

## **DISCRIMINATION**

### **Anti-discrimination Legislation**

It is unlawful to discriminate in recruitment or in employment on the basis of sex (including pregnancy and maternity) marital status, partnership status, gender reassignment, disability, race, age, sexual orientation, religion, belief, trade union membership or non-membership or status as full or part-time worker. It is also unlawful to discriminate by association i.e. because a relation has a particular orientation, belief or race.

Anti-discrimination legislation covers all public and private sector employees, traders, professional organisations, employers organisations and trustees.

Discrimination usually falls into one of four categories;

- direct discrimination;
- treating somebody less favourably on the grounds of the sex, race etc.,
- indirect discrimination; applying a general standard which in practice is disadvantageous on the basis of sex, race, harassment and bullying;
- victimisation; treating somebody unfairly, because, for example, they plan to raise a discrimination related grievance.

The legislation applies to all areas of employment including recruitment; terms and conditions; promotions and transfers; training; benefits; dismissals; pensions. A company or business can be liable for discrimination perpetrated by their employees.

If an Employment Tribunal finds that discrimination has occurred, the penalties imposed can be high. There is no cap on compensation which may be awarded. Claims must generally be brought within three months of the alleged discrimination. Generally, the employee must raise issues with the employer before bringing the claim.

## **Candidate Selection**

A job description should not contain requirements which are not directly related to the job. It is unlawful for a job advertisement to specify that an applicant must be a particular gender, race etc., unless this is a genuine occupational, qualification or requirement.

Advertisements must not imply that the candidate's chance of success depends to any extent on not having a disability. The employee must make reasonable adjustments to accommodate disabled persons.

It is advisable not to use expressions such as "young and dynamic", "just qualified" or a "minimum of ten years experience" as these may constitute age discrimination.

Application forms must be carefully vetted for compliance. Requests for age on an application form are not necessarily unlawful, but care should be taken to ensure that the information does not lead to unjustified discrimination.

It is legitimate to ascertain that an individual has a right to work in the United Kingdom, but this must be undertaken so as to avoid race discrimination. There are certain questions which should not be asked directly or indirectly in an interview. This includes whether a candidate is married, has a partner of the same sex, civil partnership or plans to have children. Information about sexual orientation should not be sought.

Information in connection with disability can only be requested to the extent that it is strictly relevant after any reasonable adjustment that is necessary. Reasonable adjustment in this context, refers to changes to accommodate the disability, be they physical or organisational, changes.

Tests must be non-discriminatory. A written test could be justified if good written English is necessary for the job. Where a disabled person applies, a reasonable adjustment will need to be made in relation to the test e.g. given more time, given appropriate facilities.

An employer can face a claim of unlawful discrimination if it picks a person for a job who is less qualified than another person who is female, black etc. It is permissible to offer a disabled applicant a job, even though they are not the best qualified. A recruitment process must always be capable of being justified, in case the matter is referred to an Industrial Tribunal.

### **Gender Discrimination**

Sex discrimination legislation covers discrimination on the grounds of sex, pregnancy, maternity, marital status, civil partnership status or gender reassignment. A direct discrimination would occur where a woman is dismissed because of pregnancy or maternity leave. Indirect discrimination could occur if a job was stated to be available only to somebody able to spend long periods of time away from home. This could be justified if this is strictly necessary to the role e.g. international sales person. Under certain limited circumstances, sex may be a genuine occupational requirement.

The law makes sexual harassment and harassment related to sex unlawful in employment or vocational training. This can include insensitive jokes, display of explicit material, innuendo or lewd comments or gestures. It can also include the circulation of lewd emails, even if not actually being sent to the person being harassed.

Employers are required to treat married employees and employees from civil partnerships the same way. This means that benefits such as healthcare available to spouses, must also be made available to a civil partner. Employers may give benefits to employees who are married or in civil partnerships without necessarily extending them to those who are unmarried and not in civil partnerships.

Men and women are entitled to equal pay for work of equal value. Pay includes all terms and conditions and not just salaries. Therefore, discrimination in relation to fringe benefits may infringe the legislation. It may be possible to justify differences in pay as long as they can be shown that gender is not a factor.

### **Age**

Age discrimination is unlawful. However, the compulsory retirement at the age of 65 is deemed not be discriminatory. Compulsory retirement below 65 is unlawful unless objectively justified. Employees have the right to request to work beyond retirement age and employers have a duty to consider such requests.

Indirect age discrimination can arise where a benefit is introduced for employees with more than a certain length of service. However it may be possible to justify this discrimination on the basis of staff retention. Redundancy procedures must be based on the business needs rather than age. Last in, first out may not necessarily be justifiable.

### **Disability**

Under the Disability Discrimination Act it is unlawful discrimination if an employee or applicant is treated unfairly on account of a disability. An example of direct discrimination, would be where a person who is suitable for the job is refused, simply because he is in a wheelchair. An example of indirect discrimination may arise where a person is dismissed, because of a long term absence, caused by an accident.

It can be discrimination to fail to make a reasonable adjustments for a disabled employee/job applicant. A disability under the disability discrimination legislation arises if the person has a physical and mental impairment which has a substantial and long term adverse affect on their ability to carry out normal day to day activities.

Special rules apply to progressive conditions. Mental illness would not have to be clinically recognised before it is judged to be a mental impairment for the purpose of the Acts. Drug addiction, alcohol addiction or a tendency to start fires, steal or physically abuse is not regarded as an impairment under the legislation.

Employers have a duty to make reasonable adjustments to their premises, practice and procedures in order to enable disabled persons to work if they would otherwise be at a substantial disadvantage compared to an non disabled worker. Reasonable adjustments often involve little or no cost.

### **Other Grounds**

It is unlawful for an employer to discriminate on the basis of race, origin, ethnicity, colour or nationality. Segregation would obviously be unlawful. Direct discrimination would apply where someone is refused employment because they were non-white. Indirect discrimination may apply where an employer refuses employment because the individual cannot write in English. This could be discrimination if English was not necessary for the job.

It is unlawful for an employer to discriminate against someone on the grounds of religion, belief or lack of religion and lack of belief. Belief could cover things such as atheism and humanism. It would not be permissible for example to pay Christians less than non Christians. Indirect discrimination could occur if an application required applicants to handle pork and pork products. This could be justified if it was absolutely necessary and there was no way the job holder could avoid handling pork.

It is unlawful to discriminate against someone on the ground of sexual orientation towards people of the same sex or the opposite sex or both. Direct discrimination would apply where an employer refused to employ a homosexual man. Indirect discrimination could occur for example where an employer placed a job in a newspaper or magazine aimed at gays/lesbians.

Employees have a right not to be refused employment, because they are or are not, a member of a trade union or have plans to join or refuse to join a trade union. An employer must not treat workers unfairly during their employment where the treatment aims to prevent the worker becoming the member of a trade union carrying out trade union activities, or making use of trade union services. It is automatically unfair to dismiss an employee on trade union membership grounds.

Victimisation is unlawful. It is victimisation for an employer to treat an employee unfairly because of giving evidence and issuing proceedings or alleging legal contraventions.

### **III Health and Discrimination**

If an employee is suffers from chronic ill health, it is important to determine whether or not, he or she is disabled under the Disability Discrimination Act. An employee

may be subject to the legislation, if his illness is substantially long term and adversely affects his ability to perform normal day to day activities. A person is disabled once he has been diagnosed with cancer, HIV, and multiple sclerosis. People with medial illness are also deemed disabled under the legislation.

An employer has a duty to make reasonable adjustments to premises and working practices for disabled persons, if not doing so would put the employee at a substantial disadvantage. Failure to make reasonable adjustments could lead to a claim of disability discrimination at an Employment Tribunal.

It may become unfeasible to continue employing an employee with an illness, because there is no reasonable adjustments that can be made to allow the employee to continue working. In this case, it may be fair to dismiss, even if the employee is disabled. At the very least the statutory internal procedures must be followed fully in the case of a disabled employee.

As an alternative to dismissal on the grounds of ill health, it may be possible to reorganise the work and redesign the job. This could involve offering relocation, retraining, alteration of hours, eliminating shift work, offering homework etc.

An employee may be entitled to pension payments depending on the rules of his pension scheme.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.