

Briefing Note: Discrimination in the Workplace

An Introduction to the Briefing Note

This Briefing Note sets out the different types of discrimination that can occur within the workplace and highlights practical steps your business can take to help avoid breaching discrimination law. This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

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Why is it important to know about discrimination laws?

Discrimination law is designed to:

- Ensure equality of opportunity at work.
- Protect employees' dignity.
- Ensure that complaints can be raised without fear of reprisal.

What are the penalties for failing to comply with discrimination laws?

High compensation payments

There is no limit on the amount of compensation that can be awarded. In a recent case, an employee of an NHS Trust was awarded £4.5 million for race and sex discrimination. Such awards are not usually covered by an employer's insurance policy.

Expensive litigation

Litigation can involve significant management time and legal costs, which are not usually recoverable.

Damaging publicity

Allegations of discrimination or harassment are likely to create bad publicity for your business. It is better to avoid a claim than to manage a crisis after a claim has been made.

Negative impact on staff morale

Discrimination and harassment issues can be highly emotive and the process may have a negative impact on staff morale.

What areas of working life are covered?

Discrimination law covers all areas of employment, including:

- Job adverts and the recruitment process.
- Terms and conditions of employment including pay and benefits
- Working hours and statutory leave
- Workplace facilities
- Promotion and transfer
- Conduct during employment.
- Work social events
- Management of sickness absence
- Termination of employment
- Job references

What types of characteristics are protected?

Your business and staff must not discriminate against workers or job applicants on the basis of:

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- Gender (for example, you must not offer a male candidate a more attractive health care package than a female candidate for the same post).
- Gender reassignment.
- Being pregnant or on maternity leave (for example, you should not delay the promotion of a female employee because she is on maternity leave).
- Being married or in a civil partnership.
- Race (including ethnic or national origin, nationality and colour). For example, it could be unlawful to refuse to promote an employee on the basis that English is not their first language. Sikhs, Jews, Romany Gypsies, Irish and Scottish Gypsies and Travellers are all protected ethnic groups.
- Disability. A person is disabled if they have a physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out normal day to day activities. Certain conditions, such as Cancer, HIV and Multiple Sclerosis are deemed disabilities from the point of diagnosis. The impairment is assessed without regard to the measures taken by the worker to treat or correct that impairment, so some impairments which are under control, such as diabetes, epilepsy, or some mental health conditions, may still fall within the statutory definition.
- Sexual orientation (for example, if you invite employees' partners to a social function, the invitation should be extended to same-sex partners).
- Religion or belief (for example, it may be unlawful to prohibit headwear at work, as this may discriminate against Sikhs who wear turbans for religious reasons). This also includes a lack of any such religion or belief, such as atheism. To be protected under the Act, a philosophical belief must be genuinely held, it must be a belief, not an opinion or view point, it must go to a weighty and substantial aspect of human life and behaviour, it must attain a certain level of cogency, seriousness, cohesion and importance and it must be worthy of respect in a democratic society and not incompatible with human dignity and not conflict with the fundamental rights of others. A belief in Spiritualism and topically a belief in left-wing democratic socialism have been found to qualify as protected beliefs. Conversely, a belief in satanic ideology and Marxist/Trotskyist views did not qualify.
- Age (for example, choosing not to interview a candidate because their application suggests they are nearing retirement age is discriminatory).

What Categories of Unlawful Discrimination are there?

Direct Discrimination

Direct Discrimination occurs when a person treats another less favourably than they treat, or would treat, others because of one of the above protected characteristics. It is, therefore, a comparative test and in all cases, other than pregnancy and maternity, it is necessary for the worker to identify a real or hypothetical comparator whose circumstances (other than the existence of the protected characteristic) are not materially different to their own.

The worker concerned need not actually have the protected characteristic in question. It is sufficient for the employer merely to perceive that they have that characteristic, or for them to associate with someone who has that characteristic so, for instance, the mother of a disabled child may be able to bring a direct disability discrimination claim if the employer has subjected them to less favourable treatment because of the child's disability.

With the exception of age discrimination, direct discrimination can never be objectively justified.

Indirect Discrimination

Indirect discrimination relates to acts, decisions or policies of the employer, which are not intended to treat anyone less favourably but which in practice have the effect of disadvantaging a group of people with a particular protected characteristic. Where an individual is disadvantaged, they may be able to bring an indirect discrimination claim. It is possible for indirect discrimination to be objectively justified by the employer – see below, so, for instance, a factory which introduces a policy that staff cannot wear their hair in

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dreadlocks is likely to be indirectly discriminatory against any Rastafarian workers it may have on its books. The burden would shift to the employer to objectively justify the policy, which it would presumably seek to do on health and safety grounds.

Discrimination Arising from Disability

This places a duty on employers not to treat a disabled person unfavourably because of something connected with their disability. It is a subtly different test to direct disability discrimination as there is no requirement for a comparator. The test is not “less favourable treatment” but “unfavourable treatment”. The motive of the employer is irrelevant. What is important is whether the unfavourable treatment was significantly influenced by the disability. The objective justification defence is available for the employer in these circumstances.

This often arises where the employer is trying to manage disability related absence or performance concerns. Where, for example, a worker with multiple sclerosis is dismissed after taking three months sick leave, the discrimination will not be because of the disability but for something arising in consequence of it, namely her disability-related sick leave.

The employer will need to think carefully before taking action against the disabled employee in these circumstances and be sure that they can objectively justify their treatment.

Duty to make reasonable adjustments

The Equality Act imposes a duty on employers to take positive steps to ensure that disabled people can access and progress in employment. This is a wide-ranging duty and further reference is made to our separate briefing note on this subject: Disability Discrimination – Reasonable Adjustments. http://www.gabyhardwicke.co.uk/images/library/files/briefingnotes/Disability_Discrimination_-_Reasonable_Adjustments.pdf

Harassment

Harassment is any unwanted conduct that has the purpose or effect of:

- Violating a person’s dignity.
- Creating a hostile, degrading, humiliating or offensive environment.

It is discriminatory if it relates to any of the characteristics listed above. For example, it is important to make sure more junior staff are not belittled or humiliated due to their lack of experience, as this may be age related harassment.

The fact that the unwanted conduct only has to relate to a protected characteristic, rather than be “because of” it, means that it is not necessary for the worker actually to have that protected characteristic so a heterosexual worker, who is subjected to homophobic banter and name calling, even if he is not gay and his colleagues know he is not gay, may still have a claim for sexual orientation harassment.

Furthermore, the unwanted conduct concerned, need not be directed at a particular worker but could be directed at another worker or no one in particular. A one-off incident could amount to harassment if the conduct complained of was sufficiently serious.

Protection from Victimisation

Victimisation occurs where the employer subjects the worker to a detriment because the employee has carried out a protected act. These include bringing proceedings under the Equality Act, giving evidence or information in connection with such proceedings, or making an allegation expressly, or otherwise, that the employer, or another person, has contravened the Equality Act. In other words, it is there to protect workers against retribution by their employer or other staff for having made complaints of discrimination or for supporting others that have done so.

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What are the main defences to a discrimination claim?

Justification

In some circumstances, an employee's treatment may not be discriminatory, if it can be objectively justified. For example, a requirement to have excellent written English skills may indirectly discriminate against non-British job applicants, unless your business can show that the aims of the job in question cannot reasonably be met without that requirement.

To succeed in this defence, the employer must demonstrate that its actions were a proportionate means of achieving a legitimate aim. A legitimate aim must be a real business need and the action that it takes to achieve that aim must be proportionate. The Employment Tribunal will carry out a balancing exercise to evaluate whether the employers legitimate business needs were sufficient to outweigh the discriminatory impact on the workforce generally and the claimant worker in particular. In particular, the Employment Tribunal will ask itself whether the employer's aims could reasonably be achieved by less discriminatory methods.

The law requires your business to discriminate

There are some instances in which your business may be required by law to do something discriminatory. For example, immigration legislation may require you to refuse to employ a non-EU job applicant on grounds of their nationality, even if they are the best qualified person for the job.

Occupational requirements

It may be lawful to discriminate if having a particular characteristic is an occupational requirement, having regard to the nature or context of the work. There are specific exceptions for organised religions so, for example, a Catholic school may require its religious education teacher to be a Catholic.

Practical steps to take to help avoid breaching discrimination law

- Provide your staff with employment handbooks (including policies on equal opportunities and harassment) setting out what constitutes acceptable behaviour and what does not.
- Provide training on equal opportunities and harassment. This may help managers:
 - Avoid inappropriate questions at interviews.
 - Recognise and deal with harassment at an early stage.
- Set up clear procedures for staff to:
 - Raise concerns and complaints.
 - Deal with complaints.
- Ensure discriminatory behaviour by staff is not tolerated and is dealt with through proper disciplinary measures
- Review employment contracts, policies and employee share schemes to ensure they comply with the law.
- Make reasonable adjustments where this will alleviate difficulties suffered by a disabled employee in the workplace, For example, by installing wheelchair ramps.
- Accommodate workers' different cultures and religious beliefs, if possible. For example, requests for time off to pray should be allowed, unless a refusal is justified.
- Try to accommodate requests for family-friendly hours by employees with childcare or other family commitments, unless a refusal is justified.
- Undertake equal opportunities monitoring, but do not use the forms as part of recruitment or other decision making.

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If you would like to know more about this topic or our other legal services, please contact Paul Maynard pcm@gabyhardwicke.co.uk

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