

# technical factsheet 154

## Unlawful discrimination

Please note, this factsheet does not cover age discrimination, which is the subject of factsheet 150.

The law recognises the right of an individual worker to be treated equally with others regardless of factors which should be irrelevant in decision making, such as sex or race.

The word 'discrimination' simply means to decide between one thing and another. As a matter of course, we will often have to 'discriminate' or make choices at work. The fact that an employer decides to employ one candidate rather than another, or decides to promote one member of staff rather than another is itself a form of discrimination. The important thing is that the employer does not make the decision, or appear to do so **unlawfully**; so the issue to be determined is the basis upon which the decision is made.

### Why do we have a law about equality of opportunity?

- It has an important role in protecting the dignity of the individual worker
- It tries to correct the disadvantages which are suffered by certain groups (perhaps in introducing some element of 'affirmative action or positive discrimination')
- It tries to overcome the failure of the market by bringing down barriers against certain excluded groups.

### General principles

Anti-discrimination legislation has a number of features which make it different from standard employment protection (and more dangerous to the employer):

- There is no qualifying period of employment required before the worker can take advantage of the protection
- All forms of discrimination allow for unlimited damages, and the legal costs involved in defending claims is high because they tend to be complicated
- There is a reversed burden of proof once the applicant shows that there is a genuine question mark over the decision and *prima facie* evidence of discrimination is found i.e. the employer has to show that in taking the decision or action in question there was **not** unlawful discrimination
- A discrimination action is often interesting enough to generate unwelcome publicity
- The law applies to all persons who work for the organisation, whether employees, workers or contractors and also to ex-employees, for example, where a failure to give a reference is claimed to be victimisation, and also to job applicants.

### Grounds for unlawful discrimination

Just because a decision seems unfair, does not necessarily mean that it is unlawful. The law specifies a number of grounds which are not a legitimate basis for decision making.

It is unlawful to treat any worker unfavourably on the basis of

- Sex (including pregnancy)
- Race, colour, nationality or ethnic or national origin
- Disability
- Gender Reassignment
- Sexual Orientation
- Religion
- Age

At the moment, each of these discriminatory grounds is dealt with in a separate piece of legislation. This has led to confusion and anomalies and the government published an Equality Bill in 2008 which aims to pull together all discrimination law into one statute. This factsheet will be updated once the law comes into force.

There is also separate provision which prevents discrimination against part-time workers, and those on fixed term contracts. Part-timers' treatment and terms and conditions should be equalised with full timers and the same applies to fixed term employees (other than that their contract is set to run for a specific period).

## **DISCRIMINATION GENERALLY**

### **What kind of acts are discriminatory?**

In all cases, the legislation provides for four main kinds of discrimination

1. **Direct Discrimination** - adverse treatment specifically because of, for example, the person's sex, race or sexual orientation etc.
2. **Indirect Discrimination** – where the employer uses a provision, criterion or practice which has an adverse impact on one or more of these groups and which cannot be objectively justified. For example, a required level of English to qualify for a job might discriminate against persons who have not been born in the UK, may have had to learn the language late and may not have such a good command of English. A minimum height requirement will discriminate against women, as will a strength requirement, a dexterity requirement will discriminate indirectly against men. The question in all cases will be, can that requirement or criterion be justified in the context of the genuine requirements of the job?
3. **Victimisation** - less favourable treatment meted out to any person related to the use of this legislation, e.g. because a person has brought unlawful discrimination proceedings, or assisted another person to do so.
4. **Harassment** - All of the anti-discrimination legislation listed above contains specific provision to make any harassment on these grounds unlawful.

Harassment is unwanted conduct violating the dignity of men and women in the workplace and causing a hostile and intimidating atmosphere for them, and which takes place on one of the grounds listed above. The key is that the actions or comments are viewed as demeaning and unacceptable to the recipient.

It will be essential to show a **good paper trail** for all decisions which have a potential unlawful discrimination element, and employers will have to be ready to provide a good explanation for such decisions.

### **How does this apply in employment?**

It is unlawful for an employer who employs someone at an establishment in Great Britain, to discriminate against someone:

- in the arrangements he or she makes for the purpose of determining who should be offered that employment, or
- in the terms on which he or she offers the person that employment, or
- by refusing or deliberately omitting to offer that employment.
- in the way it affords access to that person to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford access to them, or
- by dismissing him/ her, or subjecting him/her to any other detriment.

### **Positive discrimination**

At the time of writing, it is just as unlawful to employ someone **because** they are a particular sex or racial group as it is to refuse to employ someone on that basis. Treating a person favourably on one of the grounds listed above is unlawful. However, there are a limited number of exceptions to this in relation to employment. Where an employer has a particularly low proportion of a particular group, in practice this is most likely to be in relation to one sex or a racial group.

- in one department or part of the business compared with the rest of the organisation, or
- in the business compared with the proportion of that group in the wider community

the employer is entitled to attempt to redress that balance by

- placing job advertisements in particular parts of the press
- by using employment agencies where such groups are concentrated
- by aiming recruitment or training schemes at school leavers from particular groups
- by encouraging these employees to apply for promotion or training opportunities
- by providing special training for promotion or skills to this group.

These provisions are aimed at encouraging participation and up-skilling members of unrepresented groups. Ultimately, however, the actual decision making around recruitment, promotion or training must be fair and not unlawful discrimination

There are some provisions, however, which do constitute a type of lawful positive discrimination. The protection of pregnant women gives them particular status within the workplace; they have a right to paid leave, to return to their original job following maternity leave and a right to first choice of any suitable alternative on redundancy. Disabled people also have additional protection in that the employer is required to make reasonable adjustments to the job or to the premises to 'level the playing field' with their able-bodied colleagues.

### **Harrasment**

All of the anti-discrimination covered here contains specific provision to make any harassment on these grounds unlawful. This means that the employer has an obligation to take all reasonable steps to ensure that such harassment does not take place and to support the worker if it does. If this is not done, the liability for the harassment may shift to the employer.

The potential damages can be extremely high – even in an isolated example of severe harassment, the employer will have to demonstrate that it has a well enforced and well understood harassment policy and that it takes such matters very seriously.

The vicarious liability of an employer for acts of harassment by an employee towards a fellow employee usually extends to work related social activities.

### **Recent changes to law on harassment**

#### **Change to definition**

The new law means that the new definition of sexual harassment (and also harassment relating to gender reassignment, but not other forms of harassment) is that the harassment is covered if it is 'related to her sex or that of another person', rather than 'on the ground of her sex'. This probably means that it will be easier to show this discrimination because the woman no longer has to prove that the conduct took place **because** of her sex. It also means that the conduct need not be directed at the woman – it will suffice if she witnesses someone else being harassed, even if that person is a different sex to her.

#### **Third party harassment**

As a result of the new regulations, employers may be directly liable where an employee is harassed by a third party on the grounds of sex, race etc, where there is an awareness that it is happening and a failure to deal with or address it. This is commonly called the 'three strikes and you are out' rule. What it means is that if an employee has complained on two previous occasions of harassment against them and the employer has failed to take reasonable steps to deal with it, on the third occasion it becomes the employer's liability. It makes no difference if the harasser is the same person on each occasion, or someone different. Employers are not to be held liable for conduct beyond their control, but are expected to take whatever steps are reasonable to prevent the conduct.

### **Genuine occupational qualification**

There are a limited number of exceptions where direct discrimination is permitted and where an employer will be entitled to discriminate in the arrangements it makes for recruitment, in refusing to offer employment or in allowing access to promotion or training. This will be where there is a **genuine occupational qualification (GOQ)** which means that being of a particular sex, race or being disabled is a requirement of the job. The most commonly invoked exceptions involve acting jobs (being of a particular sex, race etc is required for the role) and the privacy and decency exception, where being of a particular sex is regarded as necessary where the job involves close personal contact with people of the opposite sex, for example, nursing, personal care. The employer will be entitled to conclude that it needs a certain number of people of a certain sex to do the job, and can restrict applications to that sex. Each of the regulations covering the grounds for unlawful discrimination provide for the possibility of a GOQ. In relation to religious discrimination, the exception is called Genuine Occupational Requirement (GOR) and is dealt with below.

### **Sex discrimination**

This is the oldest form of unlawful discrimination and it was introduced in the mid 1970s. It renders unlawful any unfavourable treatment on the grounds of sex, for example, on the ground that the person is male or female.

### **Pregnancy**

Pregnancy related discrimination amounts to direct unlawful sex discrimination. It is unfair dismissal to dismiss any woman by reason of pregnancy, no matter how long she has worked. It is also discrimination to treat a woman less favourably on the grounds that she is exercising or seeking to exercise, or has exercised or sought to exercise, her statutory right to maternity leave. It is important to be aware that a dismissal of a woman on the grounds of pregnancy or maternity is automatic unfair dismissal from day one of employment (there is no requirement for continuous service). Therefore a woman in this position will have both unfair dismissal rights and a claim for sex discrimination.

### **Returning part-time**

Any refusal to allow a woman to return part-time following maternity leave will have to be stoutly defended by the employer, and it is quite unusual for it to succeed. It will be more difficult for larger organisations than for small ones. An unjustified refusal will be sex discrimination. The employer has to be able to show that the job simply cannot be done part time and that it has no other similar roles that could be performed in that way.

### **Race discrimination (Race Relations Act 1976)**

It is unlawful to treat someone unfavourably on the grounds of their race, their colour, their nationality or their ethnic or national origin. It also includes applying a 'provision, criterion or practice' which, although it applies to everyone equally, disproportionately disadvantages workers of a particular racial group compared to another and which the employer cannot show is a proportionate means of achieving a legitimate aim. Such an example could be a requirement for building site labourers to pass a test in written English.

### **Disability discrimination (Disability Discrimination Act 1995)**

It is unlawful to discriminate against a person who qualifies as disabled or a person who is 'associated' with a disabled person. Every employer has an obligation to make reasonable adjustments to 'level the playing field' for disabled workers or job applicants. Where a disability leads to sickness absence, the impact of this is examined in Factsheet **xx**, and the definition of disability is restated here:

#### **Who qualifies as disabled?**

This definition goes far beyond the traditional perception of disability.

A disabled person is someone who has:

- 'A physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'.
- It covers any normal physically related illness which has a substantial effect on the person, for example. heart conditions, angina, epilepsy, diabetes type 1.

- It also covers mental conditions ranging from schizophrenia or manic depression to anxiety disorders; reactive and clinical depression is also regarded as a disability. The law used to require that the mental illness was clinically recognised. However, this is no longer necessary but the employee will be required to produce clear medical evidence of his/her condition.
- It can cover disorders which recur, although the person may not suffer any symptoms in between attacks, such as serious asthma and epilepsy
- Learning disorders such as dyslexia are now recognised as a disability.
- there are some conditions which are automatically regarded as disabilities, even though the worker may not currently be suffering any or many symptoms; these are HIV AIDS, multiple sclerosis and cancer,
- Some conditions are expressly excluded, including alcoholism, voyeurism and kleptomania
- In order for the disability to be seen to be substantial, it must have lasted, or be predicted to last, **at least one year** or the rest of the person's life.

### What activities must be affected?

It is not necessarily activities at work that must be affected. It is essential in order to satisfy the definition that the worker should have substantial difficulties in his or her everyday life. The physical or mental disability **must** impact on one of the following; mobility, dexterity; physical co-ordination; memory and the ability to learn or understand; continence; hearing; speech or eyesight; the ability to lift everyday objects and the perception of the risk of physical danger.

### When does this legislation apply?

- **Recruitment** - at this stage, an applicant may reveal that s/he has a disability, the employer should ask for further details of the condition. If the disabled applicant is otherwise the best candidate for the job, then the employer needs to examine the impact that the disability would have on the performance of the role. Once that has been established, the employer needs to consider whether there are any reasonable adjustments that could be put in place to minimise or remove the impact of the disability. If however the employer concludes that, for disability related reasons, it is not possible for that applicant to perform the role, then it is lawful not to recruit, It is critical to carefully document each stage of the decision making process.

There is no positive duty on a job applicant to reveal a disability. Therefore if s/he commences work for the employer, and then the employer becomes aware of it, the employer must consider the situation on its merits. Except in situations where safety is clearly compromised, for example, epilepsy in a machine shop, if the employment has been continuing for some time without any problems it will be difficult for the employer to argue that the disability is an issue. The employer will just have to put in any adjustments that might be necessary and the employment will continue.

- **During employment** – a worker may develop a disability during employment. Once this happens, as above, the employer will need to determine the extent of the disability, with medical reports if necessary, and decide whether reasonable adjustments are required, and otherwise whether the employment can continue.
- **Redundancy** – employers need to be careful in conducting redundancy selection procedures, to ensure that they do not include factors which have an adverse effect on disabled workers in comparison with able bodied staff. For example, absences related to disabilities should not be included in the marking process, and allowance should be made in marking for performance where a disability does have an impact on speed of work. Where a disabled person is made redundant, they should be at the front of the queue for redeployment.

### Discrimination by association

A recent decision in the European Court of Justice established that it is unlawful to discriminate against a person by reason of his or her association with someone who is disabled. In practice, the application is most likely to be to carers who are unreliable at work because of their commitments to a disabled child or other relative. The court made clear that it was unlawful to treat these people less favourably than members of staff who did not have caring responsibilities and it was also unlawful to harass them because, for example, their caring responsibilities were causing problems with reliability. However, the court did not find that employers have to make reasonable adjustments for such workers, which they would have to do if they themselves suffered from a disability.

### **Gender reassignment (Sex Discrimination (Gender Reassignment) Regulations 1999)**

Discrimination on the grounds that someone has been, or will be, in the process of gender reassignment/undergoing a sex change is unlawful.

Most of these cases tend to be either about harassment or washroom facilities, and the employer must be careful to ensure that a hostile working environment does not grow up around a transsexual and that it permits use of the assigned sex facilities once any operative procedures are complete. On sick leave, treatment of a GA case will be compared with those who are absent because of sickness or injury in order to determine whether there has been less favourable treatment.

The **Gender Recognition Act 2004** was passed to give transsexual people legal recognition in their acquired gender. Legal recognition follows the issue of a full gender recognition certificate by a Gender Recognition panel.

The panel has to be satisfied that the applicant:

- Has, or has had, gender dysphoria,
- Has lived in the acquired gender throughout the preceding 2 years, and
- Intends to continue to live in the acquired gender until death.

On the issue of one of these certificates, the person will be entitled to a new birth certificate reflecting the acquired gender, and will be able to legally marry someone of the opposite sex. For all purposes they will be legally regarded as being of their acquired gender.

### **Sexual orientation (The Employment Equality (Sexual Orientation) Regulations 2003)**

Discrimination on the grounds of sexual orientation was made unlawful in 2003, for example, unfavourable treatment on the grounds of homosexuality, lesbianism and bi-sexuality.

The cases have almost exclusively been on the subject of homophobic abuse and the extent to which the employers have been responsible for encouraging it or permitting it, or failing to have a policy dealing with it. The main issue for employers to be aware of here is 'banter' of a homophobic nature. It is critical that employers take action to tackle any such issue within their workforce, or there is a danger of liability.

### **Religion (Employment Equality (Religion or Belief) Regulations 2003)**

It is unlawful to discriminate against workers because of religion or similar belief. The Regulations apply, as do all the discrimination rules, to recruitment, terms and conditions, promotions, transfers, dismissals and training, and therefore both to current, prospective and former workers.

The employer must not discriminate directly by, for example, refusing to recruit or dismissing anyone on the grounds of their religion or belief, apply some rule or procedure to them which is indirectly discriminatory unless it can be justified eg a primary school teacher not being permitted to wear a full veil on the basis of the need for clear communication with the children in teaching English. Workers must not be harassed or victimised because of their religion.

#### **What is covered?**

Any religion, religious belief or philosophical belief – it probably doesn't cover philosophical or political belief unless it is **similar** to religious belief. (The ACAS guidance suggests that paganism and humanism will apply). The law has been amended to encompass atheists.

#### **What about special requests which are related to religion?**

Where a worker makes a request based on some religious observance e.g. prayer room, time off to go to mosque, Friday afternoons off, particular holidays or extended holidays – employer should listen carefully, consider consequences and grant them if possible.

If it is not possible, then s/he should explain carefully to the employee why, on good business grounds, his/her request cannot be granted.

There are two **Genuine Occupational Requirements** which can be applied in religious cases.

The first is that 'where, having regard to the nature of the employment or the context in which it is carried out' –

- (a) being of a particular religion or belief is a genuine and determining occupational requirement;
- (b) it is proportionate to apply that requirement in the particular case, and
- (c) either the person to whom the requirement is applied does not meet it, or the employer is not satisfied on reasonable grounds that s/he does meet it.

The other kind of requirement is used by religious organisations only where they have an ethos based on religion and belief (**Religious Organisations GOR**), e.g. a Christian school may demonstrate a requirement that staff are Christians, but not maintenance men. This is mainly going to apply to churches and denominational schools.

#### **The Rehabilitation of Offenders Act 1974**

This Act applies to England, Scotland and Wales, and is aimed at helping people who have been convicted of a criminal offence and who have not re-offended since.

Anyone who has been convicted of a criminal offence, and received a sentence of not more than two and a half years in prison, benefits as a result of the Act, if he or she is not convicted again during a specified period otherwise known as the 'rehabilitation period'. The length of this period depends on the sentence given for the original offence and runs from the date of the conviction. If the person does not re-offend during this rehabilitation period, they become a 'rehabilitated person', and their conviction becomes 'spent'.

For example, if a person receives a sentence of imprisonment or detention in a young offenders institute of between six months and two and a half years, the rehabilitation period is 10 years, or five years if the individual was under 18 at the time of conviction. For an absolute discharge the rehabilitation period is six months.

Sentences can carry fixed or variable rehabilitation periods and these periods can be extended if the person offends again during the rehabilitation period. However, if the sentence is more than two and a half years in prison the conviction never becomes 'spent'. It is the sentence imposed by the courts that counts, even if it is a suspended sentence, not the time actually spent in prison.

Once a conviction is 'spent', the convicted person does not have to reveal it or admit its existence in most circumstances. However, there are some exceptions relating to employment and these are listed in the Exceptions order to the ROA. The two main exceptions relate to working with children or working with the elderly or sick people. If a person wants to apply for a position that involves working with children or working with the elderly or sick people they are required to reveal all convictions, both spent and unspent.