



Discrimination

Berg Kaprow Lewis

Discrimination against employees on any grounds other than their ability to do the job is a bad idea — and could also be illegal. If an employee or potential employee brings a discrimination case against your business, you could be tied up in costly and time-consuming legalities for months. If they win, you could be liable for unlimited damages.

This briefing explains:

- Which areas of discrimination are covered by law.
- What discrimination is.
- How to avoid unintentional discrimination.
- What to do if there is a case against you.

1 Illegal discrimination

Discrimination in employment is illegal when someone is treated less favourably on specific grounds.

- 1.1** It is illegal to discriminate against anyone on grounds of **race**, colour, nationality or ethnic origins.
- 1.2** It is illegal to discriminate against anyone on grounds of their **religion** or philosophical **belief**.
- 1.3** It is illegal to discriminate against anyone on grounds of their **sex** (including gender re-assignment) or marital status (including civil partnerships). Nor can you discriminate because of pregnancy or childbirth.
- 1.4** It is illegal to discriminate against anyone on grounds of their actual or perceived **sexual orientation**.
 - You would be breaking the law if you

discriminated against someone because you thought they were gay, whether they were or not.

- 1.5** It is illegal to discriminate without justification against anyone on the grounds of his or her **disability**.

- Disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on the ability to carry out day-to-day activities.
- Justification will depend on circumstances. You must investigate to see if the person could carry out the work with 'reasonable adjustment' (see box on page 2).

- 1.6** It is illegal to discriminate against anyone on grounds of their **age**.

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- You can have a normal retirement age, but it must be at least 65. You must consider requests from employees to work beyond this age.
- You do not have to offer employment to people who will reach your normal retirement age within six months.

1.7 It is illegal to discriminate against someone who is working **part-time**.

- Part-time workers must be treated no less favourably than full-timers, with the same terms and conditions on a pro rata basis.

Even if you think you have good systems set up to avoid direct discrimination, look out for the less obvious forms (see **2.2**).

2 Test of discrimination

The test of discrimination is not what you set out to do, but how it affects the people on the receiving end. Even if you have never had

a derogatory thought about gender, race or disability in your life, you may be indulging in discriminatory practices.

2.1 If you treat somebody less favourably on grounds of sex, race, disability, age, sexual orientation, religion or philosophical belief, you are exercising **direct discrimination**.

- This can occur when you appoint, promote or dismiss someone, or deny access to training or other opportunities.
- If an employee has evidence which suggests discrimination, it is now up to the employer to prove it is not.
- Direct discrimination may be found even if you acted on several grounds, only one of which is illegal — eg if you sack someone because she is incompetent and pregnant.
- If you sack someone who is disabled for having a poor attendance record, but the poor attendance is caused by the person's disability, that counts as discrimination.
- Direct discrimination is permissible only in certain very limited circumstances (see **6**).

2.2 Indirect discrimination occurs if you impose a 'provision, criterion or practice' which members of one sex, one age group, one racial group or one religion are much less likely to be able to comply with, and which is not justified by the requirements of the job.

- For example, only employing factory packers who have GCSE English.
- An alteration in shift patterns that makes life hard for working mothers could count as indirect discrimination.

2.3 If you treat somebody less favourably because of actions (or potential actions) in connection with discrimination proceedings, you could be guilty of **victimisation**.

- For example, sacking someone who has brought (or is threatening to bring) discrimination proceedings.

You could be found guilty of victimisation, even if the main discrimination case fails, if the allegations were made in good faith.

2.4 Institutional discrimination occurs when systems and practices disadvantage some groups when compared with others.

3 Setting standards

If you own or manage the company, you are responsible not only for any discrimination you

➡ Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

➡ You are required to treat your civil partner employees in the same way as married employees. A civil partner who is treated less favourably than a married person in similar circumstances will be able to bring a claim for sexual orientation discrimination.

Reasonable adjustments

When dealing with people at a substantial disadvantage because of disability, you must be prepared to make 'reasonable adjustment' to enable them to work or continue working.

If you treat them less favourably than others, without making reasonable adjustment, you are discriminating against them.

A What is reasonable adjustment will depend on the **circumstances**.

For example, someone with mobility problems might need easier access, while someone with impaired hearing might need a telephone amplifier.

- The best way of determining what adjustments would be required is to ask the disabled person what he or she would need to be able to do the job.

B You may **refuse** to make adjustments only where such adjustments would be unreasonable.

- Where you can prove it would be impractical to make the adjustment.
- Where the cost would be beyond your means, and no assistance is available.
- Where the adjustment would put you in breach of other legislation — eg health and safety regulations.

“Base decisions on explicit criteria drawn from the needs of the job. If you are prepared to be open and explain decisions, you are less likely to unwittingly discriminate.”
Margaret Dale, employment consultant

practise yourself, but also for any practised by your employees.

3.1 Have a **code of practice**.

- Ensure it is widely and clearly displayed.
- Make breaches a disciplinary offence.
- Take disciplinary action before poor behaviour becomes established.

3.2 **Educate and train** all employees, especially those who recruit or manage employees.

3.3 Establish and publicise a **channel for complaints**.

3.4 **Review** your policies and practices regularly.

4 Equal treatment

Even when you have a policy and consciously apply it, you still need to take steps to prevent unconscious discrimination. The main danger areas are recruitment, dismissal, redundancy, and choosing people for promotion or training.

4.1 Focus on the **requirements of the job** when hiring or promoting employees, or setting conditions of employment.

- Establish objective criteria for selection.
- Establish what you expect the new

employee to do, not be.

- Offer equal pay and conditions for equal work.

4.2 Be aware of what affects **your own reactions**, particularly when hiring or promoting people.

- Look at all the evidence, not just that which supports your instinctive reaction.
- Involve other people in the process.
- Gather information about an individual's performance from a range of sources.

4.3 Maintain **records** as you go along.

- For example, be prepared to explain why you chose one person rather than another.

4.4 Consider monitoring the **composition of your workforce** against the population as a whole and carry out an equal pay audit.

- This will enable you to check on which groups are under-represented and paid differently. Investigate why.

4.5 Make sure all **dismissals** (including redundancies) are justifiable on legal grounds (see **Dismissing employees**).

- Damages for discrimination are potentially much higher than for unfair dismissal. No qualifying service is needed.

“Refusal to investigate a claim of discrimination, on the grounds that the complainant is being unnecessarily sensitive and should just get on with it, could, in itself, be discriminatory.”

**Julie Curran,
Clarke Wilmott
solicitors**

Harassment and segregation

Harassment and segregation count as less favourable treatment, and therefore as discrimination.

- A** Any conduct that is unwanted, offensive to the recipient, and offered because of the victim's sex, race, age, disability, sexual orientation, religion or philosophical belief, counts as **harassment**.
- This includes graffiti, jokes, lewd or sexist remarks, verbal abuse or physical assault.
- B** **Segregation** on grounds of race or sexual orientation is also discrimination.
- This includes allocating different shifts or different jobs to different races.
- C** You, as the employer, have **liability** for employees' behaviour, unless you convince the tribunal you have taken all reasonable steps to stop them acting illegally.

5 Dealing with a complaint

Treat all complaints seriously and make reasonable investigations before responding.

5.1 It is in everyone's interests that complaints should be **resolved** as soon as possible.

- Get advice (see 7).
- Investigate the complaint thoroughly and objectively. Be prepared to use an independent third party to mediate.
- Activate your formal grievance procedure if necessary. This must comply with statutory requirements.
- If the complaint is justified, be ready to offer redress and change your policies.
- If the complaint is not justified, tell the complainant and explain your reasons.
- Hold an appeal if requested.

5.2 If they still consider your response inadequate, **employees** can complain to the employment tribunal.

- Those engaged under contracts for

“If you get a discrimination questionnaire, answer it as fully and as soon as possible. Otherwise the tribunal may think you are being unco-operative and draw its own inferences.”

**Martin Bate,
Legal Personnel
& Management
Services**

services, such as contract workers and agency staff, are included.

5.3 Complaints must be made to the tribunal within **three months** of the act of discrimination, although this can be extended by three months if the employee has reason to think it is being dealt with internally. The employment tribunal also has discretion to extend the time limit.

- The employee (or the employee's legal adviser) may send you, as the employer, a questionnaire on discrimination.
- It is advisable (though not mandatory) to complete the questionnaire, which will become part of your evidence. Contact the tribunal if you consider the questions to be unreasonable.

5.4 You can still **settle** before the hearing.

- You can use Acas (see **7.2**) or an independent mediator to settle the complaint by conciliation. If you reach agreement, it is binding.
- A 'compromise agreement' is also binding. This generally involves the employee (who must have received independent legal advice) waiving his or her right to go to the tribunal. If either side breaks the agreement, the other can sue.

5.5 If the complaint goes to the **employment tribunal**, the more work you have put into anti-discriminatory policies the better.

- Be prepared to explain your policies and how they are implemented.
- Produce any documents that show why you made the decisions you did.
- Explain the steps that you have taken to investigate and address the complaint.

5.6 If a tribunal finds against you, evidence to show you have taken all reasonable steps to avoid discrimination should mitigate the **award**.

- Tribunals have powers to award unlimited compensation. Awards can take account of injury to feelings, plus compensating for loss of past and future earnings.
- The tribunal can also recommend that you take specific actions to prevent any repeat of the discrimination. If you ignore these recommendations, the compensation award may be increased.

6 Allowable discrimination

Some forms of discrimination are permitted.

6.1 Action can be taken to help groups seriously **under-represented** in the workforce over the preceding 12 months.

- Members of such groups can be offered more favourable access to training and work experience.
- They can also be positively encouraged to apply for work. But decisions on selection for employment or promotion must not be based on sex, race, age, sexual orientation, religion or philosophical belief.

6.2 Discrimination is permitted where a **Genuine Occupational Qualification (GOQ)** applies. GOQs are tightly defined:

- Authenticity — as where someone of a particular sex or race is required in a play.
- Personal services — where someone (such as a social worker) of a particular ethnic group might be required to serve members of the same ethnic group.
- Decency or privacy — where the job requires someone of a particular sex or sexual orientation because physical contact is involved, or because it involves residential duties, or duties in a single-sex establishment.

6.3 Discrimination is also permitted where the employee does his or her work wholly **outside Great Britain**.

7 Where to get help

7.1 **Specific** help and advice is available from:

- The Equal Opportunities Commission (0845 601 5901 or www.eoc.org.uk).
- The Commission for Racial Equality (020 7939 0000 or www.cre.gov.uk).
- The Disability Rights Commission Helpline (0845 7622 633 or www.drc-gb.org).
- The Employers' Forum on Disability (020 7403 3020 or www.employers-forum.co.uk).

7.2 Other organisations provide information and guidance on a **wide range** of employment and industrial relations matters.

- Acas (08457 47 47 47 or www.acas.org.uk).
- The Stationery Office can provide various codes of practice (0870 600 5522 or www.opsi.gov.uk).

Expert contributors

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Further help

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name, such as **Dismissing employees**.

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