

Guide to the Discrimination Law - Discrimination in Employment

Introduction

From 1 September 2018 the protected characteristics under the Discrimination (Jersey) Law 2013 are:

- **Race**
- **Sex (including sexual orientation, gender reassignment, pregnancy and maternity)**
- **Age**
- **Disability Discrimination**

The Law defines types of discrimination, the role of the employer, the role of the Tribunal and remedies that can be awarded:

1. Direct Discrimination
2. Indirect Discrimination
3. Harassment
4. Victimisation
5. Liability on employers (including the making of reasonable adjustments)
6. Tribunal role

The Jersey Advisory and Conciliation Service (JACS) has compiled this guide to assist employers and employees who may be affected and describes the way in which the Discrimination Law defines and deals with race, sex, age and disability discrimination. While every effort has been made to ensure that the information presented in this guide is accurate, many of the issues dealt with are ultimately a matter for the Employment and Discrimination Tribunal (the 'Tribunal') to decide. Examples given are intended to be illustrative and are not legally binding precedents.

When does the Discrimination Law apply?

This guide is concerned with discrimination in the field of employment only. There is a separate guide available from Citizens Advice Jersey (CAJ) in relation to goods and services. All employers – whatever their size - operating or employing people in Jersey are covered by the Discrimination Law including companies, partnerships and sole traders. The Discrimination Law outlaws race, sex, age and disability discrimination in relation to

- The recruitment of employees
- The treatment of employees
- The grounds and circumstances in which employees are dismissed.

Although the partners in a firm are not usually regarded as employees, the Discrimination Law makes special provision for them and they are protected in essentially the same way as employees.

Agency workers are also protected by the Discrimination Law and the employer who hires an agency worker must not discriminate in the way in which that worker is treated. Agencies themselves must not discriminate in the way in which they provide their services to those who are assigned or applying for work.

The Discrimination Law also covers the provision of vocational training, and the operation of professional bodies and trade associations.

This guide applies as much to voluntary work as to paid work, even though work carried out on a voluntary basis would not count as employment, the Discrimination Law makes special provision for voluntary workers who are effectively treated as 'employees'.

What is meant by 'race'?

The first protected characteristic covered by the Discrimination Law is 'race'. This characteristic has a wide definition. Race covers:

- Colour
- Nationality
- National origins
- Ethnic origins

While it would obviously be discrimination to refuse to employ someone who is black, it would also be discrimination to refuse to employ someone because they were, for example, French. Note that discrimination on the grounds of Nationality will not be unlawful when it is necessary to comply with rules on the employment of foreign nationals – see 'Exceptions' below.

National origins may refer to an individuals' original nationality. For example someone may be a British Citizen but originally born in Nigeria. Discriminating against them because of their country of birth would be unlawful.

National origins may also refer to a person's origin within a wider Nationality. It would be unlawful for example to discriminate against someone on the grounds that they are Scottish. The Discrimination Law also makes it clear that being of Jersey origin is included within the concept of national origins. This means that discriminating against somebody because they were born in Jersey will be just as unlawful as discriminating against someone because they were born in Poland.

Ethnic origin covers groups that have a clear identity and a long shared cultural history even though they do not share the same nationality or national origin. Roma people, for example, form a particular ethnic group as do Sikhs and Jews. It would therefore be unlawful to discriminate against someone on the grounds that they were ethnically Jewish.

An ethnic origin is not the same as a religious belief, however. The Discrimination Law will not protect someone against discrimination on the grounds that they are Catholic or Muslim for example. In time, the Discrimination Law may be amended to include religion as a protected characteristic in its own right.

Employers should nevertheless be aware that certain religious beliefs may be a common feature of some ethnic groups and discrimination based on those beliefs may amount to indirect discrimination (see below).

What do the sex discrimination regulations cover?

1. Sex
2. Sexual Orientation
3. Gender Reassignment
4. Pregnancy & Maternity

Sex – (being)

- a man
- a woman
- having intersex status

Sexual Orientation (towards)

- people of the same sex
- people of a different sex
- people of both the same and a different sex

Gender Reassignment

- A person who is proposing to undergo, is undergoing or has undergone a process for the purpose of reassigning gender; a transgender person

What is meant by age?

- a person of a particular age;
- people who share the same protected characteristic are of the same age or age group.

What is meant by disability?

- a long term physical, mental, intellectual or sensory impairment or disfigurement;
- it can have an adverse effect on someone's ability to engage or participate in any activity covered by the legislation.

What is discrimination?

The Discrimination Law defines four kinds of discrimination

- Direct Discrimination
- Indirect Discrimination
- Harassment
- Victimisation

Each of these needs to be dealt with separately.

Direct Discrimination

Direct discrimination occurs when the employer treats an employee less favourably because of race, sex, age or disability

Mark advertises for an assistant to work in his photography business. He only receives 2 applications – from Steve and Sally. Steve is very well qualified and is Asian. Mark does not want to employ an Asian employee. Sally is British and has recently married and Mark does not want the 'hassle' if she becomes pregnant. He decides not to recruit anyone.

This is direct discrimination. Although nobody has actually been treated more favourably than either applicant, it is clear that the reason Steve was not given the job was that he is Asian; because of his Race, Steve has been treated less favourably than someone who is white would have been treated. Likewise Sally was not given to the job because she is female and therefore may become pregnant, therefore was treated less favourably than others. This will be unlawful.

'Less favourably' means less favourably than other people are, or would be, treated. It is not necessary to find another person who has actually been treated more favourably than the

applicant in question. The question is whether that applicant would have been treated more favourably were it not for their race/sex/age or disability.

While there are some exceptions where direct discrimination is not unlawful, these will only apply in limited circumstances. In most cases less favourable treatment because of race/sex/age or disability will be unlawful. In particular, an employer may not seek to justify an act of discrimination based on any generalisation about the characteristics of people. It is important to note that for the purposes of disability discrimination only, positive discrimination is permitted, meaning that a person who does not have a disability (or does not have the same disability) cannot argue that they have been treated less favourably than someone who does have a disability (or a different disability). Additionally, if a person with a disability is treated less favourably because of something associated with their disability (but not the disability itself), and an employer cannot show the difference in treatment to be a proportionate means of achieving a legitimate aim this will be an act of discrimination.

Jeff owns a small coffee shop and wants to recruit a barista. There are two equally qualified applicants; one born in Jersey and the other born in Poland. Jeff recruits the Polish applicant because he has been told that Polish staff work harder than their Jersey-born counterparts.

This would be unlawful race discrimination. The Jersey applicant has been turned down because of national origin. The Discrimination Law does not allow for any generalisations about how hard-working members of particular national groups may be.

Jeff did receive a further application from someone who had previously worked for him and only left to undergo a process for gender reassignment. Jeff decides to just reject this applicant as he holds strong views on such processes and is also worried about what his customers may think. This is **unlawful discrimination on grounds of gender reassignment.**

In cases of age discrimination, however, an employer can justify direct discrimination if the less favourable treatment can be shown to be a 'proportionate means of achieving a legitimate aim. This will involve showing both that there is a proper business reason for the difference in treatment and that it is reasonable and appropriate for the employer to act on the basis of that reason in the particular circumstances of the case. For example, it may be appropriate to discriminate on the grounds of age in recruitment to ensure that the business is not adversely affected by a large number of employees in one department choosing to retire at the same time. Special rules will apply in the case of forced retirement - and these are discussed below.

Race, sex, age or disability must be the reason for the less favourable treatment but this does not mean it must be the sole reason. If an employee would have been treated more favourably but for their race, sex, age or disability then this will usually be sufficient to show direct discrimination. The motivation of the employer matter does not matter. If there is less favourable treatment because of one of the protected characteristics this is enough.

Direct discrimination can also be unconscious in the sense that the employer may not be aware of the reason for the treatment. Provided that it can be shown that the reason was in fact race, sex, age or disability this will be sufficient. Employers need to be mindful of the risk of unconscious bias in the way in which they treat employees and job applicants and try to act on the basis of objective criteria as far as possible.

Mark is 62 years old and applied for a job with Phil who runs a high-end women's fashion boutique. Phil is concerned that his clientele will not feel comfortable being served by an older sales assistant and so, although he personally has no objection, he turns Mark's application down.

This would be unlawful direct discrimination. The fact that Phil argues that he is not ageist himself is irrelevant. Mark has been turned down because of his age and that is enough. The defence of justification is unlikely to help Phil here. While protecting the business is obviously a legitimate business objective, Phil's decision was based on a general feeling rather than specific and reliable evidence. It is highly unlikely that a Tribunal would regard the discrimination as being a 'proportionate means' of achieving that legitimate business aim.

In most cases, it is the protected characteristic of an individual claiming discrimination that is relevant. However, the Discrimination Law does not require the less favourable treatment to be specifically because of the claimant's race/sex/age/disability. If an employee is treated less favourably because of somebody else's race/sex/age, then this will still be direct discrimination.

Jenny is employed as an accounts manager in a firm run by Derek. Derek is planning to promote Jenny to a senior management position and invites her and her partner out to dinner to discuss the future. Jenny's partner, Steve, is black and this makes Derek feel uncomfortable. He tells Jenny the next morning that the promotion is on hold while he considers the situation further.

This would be direct discrimination. Jenny is being treated less favourably than she would otherwise be treated because of race. The fact that it is her partner's race rather than her own which is the source of the employer's hostility is irrelevant.

Direct discrimination is also possible if the employer is mistaken about an employee's race. If an employee is dismissed because the employer believes that she is Jewish then this will be direct discrimination even if the employer turns out to be mistaken. Race is still the reason for the less favourable treatment.

Indirect discrimination

Indirect discrimination happens when an unjustifiable 'provision, criterion or practice', although applied to everyone, causes a particular disadvantage to people based on sex/race/age/disability. For example:

- A requirement to speak a particular language will cause a particular disadvantage to people from a country where that language is not generally spoken.
- A requirement to be clean-shaven may cause a particular disadvantage to those from an ethnic group (such as Sikhs) where facial hair has cultural or religious importance.
- Weekly staff meetings always held at 4pm may cause a particular disadvantage to women who have caring responsibility for young children.
- Working overtime at short notice may be problematic for someone with Type 1 Diabetes if they do not have insulin available.
- Organising an outdoor adventure team building session would be problematic for an employee who uses a wheelchair.

For a provision criterion or practice to cause a particular disadvantage, there is no need for it to adversely affect all members of a group.

Indirect discrimination will only be established where the provision, criterion or practice in question does cause that disadvantage to the person making the claim.

Sally runs a cleaning company employing ten part-time cleaners. They all happen to speak Hungarian with very little English. She wants to recruit a supervisor and specify in the job description that the successful applicant must speak Hungarian.

This would not be direct discrimination because Sally does not care about the national origin or nationality of the job applicant, only that he or she has a particular skill – speaking Hungarian. This may however amount to indirect discrimination because the job requirement will, on average, be much harder for people who are not of Hungarian origin to meet. In other words, people from a country other than Hungary are much less likely to speak Hungarian than Hungarians.

For the requirement to be lawful, Sally will have to show that the requirement is a proportionate means of achieving a legitimate aim. It is likely that she will be able to do this on the basis that it is legitimate and proportionate to seek to recruit a supervisor who can communicate directly with the employees he or she is supervising.

A provision, criterion or practice does not have to amount to an absolute requirement in order to amount to indirect discrimination. A mere preference will be enough if it can be shown that this causes a ‘particular disadvantage’.

The key difference between direct and indirect discrimination is that indirect discrimination will only be unlawful if the provision, criterion or practice is unjustifiable in that the employer cannot show that it is a ‘proportionate means of achieving a legitimate aim’.

Justification is a two-part test. The first requirement is to show the business reason that underlies the provision, criterion or practice. The second is to show that the provision, criterion or practice is a proportionate means of achieving that aim. The Tribunal will have to decide this issue by weighing up all the circumstances of the case but the Discrimination Law specifies that the matters to be taken into account should include:

- The nature and extent of the disadvantage caused
- How feasible it would be to overcome or mitigate the effects of that disadvantage and
- Whether the disadvantage caused is disproportionate when placed alongside the employer’s business aim.

A marketing company advertises for a copy-writing assistant and states that the successful applicant must have at least a Grade A in GCSE English.

Because the requirement is confined to a GCSE it will cause a particular disadvantage to people from countries other than England and also to individuals who took their exams prior to GCEs. The employer’s aim – recruiting somebody with the right educational standard – is clearly legitimate but the requirement is unlikely to be justified. This is because the same aim could be achieved in a less discriminatory way. The employer could simply ask for a Grade A in GCSE English or other equivalent qualification.

Reasonable Adjustments: a failure to make reasonable adjustments for applicants, volunteers or employees which would then result in a substantial disadvantage when compared to non-disabled individuals also falls under indirect discrimination. The article covering physical adjustments to buildings is effective from **1 September 2020**.

A duty to make reasonable adjustments only arises when the employer or service provider knows or ought reasonably to have known of both the individual's particular disability and the disadvantage that is being caused to them.

An employer does not have to attempt to 'future-proof' by making multiple changes to buildings against all possible disabilities before 1 September 2020. Additionally there will not be a prescribed list of reasonable adjustments and there will be no inspection/assessment of properties to check for compliance.

Reasonable adjustments/auxiliary aids include:

- the physical features of the design/construction of a building and access to it;
- fixtures, fittings, furniture etc and equipment in or on the building;
- any other physical element or quality.

Remedies for any substantial disadvantage:

- removing/altering (where possible) the physical features in question eg the use of a portable ramp for access, or installing a visual fire alarm as well as an audible one;
- seeking ways to avoid the substantial disadvantage eg adding colour to an otherwise totally white bathroom, moving a desk away from a noisy printer or 'fierce' air conditioning unit, using an off-white copier paper, phased return to work after a period of absence linked to a disability.

Proportionality of adjustments:

- impracticality of making such adjustments eg removing air conditioning altogether;
- the cost of making such adjustments may incur eg the installation of a larger lift;
- the size and administrative resources of the employer along with the nature of the business;
- the extent that such adjustments would make in removing the substantial disadvantage eg the installation of a hearing loop if the employee can only use sign language?

NB:

- **Any reasonable adjustments undertaken are to be at no cost to the employee.**
- **An employer will not be responsible for being unable to undertake a reasonable adjustment if to do so would be a breach of the Building Bye-Laws (Jersey) 2007 (as amended).**

Overall the issue of justification for any indirect discrimination is a balancing exercise. The greater the disadvantage caused to a group in question, the more compelling the reason for the provision, criterion or practice must be. One important factor is likely to be whether the same aim can be achieved in a less discriminatory way.

The key point is that the rule against indirect discrimination does not prevent an employer using appropriate criteria when recruiting, managing or dismissing an employee. However, it makes sense to consider whether any such criteria might have a disproportionate impact on particular groups and – if so – whether the same aim can be achieved in some other way.

Harassment

The third kind of discrimination defined by the Discrimination Law is harassment. Harassment is unwanted conduct which is related to race/sex/age/disability which has either the purpose or the effect of:

- Violating a person's dignity or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for that person

Lisa has worked with David for many years. Lisa is unmarried and is heterosexual. David has started teasing her, suggesting the reason she was single was that she was a lesbian and Lisa has now been forwarded some e-mails from a work colleague that he has been distributing. One email contains a picture of 2 women in bed and he has labelled one of the women 'Lisa'.

This is humiliating and offensive and therefore harassment.

In the context of employment, the subject will normally be an employee or contract worker but unlawful harassment may also take place during the recruitment process.

Harassment can arise because of either the purpose or effect of what somebody says or does. It is no defence to a claim for harassment that the person in question did not intend to cause any offence. If the effect of the unwanted conduct meets the required standard then this will be sufficient.

David is an accountant working for a financial services company and in his late 50s. On several occasions he has heard his younger colleague Susan refer to him as 'gramps'. When David objects to this term, Susan denies that she is ageist and says that the term is not meant in an offensive way. Soon afterwards David hears Susan tell a colleague that she has no problem with older people and that David is still a good accountant.

David would probably succeed in a claim of harassment on the grounds of age. He has made it clear that Susan's use of the term 'gramps' is unwanted and offensive to him. He would be likely to succeed in claiming that her repeated use of the term and the use of the word 'still' when referring to his skills violates his dignity or creates an offensive environment for him.

One difficulty with defining harassment is that what is harmless banter for one individual may be extremely offensive for another. In judging the effect of conduct the Discrimination Law requires the Tribunal to take the following into account:

- The perception of the person alleging harassment
- The circumstances of the case and
- Whether a reasonable person could regard the conduct as having that effect

There is therefore a careful balance to strike. The fact that somebody perceives such comments as falling under one of the protected characteristics is relevant but not definitive. If no reasonable person could form such a view, then it is unlikely that a claim of harassment will be upheld.

Maria is Irish and after she is made redundant argues that during her employment at an accountancy firm she was regularly subjected to 'Irish jokes'. In its defence the employer produces several emails from Maria where she tells such jokes herself, and also tells other jokes relating to the various national origins of her colleagues.

Depending on the circumstances the Tribunal may find that there is nothing to indicate that the telling of Irish jokes amounted to unwanted conduct or that Maria was genuinely offended by them. If that is so then there will have been no unlawful harassment.

If conduct is not unwanted, it cannot amount to harassment. But whether conduct is unwanted or not is an objective question. It is no defence to a claim of harassment to argue that the harasser did not realise that the conduct was unwanted. When engaging in conduct which is related to race/sex/age/disability and which could potentially cause offence, the person in question must bear the risk that the conduct will be unwanted and may amount to harassment.

There will be cases however in which conduct which could amount to harassment is held not to be so because the employee in question is found not to have been offended. Each case will depend on the specific circumstances of the case.

Mary complains that she was passed over for promotion on the grounds that she is not Polish. She believes that her employer, who is Polish himself, has promoted Mike because he is also Polish.

In fact Mary is wholly mistaken in this belief and Mike is not Polish at all. Nevertheless Mary's employer must be careful not to take any adverse action against Mary such as withholding a pay rise or selecting her for redundancy. Even though Mary was mistaken in her belief, it was a genuinely held belief and she was entitled to make a complaint.

Sexual Harassment

There are additional provisions in the law dealing with sexual harassment covering unwanted conduct of a sexual nature. Unwanted sexual attention can therefore amount to harassment whatever the gender of the people concerned. Additionally, if an individual is treated less favourably because they rejected or submitted to sexual harassment this is unlawful.

On a business trip in Europe, George propositions Edward advising him he would be guaranteed the promotion if he were to sleep with George whilst they are away and 'nobody needs to know about it'. Edward declines these advances and when he applies for a more senior role, he is interviewed by George and 2 others, but does not secure the role.

If Edward could show that the reason he did not get the job was the fact that he had refused George's proposition then that would amount to sexual harassment.

Victimisation

The fourth kind of discrimination defined by the Discrimination Law is victimisation.

For the Discrimination Law to be effective it is important that employees are free to make complaints of discrimination in good faith, without fear of reprisal. The Discrimination Law therefore provides that discrimination occurs when an employer treats an employee less favourably than other employees are, or would be, treated because the person has:

- Made a complaint under the Discrimination Law
- Brought proceedings against any person under the Discrimination Law
- Given evidence or given information in connection with the Discrimination Law
- Done anything in connection with the Discrimination Law
- Made any allegation that a person has acted in contravention of the Discrimination Law.

This is a wide-ranging protection which essentially means that any allegation of breach of the Discrimination Law or any activity supporting another individual's complaint is likely to be protected.

Fred is taken to a Tribunal accused of selecting an employee (Jane) for redundancy on the grounds that she is 'trying for a family'. At the Tribunal hearing Paul – one of his other employees – gives evidence of some derogatory comments that Fred had made about pregnancy and working mothers in the past. The Tribunal upholds the complaint and awards £10,000 compensation.

Fred is furious with Paul for his disloyalty and withholds a pay rise that would normally be given because of the money he believes that Paul has cost him. This would be unlawful victimisation. Although Paul has not complained of discrimination himself, he has supported the claim of another employee and this is enough.

Importantly, the protection does not depend on the discrimination complaint itself being well-founded. Even if an employee is wholly mistaken and wrongly believes that he or she has been discriminated against, it will still be unlawful for an employer to take any action against them.

After she was made redundant from her last job, Jane took her employer to a Tribunal alleging victimisation on the grounds of her sex. She was unsuccessful and the case was reported in the Jersey Evening Post. When Jane applies to Frank for a job, Frank remembers the press coverage and decides that Jane is a trouble maker, and therefore he does not give her the job.

This would be unlawful victimisation. Jane is being treated less favourably because she has made a complaint of discrimination and although the complaint was not upheld, there is no evidence that it was made in bad faith. The fact that the original complaint was made against a previous employer rather than Frank makes no difference.

The only exception to the rule is where the employee has given false information or made a false complaint in bad faith. Bad faith can generally be taken to mean either that the employee knows that the allegation is false or is acting from some ulterior motive in making the complaint.

It is not enough, however, for the employer to believe that the employee was acting in bad faith – this must actually be true. A Tribunal is likely to require clear evidence of this before holding that an employee has lost the right not to be victimised.

Joe complains that his manager made derogatory comments to him in relation to his sexuality during his appraisal. In the ensuing investigation, the manager denies this and a fellow employee comes forward to say that Joe approached him suggesting that they try to get rid of the manager by accusing him of being homophobic.

The employer then launches a disciplinary process which concludes that Joe made malicious complaints against his manager. A Tribunal would be likely to find that there was no victimisation in this case. There is clear evidence that Joe deliberately made a false allegation and was acting in bad faith.

Giving instructions to discriminate

As well as being under a duty not to discriminate against employees, an employer will also be acting unlawfully if it instructs one of its employees to act in a discriminatory manner. If it does so, the employee who has been given the instruction will be able to bring tribunal proceedings against the employer.

A complaint under this heading can be made by the person who is given the discriminatory instruction or the subject of the intended discrimination (irrespective of whether any

discrimination actually takes place). However, in order to bring a complaint, the individual must have suffered a detriment as a result of the employer's actions.

The Tribunal is likely to give a wide definition to the concept of detriment in this context. It will not be limited to financial loss but is likely to include being upset at the nature of the instruction being given. However, where the detriment is of a less tangible nature, that fact is likely to be reflected in any award of compensation made by the Tribunal.

Alan is employed as a doorman in a bar/nightclub owned by Peter. Peter tells Alan that on no account should he allow dogs into the venue, even if they are assistance dogs. Alan refuses to comply with this instruction and is dismissed as a result.

Not only would Alan's dismissal be unfair but he will also be able to bring an action against his employer on the grounds that he was instructed to commit a prohibited act. It will not matter that no act of discrimination actually took place.

Who is liable for discrimination?

Acts of discrimination committed by an employer are often committed by an employee acting on the employer's behalf. For example, a manager employed by a company may make a discriminatory recruitment decision even though it is the policy of the company as a whole not to discriminate.

The Discrimination Law does not allow employers to hide behind the fact that acts of discrimination are committed by employees without the employer's permission. The employer will be liable for anything done by one of its employees acting in the course of his or her employment, even if it is done without the employer's knowledge or approval.

Tony is employed by Best Restaurants Ltd as the manager of one of its three restaurants. He is tasked with recruiting a head waiter and turns down Stefan for a job because he is gay. When Stefan complains to the company they apologise immediately and Tony is disciplined.

Nevertheless, Stefan will still be able to bring a discrimination claim against Best Restaurants Ltd. Tony was acting in the course of his employment when he committed the act of discrimination and so they are responsible. The fact that they apologised and took action after the fact does not affect this, although it may influence the amount of compensation that the Tribunal subsequently awards.

The only circumstance in which the employer will not be liable for the discriminatory acts of its employees is if it can prove that it has taken all reasonably practicable steps to prevent the employee from acting in a discriminatory manner.

Note that it is only preventative measures that can support this defence. It is not enough for the employer to show that it took reasonable steps to deal with a situation once the act of discrimination had actually taken place.

What steps are practicable to prevent discrimination will vary according to the circumstances. However the Tribunal is likely to look for the following:

- A clear policy adopted by the employer emphasising that discrimination will not be condoned or tolerated

- Training for managers and appropriate staff on equality issues and the need not to discriminate
- A company culture which takes complaints of discrimination seriously and does not tolerate discriminatory conduct on the part of employees

Where these are in place, it is likely that a Tribunal will find that the employer is not liable for acts of discrimination committed by employees.

The issue of the employer's liability for the acts of employees is likely to be particularly important in the context of harassment. Race or gender motivated jokes or insults are highly unlikely to be specifically endorsed or authorised by an employer but if they are committed 'in the course of employment' then the employer will still be liable.

There is no formal definition of what 'in the course of employment means' and in most situations it will be a matter of common sense. A manager conducting a job interview is clearly acting in the course of employment as is one colleague taking to another during working hours. Even behaviour which takes place in a break is likely to be 'in the course of employment' because the activity is closely related to the work and arises from it.

In contrast, a conversation between two colleagues which takes place after work and is not arranged by the employer is unlikely to be something which happens 'in the course of employment' and so the employer will not be liable for anything that is said in that context.

Julie works with Steve and has always got on reasonably well with him. Last Saturday however they were both in the same restaurant when an argument arose over Julie's recent period of time off work for depression. Steve made various comments in relation to this not being a 'proper disability'.

Although the employer might be entitled to discipline Steve for his behaviour, Julie would not be able to sue for disability discrimination because the abuse was not done in the course of employment. Therefore the employer will not be liable for Steve's actions.

One aspect of the test may be whether the employer is in a position to control what the employee does in the context in question. In most cases, the employer will be liable for actions that take place in the workplace or during normal working hours, but will not be liable for what happens wholly outside of work (other than work organized events eg the Summer Ball)

Individual liability

In a case of discrimination, it is not only the employer who will be liable. Any individual who knowingly aids an employer in doing an act that is prohibited by the Discrimination Law is also individually liable. What is more, an employee for whose act the employer is deemed to be liable is also individually liable for that act and can be sued as an individual.

This means that an employee with a discrimination claim may be pursuing that claim against more than one party. An individual may be suing the employer as well as the individual manager who committed the act of discrimination in question. If the claim is upheld, the Tribunal will be able to apportion liability for compensation between the parties according to what it considers to be just and equitable.

What happens if a claim succeeds?

Individuals who believe that they have been the victims of discrimination or other conduct that is prohibited by the Discrimination Law may present a claim to the Tribunal within 56 days (or 8 weeks) of the last discriminatory act occurring. In an employment case the matter will be referred to JACS who will explore the possibility of the parties agreeing a settlement of the dispute before the case is referred to the Tribunal for hearing.

The Tribunal will consider evidence and representations from both sides before reaching its decision. If it concludes that discrimination has taken place then it may do one or more of the following:

- Make a declaration of the rights of both parties
- Order a payment of compensation
- Make a recommendation that the employer take action which will alleviate the adverse effect of the discrimination on the applicant

Compensation may reflect both financial loss and a sum for hurt and distress and must not exceed £10,000. Within that overall limit, the amount awarded for hurt and distress must not exceed £5,000.

Alison is passed over for promotion and complains of discrimination because she hears her manager say that other employees are not yet ready for a transgender manager.

The Tribunal upholds the complaint and makes a declaration that there has been discrimination. However the Tribunal finds that even if there had been no discrimination, Alison would still not have been promoted because the employee who was promoted was better qualified.

Although Alison has suffered no financial loss the Tribunal considers that she should receive £1,000 for hurt and distress and also makes a recommendation that the employer ensures that its management and staff are given training in equality and diversity issues.

General Exceptions

There are some circumstances in which it is not unlawful to treat people less favourably on the grounds of one of the protected characteristics.

In particular, an employer will not be acting unlawfully if it is simply complying with some other applicable law or court ruling, or for the purposes of safeguarding national security. The following are also general exceptions:

Positive Action

This is when steps are taken to help to re-dress any imbalance or under-representation of certain groups by putting in place provisions to enable or encourage people from such groups to overcome/minimize the disadvantage. However positive action does not go as far as allowing an employer to actively recruit or promote, based on their protected characteristic.

The Education Department is aware that male teachers for infant and junior schools are under represented, and would like to take steps to promote this as a career route to men. A series of events/roadshows are advertised as men only events in order to get this message over.

The running of these events will fall under 'positive action' and therefore not an act of discrimination.

Having attended one of the Education Department events, Colin applies for a teaching role in an infant school and is the only male applicant; he is interviewed along with 5 female candidates. All the candidates are measured on objective criteria and Colin is successful in securing the job. Ellen who also applied for the job considers that the school employed Colin purely because he was male and lodges a complaint with the Tribunal.

The Tribunal will need to look at the objective criteria applied to all the candidates before deciding if the employer had acted outside the grounds of positive action in appointing Colin to the role.

Genuine Occupational Requirements

There may be some roles which because of the particular nature of their duties or the context in which work is done can only be done by individuals of a particular race/sex/age or with a particular disability.

For example, a charity working with members of the Portuguese community may insist on employing a Portuguese person as an outreach worker providing personal services to members of the community. This will not be unlawful provided the requirement is a proportionate one in all the circumstances. Likewise if the charity is providing services exclusively to one sex or a particular age group it can require an employee of the same sex or that particular age group to undertake work for them.

Circumstances in which race is a genuine occupational requirement are expected to be rare. In most cases the employer can simply specify the skills and experience needed to do the job properly.

Exceptions in relation to Sex Only

Recruiting a person to conduct religious services where the employer requires their employees to be of a particular sex, have a particular sexual orientation or to be/not be a transgender person will not be an act of discrimination. This does not extend to other people employed by the organised religion only those who are required (as an essential part of the role) to conduct such services. This exception is for the purposes of complying with the doctrines of the religion.

If, following a Health and Safety risk assessment, it is considered that a pregnant employee may be at risk it will not be an act of discrimination to allocate the employee other duties or to make changes to her working environment, which may also include allocating duties to another employee or suspending without pay the pregnant employee.

An employer who is looking to recruit on a short term contract to undertake project work that requires completion within a particular time-frame (and will not be extending the contract at the end of this time-frame) will not be discriminating if they choose not to recruit an employee who is pregnant and the likely period of maternity leave would interfere with the completion of the project.

Exceptions in relation to Age Only

Many employment benefits are only offered to employees with a particular length of service – or are improved as service increases. This is perfectly lawful. An employer may therefore continue to increase holiday entitlement for employees with longer service, or give other long-service awards.

Offering employees benefits in relation to financial services or insurance will also not be an act of age discrimination if this is based on actuarial evidence.

Additionally, if an employer offers assistance with child care for children of a particular age eg subsidised nursery places, there is no obligation to provide assistance for older children or to employees who are not the parents of nursery aged children.

If an employee would not qualify for minimum wage under the Employment Legislation ie they are under the age of 16 years, then an employer will not be discriminating against this employee if they pay them less than the minimum wage. This applies even if the employee is working alongside and doing the same job as someone aged 16 or over.

While a retirement age remains in place, an employer will not be discriminating against an employee if they are not offered promotion or training in the 6 month's prior to retirement. This will also apply when an employer chooses not to recruit someone who is approaching the Social Security pensionable age, or the justifiable retirement age (see below) for the business.

Retirement Age

From 1 September 2018 a requirement for an employee to retire at **any** age will be an act of direct discrimination and also potentially an unfair dismissal unless the employer can show this to be a proportionate means of achieving a legitimate aim. There are a number of reasons why compulsory retirement might be lawful. The job may be hazardous to the extent that employing someone beyond a certain age becomes a health and safety risk. There may also be circumstances in which a policy on retirement is needed to provide an appropriate career structure and promotion opportunities for other employees. It is also possible that in some jobs the levels of an employee's performance will inevitably tail off after a certain age and a general policy of retirement is a proportionate and reasonable way of addressing that.

Leading up to September 2018, employers should think carefully about their retirement policy and ask whether forcing employees to retire fulfils a genuine business need, or whether it simply reflects an outmoded view of the value of older workers. JACS have prepared a guide on retirement which is available on www.jacs.org.je.

Exceptions relating to disability

The Law also provides some exceptions that are specific to disability.

Public service vehicles: These services will have the same duty not to discriminate in the way they treat individuals. However, there is no duty to make reasonable adjustments in the provision of public service vehicles such as buses and taxis. Accessibility is dealt with as a matter of contract.

Building Bye-laws: A person will not be responsible for being unable to undertake a reasonable adjustment if to do so would be a breach of the Building Bye-Laws (Jersey) 2007.

School admissions: A limited exception allows schools to continue to set entry standards based on high ability or aptitude. It does not excuse the school from its general duty not to discriminate nor its duty to make reasonable adjustments in accommodating pupils with a disability.

Sport and competitions: An exception ensures that the application of the rules of international sporting competitions (such as the Paralympics) will not be disability discrimination.

Ministerial or States policies: An exception allows policies to be applied where they make resources available to promote the employment of or opportunities for, disabled people or to improve access to services and facilities.

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