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STANDING UP FOR YOU

Summary of the law
on sexual orientation
discrimination

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standing up for you

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The Spirit of Brotherhood
by Bernard Meadows

About this booklet

This booklet sets out the basic employment rights to which workers are entitled under the sexual orientation discrimination provisions of the Equality Act 2010. These apply in England, Wales and Scotland (except where indicated) only.

- Protection and liability.
- Discrimination.
- Harassment.
- Victimisation.
- Exceptions.
- Tribunal claims.
- Remedies.
- Civil partnership.

What does the Equality Act cover?

The Act covers all forms of discrimination in the workplace, including; recruitment, terms and conditions, promotions, transfers dismissals and training or any other detrimental treatment because of sexual orientation.

Who is protected?

It covers all forms of employment and applies to apprentices, those working under a contract of employment and the self employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment.

Sexual orientation discrimination legislation applies to lesbian women, gay men, heterosexual people and bi-sexual people.

Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable for example if they have subjected a colleague to harassment related to sexual orientation.

When can sexual orientation discrimination arise?

Sexual orientation discrimination can arise in relation to:

- The arrangements made for deciding who should be offered employment such as shortlisting and interviews.
- The terms upon which employment is offered.
- Refusing or deliberately omitting to offer employment.
- The ways in which access to opportunities for promotion, transfer, training or other benefits, facilities or services are offered.
- Dismissal or any other detriment.

What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day-to-day decisions, both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people from different groups.
- Foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. Broadly these require specified public bodies to publish information on how the general duty is being met, and to prepare and publish one or more equality objectives.

The specific duties for England, Wales and Scotland are different. Trade unions should therefore check that the employer is complying accordingly.

What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion.

If they reasonably think that the person with a protected characteristic suffers a disadvantage because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the protected characteristic provided that:

- The person with the protected characteristic is as qualified as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the under-represented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.

What does the Act outlaw?

Direct discrimination

Direct discrimination means treating a worker less favourably than someone else because of sexual orientation.

In order to determine whether someone is directly discriminated against, a comparison has to be made with someone who is not of the same sexual orientation but whose circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to be of a particular sexual orientation or because they are associated with someone of a particular sexual orientation.

Examples of direct discrimination include:

- Someone who is not promoted because they are a gay man.
- Someone who is subject to harassment because they have a daughter who is a lesbian.
- Someone who is prevented from attending training because they are thought to be bi-sexual.

Indirect discrimination

Indirect discrimination arises when an employer applies a provision, criterion or practice which puts those of a particular sexual orientation at a particular disadvantage compared to those who do not share the same sexual orientation and which the employer cannot justify.

Employers can only justify indirect discrimination if they can show that it is "a proportionate means of achieving a legitimate aim".

Harassment

This occurs when one person subjects someone else to unwanted conduct related to sexual orientation that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subjected to unwanted conduct because of another person's sexual orientation. So, for example, a worker who is subjected to offensive comments about their lesbian daughter will be protected under the Act.

Unwanted conduct includes the spoken or written word, jokes, graffiti or other behaviour.

In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.

Victimisation

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- Bringing proceedings under the Act.
- Making allegations of a breach of the Act.
- Giving evidence or information in connection with proceedings that someone else has brought in relation to the Act.
- Doing anything else in connection with the Act, such as raising a grievance.

The person complaining of victimisation does not need to show that they are of a particular sexual orientation in order to bring a claim. However, they do have to have acted in good faith when doing a protected act. If someone knowingly makes a false allegation, it will not amount to a protected act.



Are there any exceptions?

There are a number of exceptions to the principle that people should not be discriminated against because of sexual orientation, the two most-commonly argued principles being:

- Occupational requirement (OR).
- Benefits dependent on marital status.

Occupational requirement (OR)

The Act does not apply when the employer can show that there is an occupational requirement to do with the nature or context of the work which means they need to recruit someone of a certain sexual orientation. However, the employer also has to show that the requirement is a proportionate means of achieving a legitimate aim.

The occupational requirement applies only to direct discrimination in recruitment, promotion, transfer and training, and not to the way in which an employer affords access to benefits, facilities or services.

In practice, the occupational requirement will only apply in very limited circumstances.

Discrimination because of sexual orientation is also lawful in relation to employment for the purposes of an organised religion. Organised religion is not defined in the Act but case law has established that it should be applied very narrowly.

In order to satisfy the occupational requirement the employer will have to show that the employment is for the purposes of an organised religion; that there is a requirement which is related to sexual orientation and that applying that requirement is a proportionate means of complying with the doctrines of the religion or which avoids conflict with the strongly held religious convictions of its followers. The employer would also have to show that the employee either does not meet the requirement or that they have reasonable grounds for being satisfied that is the case.

Benefits dependent on marital status

The Act states that it does not amount to sexual orientation discrimination where an employer provides certain benefits restricted to married persons or civil partners.

In terms of occupational pension schemes, the Supreme Court ruled in the case of *Walker v Innospec Limited* that it is discriminatory to limit the calculation of a survivor's pension payable to a civil partner to service after 5 December 2005, which is when the Civil Partnership Act 2004 came into force. A spouse's pension payable to a surviving partner must therefore reflect the whole period of pensionable service in the same way as for opposite sex marriages.

Is it easy to prove a claim?

Someone complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them because of sexual orientation.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so once an employee has established facts from which a Tribunal could conclude that there had been discrimination, then the burden may shift to the employer to show that they did not discriminate against them.

This is known as the reversal of the burden of proof.

How do workers gather information from their employer?

Workers can use the ACAS (Advisory, Conciliation and Arbitration Service) guidance, 'Asking and responding to questions of discrimination in the workplace', to request information from the employer which is relevant to a potential claim of discrimination.

Although the employer is not under a sexual orientation legal obligation to respond if the case proceeds to an employment tribunal hearing, an employment tribunal may draw an inference if the employer does not respond or its replies are evasive.



What is Early Conciliation?

Early Conciliation is the requirement to contact ACAS before lodging an employment tribunal claim. This can be done over the phone or by completing an Early Conciliation notification form on line on the ACAS website (www.acas.org.uk).

Early Conciliation usually lasts for four weeks, after which a conciliation certificate is issued. The Early Conciliation certificate number must be put on the employment tribunal claim form (ET1). If it is not, the claim form will be rejected and the claim may go out of time.

What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances, the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

When the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.

What remedies are available?

There are three remedies available to a Tribunal:

- Declaration.
- Compensation.
- Recommendations.

Declaration

A declaration is a statement of the rights at the end of a claim, for instance that a worker has been subject to direct discrimination.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. This will vary from case to case and depends on the individual circumstances. There is no statutory limit to the amount of compensation, which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination.

The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Aggravated damages (not applicable in Scotland) can also be awarded if the Tribunal is satisfied that the employer has behaved in a high-handed, malicious or insulting way which has aggravated the injury to the claimant's feelings

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.

Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant.

Examples of recommendations Tribunals have made include requiring an employer to:

- Ensure their harassment policy is more effectively implemented.
- Review the equal opportunities, harassment and grievance procedures.
- Re-locate the harasser.

A Tribunal cannot recommend that a person be given a job in a case where an employee successfully claimed they were discriminated against in a promotion exercise, for example.

If the employer fails without reasonable excuse to comply with a recommendation, then the Tribunal may order the compensation to be increased.

Discrimination because of civil partnership

Anyone who is in a civil partnership is also protected under the Act. Civil partnership refers to the union of a same-sex couple under the Civil Partnership Act 2004, including those registered outside the UK.

People who only intend to form a civil partnership, or who have had their civil partnership dissolved, are not protected.

Unlike other discrimination legislation, there is no protection from direct discrimination by association or perception or harassment for those who are in a civil partnership, although harassment related to civil partnership may amount to harassment because of sexual orientation.

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Published September 2017

TH17-122

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