

## Guidance Notes for Employers: Equal Opportunities and Preventing Discrimination

### INTRODUCTION

It is essential that employers are committed to achieving equality in the workplace and as such it is imperative that an equal opportunities and diversity policy is put in place.

The Equality Act 2010 ties up all existing equality legislation. The protected characteristics are now all in one Act: age, disability, race, sex, pregnancy and maternity, gender reassignment, marriage or civil partnership status, religion or belief, and sexual orientation. It is now possible for employees to claim discrimination on up to two of these grounds.

Unlawful discrimination can be very costly for a business. If an employee succeeds in a claim the tribunal can award an unlimited amount of compensation as there is no cap on the amount that can be awarded. In addition to this a discrimination claim can mean bad publicity for the business.

There are no age or length of service requirements necessary for a claim to be brought and employers are required to protect their workers (not just employees) from discrimination. Discrimination has wide parameters as many areas are covered and individuals are also protected against unlawful discrimination by association.

Employers whose business is providing goods and services should be aware that when providing such goods and services to a public-sector organisation, they will often be asked to show that they have an equality and diversity policy in place.

The following provides guidance as to what types of discrimination there are, how they can occur and the responsibilities of the employer in preventing discrimination.

### DISCRIMINATION

**1. In order for discrimination to occur in the workplace it must relate to one or more of the following:**

- 1.1 Selection and recruitment
  - 1.1.1 Advertisements should contain job criteria that are clear and justifiable.
  - 1.1.2 It is unlawful to specify gender, race, age etc in advertisements. Although in some circumstances this can be justified on the grounds that it is a Genuine Occupational Requirement (See Clause 9).
  - 1.1.3 For disabled candidates protection extends to application forms, interview arrangements, proficiency tests etc.

- 1.1.4 Note: job applicants can make a claim against employers if they believe that they were not selected because they were being unlawfully discriminated against.
- 1.2 Terms and conditions of employment
- 1.3 Training and promotion
- 1.4 Benefits and pay
- 1.5 Dismissal
- 1.6 Subjecting a person to a detriment
- 1.7 Post-termination e.g. unfavourable references

## 2. Types of Discrimination:

- 2.1 Direct Discrimination – where an employee is treated less favourably on the grounds of their sex, race, age, religion or belief, or disability.
- 2.2 Indirect discrimination – where an employer implements a provision, practice or criterion that puts the employee's sex, race, age, or religion or belief at a particular disadvantage, which cannot be justified.
- 2.3 Harassment – where an employee is subjected to unwanted conduct that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. *See also Harassment and Bullying Guidance Notes.*
- 2.4 Victimisation – applies to employees treated less favourably because they have brought or intend to bring proceedings or they have given or intend to give evidence about discrimination.

## 3. Sex

- 3.1 The Sex Discrimination Act 1975 restricts discrimination on the grounds of:
  - 3.1.1 Sex
  - 3.1.2 Marital status
  - 3.1.3 Entering a civil partnership
    - 3.1.3.1 For example, benefits available to married employees should also be available to civil partners e.g. private healthcare for spouses.
  - 3.1.4 Pregnancy or maternity
  - 3.1.5 Gender reassignment (whether undergone or intending to undergo) / transgender status
    - 3.1.5.1 Note a person is protected from discrimination on the grounds of gender reassignment from the date on which they tell the medical practitioner they wish to undergo gender reassignment.
- 3.2 Examples of types of discrimination that may be deemed unlawful sex discrimination:
  - 3.2.1 Indirect discrimination can occur where an employer says that every employee will be required to spend longer hours away from home. As

women generally have more childcare responsibilities than men, this would put them at a disadvantage and could constitute indirect discrimination. This could however, be justified as in Clause 9.

- 3.2.2 Sexual harassment may include sexist or insensitive jokes, sexual innuendos, displays of pornographic material or inappropriate comments and gestures. Note there are two types of sexual harassment:
  - 3.2.2.1 Conduct sexual in nature; or
  - 3.2.2.2 Conduct not sexual but likely to be offensive.
- 3.3 Under the Equal Pay Act 1970, it is unlawful to discriminate between men and women in terms of their pay and terms and conditions of employment when they are doing:
  - 3.3.1 The same or similar work; or
  - 3.3.2 Work rated as equivalent in an employer's job evaluation study; or
  - 3.3.3 Work of equal value.
- 3.4 The Genuine Occupational Requirement defence may apply to a sex discrimination claim where, for example, a male applicant applies for a job in an all-girls school, or an acting job requires a man or woman for the role.

#### **4. Sexual orientation**

- 4.1 The Employment Equality (Sexual Orientation) Regulations 2003 restrict discrimination on the grounds of sexual orientation which includes sexual orientation towards:
  - 4.1.1 Persons of the same sex;
  - 4.1.2 Persons of the opposite sex; or
  - 4.1.3 Persons of both the same sex and of the opposite sex.
- 4.2 It is also unlawful to discriminate against an employee on the grounds of their perceived sexual orientation or because they associate with people of a certain sexual orientation.

#### **5. Race**

- 5.1 The Race Relations Act 1976 restricts discrimination on the grounds of:
  - 5.1.1 Colour
  - 5.1.2 Race
  - 5.1.3 Nationality (including citizenship)
  - 5.1.4 Ethnic or national origins
- 5.2 Direct discrimination may, for example, occur where an employer refused to employ someone because they were not white and British.
- 5.3 Indirect discrimination may, for example, occur where an employer introduces a dress code which discriminates against an employee's ethnic group and there is no justification for the dress code.

- 5.4 The Genuine Occupation Requirement defence may apply to a race discrimination claim where, for example, a Chinese actor is required for a television or film role.
- 5.5 Where there is a particular racial group that is badly under represented, employers may offer special training or encourage members of that group to apply for jobs. However, employers may not discriminate in favour of a racial group as this is unlawful.

## **6. Age**

- 6.1 The Employment Equality (Age) Regulations 2006 provide protection from discrimination based on an employee's age. There is specific protection in recruitment for employees who are over 6 months below the national retirement age.
- 6.2 The national retirement age is 65, and compulsory retirement below this age is unlawful unless objectively justified. Employees can request to work beyond retirement age and employers must consider such requests although they are under no obligation to accept them.
- 6.3 It may be possible to justify direct age discrimination where, for example, a level of physical fitness was required for physically demanding work for the fire service, and the employer set a maximum age for health and safety reasons.
- 6.4 When employers are recruiting, it is unlawful for them to impose a lower age limit unless this age restriction can be objectively justified.
- 6.5 When justifying age discrimination:
  - 6.5.1 There should be no reasonable alternative; or
  - 6.5.2 There must be a reasonable need and legitimate aim.

## **7. Religion and Belief**

- 7.1 Religion and belief are not defined in law; instead factors such as collective worship, a clear belief system etc are taken into account. Therefore, religion can mean any religion including less widely practiced ones; and belief can cover religious and philosophical beliefs including atheism and humanism. Belief does not, however, include political beliefs.
- 7.2 Prohibiting discrimination based on religion or beliefs also protects employees from discrimination on the grounds of an employee's lack of any religion or any belief.
- 7.3 There are practical implications that employers should consider in regards to discrimination based on religion or belief. For example they may need to adapt working life to accommodate religious observance e.g. dress code, hours of work, rest breaks, canteen, social events, place for prayer etc.
- 7.4 There is no obligation to give employees time off or facilities for religious observance. However, where possible employers should do so provided it does not disrupt others or the ability of the employee to do their job properly.
- 7.5 Employees may request time off for religious holidays, and should do so in advance. Employers must consider such requests, but may refuse them where it would adversely affect their business.

- 7.6 Religious clothing and jewellery should be allowed unless they cause a health and safety risk and a request that employees do not wear them may be justifiable.
- 7.7 Where employees do not wish to handle certain foods, for example pork, they should make a request to their employer. If employers can accommodate such requests, they should, provided it does not adversely affect their business.

## **8. Disability**

- 8.1 In addition to the types of discrimination outlined in Clause 2 above (excluding indirect discrimination), there are two additional types in relation to disability discrimination:
  - 8.1.1 Failure to make reasonable adjustments (see below).
  - 8.1.2 Disability related discrimination – where a person is discriminated against for a reason related to their disability.
- 8.2 Reasonable Adjustments
  - 8.2.1 Once a disability is identified employers must comply with s.4A of the Disability Discrimination Act 1995 (DDA) in making reasonable adjustments where required. Employers must consider:
    - 8.2.1.1 Whether a duty to make reasonable adjustments arises? E.g. do the premises or practices place the disabled employee at a substantial disadvantage?
    - 8.2.1.2 Whether the adjustments are possible? I.e. are there any steps the employer could take to remove this substantial disadvantage?
    - 8.2.1.3 Whether it is reasonable for the Company to make such adjustments?
  - 8.2.2 Examples of reasonable adjustments that could be made by employers:
    - 8.2.2.1 Adjustments to premises;
    - 8.2.2.2 Re-allocating some or all of a disabled employee's duties;
    - 8.2.2.3 Transferring a disabled employee to a role better suited to their disability;
    - 8.2.2.4 Relocating a disabled employee to a more suitable office;
    - 8.2.2.5 Giving a disabled employee time off work for medical treatment or rehabilitation;
    - 8.2.2.6 Providing training or mentoring for a disabled employee; or
    - 8.2.2.7 Supplying or modifying equipment, instruction and training manuals for disabled employees.
  - 8.2.3 Reasonable adjustments must also be made for interviews where the applicant is disabled under the DDA.
  - 8.2.4 Employers should discuss with employees how effective any adjustments would be and encourage them to put forward any suggestions. Access to Work is run by Jobcentre Plus and gives employers advice and, where possible, financial assistance for adjustments.
- 8.3 To avoid indirectly discriminating against disabled employees, employers must make

reasonable adjustments to the selection criteria in cases of redundancy. For example, they should discount disability-related sickness.

- 8.4 Where the Company does not know of the employee's disability and the effect of such disability, they will be exempt from any duty to make reasonable adjustments. This exemption does not apply, however, where the Company ought to have known that the employee was disabled and that the disability was liable to affect the employee in the manner set out in s.4A. *For criteria see Disability Discrimination Guidance Notes.*
- 8.5 Note: Volunteers, for example unpaid charity or CAB workers, are not protected by the DDA or the EU Framework Directive. In order to be protected 'employment', a material contract between the parties is required.

## **9. Defences to discrimination claims**

- 9.1 It is possible to put forward a defence to discrimination on the grounds of Genuine Occupational Requirement. This defence applies to discrimination on the grounds of sex, age, race and religion or belief.
- 9.1.1 In order for this defence to apply, the determining requirement must be crucial for the job. For example in the case of a particular religion or belief, that religion or belief must have a close connection with the job and must not be created to avoid regulations.
- 9.1.2 Another example would be an Indian waiter being recruited in an Indian restaurant to provide an 'authentic' Indian atmosphere.
- 9.2 There is also a defence for disability related discrimination; here the employer must show that they have a material reason for discriminatory action.
- 9.3 Indirect discrimination, i.e. disadvantaging a particular group by implementing a rule or provision, can be justified on the grounds that the rule or provision has been put in place to help the employer achieve a legitimate aim.
- 9.4 Employers relying on any of the above defences should do so with caution. This is because an employment tribunal will decide whether a particular defence stands up, based on the evidence available, and therefore although these defences exist they must only be used where they are genuine.

## **10. Vicarious Liability**

- 10.1 Employers can be made liable for employees' acts of discrimination carried out in the course of their employment. This can extend to acts of discrimination at organised work social outings e.g. Christmas parties.
- 10.2 If employers take all reasonable practicable steps to stop or prevent discrimination they may be able to put forward a defence if there is:
- 10.2.1 Evidence of employment policies;
- 10.2.2 Details of implementation and training on policies; and
- 10.2.3 Evidence allegations were investigated and appropriate action was taken.

## 11. Preventing discrimination and encouraging equality and diversity

- 11.1 Employers should have an equality and diversity policy in place which: lays out the objectives of the policy; names the designated officer; explains the types of discrimination; explains employee's responsibilities in relation to the policy; and describes how the employer plans on implementing the policy. By having this in place employers can display their commitment to equality in the workplace. See *Equal Opportunities and Diversity Policy*.
- 11.2 Once the Equal Opportunities and Diversity Policy is in place, equality and diversity should be regularly monitored by employers to establish whether the policy is working effectively. This should be done confidentially and, where possible, anonymously. The employer will then be in a position to establish any significant differences between groups or to identify trends over a period of time.
- 11.3 Employers may decide to review their current position by carrying out an equality audit. It may also be wise to carry out an equal pay review especially in light of the provision that the Equality Act 2010 has made for publishing information relating to pay differences between men and women. When carrying out such reviews it may be helpful to talk to employee representatives and unions to discuss possible improvements.
- 11.4 If employers establish that their policy is not working effectively, it may be wise to develop an action plan to improve the effectiveness of the policy. This could be done by encouraging applications from ethnic minority groups that are underrepresented. However, successful applicants should still have the individual merits and qualifications required and should not be recruited on the basis of their ethnicity alone where there are better qualified candidates from, for example, a white background. Note, however, that disabled people can be treated more favourably even where they are not the best candidate for the job.
- 11.5 An action plan can include the following:
  - 11.5.1 Reiterate the goals outlined in the equality and diversity policy;
  - 11.5.2 Explain what will be done to achieve such goals;
  - 11.5.3 Designate the employee responsible for achieving each goal and/or action;
  - 11.5.4 Create target dates for meeting goals;
  - 11.5.5 Outline the consequences of any breaches of the policy; and
  - 11.5.6 Create a review date and instructions on how the plan is to be reviewed.
- 11.6 Employers should collect information on their employees and potential candidates in regards to the following factors:
  - 11.6.1 Age
  - 11.6.2 Race
  - 11.6.3 Sex
  - 11.6.4 Gender reassignment
  - 11.6.5 Marital / civil partnership status
  - 11.6.6 Disability
  - 11.6.7 Religion or belief

#### 11.6.8 Sexual orientation

- 11.7 Where employees feel uncomfortable with the process of monitoring, it may be necessary to explain the benefits of the process and that the information is collected for monitoring purposes and will not be used as a form of discrimination itself.
- 11.8 By having a policy in place and, where appropriate, an action plan employers are providing themselves with some protection from potential claims. This is because should an employee make a discrimination claim, the policy and the enforcement of the policy through an action plan will provide evidence of the employer taking steps to prevent discriminatory behaviour in the workplace.
- 11.9 For public sector employers, the existing separate equality duties covering race, disability and gender are to be replaced by a single equality duty. The single duty will also extend to gender reassignment, age, sexual orientation and religion or belief. The new duty is expected to come into force in April 2011. The general duty to have due regard to the need to advance equal opportunities remains in force.
- 11.10 Training
- 11.10.1 Training can be a very useful tool in encouraging compliance with the equality and diversity policy as well as evidence that employers have taken reasonable steps to implement the policy.
- 11.10.2 Senior employees and those employees involved in recruitment or training should be provided with training on the equality and diversity policy and the implementation of the policy in the workplace. Where possible training on this should be provided for all employees to ensure that they are aware of their personal responsibilities.
- 11.11 Employers should ensure that any complaints and grievances regarding unlawful discrimination are dealt with properly, consistently and fairly. See *Disciplinary Policy and Procedure* and *Grievance Procedures*.
- 11.12 It may be appropriate to have a dedicated grievance or disciplinary procedure, see *Equal Opportunities and Diversity Policy with Grievance and Disciplinary Procedures*. Alternatively, employees should have access to the Company's Grievance Procedure so that they are aware of how to raise a complaint if subjected to discrimination.

## 12. Notes

- 12.1 If in doubt about what constitutes discrimination it is advisable to seek legal advice.
- 12.2 Employers can and often should take positive action to encourage equality and diversity in the workplace, however positive discrimination is unlawful and when in doubt it is advisable to seek legal advice.