# Navigating conflict with sex-based rights in the NHS healthcare workplace

**Drafted by SEEN in Health, experts by experience**

## Practical guidance to protect yourself at work

### Social media

Ensure that all your social media accounts are set to private.

Remove any affiliation with your NHS trust or organisation you work for, including pictures in uniform or with colleagues that could link you to your organisation.

Set any picture, check-in or activity tags to ‘requires authorisation’.

Add a disclaimer to your profile stating “all opinions/views expressed are my own” or similar.

### Whilst at work

The saying ‘bring your whole self to work’ certainly does not apply in the current NHS climate. It is frustrating that you are unable to discuss your opinions and beliefs with colleagues, especially in a medical profession, but to avoid unnecessary conflict,

unwanted harassment or a potential disciplinary process, it is best you remain professional and objective within the workplace.

That said, if you are lucky enough to find like-minded colleagues, it can help to have a safe and confidential space where you can discuss issues, especially where they relate to your work.

If you are not already a member, consider joining **SEEN in Health**.

## Pronouns

It is possible you will be asked your pronouns in various meetings.

Requesting pronouns is not a neutral, inclusive ask, but it's important to respond respectfully. It may be possible (if preferred) in a group setting to ignore the request, or you may wish to state that you do not share pronouns.

An employer should not compel an employee to share pronouns, nor should an employee have to justify or explain why they do not – to do so would be discriminatory.

If you find yourself in a position where you feel compelled to provide pronouns, make a note of the details of the event and share your concerns:

- with your line manager
- with your union representative
- with your Freedom to Speak Up Guardian
- via the internal complaint or grievance process

Who you share with will depend on your organisation and also your willingness to raise this issue.

We have written about pronouns on the **SEEN in Health website**.

## Know your policies

Important policies to be aware of are the:

- social media policy
- dignity at work policy
- disciplinary and investigation policy
- equality and Inclusion policy

In addition to this, **review your contract**.

## Representation and your rights

If you find yourself subject to a complaint or disciplinary proceedings because of your sex-based views the following information will be useful.

If you are with a union, contact them to arrange a meeting. Do not attend any meeting regarding the complaint/action against you without your union rep – they may not be well versed in the gender critical debate but they will understand formal disciplinary processes better than you and their role as a representative is to assist you.

Be prepared, however, to accept that your union might offer only limited support. Some unions have policies that disadvantage those who do not believe in gender identity, despite these not being compliant with the Equality Act 2010 (**s.57 of the EA10 prohibits unions from discriminating against members**).

If you are not a member of a union, then you have a legal right under the **Employees Relations Act (1999)** to be accompanied to all meetings by a colleague. The colleague will only be there in a support capacity and is unable to speak on your behalf.

There is no point joining a union retrospectively – most unions will require membership for 28 days before providing representation and will not take on a case that has already started.

If you find yourself without a workplace/professional union, consider joining the **Free Speech Union**. They will provide support and legal advice if and when required and they understand 'gender critical beliefs' and the protections afforded you in your workplace (unlike the unions we have reviewed).

# The process

## Invitation to meetings

Any invitation to a meeting with HR present will be recorded and placed on file.

- You should not be blindsided going into the meeting. The meeting purpose should have been made clear to you to enable you to go in prepared.
- When attending any meeting with HR or senior management, a union representative or a trusted colleague should accompany you.
- Following a meeting, you should receive an outcome letter – it is important to go through the outcome letter and ensure you agree with all points made. If the outcome letter does not represent your own interpretation, contest each point you disagree with and send it to HR. It is unlikely that the outcome letter will change but the contested points will remain on file.

## Keep a record

**This is key!**

Keep a diary and log anything and everything you feel is relevant to a potential disciplinary, suspension or employment tribunal. If you have raised concerns, log who with and when – make sure there is a clear paper trail. If you have had a conversation with a manager or HR, follow this up with a 'further to our earlier conversation' email. If somebody fails to attend a meeting or reply to you, add this to your record.

If an investigation is to take place, it is important that you study the disciplinary policy, particularly the process.  Highlight any part of the process that hasn't been met, such as notice given prior to meetings, timescales, and the management structure involved.

An investigation officer will be assigned (this should be someone in a higher band role) and an investigation interview will be arranged between you and the investigating officer. If there has been a complaint, then those involved will also be interviewed. Your interview is usually last to take place.

The investigation will centre around the 'terms of reference' or allegations made against you. You should attend this meeting with union representation or a colleague.

The **Acas Code of Practice on disciplinary and grievance procedures** provides organisations with a minimum set of guidelines for handling investigations into employers. The purpose of this guidance is to ensure that all investigations are full and fair.

- Employers should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made. This is often termed "fact-finding" and ideally should be carried out before a decision is made on whether to proceed with an investigation.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

Most trusts allocate you a welfare officer during the investigation process. This role is carried out by a senior member of staff. In our experiences, the support offered to staff

could be greatly improved. Alongside this individual we would instead encourage you to use your employer's Employee Assistance Programme, your GP or any other service to assist with your welfare during this time.

## Suspension

Unfortunately, if the allegations made against you have the potential to amount to misconduct, there is a chance you will be suspended (this is likely to be with full pay).

A suspension is deemed to be 'a non-punitive process'.

However, the process is the punishment from the start and is likely to have a detrimental effect on your mental health, professional reputation and personal life. If your wellbeing is affected it is important to contact your GP, or your employer's Employee Assistance Programme, for support.

Upon suspension, you will have all work devices and ID taken away and your IT access will be disabled. It is important that any relevant content on work devices, such as emails or reports, is forwarded to your personal email address immediately.

In order for an organisation to justify a suspension, there will have to be a risk assessment carried out to determine the risk you pose to the trust, colleagues and/or patients.

From your personal email address, email your HR manager to ensure they know how to contact you, request a copy of the risk assessment carried out prior to your suspension and raise a subject access request (see the **appendix** for templates).

## Subject access request

A subject access request (SAR) is a legal process in which your employer is obliged to provide any data pertaining to you and the individuals you have requested (see the **appendix** for templates).

An organisation has 30 days to provide you with all information from the SAR or make you aware of any delay.

The request should be made to HR and they will have to acknowledge they have received the request.

## The investigation process

During this investigation, you will be presented with any evidence collected against you. This is likely to be the first time you are made aware of the reason behind the investigation. It is important to remain calm and professional. Take your time to answer any questions and keep your answers short, direct and to the point.

Following the investigation interview, the investigating officer will decide, based on all evidence provided, if there is a case to answer. If so, a disciplinary panel will then be scheduled. You will be made aware of this in writing and should receive an investigation pack containing all evidence collected, including the interview/s with the complainants and any witness statements obtained.

Depending on your trust policy, there should be a minimum of 14 days between receipt of this and the disciplinary panel date set.

During this 14-day period, it is important to:

- Review the complete investigation pack, highlighting anything that you think is false or any part of the investigation process you contest.
- Gather information to fight your case – this could be character references from colleagues, relevant legislation, policies that you feel have not been followed, case law that you feel has similarities to the allegations made against you.
- It is a good idea to write a statement. This should include the context to the information you have collected, how the process has affected you personally and any recommendations you feel are appropriate.

You will be expected to submit any evidence or information prior to the disciplinary panel to afford them opportunity to look over it.

You **should not** include this statement in the evidence you submit to the panel – it is for you to deliver at the panel hearing.

# Employment tribunal claim

Before you make an employment tribunal claim, it's a good idea to try to resolve your workplace problem ('dispute') by raising the problem informally and/or raising a formal grievance.

You do not need to do this to make an employment tribunal claim, but it could help you. This is because you may resolve your dispute informally so you no longer need to make a claim and/or it could affect how much compensation you're awarded if you do make an employment tribunal claim

The UK Employment Tribunal court is responsible for hearing claims from people who think their employer has treated them unlawfully.

## Deadlines and timescales

For the majority of claims, you will have **three months less one day**, from the event or act to start the employment tribunal process. Any internal grievance procedures will not affect these timescales and although judges can extend given timescales, they have limited discretion to do so.

## ACAS

You **must** tell ACAS first before making a claim to an employment tribunal about a workplace dispute.

For the purpose of the claim to an employment tribunal you are 'the claimant' and the other person in the dispute who will respond to the claim, for example your employer, is 'the respondent'.

When you make a claim, ACAS will offer you 'early conciliation'. This is when ACAS talks to both you and the respondent about your dispute. It gives you the chance to come to an agreement without having to go to tribunal. ACAS is not part of the tribunal service and will not discuss any matter with the tribunal.  During early conciliation, if you agree, ACAS will contact the respondent. All conversations are confidential and you

decide what ACAS can and cannot share with them. Early conciliation involves being assigned and represented by an ACAS conciliator, who will liaise with you as the claimant, and the respondent, over the six-week early conciliation period.

There are two potential outcomes:

1. The respondent will agree to early conciliation and begin negotiations.
2. The respondent will refuse to enter into early conciliation. At this point ACAS will issue you with a conciliation certificate. Once you have this you can begin tribunal proceedings.

## Making a claim

The ET1 form is the first step in your Employment Tribunal case.

An ET1 is the claim form you need to send to the Employment Tribunal if you want to make a legal claim about an employment law problem. The UK Government website has a **copy of the ET1**, and as well as the link to **make your claim online**.

**You need the number from your Early Conciliation Certificate to be able to submit your claim.**

Most of the ET1 form is fairly simple to fill out. The most tricky part is ‘Section 8 - Type and Details of Claim’.

Claim and official guidance is available in both **Welsh and English**.

## Legal representation

Although it is not essential to have an employment solicitor to represent you in a tribunal hearing it is beneficial as your employer will likely have legal representation. There are many resources which can be found online which can help you prepare for a tribunal. It is very important to be well versed in the elements of your case: remember no one will know your case better than you.

**Valla.uk** is a very helpful resource which provides legal advice at a low cost, they use legal coaches who can advise and help prep for your case. If you choose to get legal representation the earlier you do so the better, this allows your legal representative to get to grips with the essential elements of your case.

## Preliminary hearing

During the preliminary hearing the judge will decide the list of issues that need to be established in a full hearing and agree dates for submissions and exchange of documents.

It is imperative that you adhere to all orders that are given by the court.

The preliminary hearing is your opportunity to briefly give the facts of your case. The judge will have read your ET1 so will have an idea of the basis of your claims.

Do not send any documents to the respondent unless this has been ordered by the court.

## Key points

1. Send any emails/evidence stored on a work device to a private email that is not associated with your employer.
2. Always attend any meeting with a union representative or colleague.
3. After any meeting, request a copy of the notes taken. If you do not agree with the content, challenge by email.
4. Always request a subject access request (SAR) for all digital data, including emails, between all parties you believe may have held discussions about you.
5. Remember to conduct your own investigation. Also, if there is evidence you believe can help your case, request this via your allocated welfare officer.
6. Submit a freedom of information (FOI) if you believe there is information that could support your case.

7. Start compiling a folder of evidence: keep all correspondence in chronological order.

8. The disciplinary interview is there to “trip” you up: never volunteer more information than what is required.

9. Allow the investigating officer to present their evidence against you. Take your time looking through it before you say anything.

10. Be mindful that you have 3 months less 1 day to lodge your case with ACAS. This date is very important as if you miss this deadline, there is little chance of obtaining an exemption.

11. Once you start your claim with ACAS, the clock stops for 6 weeks. This gives you and your employer the opportunity to enter into early conciliation. Always engage in the process, it will fare better for you in the long run.

12. By the end of the 6 weeks, if you and your employer have been unable to reach a resolution, you will be issued with a conciliation certificate by ACAS to begin your tribunal claim and lodge your ET1.

13. Be aware that the ET1 submission also carries a strict deadline. It is important to give a detailed account in your ET1 and be aware of the legal subsections of law in which your claim falls, e.g. direct discrimination, sex discrimination, unlawful deduction of wages.

# The law

There are key pieces of legislation that you are protected by.

## The Equality Act (2010)

The Act protects those who fall under nine protected characteristics, from discrimination, harassment and victimisation.

The protected characteristics are:

- sex
- age
- race
- disability
- sexual orientation
- religion and belief
- pregnancy and maternity
- marriage and civil partnership
- gender reassignment

The Act provides exemptions that allow for the provision of single-sex services, and these are detailed in paragraphs 26 to 28.

Single-sex provision is permitted:

- where only people of that sex require it
- there is joint provision for both sexes but that is not sufficient on its own
- if the service were provided for men and women jointly, it would not be as effective and it is not reasonably practicable to provide separate services for each sex
- where they are provided in a hospital or other place where users need special attention (or in parts of such an establishment)
- where they may be used by more than one person and a woman might object to the presence of a man (or vice versa)

- where they may involve physical contact between a user and someone else and that other person may reasonably object if the user is of the opposite sex

Exclusion of those holding a GRC has to be objectively justified.

The NHS is also required to demonstrate ‘intent to improve society and promote equality’ as part of s149 within the Equality Act. This is the Public Sector Equality Duty, and the NHS is expected to ‘foster good relations between people who share a protected characteristic and people who do not’. This should prevent any NHS employer from prioritising one individual’s protected characteristic over another.

**Definitions used in the Equality Act (2010):**

- **Discrimination**
  (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

- **Harassment**
  (1)A person (A) harasses another (B) if— (a)A engages in unwanted conduct related to a relevant protected characteristic, and. (b)the conduct has the purpose or effect of— (i)violating B's dignity, or. (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

## Important gender critical case law

The Equality Act (2010) prohibits forms of discrimination to the extent that it relates to one or more ‘protected characteristics’.

‘Religion or belief’ is one of the nine specific protected characteristics, which means it is unlawful to discriminate because of an individual’s belief. To qualify as a ‘philosophical belief’ under s.10 of the Equality Act, the belief must satisfy the five criteria set out at para 24 in Grainger v Nicholson [2010].

These are that:

- the belief must be genuinely held

- be a belief and not an opinion or viewpoint based on the present state of information available
- be a belief as to a weighty and substantial aspect of human life and behaviour
- it must attain a certain level of cogency, seriousness, cohesion and importance
- it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others

Those who hold gender critical beliefs, an uncontested philosophical belief, must show that this belief is genuinely held and more than an opinion. It must be cogent, serious and apply to an important aspect of human life or behaviour. The definition, according to the employment appeal tribunal judgement from the Forstater v GCD, is that gender critical beliefs 'include the belief that sex is immutable and not to be conflated with gender identity'.

Gender reassignment, also a protected belief, states that you must not be discriminated against because of gender reassignment. In the Equality Act (2010), gender reassignment means proposing to undergo, undergoing or having undergone a process to reassign your sex.

**Maya Forstater versus CGD Europe**

Forstater worked as a consultant for CGD Europe, a not-for-profit think tank focussed on international development, from November 2016 until October 2018, when her contract was not renewed. This occurred after a number of colleagues raised concerns about some of her tweets, alleging that they were transphobic, exclusionary or offensive and made them feel uncomfortable.

Forstater consequently brought a claim in the ET, alleging direct discrimination and harassment because of her ‘gender-critical’ beliefs.  This involved a preliminary hearing to determine whether Forstater’s belief was a philosophical belief within the meaning of s10 of the Equality Act. The Tribunal held that it did not constitute a protected philosophical belief.

Maya Forstater appealed the decision and it was held that the ET had erred in its application of the fifth Grainger criteria and that a philosophical belief would only fail to satisfy the fifth criteria "if it was the kind of belief of which would be akin to Nazism or totalitarianism". The EAT explained that s10 of the Equality Act, must be interpreted in accordance with Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR). The EAT also explained that Forstater's gender-critical beliefs were widely shared and were in accordance with previous decisions of UK law.

**Rachel Meade versus Westminster City Council and Social Work England**

In 2020, Rachel, who had been a dedicated and respected social worker for more than 20 years, used her personal Facebook account to share content from women's rights groups such as Fairplay for Women and Woman's Place UK, articles from mainstream media and a petition to ban men from women's sports.

Her posts were in a small Facebook group, seen by a small number of Facebook friends. Nonetheless, one of those 'friends' was a work colleague, who reported her to her employer for posting "transphobic content". In response, Westminster suspended her for gross misconduct. In an even more extraordinary step, it also suspended two of her colleagues for failing to report the posts to them. Social Work England threatened her with fitness to practise proceedings and sanctioned her for misconduct.

Fortunately, the employment tribunal ruled conclusively in Rachel's favour and was damning in its criticism of both Westminster and Social Work England. The judgement states unequivocally that Rachel's right to express gender-critical views is protected under the law:

"All of the Claimant's Facebook posts and other communications fell within her protected rights for freedom of thought and freedom to manifest her beliefs as protected under Articles 9 and 10."

**Phoenix versus The Open University**

Joanna Phoenix was employed by the Open University as a Professor in Criminology. She holds gender critical beliefs, which are that she believes sex is real, important, that a person cannot change their sex and that sex is not to be conflated with gender

identity. She was found by the employment tribunal to have suffered numerous detriments at work due to her beliefs. Phoenix's health deteriorated to the point where she was experiencing intrusive thoughts and PTSD symptoms. She considered herself publicly defamed by University academics and learnt that a targeted campaign was being fomented by a private Facebook group. It follows that no action was taken by the University. Phoenix received death threats, but the tribunal found no evidence that these were investigated or followed up by the University. The situation became unbearable for her, and she resigned, successfully claiming constructive unfair dismissal.

## Human Rights Act (1988)

A UK law that protects the human rights of UK citizens by making the rights in the European Convention on Human Rights (ECHR) enforceable in the UK.

The HRA protects a range of rights, including:

- The right to respect for private and family life.
- The right to liberty and security.
- Freedom from torture and inhuman or degrading treatment.
- Freedom of expression.

The HRA also requires public organisations, including the government, police, and local councils, to treat everyone fairly, with dignity, and with respect.

## Workplace (Health, Safety and Welfare) Regulations (1992): Regulation 20

Employers should provide single sex toilet facilities unless these facilities are in separate rooms that can be locked. This regulation is often overlooked when discussing single sex facilities.

## Worker Protection (Amendment of Equality Act 2010) Act (2023)

This new Act (26 October 2024) requires all employers to take reasonable steps to prevent sexual harassment in the workplace. An example of a reasonable step, in our opinion, is to ensure changing and toilet facilities remain single sex.

This new Act also requires employers to do more to challenge discriminatory behaviour and workplace norms.

This Act aligns with the Sexual safety in healthcare charter, introduced due to the unacceptably high incidents of sexual harassment reported by NHS employees, with women most significantly impacted.

## Local Authority Planning Permission (2021)

Not all flags are permitted to be flown, without permission, as flying flags is considered to be advertisement. The Local Authority Planning Permission 2021 provides more details of flags that can be flown with no consent (i.e. country or county flags) or with some restrictions (i.e. the NHS flag or the rainbow flag). Other flags require Local Authority consent to be flown.

This guide has been drafted by SEEN in Health members with experience of navigating GC beliefs in the workplace. If you can identify any errors, gaps or improvements we could make, please get in touch.

# Appendix: Templates

## Risk assessment request

Dear HR representative,

I write to make a formal subject access request pertaining to personal data about myself [insert full name]. This request is made in relation to my legal entitlement under the general data protection regulation law. I specifically request a copy of the risk assessment undertaken which resulted in my suspension. I ask that the data being forwarded is sent by email to [insert personal email address].

Should any issues arise, I can be contacted on the above email address.

I look forward to your timely response.

Regards

## Subject Access Request

Dear HR representative,

I write to make a formal subject access request pertaining to the personal data about myself [insert full name]. This request is made in relation to my legal requirement under the General data protection regulation law (GDPR). I specifically request a copy of all digital data in the form of email correspondence between myself and in reference to myself from the following; [insert all names of colleagues including managers who you feel may have information about you] between the dates [insert time frame e.g. 12 months prior from date of letter]. I ask that the requested data being forwarded is sent by email to [insert personal email address].

Should any issues arise I can be contacted on the above email address.

I look forward to your timely response.

Regards