

# Discrimination

**Discrimination against employees on any grounds other than their ability to do the job is illegal. If an employee or potential employee brings a discrimination case against you, 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 because of one or more protected characteristics.

- 1.1** It is illegal to discriminate against anyone on grounds of **race**, colour, nationality or ethnic origins or on grounds of their religion or philosophical beliefs.
- 1.2** It is illegal to discriminate against anyone on grounds of their **sex** (including gender re-assignment) or marital status (including civil partnerships), or on grounds of their actual or perceived sexual orientation.
- Nor can you discriminate because of pregnancy or maternity.
- 1.3** 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, page 2).

**1.4** It is illegal to discriminate against anyone on the grounds of their **age**.

- The Default Retirement Age (DRA) will be phased out from April 2011. The last day that you can give an older employee their six-month notice of retirement on grounds of the DRA is 30 March 2011.
- If you want to let an older employee go due to poor performance, from April 2011 you

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must treat them like any other employee who is performing poorly, and go through the standard dismissal procedures.

**1.5** It is illegal to discriminate against **fixed-term** or **part-time** workers.

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

**1.6** It is illegal to **discriminate** against someone on the grounds of their membership or non-membership of a trade union.

**1.7** Under the Equality Act 2010, **positive discrimination** is still illegal, but employers can use positive action during the recruitment process. For example, if two candidates are equally competent but one of them has a protected characteristic that is misrepresented in your workplace, you are allowed to use that reason for selecting them rather than the other candidate.

### Reasonable adjustments

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

If you treat them less favourably than others, without making reasonable adjustments, 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 they 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.

This does not mean that you can select someone solely because they have a protected characteristic.

As well as employers, anyone who is involved with employment, education, housing, the provision of services and the exercise of public functions must comply with the equality and diversity requirements.

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. You may be involved in discriminatory practices without realising it.

**2.1** If you treat somebody less favourably by practising illegal forms of discrimination (see **1**), 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 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 poor attendance, 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 group 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.

**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.

► 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.

“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**

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 your own actions, but also for the behaviour and actions of your employees, managers and third-parties — such as suppliers and customers. Make it clear that discrimination and harassment are not acceptable.

**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.

#### Harassment and segregation

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

- A** Any conduct that is unwanted or offensive to the recipient is **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, can be held **liable** for your employees' behaviour and that of third-parties (such as suppliers and customers), unless you convince the tribunal you have taken all reasonable steps to stop them acting illegally.

### 4 Equal treatment

Even when you have a policy and consciously apply it, you still need to take steps to prevent unintentional 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 work of equal value.

**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 over 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 which groups are under-represented and paid differently. Investigate the reason.
- Under the Equality Act 2010 it is prohibited to pay women less than men for equivalent duties. Individuals who discuss their pay to find out whether there is discrimination are protected from victimisation, even if their employment contract says they cannot discuss their pay.

**4.5 Make sure all dismissals** (including redundancies) are legally justifiable.

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

### 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.
- Use your 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 services, such as contract workers and agency staff, are included.

**5.3** Complaints must be made to the tribunal within **three months**, although this can be extended by three months if the employee believes 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 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.

- Use Acas (see 7.2) or an independent mediator to help settle the dispute. This would be voluntary for both parties. 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 their right to go to 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 that shows 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 illegal forms of discrimination.

**6.2** Discrimination may be permitted where an 'occupational requirement' applies:

- It must be a genuine and crucial requirement in order to do the job — for example requiring a model of a particular gender to advertise clothing for that gender.
- The application of the requirement must be a 'good proportionate means of achieving a legitimate aim'.

## 7 Where to get help

**7.1 Specific** help and advice is available from the Equality and Human Rights Commission (0845 604 6610; [www.equalityhumanrights.com](http://www.equalityhumanrights.com)).

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

- The Employers' Forum on Disability aims to make it easier to recruit and retain disabled people (020 7403 3020; [www.efd.org.uk](http://www.efd.org.uk)).
- The service provided by Acas is free, confidential and impartial (08457 47 47 47; [www.acas.org.uk](http://www.acas.org.uk)).

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