

# EQUALITY: THE LEGAL FRAMEWORK



## THE OBJECTIVES OF THIS CHAPTER ARE TO:

- 1 REVIEW THE KEY LEGAL REQUIREMENTS IN THE AREAS OF DISCRIMINATION
- 2 EXPLAIN THE CORE PRINCIPLES OF DISCRIMINATION LAW
- 3 DISTINGUISH BETWEEN DIRECT AND INDIRECT DISCRIMINATION
- 4 EXPLAIN THE IMPORTANCE OF HARASSMENT IN DISCRIMINATION LAW
- 5 SET OUT THE MAJOR DEFENCES DEPLOYED BY EMPLOYERS IN DISCRIMINATION CASES

An important part of employment law in the UK is concerned with deterring employers from discriminating unfairly at any stage in their relationship with an individual worker. It is an area of law which is well established but which is also developing fast in new directions. As we write there are specific statutes making it unlawful to discriminate on the following grounds:

- sex;
- marital status;
- race;
- national origin;
- ethnicity;
- disability;
- sexual orientation;
- religion or belief;
- union membership or non-membership;
- that individuals are part-time workers;
- that individuals are fixed-term workers,
- that individuals are ex-offenders whose convictions are spent.

Discrimination law operates rather differently in the case of each of the above grounds, providing a greater degree of protection, for example, to those discriminated against on the grounds of sex or race than to union members or ex-offenders. In some cases the law allows employers to discriminate on certain grounds provided their action can be objectively justified, while in others the grounds for defence are very limited.

In recent years the UK has had to amend and extend its discrimination laws in order to comply with new European directives which establish a common framework across all member states in respect of discrimination on grounds of sex, race, sexual orientation, religion or belief, disability and age. By the end of 2006 this process will be complete, meaning that most of UK discrimination law will fall within the boundaries of European competence, the European Court of Justice being the final court of appeal.

In the following chapter we look more generally at employment policy on equality issues and at the practices associated with the effective management of diversity.

### ACTIVITY 23.1

What other grounds, aside from those currently covered by the law, would you consider should be covered by discrimination law? Are there any that are currently covered that you think should not be?



## DISCRIMINATION ON GROUNDS OF SEX OR MARITAL STATUS

The two major Acts of Parliament that govern sex discrimination matters in the UK are the Equal Pay Act 1970 and the Sex Discrimination Act 1975. Although both came into effect thirty years ago they have been subsequently amended in important ways. Sex discrimination is an area of law which has long been one of EU competence, so appeals can be made to the European Court of Justice. UK law can also be challenged in the European courts if it is considered that it fails to comply in some way with Article 141 of the Treaty of Amsterdam (formerly Article 119 of the Treaty of Rome) or with EU directives in the sex discrimination field.

Employer actions are policed to some extent by the Equal Opportunities Commission (EOC) which is required to keep the legislation under review, to conduct formal investigations into employer actions where it has reason to suspect there has been a contravention of the law, to issue codes of practice and to provide legal assistance to employees who consider themselves to be victims of unfair discrimination. On many occasions the EOC has itself represented employees before employment tribunals. It also brings its own test cases in a bid to push back the frontiers of sex discrimination law. In the future the EOC's current duties will be carried out by a new larger body with responsibilities extending across and beyond the major fields of discrimination law. At the time of writing the provisional title is the Commission for Equality and Human Rights.

### The Equal Pay Act 1970

The Equal Pay Act 1970 was the first legislation promoting equality at work between men and women. Although passed in 1970, it only came into force in December 1975. It was subsequently amended, and its scope extended, by the Equal Pay (Amendment) Regulations 1983 and by the Sex Discrimination Act 1986. The Act is solely concerned with eliminating unjustifiable differences between the treatment of men and women in terms of their rates of pay and other conditions of employment. It is thus the vehicle that is used to bring a case to tribunal when there is inequality between a man's contract of employment and that of a woman. In practice the majority of cases are brought by women and concern discriminatory rates of payment, although there have been some important cases brought by men focusing on aspects of pension provision.

The Act, as amended in 1983, specifies three types of claim that can be brought. These effectively define the circumstances in which pay and other conditions between men and women should be equal:

- 1 Like work:** where a woman and a man are doing work which is the same or broadly similar – for example where a woman assembly worker sits next to a male assembly worker, carrying out the same range of duties.
- 2 Work rated as equivalent:** where a man and a woman are carrying out work which, while of a different nature, has been rated as equivalent under a job evaluation scheme. We cover this aspect of equal pay in greater detail in Chapter 27.
- 3 Work of equal value:** where a man and a woman are performing different tasks but where it can be shown that the two jobs are equal in terms of their demands, for example in terms of skill, effort and type of decision making.

In order to bring a case the applicant must be able to point to a comparator of the opposite gender with whom he or she wishes to be compared. The comparator must be employed by the same employer and at an establishment covered by the same terms and conditions. When an equal value claim is brought which an employment tribunal considers to be well founded, an ‘independent expert’ is appointed to carry out a job evaluation exercise in order to establish whether or not the two jobs being compared are equal in terms of the demands they make.

Employers can employ two defences when faced with a claim under the Equal Pay Act. First, they can seek to show that a job evaluation exercise has been carried out which indicates that the two jobs are not like, rated as equivalent or of equal value. To succeed the job evaluation scheme in use must be both analytical and free of sex bias (*see* Chapter 27). Second, the employer can claim that the difference in pay is justified by ‘a genuine material factor not of sex’. For this to succeed, the employer has to convince the court that there is a good business reason for the unequal treatment and that there has thus been no sex discrimination. Examples of genuine material factors that have proved acceptable to the courts are as follows:

- different qualifications (e.g. where a man has a degree and a woman does not);
- performance (e.g. where a man is paid a higher rate than a woman because he works faster or has received a higher appraisal rating);
- seniority (where the man is paid more because he has been employed for several years longer than the woman);
- regional allowances (where a man is paid a London weighting, taking his pay to a higher rate than that of a woman performing the same job in the Manchester branch).

The courts have ruled that differences in pay explained by the fact that the man and woman concerned are in separate bargaining groups, by the fact that they asked for different salaries on appointment or because of an administrative error are not acceptable genuine material factor defences. It is possible to argue that a difference in pay is explained by market forces, but evidence has to be produced to satisfy the court that going rates for the types of work concerned are genuinely different and that it is therefore genuinely necessary to pay the comparator at a higher rate.

In 2003 a questionnaire system was introduced to provide a vehicle for people who believe that they may have grounds for bringing a claim formally to ask their employers whether they are being paid less than a named comparator and, if this is the case, to give reasons. Legal action can then follow (or be threatened) if the reasons given are unsatisfactory. When someone wins an equal pay claim they are entitled to receive up to six years’ back pay to make up the difference between their salary and that of their comparator.

#### WINDOW ON PRACTICE

Ms Smith was taken on to work for a company as a stockroom manager at a salary of £50 a week. After a few months she discovered that her predecessor (a man) had been paid £60 a week for doing the same job. As there was no suitable male

comparator currently employed by the firm, she decided to bring an equal pay case using her predecessor as her male comparator. The European Court of Justice decided that this was acceptable under the terms of Article 119 of the Treaty of Rome. Ms Smith thus won her case.

In a more recent case, a woman who had been employed in a senior role resigned and was subsequently replaced by a man who was paid a considerably higher salary. She brought an equal pay claim against her former employer citing her successor as the male comparator. This too was ruled acceptable under the terms of the European Treaties. Sources: *Macarthy's Ltd v. Smith* (1980), *Diocese of Hallam Trustees v. Connaughton* (1995).

### The Sex Discrimination Act 1975

The Sex Discrimination Act also came into force in December 1975 and was designed to complement the Equal Pay Act 1970 by dealing primarily with non-contractual forms of sex discrimination such as employee selection, the provision of training opportunities, promotion, access to benefits and facilities and dismissal. It also applies outside the workplace, so case law that relates to events which have nothing at all to do with employment can be the source of important precedents. The Act covers all workers whether or not they serve under contracts of employment or are employed and all job applicants. The only groups excluded are ministers of religion, soldiers who may serve in front-line duties and people employed to work abroad. It thus remains permissible for firms recruiting employees to work in Saudi Arabia exclusively to select men. The Act applies equally to men and women, and also protects people from unfair discrimination on the grounds that they are married.

There are three headings under which claims are brought: direct discrimination, indirect discrimination and victimisation, the way the law works in each case being rather different.

**Direct discrimination** is straightforward. It occurs simply when an employer treats someone unfavourably and when sex or marital status is an important factor in this decision. In judging claims the courts use the 'but for' test, asking whether the woman would have received the same treatment as a man (or vice versa) but for her sex. Examples of direct sex discrimination include advertising for a man to do a job which could equally well be done by a woman, failing to promote a woman because she is pregnant or dismissing a married woman rather than her single colleague because she is known to have a working husband.

If an employer is found to have discriminated *directly* on grounds of sex or marital status, except in one type of situation, there is no defence. The courts cannot, therefore, take into account any mitigating circumstances or make a judgment based on the view that the employer acted reasonably. Once it has been established that direct discrimination has occurred, proceedings end with a victory for the applicant. The one exception operates in the area of recruitment, where it is possible to argue that certain jobs have to be reserved for either women or men. For this to be acceptable the employer must convince a court that it is a job for which there is a 'genuine occupational qualification'. The main headings under which such claims are made are as follows:

- **authenticity** (e.g. acting or modelling jobs);
- **decency** (e.g. lavatory or changing room attendants);
- **personal services** (e.g. a counsellor engaged to work in a rape crisis centre).

Direct discrimination on grounds of pregnancy or maternity is assumed automatically to constitute unlawful sex discrimination. This means that there is no defence of reasonableness whatever the individual circumstances. It is thus unlawful to turn down a job application from a well-qualified woman who is eight months pregnant, irrespective of her intentions as regards the taking of maternity leave.

**Indirect discrimination** is harder to grasp, not least because it can quite easily occur unintentionally. It occurs when a ‘requirement or condition’ is set which has the effect, in practice, of disadvantaging a significantly larger proportion of one sex than the other. In other words, if substantially fewer women than men can comply with the condition, even if it is applied in exactly the same way to both men and women, it is potentially unlawful. A straightforward example is a job advertisement which specifies that applicants should be taller than 5 feet 10 inches. This is indirectly discriminatory because a substantially smaller proportion of women are able to comply than men. The same rule applies in the case of discrimination on grounds of marital status, an example being that of an employer who offers promotion on the basis that the employee must be prepared to be away from home for considerable spells of time, when in reality such absence was never or rarely required.

Indirect discrimination differs from direct discrimination in that there are defences that an employer can deploy. For example, an employer can justify the condition or requirement they have set ‘on grounds other than sex’, in which case it may be lawful. An example might be a job for which a key requirement is the ability to lift heavy loads. It is reasonable in such circumstances for the employer to restrict recruitment to people who are physically able to comply, for example by including a test of strength in selection procedures. The fact that more men than women will be able to do so does not make the practice unlawful, provided the lifting requirement is wholly genuine.

In the USA the ‘four-fifths rule’ applies in judging cases of indirect discrimination, meaning that a practice is unlawful where the proportion of one sex that can comply with the condition is fewer than 80 per cent of the other. At present there is no such convention in the UK, meaning that it is for individual tribunals to decide what exactly constitutes ‘a substantially smaller proportion’ of men or women when judging these cases.

### WINDOW ON PRACTICE

A leading case in indirect sex discrimination law is *Price v. Civil Service Commission* (1977). This concerned a requirement set by the Civil Service that applicants for posts of executive officer level should be between the ages of 17 and 28. Mrs Price, who was 36, claimed that an advertisement for an executive officer was indirectly discriminatory against women on the grounds that a substantially greater proportion of men could in practice comply with the age requirement. Her case was based on the contention that many women were outside the labour market during these ages bringing up children. The Employment Appeals Tribunal agreed with her and declared the age limitation to be unreasonable.

In the field of sex discrimination the term ‘**victimisation**’ means the same as it does in other areas of employment law. An employer victimises workers if it disadvantages them in any way simply because they have sought to exercise their legal rights or have assisted others in doing so. An employee would thus bring a claim of victimisation to a tribunal if they had been overlooked for promotion having recently successfully settled an equal pay claim. Importantly victimisation covers situations in which someone threatens to bring an action or plans to do so even if no case is ultimately brought.

### **Positive discrimination**

Positive sex discrimination involves directly or indirectly discriminating in favour of women in situations where they are underrepresented – usually at senior levels in an organisation or in occupational groups which are male dominated. Such practices are unlawful under UK law when they involve actively discriminating against men who are better qualified to fill the positions concerned. However, it is lawful to take positive action aimed at encouraging and supporting women provided it stops short of actually discriminating in their favour. It is thus acceptable to include an equal opportunities statement in a job advertisement as a means of indicating that the organisation welcomes applications from women. Similarly employers can design and offer training courses tailored specifically for women. As long as men are not prevented from participating, such action is lawful.

### **Dress codes**

In relation to dress codes, a tribunal will only find valid a claim of sex discrimination if the applicant or applicants can be shown to have suffered a detriment as a result of the condition being imposed. Merely treating members of the two sexes differently is not in itself sufficient to constitute unlawful indirect discrimination. For this reason it is acceptable in principle for employers to impose different dress codes on male and female staff, provided the same broad ‘standard of conventionality’ is applied.

It is thus lawful, as far as sex discrimination law is concerned, to insist that male employees wear business suits at work while permitting women more choice about their attire. Over the years, however, tribunals have adapted their interpretation of the term ‘standards of conventionality’ to reflect changing social norms. As a result sex discrimination claims have been successfully won by men who wish to retain their long hair tied in a pony-tail and women who wish to wear trousers at work.

### **Transsexuals**

Whereas homosexuals have had great difficulty over the years in persuading the courts that they have rights under sex discrimination law, transsexuals have been protected for some years. It is therefore unlawful to discriminate against someone on the grounds that he or she is a medically defined transsexual. The rights of people undergoing gender reassignment are now specifically protected by the Sex Discrimination (Gender Reassignment) Regulations 1999.

## ACTIVITY 23.2

In making its judgment in *Rewcastle v. Safeway* (1989), a case that concerned the dismissal of a man who refused to cut his hair to a conventional male length, the tribunal made the following remark about the law on dress codes:

Whilst we naturally accept the employer's right to determine standards of appearance and dress for its employees . . . we question whether a policy which is designed to mirror 'conventional' differences between the sexes can be reconciled with the underlying rationale of the sex discrimination legislation which is to challenge traditional assumptions about sexes.

To what extent do you agree with these sentiments?

Source: IRS (1993, p. 11).



## Sexual harassment

While the area of sexual harassment is not specifically covered in the Sex Discrimination Act 1975, the courts have accepted for some years that allowing someone to be subjected to acts of harassment which have a sexual dimension amounts to unlawful sex discrimination. Although the law applies equally to men and women, the vast majority of cases are brought by women. The employer's liability in harassment cases arises from the application of the doctrine of **vicarious liability**, under which employers are held responsible for the commitment of civil wrongs by employees when they are at work. The doctrine also plays an important role in health and safety law, as we saw in Chapter 22.

Sexual harassment is defined in a European Union code of practice dating from 1991. It establishes the following:

- (a) that it consists of unwanted conduct of a sexual nature or based on sex, which affects the dignity of men and women at work;
- (b) that sexual harassment can be physical or verbal in nature;
- (c) that the conduct *either* leads to material detriment (i.e. it affects promotion, pay, access to training, etc.) *or* creates an intimidating or humiliating work environment.

In judging cases the courts focus on the reaction of the victim and do not apply any general definitions of what types of conduct do and do not amount to unlawful harassment. Hence conduct which may not offend one person in the slightest can be found to constitute sexual harassment when directed at someone else who is deeply offended.

For an employer the only valid defences relate to the notion of vicarious liability. An employer can, for example, claim ignorance of the incident of which the victim is complaining or can claim that vicarious liability does not apply because it occurred away from the workplace and outside office hours. Finally the employer can defend itself by showing that all reasonable steps were taken to prevent the harassment from occurring or continuing. In order to succeed here, the employer needs to produce evidence to show that initial complaints were promptly acted upon and that



appropriate action, such as disciplining the perpetrators or moving them to other work, was taken.

## RACE DISCRIMINATION

UK race discrimination law is governed by the Race Relations Act 1976 and subsequent amendments. This area of law became one of European competence in 2003, but the principles established in the 1976 Act have not changed, and they remain very similar to those set out in the Sex Discrimination Act described above. The law applies to all workers except those recruited to work overseas or in private households. The 'direct' and 'indirect' forms of discrimination are defined in the same way as in sex discrimination law, as are the terms 'victimisation', 'positive discrimination' and 'harassment'. Moreover, the Commission for Racial Equality plays a similar facilitating role to that played by the Equal Opportunities Commission in the field of sex discrimination. Precedents from the sex discrimination arena can apply in that of race discrimination and vice versa. There is, however, no equivalent law to that contained in the Equal Pay Act operating in the field of race discrimination.

Importantly the Act extends beyond discrimination on grounds of race to embrace the notions of nationality and ethnic and national origin. It is thus as unlawful for an employer to discriminate against someone because they are French or American as it is to treat someone less favourably because of their racial origins. The term 'ethnicity' was defined by Lord Fraser in the case of *Mandla v. Lee* (1983) as applying to a distinct group within the population sharing the following essential characteristics:

- a long history of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive;
- a cultural tradition of its own, often but not necessarily associated with religious observance;
- a common geographical origin, or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to the group;
- a common literature peculiar to the group;
- a common religion different from that of neighbouring groups or from the general community surrounding it;
- being a minority or being an oppressed or a dominant group within a larger community.

According to this definition, merely practising a minority religion is an insufficient basis to constitute being of distinct ethnic origin. There also has to be a shared and long history of distinctiveness. As a result, until the introduction of law preventing discrimination based on religion in 2003, unless a religious group was ethnically distinct, its members could lawfully be treated less well because of their faith.

Genuine occupational qualifications (now known as genuine occupational requirements), as in sex discrimination law, permit discrimination on grounds of race at the recruitment stage for one or two kinds of job. The main grounds are authenticity and the provision of personal services to members of a particular racial community. In the case of race discrimination the defence of authenticity extends to employers of people to work in ethnic restaurants.

Most cases involving indirect discrimination under the Race Relations Act concern requirements being set for a high standard of English or for specific UK-based qualifications. As in sex discrimination law, it is necessary to be able to show objectively that these are necessary for the jobs in question. The courts will not allow employers to set conditions such as these unless it can be shown that there really is a *need* for such a condition. For example, in the case of *Hampson v. Department of Education and Science* (1990) a teacher was able to show that the requirement to have completed a three-year training course before being appointed to a teaching post in the UK unfairly discriminated against people of Chinese origin who had qualified in Hong Kong. She was successful because she was able to convince the Court of Appeal that her two-year qualification followed by eight years' classroom experience made her well qualified to teach in Britain.

A fine line has to be trodden when recruiting people from overseas countries because there is a need to stay on the right side of both the Race Relations Act 1976 and the more recent Asylum and Immigration Act 1996. The former makes it unlawful to treat an overseas application unfavourably in any way, while the latter makes it a criminal offence to employ someone who does not have the right of residence in the UK or a valid work permit. Great care is thus called for in handling such matters.

### WINDOW ON PRACTICE

A race discrimination case with important implications was brought by two women in 1996.

This case concerned the appearance at a private function of Mr Bernard Manning in the guise of a comedian. The audience consisted of 400 men who were treated to a routine consisting in large part of racially and sexually offensive jokes. Two of the waitresses employed by the hotel at the function were black. Bernard Manning noticed them and made a number of remarks directed at them during his routine.

The two women sued the hotel group which employed them on the grounds that it was vicariously liable and that they had been allowed to suffer racial harassment. The employer contested this, saying that it could not be liable for offensive remarks made by someone who was not an employee – indeed was not even a guest in the hotel and thus had no contractual relationship with it at all.

The women won their claim, successfully arguing that the hotel's management had failed to take action to prevent the harassment from occurring by removing them from the function at the earliest possible time.

Source: *Burton v. De Vere Hotels Ltd* (1996).

## DISABILITY DISCRIMINATION

The Disability Discrimination Act (1995) came into force in December 1996, since when several thousand cases have been lodged with employment tribunals. It replaced the Disabled Persons (Employment) Act 1944, which was widely criticised for being ineffective, only eight successful prosecutions having been brought during its

fifty-year existence. From April 2000 the Disability Rights Commission has been in operation, with a remit in respect of discrimination against disabled people which is very similar to that of the Equal Opportunities Commission and the Commission for Racial Equality in their respective fields. Disability discrimination will come within the field of European competence in 2006. This has major consequences for countries which do not have established law in this area, but for the UK only relatively minor adjustments are necessary. The Disability Discrimination Act was thus amended in October 2004 so as to bring it into line with expected EU requirements.

While it shares some features in common with established legislation on sex and race discrimination, disability discrimination law is different in important respects. The most significant is the restriction of protection to direct discrimination and victimisation. There are no provisions equivalent to those on indirect discrimination in the Sex Discrimination and Race Relations Acts. The key words are as follows:

An employer discriminates against a disabled person if for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply. (Disability Discrimination Act 1995, s. 5(1))

The Act is thus concerned with preventing an employer from discriminating directly against an individual worker or job applicant who suffers from a disability. There is no specific prohibition on the setting of requirements for use in recruitment or promotion processes which might be held to discriminate against disabled people in general. It is thus lawful to list 'good record of health' as a desirable characteristic in a person specification – that alone cannot constitute discrimination under the terms of the Act. Employers only invite tribunal claims at the point that they actually discriminate against an individual.

However, this does not mean that employers can safely use language in job advertisements which could deter disabled people, because the advertisement can later be used by a rejected applicant as evidence in support of a disability discrimination claim. Newspapers and employment agencies which knowingly publish advertisements which are discriminatory may also face fines of up to £5,000 if successfully prosecuted.

The other important difference between direct discrimination on grounds of disability and that on grounds of sex or race is the existence of defences which an employer can employ. Essentially, 'less favourable treatment' is permitted if it is for a good reason. An example of this might be a typist who is required to type at a certain speed due to valid job demands. If a person with arthritis in their hands, who could only type at a much lower speed, applied for this job, they could lawfully be rejected on the grounds of their disability provided the potential employer had first explored whether any adjustment in the working environment could be made to overcome the mismatch. Discrimination is thus permitted if no 'reasonable adjustment' can be made to allow the person concerned to perform the job satisfactorily. Employers are nonetheless under a duty to consider reasonable adjustments in any situation in which 'a provision, criterion or practice puts the disabled individual at a substantial disadvantage'.

Since 2004 a distinction has been made between treating somebody less favourably ‘because they are disabled’ and treating somebody less favourably ‘for a reason related to their disability’. There is now no defence that can be deployed in the former case, the established defence relating to reasonable adjustment remaining in the latter.

There are two key issues which the courts are required to rule on when determining cases brought under the Disability Discrimination Act:

- 1 What does and what does not constitute a disability for the purposes of the Act.
- 2 What is and what is not ‘a reasonable adjustment’ for an employer to make in order to accommodate the needs of a disabled person.

The first issue is decided with reference to the words used in the Act. These define someone as disabled if they have ‘a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities’. The term ‘impairment’ is taken by the courts to mean any kind of a loss of a key bodily function such as the ability to hear, see, walk or write. It also covers conditions involving loss of memory and incontinence. An impairment is ‘substantial’ if it is more than minor or trivial, while ‘long term’ is defined as a condition which has lasted or *might reasonably* be expected to last for 12 months or more.

The words ‘normal day to day activities’ have been the source of much confusion and litigation. This is because the courts have taken the phrase very much at face value. It is thus the case that someone is not disabled – and is thus not protected by the Act – if their condition stops them from climbing mountains or playing football, as these are not considered to be ‘normal day to day activities’. It has to be an impairment which severely restricts someone’s ability to carry out basic, commonplace tasks in the household or workplace.

However, provided the symptoms are serious in their impact, virtually all medical conditions can potentially be accepted as ‘disabilities’ for the purposes of the Disability Discrimination Act. This includes mental illnesses as well as those with physical symptoms. Hence the definition of disability in the Act has been found by the courts to encompass severe depression, bulimia and ME, as well as asthma, speech impairments and severe back pain. Severe facial disfigurement is also included as a relevant condition. The only exceptions are a few conditions with socially undesirable symptoms which have specifically been excluded. These include alcoholism, drug addiction, exhibitionism, kleptomania and pyromania. Hay fever is also excluded. Importantly it is irrelevant whether or not an individual has recovered from their disability. Discriminating against someone on the grounds that they have suffered from a condition in the past amounts to unlawful discrimination, provided the discrimination met the definition set out in the Act. The fact that someone can live and work normally because they are receiving treatment for their condition, for example in the form of drugs or psychiatric counselling, does not mean that they have ceased to be disabled under the terms of the Act. It is thus unlawful to discriminate against them on these grounds without an objectively justifiable reason.



## WINDOW ON PRACTICE

In 1997 a Mr Quinlan was dismissed from his job as an assistant working at a garden centre after seven days because he refused to carry out the heavy lifting work that formed a part of the job. He would not do this because he had had open heart surgery some ten years previously and had been told that lifting heavy weights might injure his health. He brought a claim to a tribunal under the Disability Discrimination Act arguing that it would have been reasonable for the employer to omit from his work the requirement to lift heavy weights, and that his dismissal was thus unlawful.

He lost his case on the grounds that he was not disabled under the terms of the Act. This was because lifting heavy weights was not found to constitute 'a normal day to day activity'. He could only have succeeded had his illness not allowed him to lift everyday objects. There was no consideration given to questions of reasonable adjustment, because the Disability Discrimination Act was found not to apply to Mr Quinlan in the first place.

(*Quinlan v. B&Q plc* (1997) Employment Appeals Tribunal 1386/97).

Source: L. Macdonald (1998) 'Discrimination', *Personnel Manager's Factfinder*. London: Gee Publishing.

The burden of proof in disability discrimination cases passes to the employer to satisfy the tribunal that no reasonable adjustments could be made to accommodate the needs of a disabled person. The courts thus assume that adjustments are possible unless the employer can show that it would be unreasonable to expect them to be made. There are no general rules here, because the courts are obliged in reaching their judgments to take account of the size and resources of the employer concerned. The large PLC is thus expected to make bigger adjustments in response to the demands of the Act than the owner of a small corner shop.

It is expected that employers consider making adjustments to the physical working environment, working arrangements and working conditions. Minor building alterations are clearly covered; so unless the employer is very small and is unable to afford to make them, it would be expected that disabled toilets and/or wheelchair ramps would be installed to accommodate a disabled person. Other examples would include changing taps to make them easier to switch on, altering lighting for people with restricted vision and allocating specific parking spaces. However, the concept of 'reasonable adjustment' goes a great deal further, encompassing changes in all kinds of working practices. It is thus expected that employers reorganise duties, allocate ground-floor offices to wheelchair users, adjust working hours for a disabled person or allow someone to work from home if these changes would allow an individual disabled person to be employed. Of particular importance is the requirement to permit disabled people a greater amount of sick leave than other employees. Hence, as was shown in Chapter 9, it is no longer possible to dismiss a chronically ill employee on grounds of incapability, without first considering whether reasonable adjustments could be made to allow them to continue working. The courts expect to see evidence that the employer has given serious consideration to a request for adjustments and that no request is turned down without a proper investigation having first taken place.

When applicants win their cases at tribunal, there are three possible outcomes:

- 1 The tribunal issues a declaration affirming the complainant's rights (e.g. preventing an employer from making someone redundant).
- 2 The tribunal makes a recommendation (e.g. requiring a doorway to be widened to accommodate a wheelchair).
- 3 The tribunal makes a compensatory award.

In the case of the third outcome, there are no statutory limits on the compensation that can be paid, allowing the courts to fully recompense people for any past or estimated future losses they may have incurred.

## DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION

The Equality (Sexual Orientation) Regulations 2003 gave effect to EU law which seeks to protect people from discrimination on grounds of their sexual orientation. For many years test cases had been brought in a bid to establish rights of this kind using sex discrimination law. Occasionally applicants were successful, but almost all these rulings were subsequently overturned by the higher courts. The principle that such discrimination is unlawful has now been established in statute, but aspects of the 2003 regulations are controversial, and there are significant outstanding issues that will have to be addressed by the courts as cases come through the system. Research suggests that discrimination against people on grounds of their sexual orientation is common in the UK, so there are good reasons for anticipating substantial numbers of claims being brought to employment tribunals in the coming years.

All workers and job applicants are covered by the regulations. Former employees are also explicitly covered and could bring a claim, for example, were a discriminatory job reference to be written. Four types of claim can be brought, reflecting the standard approach to discrimination law which is now being developed in the statutes. The meanings of these terms are the same as for sex discrimination law (*see above*):

- 1 direct discrimination;
- 2 indirect discrimination;
- 3 harassment;
- 4 victimisation.

Harassment claims are likely to be common under the 2003 regulations, as evidence suggests that this is the major source of discrimination against gay and lesbian people. It is thus important for employers to put relevant policies in place and to take a very firm line with staff who perpetrate harassment of this kind if they wish to avoid a day in court defending their actions.

One of the most interesting issues the government had to wrestle with when drawing up the regulations was how to define the term 'sexual orientation'. After consulting extensively it was decided to define the term narrowly and specifically as meaning 'a sexual orientation towards persons of the same sex, persons of the opposite sex, or persons of the same sex and the opposite sex'. Importantly, the regulations make it unlawful to discriminate against someone 'on grounds of sexual orientation' and not simply because of their sexual orientation. This means that

treating someone unfavourably because a relative is gay or because they have gay friends is as unlawful as discriminating against someone because they are themselves gay or perceived to be so. Discriminating against people because they are not gay is also equally unacceptable under the regulations. It remains to be seen how the courts will deal with situations in which someone claims to be in a gay relationship in order to gain access for a partner to a benefit of some kind (e.g. a staff discount scheme) but where the employer claims that they are not in fact in a gay relationship.

As is the case with existing law on sex and race discrimination, it is permissible to discriminate against people on grounds of sexual orientation where there is a 'genuine occupational requirement'. It is thus lawful in principle to refuse to employ someone, or to promote them, if the job concerned is only suitable for someone of a particular sexual orientation. However, the guidance notes issued by the government and ACAS suggest only two types of genuine occupational requirement that might apply:

- 1 Counselling/support services related to sexual matters.
- 2 Some roles in religious organisations.

A major source of complaint, and of litigation, over the years has been differential treatment given to heterosexual and homosexual people in the field of employee benefits. Pension scheme rules are the biggest issue, particularly widows' pensions and survivors' payments under life assurance terms, but some staff discount schemes have similarly been restricted to spouses and heterosexual partners. While the 2003 regulations make it unlawful for an employer to favour heterosexual partners over homosexual partners in the operation of any type of scheme, it remains possible to restrict benefits to married people. This aspect of the law has been the subject of much criticism and is likely to be the subject of legal challenges at an early opportunity.

## **DISCRIMINATION ON GROUNDS OF RELIGION OR BELIEF**

The Employment Equality (Religion and Belief) Regulations also came into force in December 2003 and derive directly from the European Union's Equal Treatment Framework Directive. Their structure and content is the same as for sexual orientation, although the practical issues that they throw up are different. They had the effect of righting some anomalies in existing UK law, under which discrimination *purely* on grounds of religious belief was lawful except in Northern Ireland. Religious groups who do not share a common ethnicity are thus now protected from unfair discrimination.

The government stated from the outset that its intention was to define the term 'religion or belief' narrowly. However, the definition that appears in the draft regulations allows plenty of room for interpretation. The wording used is 'any religion, religious belief or similar philosophical belief'. Specifically excluded are 'philosophical or political beliefs unless those beliefs are similar to a religious belief'. The aim is to try to avoid a situation arising in which, for example, a member of a neo-nazi group could make use of the law to protect themselves from discrimination on grounds of their politics but, in the process, the regulations also ensure that people with pacifist or vegetarian convictions, or indeed those committed to any political

creed, fall outside their protection. The explanatory notes issued alongside the new regulations state that courts should take a number of factors into account when deciding whether or not a 'belief' falls within the purview of these regulations. In particular, there should be evidence of collective worship, 'a clear belief system' and a 'profound belief affecting way of life or view of the world'. It will not be long before cases of discrimination on grounds of political belief start coming through European court systems and the European Court of Justice may well interpret the term 'religion and belief' more broadly than the UK government has chosen to.

As elsewhere in discrimination law the regulations on religion or belief permit direct discrimination to occur only where a post carries with it a genuine occupational requirement (GOR). This is likely to be one of the major areas in which the case law evolves as there are a number of obvious and common situations in which GORs will be an issue. The regulations permit GORs *both* where 'being of a particular religion is a genuine and determining occupational requirement for the job' *and* where 'the employer has an ethos based on religion or belief'. It is pretty clear therefore that a GOR would apply in the case of clerical roles, such as a hospital chaplain or a Christian outreach worker, but what about posts in denominational schools? More interesting is the case of organisations which do not have a religious purpose, but which claim to run themselves in accordance with a particular religious ethos. There are, for example, Christian medical practices, Islamic businesses and Jewish law firms which currently only employ members of a particular religious group, at least in senior roles.

For most employers, however, the most important practical consequence of the 2003 regulations has been a need to review policy on time off for religious holidays. Refusing to allow someone to take a day off to observe a Sabbath or religious festival constitutes indirect discrimination because the organisation has a rule in place which indirectly discriminates against members of certain religious groups. This means that it is only permissible to refuse time off if the rule can be objectively justified. In other words, there must be a credible business reason advanced for refusing requests. In its guidance ACAS states that where it would be possible to accommodate the request, and where sufficient notice has been given, it will normally be expected that employers should grant it. Examples of where it would be reasonable to refuse would be where a large proportion of the workforce wanted to take the same day off, making it impossible to continue operating or where the dates coincide with a very busy period.

## **TRADE UNION DISCRIMINATION**

The freedom to join a trade union and take part in its lawful activities is generally regarded as a fundamental human right. It is included in both the European Convention on Human Rights and the founding conventions of the International Labour Organisation. Although this freedom is not couched in the language of positive rights, it is in practice difficult for a UK employer lawfully to discriminate against people simply because they have joined a union or have taken part in union activities. These rights are long established, but are now found in the Trade Union and Labour Relations (Consolidation) Act 1992. In 1990, equivalent rights were extended to people who do not wish to join a union or become involved in its activities. There are three basic rights:



- 1 the right not to be dismissed for a trade union reason;
- 2 the right not to suffer action short of dismissal for a trade union reason;
- 3 the right not to be refused a job on trade union grounds.

The first two of these protect people who take part (or refuse to take part) ‘in the activities of an independent trade union at an appropriate time’. The protection, however, only extends to employees (i.e. people working under a contract of service) and does not apply in the police and armed services. In the case of dismissals, because trade union reasons are regarded as ‘automatically unfair’, there is no qualifying period of service. Full rights thus apply from the first day someone is employed at a particular establishment.

In order to gain the protection of the law in this area the organisation an individual joins or with which he or she becomes involved must be one which has been listed as an independent trade union by the Certification Officer. Moreover, the activities in which the individual engages must be authorised by the trade union concerned and must, if they take place during work time, be carried out with the consent of the employer. Industrial action is not included in the definition of ‘the activities of an independent trade union at an appropriate time’, but is the subject of other protective legislation.

Discrimination against prospective employees at the recruitment stage simply because they are or are not union members has been an unlawful practice since 1990. In the Employment Relations Act 1999 rights in this area were extended to cover any discrimination occurring as a result of an individual’s past involvement in trade union activity. The aim was to prevent groups of employers from maintaining black-lists of individuals perceived to be union troublemakers.

## **PART-TIME WORKERS**

Discriminating against a female part-time worker has long been taken by the courts to constitute indirect sex discrimination because the vast majority of part-time workers are female. Since 2000, however, it has not been necessary for part-time workers (of either gender) to use sex discrimination law to protect themselves. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 were introduced to ensure that the UK complied with the EU’s Part-Time Workers Directive. They now seek to ensure that part-time workers (not just employees) are treated equally with full-time workers in all aspects of work, the key features being as follows:

- 1 Part-time workers who believe that they are being treated less favourably than a comparable full-time colleague can write to their employer asking for an explanation. This must be given in writing within 14 days.
- 2 Where the explanation given by the employer is considered unsatisfactory, the part-time worker may ask an employment tribunal to require the employer to affirm the right to equal treatment.
- 3 Employers are required under the regulations to review their terms and conditions and to give part-timers pro rata rights with those of comparable full-timers.
- 4 There is a right not to be victimised on account of enforcing rights under the Part-time Workers Regulations.

Any term or condition of employment is covered by the regulations, as is any detriment caused as a result of failure to be promoted or given access to training. It is also now unlawful to select someone for redundancy simply because they work part-time.

There are a number of problems with the new regulations, including the absence of a statutory authority to enforce the third of the above points. One of the more complex issues involves how the term 'part-time worker' should be defined, because it is used differently in different workplaces. In some organisations someone working 35 hours a week is employed on a 'part-time contract' because full-time hours are 40 per week. Elsewhere, where everyone works 35 hours, such a worker would be regarded as a full-timer. The regulations simply state that a worker is part-time if they work fewer hours in a week than are worked by recognised full-timers. This obviously poses difficulties for organisations which do not employ people to work a set number of hours a week, or for whom patterns of hours vary considerably over the course of a year. There is also a need for part-time workers who consider themselves to have been less favourably treated to name a comparator employed in a broadly similar job who is employed on a full-time basis in the same employment. Where none exists it is effectively impossible to bring a claim.

## **FIXED-TERM WORKERS**

The EU's Fixed-term Work Directive (brought into UK law via the Employment Act 2002) includes a range of important provisions designed to improve the position of the many employees who are employed on temporary contracts. The general requirement is that a fixed-term employee should not be treated less favourably than a comparable permanent employee unless less favourable treatment can be objectively justified. This has meant an end to the common practice of avoiding making redundancy payments when fixed-term contracts finish by including a waiver clause in the contract of employment. The statute extends to fixed-term employees the right to receive statutory sick pay (SSP) in the same way as permanent staff and also requires employers to inform fixed-term employees about permanent vacancies in the organisation.

However, the most significant change is the restriction on the employment of people on successive fixed-term contracts. In the past employers commonly used this device to give themselves numerical flexibility and, many would argue, to extract greater effort out of people who were in constant fear of the consequences of non-renewal. Employment of people on successive fixed-term contracts is now limited to four years unless further extensions can be objectively justified. It thus remains acceptable to extend a fixed-term contract beyond four years if the money to fund the post is limited or if a specific project is clearly coming to an end within a short period of time. However, in other situations, after four years the law treats all fixed-term contracts as if they were permanent.

The law gives fixed-term employees the right to ask for a written statement of reasons from their employer if they are being treated unfavourably as well as a statement that their contract has become permanent after four years. Where employers fail to honour these rights or to give satisfactory explanations, complaints can be taken to an employment tribunal.

## EX-OFFENDERS

Another group who are given some measure of legal protection from discrimination at work are ex-offenders whose convictions have been 'spent'. The relevant legislation is contained in the Rehabilitation of Offenders Act 1974 which sets out after how many years different types of criminal conviction become spent and need not be acknowledged by the perpetrator. In the field of employment, protection from discrimination extends to dismissal, exclusion from a position and 'prejudicing' someone in any way in their employment. In other words, employers cannot dismiss someone, fail to recruit them or hold them back in their occupations simply because they are known or discovered to have a former conviction. Failing to disclose the conviction can also be no grounds for discrimination. Moreover, no one (the individual concerned or anyone else) is under any obligation to tell anyone else about the conviction once it has been spent. Effectively, the slate is wiped clean, allowing the ex-offender to live and work as if no conviction had been received.

The rehabilitation periods set out in the Act vary depending on the type of sentence that has been received. The tariff is as follows:

imprisonment over 30 months:	never spent
imprisonment 6 to 30 months:	ten years
less than 6 months' imprisonment:	seven years
fine or community service order:	five years
detention in a detention centre:	three years
conditional discharge:	one year
absolute discharge:	six months

The time runs from the date of the conviction, the times being cut in half for those who are under the age of 18 at this time. It is the sentence imposed that is relevant to the Act and not the sentence actually served.

Numerous jobs and occupations are excluded from the terms of the Act. Organisations which employ people to work in these positions are entitled to know about spent convictions and can lawfully discriminate against individuals on these grounds. The list includes all jobs which involve the provision of services to minors, employment in the social services, nursing homes and courts, as well as employment in the legal, medical and accountancy professions.

At the time of writing the government is proposing to make a series of relatively minor amendments to the law on the rehabilitation of offenders, but no date has been given for their introduction.

## AGE DISCRIMINATION LAW

The final element of the EU's Equal Treatment Framework Directive that will be implemented in the UK is the outlawing of age discrimination from October 2006. This is a wholly new field of law which will require major changes to many existing statutes both within and outside the employment field. At the time of writing (early 2004) no detailed proposals have been published, but it is clear from the government's consultation paper that a complex piece of legislation will be introduced requiring major changes to be made to common employment practices.

In terms of its basic structure and scope, age discrimination law will follow the same approach as has been established for the other types of discrimination law that fall within the area of European competence (i.e. sex, race, disability, sexual orientation and religion or belief). It will also extend beyond the world of employment to the activities of trade unions, professional bodies and institutions of further and higher education. However, it appears that in cases of direct age discrimination (i.e. treating an individual less favourably because of their age or for a reason related to their age), defences will be available. So it will remain possible for employers to discriminate on age grounds under certain types of circumstances. The consultation document labels these ‘exceptional circumstances’, but goes on to list situations which appear commonplace:

- health, safety and welfare reasons;
- facilitation of employment planning;
- encouraging or rewarding loyalty;
- the need for a reasonable period for employment prior to retirement.

The biggest issue of all in the field of age discrimination is mandatory retirement, and the government has yet to announce how it intends to legislate on this. It is currently acceptable for an employer to require all employees to retire, whether they want to or not, at a pre-determined age. This is 65 unless the employer has another ‘normal’ contractual retirement age. The government wants greater flexibility in this area, but also appears anxious to avoid a situation in which elderly people exercise a legal right to continue in jobs which they are no longer capable of carrying out. The likely outcome is a later compulsory retirement age, with lower ages being permitted for certain professions, but until the regulations are finalised employers are not able to plan ahead with confidence.

## SUMMARY PROPOSITIONS

- 23.1** Discrimination law has grown rapidly in recent years, extending to new grounds such as age, sexual orientation and religion or belief.
- 23.2** Equal pay law requires men and women to be paid the same wage for doing work which is the same or which can be shown to be of equal value unless the employer can justify a difference on grounds other than sex.
- 23.3** In much discrimination legislation an important distinction is made between direct and indirect discrimination. The former relates to a situation in which someone is discriminated against because of a personal characteristic, the latter relates to the setting of a requirement by an employer with which fewer of one group can comply than another.
- 23.4** Harassment claims can be brought against any employer who allows a worker to be subjected to treatment which intimidates or humiliates the victim for reasons related to their sex, sexual orientation, race or disability.

- 23.5** The Disability Discrimination Act 1995 requires employers to consider making reasonable adjustments to working conditions to accommodate the needs of a disabled person before dismissing them or failing to offer them a job.
- 23.6** Limited protection from discrimination is given in law to trade union members, employees who do not engage in union activity, part-time workers, fixed term-workers and ex-offenders whose convictions are spent.

### GENERAL DISCUSSION TOPICS

- 1 Which groups who are not currently protected would you like to see covered by anti-discrimination law? What arguments could be advanced for and against your proposition from an employer perspective?
- 2 How far do you think that UK discrimination law is effective in achieving its aims? What could be done to make it more effective?

### FURTHER READING

Bowers, J. and Moran, E. (2002) 'Justification in sex discrimination law: breaking the taboo', *Industrial Law Journal*, Vol. 31, No. 4, pp. 307–20

Gill, T. and Monaghan, K. (2003) 'Justification in sex discrimination law: taboo upheld', *Industrial Law Journal*, Vol. 32, No. 2, pp. 115–22

An interesting debate was carried out in 2002 and 2003 in the pages of the *Industrial Law Journal* about whether or not there is a good case for allowing employers grounds for justifying direct sex discrimination in certain defined circumstances. This view was advanced by Bowers and Moran in 2002 and robustly rebutted a few months later by Gill and Monaghan.

Department of Trade and Industry (DTI)

*IRS Employment Review* (Industrial Relations Services)

The best way of keeping up to date with this fast evolving area of law is to visit the DTI website ([dti.gov.uk](http://dti.gov.uk)). There is extensive coverage there of new discrimination law on the equality and employment pages. It is also possible to download research commissioned by the DTI looking at the background to new laws and their impact. Any significant new case law is reported fortnightly in *IRS Employment Review*.

Fredman, S. (2002) *Discrimination Law*. Oxford: OUP

This provides an excellent and thoughtful summary of the principles behind the law, the purposes it serves and the major critiques that are advanced. It also draws extensively on the experience of other countries.

### REFERENCES

- IRS (1993) 'Dress and Personal Appearance at Work', *IRS Law Bulletin*, No. 469, pp. 2–13.
- Macdonald, L. (1998) 'Discrimination', *Personnel Manager's Factfinder*. London: Gee Publishing.

## LEGAL CASES

*Burton v. De Vere Hotels Ltd* [1996] IRLR 596.  
*Diocese of Hallam Trustees v. Connaughton* (1995) (EAT 1128/95).  
*Hampson v. Department of Education and Science* [1990] IRLR 302.  
*Macarthy's Ltd v. Smith* [1980] IRLR 209–10.  
*Mandla et al. v. Lee et al.* [1983] IRLR 209.  
*Price v. Civil Service Commission* [1977] IRLR 291.  
*Quinlan v. B&Q plc* (1997) (EAT 1386/97).  
*Rewcastle v. Safeway plc* (1989) (EAT 22482/89).

An extensive range of additional materials, including multiple choice questions, answers to questions and links to useful websites can be found on the Human Resource Management Companion Website at [www.pearsoned.co.uk/torrington](http://www.pearsoned.co.uk/torrington).

