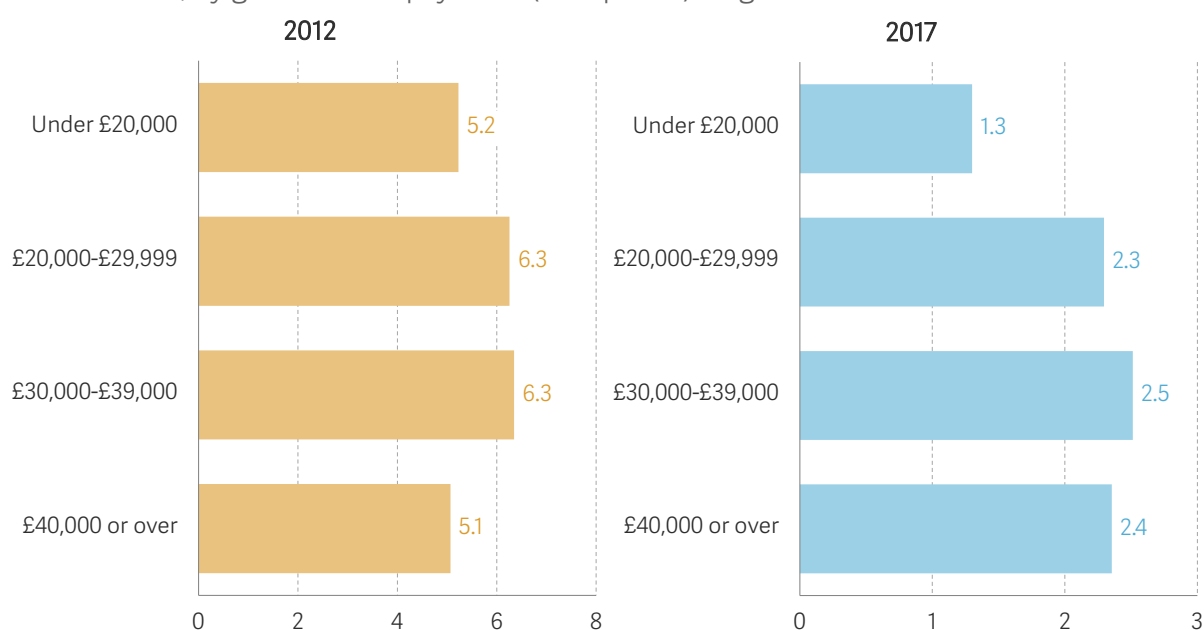
Figure 6 showed that the lowest-paid workers were almost twice as anxious about discrimination affecting them at work than the highest-paid, but as Figure 12 makes clear, that does not translate into lower earners bringing discrimination cases to an ET in greater numbers than their higher-paid peers. In 2012 (before ET fees were introduced), there was little income gradient in who took cases to court. But by 2017, the highest earners were almost twice as likely as the lowest earners to take a discrimination case

<sup>61</sup> N Cominetti & L Judge, *From rights to reality: Enforcing labour market laws in the UK*, Resolution Foundation, September 2019.

to court (2.4 and 1.3 cases respectively per 10,000 workers in that pay band), despite being less likely to experience discrimination. It seems likely that the increased financial cost brought about by ET fees contributed to making it harder for lower earners to seek redress through the courts. Some of this effect may be reversed with the removal of fees – but given that, as Figure 11 showed, the overall number of cases has not returned to pre-fee levels, this should not be taken for granted.

**FIGURE 12: The likelihood of lower earners bringing a case to ET fell especially starkly with the introduction of fees**

Number of employment tribunal applications involving discrimination per 10,000 workers, by gross annual pay band (2017 prices): England and Wales



NOTES: Number of cases from SETA divided by the number of people within that pay band in the FRS. SETA data covers January 2012-January 2013 and October 2016-October 2017; FRS data covers 2012-13 and 2017-18 financial years. Figures have been deflated using CPIH inflation.

SOURCE: RF analysis of BEIS, Survey of Employment Tribunal Applications; DWP, Family Resources Survey.

There are, however, other financial barriers beyond accessing an ET in the first instance. Discrimination cases are often complex and clearly applicants would benefit in many cases from professional legal advice and potentially representation. Unusually, legal aid is available for ET cases which involve discrimination but the eligibility requirements are quite restrictive: applicants must pass both a merits test (that the case has prospects of success) and a means test. To pass the means test an applicant must have a net household income (after tax, housing and other costs) of no more than £733 per month, and household savings of less than £3,000.<sup>62</sup> That said, there is some (albeit quite limited) support available from EHRC (see Box 2).

<sup>62</sup> Working Families, *Legal aid and sources of advice for employment matters*, June 2022.

## BOX 2: Financial support from the EHRC

The EHRC also provides funding and legal assistance for individuals to take their own case to an employment tribunal.<sup>63</sup> From 2017 to 2019, a targeted fund for disability discrimination provided £189,000 for legal assistance across 94 cases. (This covered all forms of disability discrimination, not just in the workplace.) In 2021, a similar fund was launched, this time providing

£250,000 over two years for race discrimination.<sup>64</sup>

Given the prevalence of disability and race discrimination cases reported in our survey (see Figure 2), the focus on these forms of discrimination is welcome – although the scheme has been criticised in the House of Lords for not providing enough support, given the scale of legal fees.<sup>65</sup>

## Discrimination cases often involve substantial stress for the applicants

The battle is not won once someone makes an ET application, however. The majority of cases do not actually make it to a full tribunal: Figure 13 shows that depending on the form of discrimination, between two-thirds (66 per cent) and four-fifths (80 per cent) of cases are settled out of court or withdrawn. In most cases, this is higher than the average across all employment tribunal cases (66 per cent). Settling out of court is not necessarily a bad thing, of course, if the worker is able to reach a suitable agreement with their employer without going through a costly and emotionally difficult court case. But it is interesting that discrimination cases are more likely than average to drop out of the system – and is definitely a concern if this means that workers are not getting the redress they deserve.

<sup>63</sup> EHRC, [Legal support scheme](#), accessed 28 October 2022.

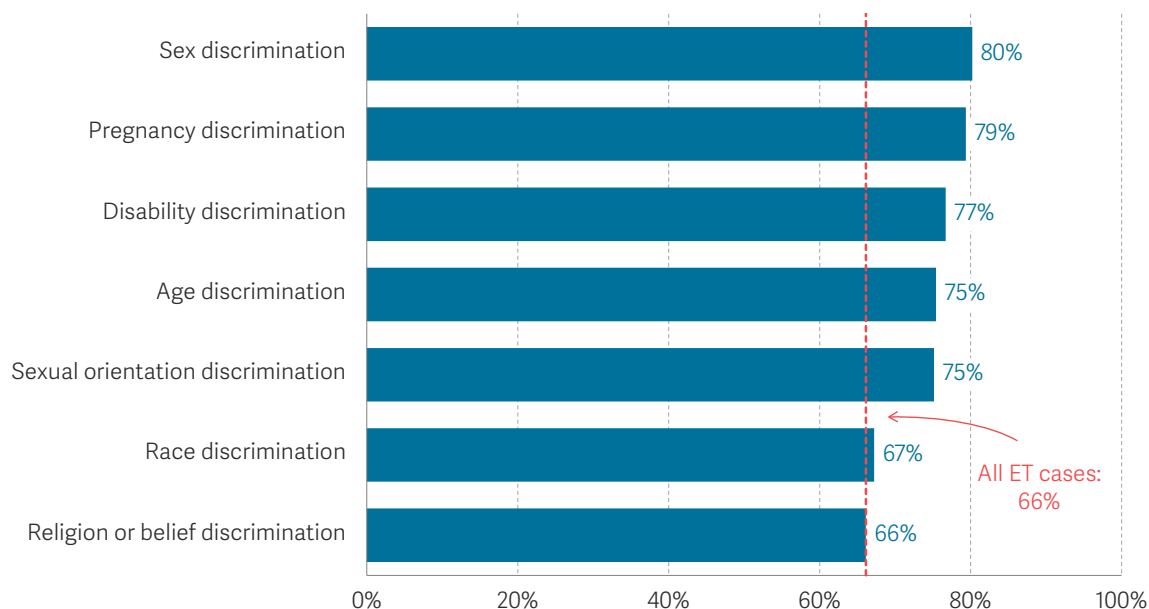
<sup>64</sup> EHRC, [Legal support scheme](#), accessed 28 October 2022.

<sup>65</sup> Hansard, [Commission on Race and Ethnic Disparities, Volume 820](#), March 2022.



**FIGURE 13: Discrimination cases are more likely than the average ET case to be withdrawn or settled out of court**

Proportion of cases that are settled out of court or withdrawn, by jurisdiction: England & Wales, 2019-20



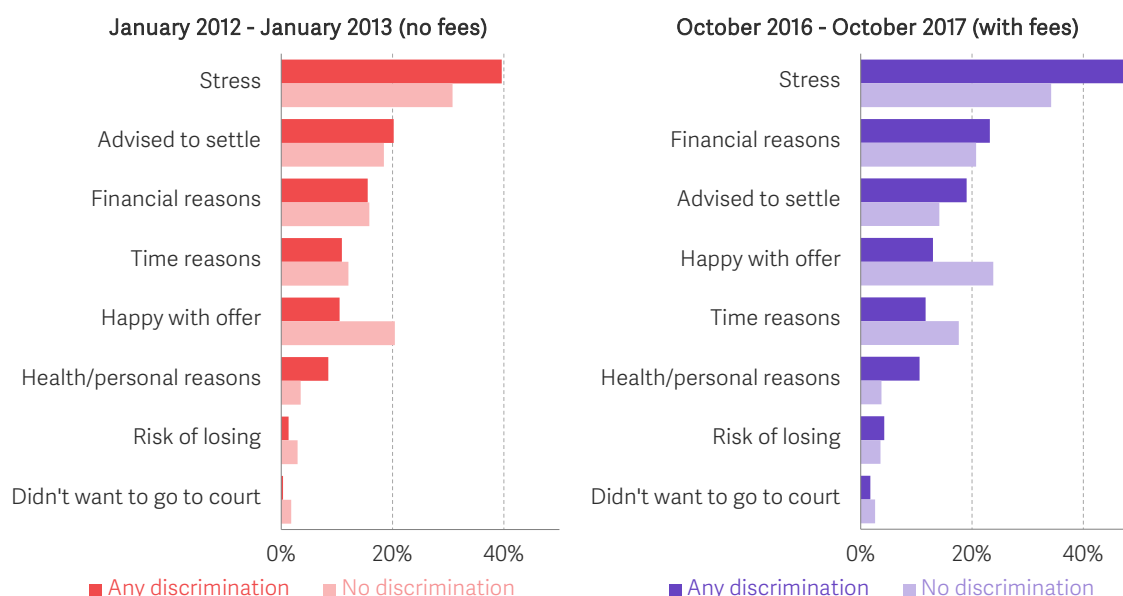
SOURCE: RF analysis of MoJ, Employment Tribunal Statistics Quarterly.

To shed some light on the reasons for this, Figure 14 shows why claimants report choosing to settle out of court, split out by whether the case involved a discrimination claim. Between October 2016 and October 2017, the most common reason for claimants settling an ET case is stress, and this is more common among cases involving discrimination than other cases (48 per cent versus 34 per cent). And this does not appear to be because discrimination cases attract more generous out-of-court settlements. Strikingly, just one-in-eight claimants in discrimination cases (13 per cent) said one of their main reasons for settling was that they were happy with the offer, compared to almost one-in-four (24 per cent) for cases with no discrimination element. And perhaps unsurprisingly, financial concerns became more important once ET fees were in force.

Looking at the data from the employer side, financial reasons dominate. This refers to the direct financial cost of dealing with the case – wider commercial reasons, including reputation, do not appear to be important, although the share of employers citing these reasons is marginally higher where discrimination claims are involved.

**FIGURE 14: The most common reason for settling an ET case before hearing is stress**

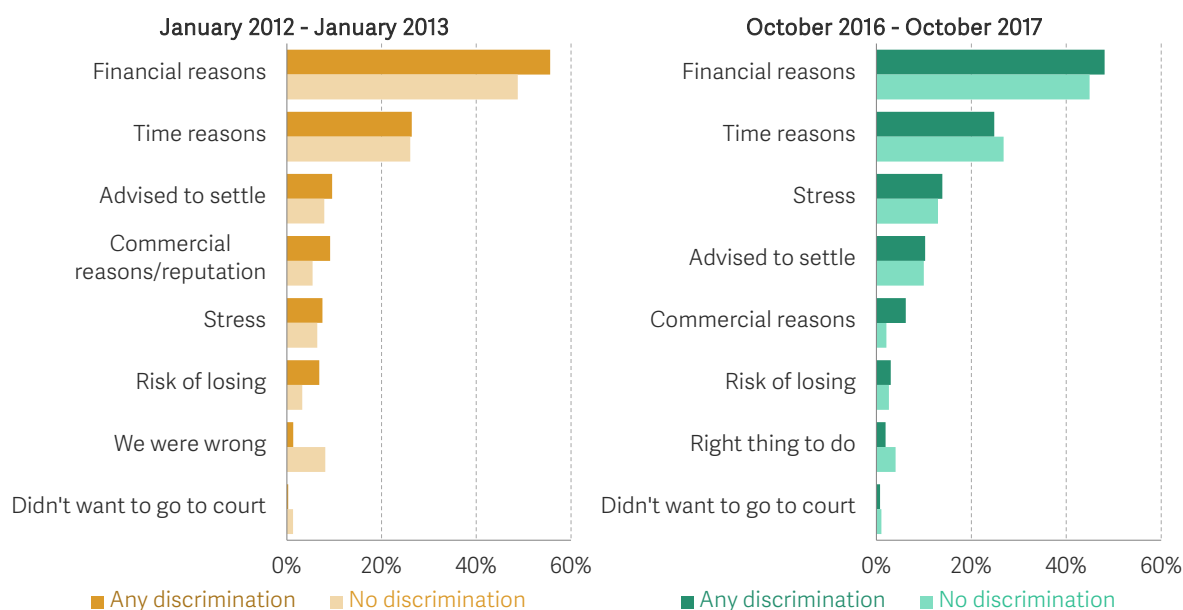
Reasons reported by claimants who settled an employment tribunal case, by year and whether case involved a discrimination claim: GB



NOTES: Base = claimants who brought forward an ET case which was subsequently settled out of court. For the 'any discrimination' bars, discrimination need not be the main jurisdiction of the case. Employment tribunal fees were in effect during the 2016-2017 survey wave but not during the 2012-2013 wave; the introduction of fees was associated with a sharp drop in the number of tribunal receipts and disposals. Respondents can give multiple reasons for settling.  
SOURCE: RF analysis of BEIS, Survey of Employment Tribunal Applications.

**FIGURE 15: Employers choose to settle cases for financial reasons**

Reasons reported by employers for settling an employment tribunal case, by year and whether case involved a discrimination claim: GB

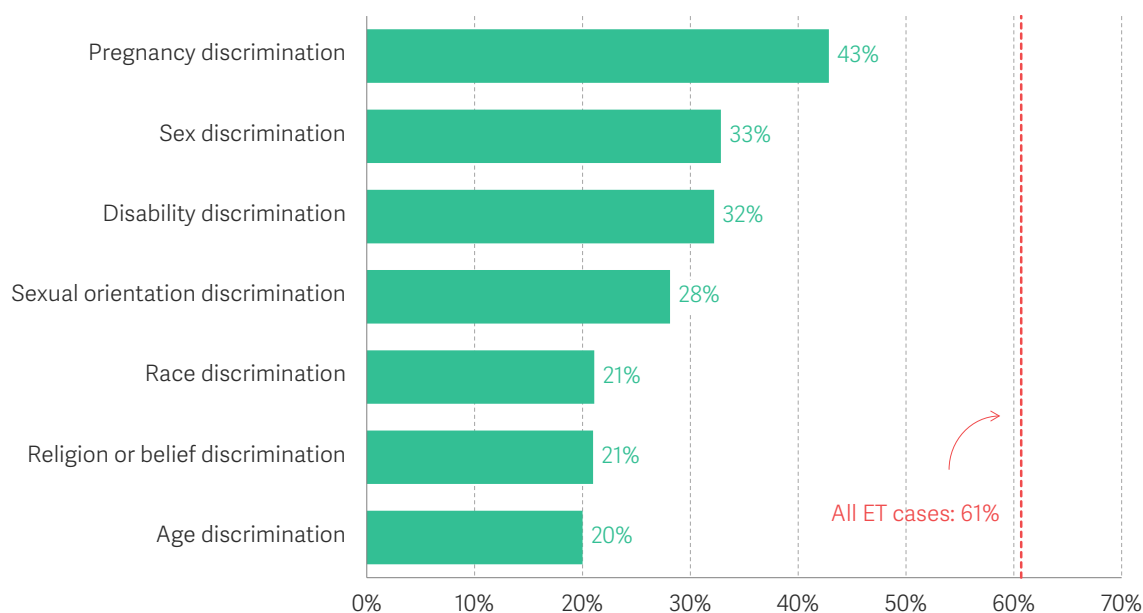


NOTES: Base = employers who were involved in an ET case which was subsequently settled out of court. For the 'any discrimination' bars, discrimination need not be the main jurisdiction of the case. Respondents can give multiple reasons for settling.  
SOURCE: RF analysis of BEIS, Survey of Employment Tribunal Applications.

Finally, those discrimination cases that do make it through to a full hearing have a lower chance of success than the average ET case. In 2019-20, the success rate of all ET cases that made it to this stage was three-fifths (61 per cent); among discrimination cases, the success rate ranged from one-fifth (20 per cent, age discrimination) to just over two-fifths (43 per cent, pregnancy discrimination). A likely reason for this low success rate is that discrimination cases are rarely clear-cut and can be more difficult to prove than other violations of labour market rights – something that many be further exacerbated by the fact that claimants often must represent themselves in what can be very emotional cases. This is true even though a claimant needs to establish, on the balance of probabilities, that they received less favourable treatment due to a protected characteristic (a lower ‘standard of proof’ than in the criminal courts) and the ‘burden of proof’ then shifts to the employer to prove there was a non-discriminatory reason for the facts.<sup>66</sup>

**FIGURE 16: Less than half of discrimination cases that make it to a full ET hearing are successful compared to almost two-thirds of all cases**

Success rate of cases that go to a full hearing: England & Wales, 2019-20



SOURCE: RF analysis of MoJ, Employment Tribunal Statistics Quarterly.

<sup>66</sup> Springhouse Solicitors, [How to prove discrimination at an employment tribunal](#), accessed 6 November 2022.

## The ET system could more effectively enforce anti-discrimination laws in the workplace

Resolution Foundation research focusing on other forms of labour market violations has often made a strong case for state enforcement over individual routes of redress.<sup>67</sup> But deciding whether unlawful discrimination has or has not occurred in the workplace is a much more complicated matter than binary issues such as minimum wage underpayment, failure to provide holiday pay or to ensure premises are safe and healthy places to work. In discrimination cases, it is often not clear-cut when a case constitutes unlawful discrimination as opposed to simply unfair treatment, or whether what looks like discriminatory behaviour at work can be proven in law.

As a result, there is a stronger argument for judicial assessment of individual discrimination cases, which means that there will continue to be an important role for the ET system in enforcing discrimination law. But as this briefing note has shown, the ET system could be made both more efficient and more accessible to workers. First, given that lower-income workers are less likely to take their case to an ET despite being more likely to experience discrimination in the first place, more should be done to ensure that the system is accessible to all who need it. To remove financial barriers, the Government could expand access to legal aid – currently, only those on extremely low incomes are eligible<sup>68</sup> – or provide more funding for not-for-profit organisations, such as Law Centres, that provide support for those on low incomes.<sup>69</sup> And the EHRC could consider a targeted campaign to ensure that particularly those in lower-paying work – for example, people working in the sectors shown in Figure 6 to have higher rates of anxiety about discrimination – know their rights and how to access support.

Second, the Government should consider giving workers longer to decide whether to take their case to a tribunal. Currently, someone who wants to make an ET claim for workplace discrimination must do so within three months less one day from the discrimination taking place. (This period can be extended in some circumstances – for example, to allow time to go through Acas' early conciliation procedure.) This is shorter than the time limit for other forms of discrimination, where the time limit is six months less one day.<sup>70</sup> Increasing the time limit for ET cases to six months – as the Government indicated it was considering last year – could help ensure people have time to think through a case and seek relevant advice if they choose to.<sup>71</sup>

<sup>67</sup> See, for example: L Judge & A Stansbury, *Under the wage floor: Exploring firms' incentives to comply with the minimum wage*, Resolution Foundation, January 2020.

<sup>68</sup> HM Government, *Legal aid: eligibility*, accessed 31 October 2022.

<sup>69</sup> There is precedent for this: during the pandemic, the Ministry of Justice provided a grant to the Law Centres Network, which runs law centres across the country. See: Law Centres Network, *Justice in the Balance: LCN Annual Review 2020-21*, November 2021.

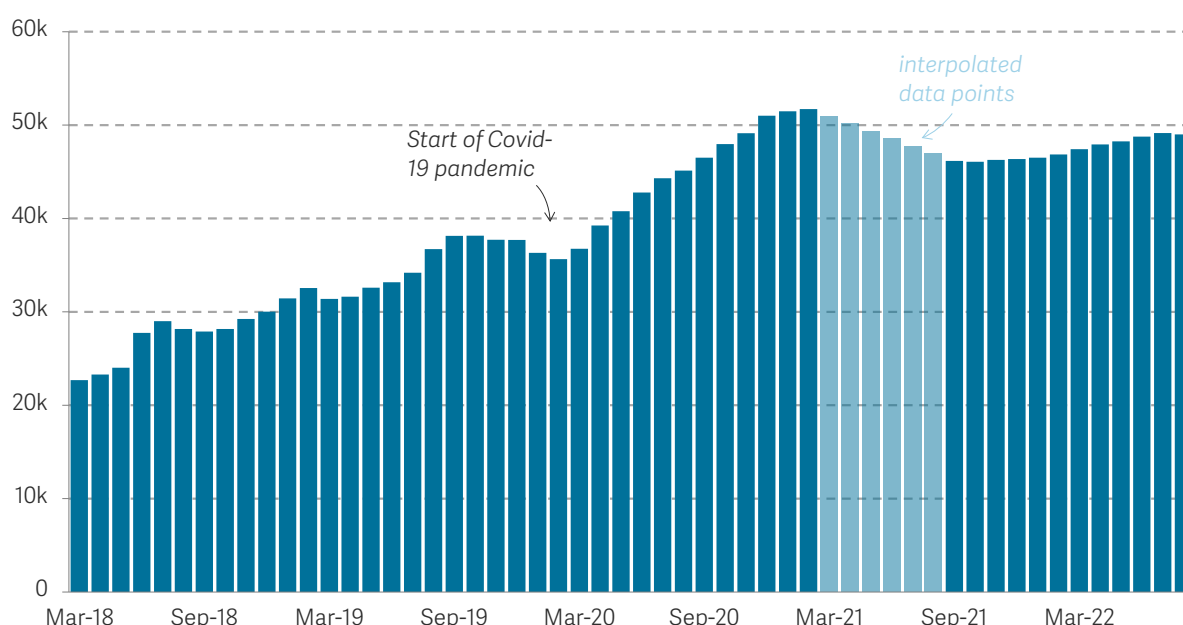
<sup>70</sup> Citizens Advice, *Check the time limits for taking legal action about discrimination*, accessed 31 October 2022.

<sup>71</sup> In July 2021, the Government said it would 'look closely at extending the time limit for bringing Equality Act-based cases to tribunal to 6 months'. See: Government Equalities Office, *Government response to consultation on sexual harassment in the workplace*, July 2021.

Third, the Government should prioritise decreasing the backlog in the court system. This was exacerbated by delays during the Covid-19 pandemic – between February 2020 and February 2021, the number of outstanding tribunal cases rose by 45 per cent (see Figure 17). But the backlog was increasing even before the pandemic: Figure 17 shows that the backlog has more than doubled since March 2018. A rising backlog comes with long wait times for a case to go to court: in 2020-21 (the latest data available), ET claims took around a year, on average, to get to a first hearing.<sup>72</sup> This is not just stressful for the claimant: the longer it is since the discrimination took place, the more difficult it will be to provide evidence (for example, if other employees who may have witnessed the discrimination have moved employer).

**FIGURE 17: The employment tribunal backlog has doubled since early 2018**

Employment tribunal open caseload: England and Wales



NOTES: Data unavailable between March and August 2021; these bars have been calculated by linear interpolation between the February and September 2021 data points. Latest data point is August 2022.  
SOURCE: RF analysis of HMCTS, HMCTS management information, various.

## State enforcement should be strengthened to protect the many workers who do not take individual action

Even with such improvements to the ET system, however, it is likely that lower-paid workers would continue to use the enforcement system less than higher-paid workers: the awards that low paid workers could get are smaller than for the higher paid if based on lost earnings and not worth the wider, non-financial costs of going through a stressful court case that can take up substantial amounts of time. And there are

<sup>72</sup> UK Parliament, [Question for Ministry of Justice UIN 96930](#), January 2022.

particular benefits to the state stepping in when there are systemic issues with particular businesses, where workers taking cases individually could be inefficient. This means that state enforcement should still play a large role, in terms of both prevention and enforcement of discrimination.

State enforcement can take a range of forms. The enforcement bodies in the UK today take a range of approaches and there are plans afoot to bring a number of them together in Single Enforcement Body (SEB) in the coming years.<sup>73</sup> So should discrimination be brought into the SEB's purview? In response to the Government consultation around the SEB, a majority of stakeholders supported maintaining the EHRC as the body responsible for discrimination enforcement (sitting outside the SEB).<sup>74</sup> But clearly there could be better join-up between the EHRC and other enforcement bodies. Where appropriate – and, of course, taking account of important data protection considerations – enforcement bodies should share intelligence that could help them to deal with employers who fail to meet their legal obligations regarding more than one form of workers' rights.

It is clear, however, that the EHRC must be strengthened to protect more workers. The Government should pass legislation to give the EHRC stronger powers to act when it finds non-compliance. For example, it should have the power to fine employers when it finds cases of non-compliance, so that firms face a more direct financial incentive to abide by the law. The EHRC could also be given the ability to proactively inspect businesses where there is a high risk of discrimination (for example, those in at-risk sectors or where other labour market violations have been uncovered).

To allow them to do more proactive work, the EHRC will need an increase in its resources. At the moment, the EHRC has a high bar for the cases it takes on; more resources would allow it to broaden the scope of cases it deems worth taking on. And, given the scale of the discrimination shown in this note on the grounds of ethnicity and disability, tackling these forms of discrimination should be a particular priority.

In addition to expanding legal support for those on lower incomes to take cases to court, the Government should consider expanding the pots of funding targeted at specific forms of discrimination (such as the current funding to support cases of race discrimination). With more resources, the EHRC could also extend this targeted funding to multiple forms of discrimination at once – for example, targeting discrimination on the grounds of both ethnicity and disability. Finally, as we think through how to improve the UK's state enforcement of anti-discrimination laws it is worth looking other models such as the ombudsman in Germany (see Box 3).

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<sup>73</sup> The 2019 Conservative Party manifesto promised to create a Single Enforcement Body, bringing together the enforcement functions of several existing organisations, although the Employment Bill that would set this process in motion has not yet been tabled. See: Conservative Party, [Conservative Party Manifesto 2019](#), November 2019.

<sup>74</sup> BEIS, [Good work plan: establishing a new single enforcement body for employment rights](#), June 2021.



### BOX 3: The ombudsman model: a case study of Germany

In this briefing note, we focus primarily on improvements that could be made to the system that already exists in the UK. But policy makers could consider more radical changes, such as moving to an ombudsman model. In this, they could learn from countries such as Germany, which enforces discrimination through the Federal Anti-Discrimination Agency (FADA), or Antidiskriminierungsstelle.

The FADA was established in 2006 and covers all the forms of discrimination for which the EHRC is responsible. Alongside educating the public about discrimination and their rights, its responsibilities include offering advice to those who have experienced or witnessed discrimination (including at advice centres throughout Germany) and providing initial legal advice. It can also refer people to other organisations

where appropriate and perform a mediation role between the parties involved. As well as these public-facing responsibilities, the FADA submits a report to the Bundestag (German parliament) every four years outlining the discrimination cases it is seeing and makes recommendations on avoiding and eliminating discrimination.<sup>75</sup>

Its responsibilities, then, are broader than those of the EHRC, incorporating some of the functions currently taken on by other organisations such as Acas. Like the EHRC, it is not an inspectorate, and does not carry out proactive enforcement. But its range of services provide a single point of contact where those experiencing discrimination can go – and, crucially, feel confident that their case will be addressed in the way that is most suitable.

## Conclusion

Laws that protect workers against discrimination will always be more difficult to enforce than other labour market violations, given that cases tend to be complex and require informed judgement calls. But as this briefing note has shown, discrimination is widespread in today's labour market – and its enforcement, both via the EHRC and individual routes, is not effective at protecting large numbers of workers, especially those who are more vulnerable to discrimination.

Much of the Government's focus on enforcement has been on the Single Enforcement Body – and, with changes of Government and unforeseen crises (in the form of the

<sup>75</sup> Federal Anti-Discrimination Agency, [Our tasks](#), accessed 27 October 2022.

pandemic and the cost of living crisis), even that has fallen down the priority list. But this briefing note makes clear that, as well as returning to labour market enforcement as a wider priority, policy makers should also prioritise strengthening other parts of the enforcement system, to ensure firms are effectively deterred from discriminating, and workers who are at the sharp end of unlawful practice receive the redress they deserve.

The Resolution Foundation is an independent research and policy organisation. Our goal is to improve the lives of people with low to middle incomes by delivering change in areas where they are currently disadvantaged.

We do this by undertaking research and analysis to understand the challenges facing people on a low to middle income, developing practical and effective policy proposals; and engaging with policy makers and stakeholders to influence decision-making and bring about change.

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