

GUIDANCE NOTE

Discrimination Law

March 2013

Equality Act 2010

In October 2010 the separate threads of UK Discrimination Law were consolidated in the Equality Act 2010 (except for equal pay which is still governed by the Equal Pay Act 1970).

The Act outlaws discrimination and harassment which takes place because of a person's "protected characteristic". The protected characteristics are:

- Age.
- Disability.
- Gender reassignment.
- Marriage and civil partnership.
- Pregnancy and maternity.
- Race.
- Religion or belief.
- Sex.
- Sexual orientation.

Types of Discrimination

There are various types of discrimination and other conduct which are unlawful under the Equality Act:

- Direct discrimination.
- Indirect discrimination.
- Harassment.
- Victimisation.
- Instructing, causing, inducing and aiding discrimination.

Direct Discrimination

Direct discrimination occurs where, because of a protected characteristic, A treats B less favourably than A treats or would treat others whose circumstances are not materially different to B's. The other, i.e. the comparator, may be a real or hypothetical comparator. In the case of pregnancy or maternity, no comparator is required.

Discrimination because of association with someone who has a protected characteristic (except for marriage and civil partnership cases) is covered. For example, discrimination against a non-disabled employee because they have a disabled child.

Discrimination because a person is perceived to have a protected characteristic (except for marriage and civil partnership) is covered.

There is no discrimination where a disabled person is treated more favourably than a non-disabled person: non-disabled people are not protected against less favourable treatment than disabled people. In similar vein it is not unlawful to provide women with special treatment in connection with pregnancy or childbirth.

There is no defence of justification in the case of direct discrimination, except in a case of age discrimination. Age discrimination is not unlawful if A's treatment of B was a proportionate means of achieving a legitimate aim.

Disability Discrimination

In addition to direct discrimination because of disability, discrimination arising from disability is unlawful. This occurs where A treats B unfavourably because of something arising in consequence of B's disability and A's treatment of B is not a proportionate means of achieving a legitimate aim. No comparator is required.

Further, an employer has a duty to make reasonable adjustments where a disabled employee or job applicant is placed at a substantial disadvantage in comparison with non-disabled persons by a provision, criterion or practice of the employer or by a physical feature or by the non-provision of an auxiliary aid. The employer is obliged to take such steps as it is reasonable to have to take to avoid the disadvantage. The disabled person cannot be required to make any payment towards the cost of compliance with this duty.

The duty to make reasonable adjustments only applies where the employer knows or ought reasonably to know of the person's disability and of the substantial disadvantage at which the person is placed.

The kinds of adjustment which may be required under this duty are wide ranging, but must be related to the employee's work or employment. An employer does not have a general duty to assist a disabled person to overcome the effects of their disability. The duty is primarily concerned with enabling the disabled employee to remain in or to return to work with the employer.

However it is important for an employer to carry out an assessment of the work related needs of any disabled employee and of any disadvantage which may be suffered and to review the situation at regular intervals.

In assessing the steps it is reasonable for an employer to have to take, an employment tribunal will normally take into account the extent to which the adjustment is practical and would alleviate the disadvantage, the cost of the adjustment and the employer's financial resources, and the nature of the employer's business and any disruption which the adjustment might cause.

Indirect Discrimination

Indirect discrimination is concerned with treatment which is not necessarily intended to be less favourable, but which has the effect in practice of disadvantaging to a disproportionate extent a group of people (including the individual in question) with a particular protected characteristic. Where the individual is disadvantaged, it amounts to indirect discrimination unless the treatment can be objectively justified.

Thus indirect discrimination occurs where

- A applies to B a provision, criterion or practice which puts or would put B and persons with the same protected characteristic at a particular disadvantage when compared with persons without that protected characteristic and
- A cannot show it is a proportionate means of achieving a legitimate aim corresponding to a real business need on A's part.

Proportionate means involves the application of a balancing exercise to evaluate whether A's legitimate business needs are sufficient to outweigh the discriminatory impact on B and others with the protected characteristic. Could A's aims reasonably be achieved by a less discriminatory means?

Harassment

Harassment occurs if A engages in unwanted conduct related to a protected characteristic which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In deciding whether A's conduct has the proscribed effect, there is taken into account B's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. It is possible for a one-off incident to amount to harassment, depending on the seriousness of the conduct.

Conduct which is related to a protected characteristic can amount to harassment even if B does not have that protected characteristic, e.g. racist, sexist or homophobic banter which is reasonably offensive to B regardless of B's own race, sex or sexual orientation.

As with direct discrimination, harassment because of association with another person with the protected characteristic is covered, as is harassment because B is perceived to have the protected characteristic, for example, a straight person who is thought to be gay.

Harassment (sexual harassment) also occurs if A engages in unwanted conduct of a sexual nature which has the purpose or effect of violating B's dignity or creating an intimidating, degrading, humiliating or offensive environment for B.

In addition there is also harassment if A engages in unwanted conduct of a sexual nature or which is related to gender reassignment or sex and which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B and, because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

Victimisation

Victimisation occurs where A subjects B to a detriment because B has done a protected act or A believes B has done or may do a protected act.

Protected acts include:

- Bringing discrimination proceedings under the Act.
- Giving evidence or information in connection with proceedings under the Act (regardless of who has brought the proceedings).
- Doing any other thing for the purposes of or in connection with the Act.
- Making an allegation that A or another person has contravened the Act.

Victimisation claims usually arise when an employer which is already the subject of a discrimination claim or allegation by a current or former employee is alleged to have victimised the employee in some additional way.

Instructing, Causing, Inducing and Aiding Discrimination

It is unlawful to instruct, cause, induce or knowingly help a person or organisation to discriminate against, harass or victimise another person.

Who is Protected?

The Act protects a wide range of individuals in the workplace, not simply those who are employees in a strict narrow sense. All of the following individuals are covered:

- Job applicants.
- Current employees.
- Former employees.
- Contract workers.
- Agency workers.
- The self-employed who carry out work or provide services personally.
- Partners, including LLP members.

Discrimination in Employment

The Act outlaws most kinds of discrimination, victimisation or harassment in the workplace because of a protected characteristic. Specifically the Act states that an employer must not discriminate against or victimise any person in relation to recruitment, terms of employment, access to opportunities for promotion, transfer or training, access to benefits, facilities or services, or by dismissing the person or subjecting the person to any other detriment.

Although discrimination in employment is generally unlawful, there are circumstances where an employer may have a defence available. The most important exceptions (in addition to the defence of objective justification for indirect discrimination) are occupational requirements, positive action and statutory provisions.

There is a general occupational requirement defence where, having regard to the nature or context of the work, being of a particular sex, race, disability, religion or belief, sexual orientation or age is an occupational requirement. The occupational requirement must be a proportionate means of achieving a legitimate aim.

The Act contains provisions concerning lawful positive action which apply where persons who share a protected characteristic are disadvantaged, have different needs or are disproportionately under-represented. The employer can take proportionate measures to enable or encourage persons with that protected characteristic to overcome that disadvantage, to meet their needs or to enable or encourage their increased participation.

It should be noted that an employer is not obliged to take positive action. Also positive discrimination is not permitted, although there is a limited positive action provision in relation to recruitment and promotion: where an employer reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented, the employer can treat a person with that protected characteristic more favourably than others provided that the person is as qualified as those others. It is not clear how this works in practice and how equal qualifications can be established.

Who is Liable?

If an employer discriminates against, victimises or harasses an employee, the employer will be liable. An employer may also be vicariously liable for discrimination, victimisation or harassment committed by its employees or agents, for example, contractors or consultants.

Anything done by an employee in the course of employment is treated as having been done by the employer regardless of whether the act was done with the employer's knowledge or approval. However, an employer will have a defence if it can show that it took all reasonable steps to prevent the employee from doing the discriminatory act.

In addition to liability on the part of the employer, claims for discrimination, victimisation and harassment can also be brought against individual managers, fellow employees or agents personally who have committed the discrimination, victimisation or harassment.

Where a claim succeeds against both the employer and an individual employee or employees, all parties will incur joint and several liability for specific acts of discrimination. This means that the employer and a fellow employee may each be fully liable for payment of compensation awarded to the claimant, although the claimant cannot obtain double recovery. The question of apportionment of the compensation is a matter between the employer and the fellow employee.

Compensation for discrimination, victimisation and harassment can include compensation for injury to feelings and/or personal injury in addition to compensation for any financial loss suffered by the claimant, such as loss of earnings and benefits and pension loss. Aggravated damages may also be awarded in serious cases where the discrimination has aggravated the claimant's injury.

There is no upper limit on the amount of compensation that may be awarded for discrimination, victimisation and harassment.

An employment tribunal may also make a recommendation as to what steps an employer should take to reduce the adverse effect of discrimination on the claimant or any other person. Under this power a tribunal could recommend that an employer introduces an equal opportunities policy or should set up a review panel to deal with grievances and complaints involving allegations of discrimination, victimisation or harassment.

The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues

ASHTON BOND GIGG
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