

*The Sex Discrimination Act 1975, makes it unlawful for an individual to be discriminated against in the workplace in relation to selection for a job, training, promotion, work practices, dismissal or any other disadvantage such as sexual harassment.*

*The Act outlaws discrimination in a number of other areas as well - education and the supply of goods and services. This booklet is solely concerned with employment. It is intended as a brief summary of the law in this area.*

### **SEX DISCRIMINATION AND EMPLOYMENT**

The Act applies to both men and women, and also covers discrimination on the grounds of marital status. However, generally it is women who are discriminated against and therefore for the purpose of this booklet we will assume that it is a woman who has suffered the discrimination.

The Act does not require any qualifying period of employment. An employee is covered from the moment that they apply for a job. This protection continues throughout the period of employment, and may also cover the provision of references for a former employee after the employment has terminated. It covers not just employees but workers, agency workers and often also the self employed.

Discrimination is divided into two main categories, direct and indirect discrimination. Broadly, direct discrimination occurs where a person is treated differently on the grounds of their gender. Indirect discrimination is where an employer applies a

requirement or policy, which though on the face of it has nothing to do with gender, in practice tends to effect one sex rather than another.

### **DIRECT DISCRIMINATION**

Section 1 (1) (a) of the Act states that it is unlawful discrimination for an employer to treat an employee less favourably on the grounds of their sex.

It does not matter what the employers intention or motive was. Even if their motive is benign, it may still be discrimination. There can also be no defence of justification to direct discrimination.

The employee bringing the complaint has to make a comparison between how she was treated and how a man would have been treated. She can either point to an actual colleague, or refer hypothetically to how a man would have been treated.

The following situations and examples could give rise to a claim for direct discrimination.

#### **Job applicants**

In an interview for a job or promotion the employer only asks female applicants about their domestic circumstances, for example, "What will you do about child care?"

A man with inferior qualifications, and/or less experience than a women is appointed to the job or the promotion for which they both applied.

A woman is told that she could not be considered for a job because it is "dirty work" or because of "a lack of decent toilet facilities".

#### **During employment**

A woman who takes time off for pregnancy or maternity leave is regarded as unreliable and is demoted when she returns to work.

A woman is subject to personal comments about her physical appearance in a way that would not have happened to a man.

A woman is not encouraged to meet clients or invited to social events to meet clients, and instead a primarily male group is selected.

#### **Pregnancy discrimination**

It is also direct discrimination to treat a woman less favourably by reason of her pregnancy or by reason of her taking maternity leave. This includes a pregnancy related illness.

#### **Sexual harassment**

Sexual harassment has been defined as:

*"unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct..."*

*(European Commission Recommendation on the Protection of the Dignity of Women and Men at work 1991)*

This is a form of direct discrimination, in that a person of the other sex would not be treated in the same way.

Examples of sexual harassment include the following:  
Physical harassment.

Unwanted sexual comments or personal comments about a woman's appearance.

Non verbal harassment such as unwanted gestures or displays of pornographic pictures.

The victim does not have to demonstrate any financial or other specific loss, such as a threat of dismissal. It is enough that her working environment has become intimidating, hostile or offensive.

In one case a school laboratory assistant was subjected to constant suggestive remarks and conduct by two male colleagues as a part of a campaign to persuade her to leave. The tribunal decided that the woman did not have to produce evidence of a man having been treated differently, since the treatment that she received was clearly discriminatory by reason of its sexual character.

Single incidents can constitute harassment, though generally speaking a one off incident would have to be more serious.

### **INDIRECT DISCRIMINATION**

Section 1 (1) (b) of the Act sets out the definition of indirect discrimination. This is where an employer applies to a woman a requirement or condition which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can, and which the employer cannot show to be justified.

The point here is that the policy applied by the employer is on the face of it neutral, but in its effect impacts more on women than men. The most common example is a requirement for full time working, which generally fewer women than men can do by reason of their child care commitments. In these circumstances, the real test tends to be whether the employer can justify their requirement for full time work.

### **Requirement or condition**

A requirement or condition covers not only an absolute requirement, for example an absolute requirement to work full time or on a rotating shift pattern. It may also cover a preference, where for example an employer specifies that managerial and supervisory experience "desirable", and in reality such qualifications are decisive in making the appointment. If fewer female candidates have the

necessary managerial and supervisory experience, this may be indirectly discriminatory.

### **Smaller proportion**

Normally the employee will need to produce statistics from the work place showing that less women than men can comply with the requirement or condition. Otherwise, an employment tribunal may be prepared to use their industrial relations experience and common sense to find that certain practices work against women.

### **Can comply**

This means that a smaller proportion of women can comply in a practical sense. For example, though in theory women with young children can work full time, in practice they may choose not to, and tribunals will generally accept that this means that fewer women can comply with the requirement to work full time.

### **Justification**

A defence of justification is available to employers in an indirect discrimination case, where they can show that there is an objective need for the requirement. To prove this defence, they have to show that the requirement is necessary, and not merely convenient.

Examples of indirect discrimination are

Age bars which can indirectly discriminate against women who often have taken time out from work to bring up children and therefore may acquire their qualifications later than men.

Any benefit which results from length of service may again work against women who have taken time out from work to bring up their children.

Mobility clauses may discriminate. Often women are less able to relocate than men because of their family commitments or a reliance on their partner's income as the primary wage earner.

Height or weight requirements will favour men rather than women.

Work that requires unsocial hours or a requirement to work full time may work against women with child care commitments.

In all these examples, the employer will be able to defend their practices if they can show that they were objectively necessary.

## **VICTIMISATION**

Many women may be deterred from exercising their rights under the Sex Discrimination Act, or supporting others who wish to exercise their rights, for fear that they may be victimised by their employer. The Act guards against this by making it unlawful for an employer to victimise an individual because she has brought a discrimination claim, or given evidence in a discrimination case, or made an allegation of sex discrimination (whether it has been upheld or not).

To succeed in a victimisation case, it must be shown that the treatment of the employee was less favourable than someone who had not taken these steps, and that the treatment is a result of their pursuing a discrimination case, giving evidence or making allegations of discrimination.

## **WHO IS LIABLE?**

Responsibility for sex discrimination usually lies with the employer, and also any other employee or worker who is found to have discriminated and for whom the employer has responsibility. This is known as vicarious liability.

This covers not only incidents of discrimination actually in the work place, but may also extend to out of work activities such as Christmas parties and drinks in the pub after work.

If the alleged discrimination takes the form of the conduct of another employee, it is usually wise to bring the tribunal application against the employee in question as well as the employer.

Employers have a defence to a complaint of discrimination based on vicarious liability, if they can show that they took all reasonably practicable steps to prevent the discrimination occurring. It is rare for employers to succeed with this defence. But even if they do, the tribunal claim can be pursued against the individual employee.

## **EXCEPTIONS UNDER THE ACT**

### **Overseas employment**

The Sex Discrimination Act does not apply to workers whose work is done wholly or mainly outside Britain.

### **Pregnancy and childbirth**

It is not unlawful to give special treatment to women in respect of pregnancy and childbirth, for example, maternity leave.

### **Genuine Occupational Qualifications (GOCS)**

The nature of the job may call either for a man or a woman for reasons of authenticity, for example with a model or an actor. The job may involve physical contact, or there may be circumstances where members of one sex might reasonably object to the presence of the other because they are in a state of undress or using sanitary facilities. The work may be concerned with one sex only and require special care, supervision or attention eg in hospitals or prisons. All these situations may give rise to the GOQ defence.

## **BRINGING A CLAIM**

### **Proof**

Proving sex discrimination is not straightforward. A woman complaining of discrimination, the applicant, has to prove that her employer discriminated against her on the grounds of her sex. This has to be proved

“on the balance of probabilities”. This means that the tribunal does not have to be certain, but they have to think it more likely than not that her treatment was on the grounds of her gender.

Direct evidence of being treated differently on the grounds of gender is very rarely available. Therefore where a woman shows that on the face of it she has been less favourably treated than a man, the tribunal will look to the employer to explain the reason for the treatment. If the tribunal is not satisfied by the employer’s explanation, then the tribunal may be prepared to infer that discrimination has taken place.

It helps if the applicant has available all relevant letters and documents. In cases of sexual harassment, it is useful if the applicant has made a note of the key incidents and the dates on which they took place.

From October 2004, unless there are special circumstances (e.g. threats or continuing harassment by the employer) the employee must write to the employer raising a grievance and attend one or two meetings before bringing a discrimination claim to an employment tribunal. This is even where the complaint relates to disciplinary action short of dismissal or another grievance.

#### **Questionnaire**

The employee is allowed to serve a questionnaire on her employers. The purpose of this is to obtain information or documents in order to decide on the strength of her claim, and to establish so far as possible what the facts are and the reasons for her treatment. An employer’s replies can be referred to in evidence. If an employer fails to reply, or delays in doing so or provides an inadequate response, then this may assist the tribunal in drawing an inference of discrimination.

A questionnaire will not count as raising a formal grievance.

#### **TIME LIMITS**

A complaint of sex discrimination in the workplace is lodged with the employment tribunal using form “ET1”.

The applicant must complain to the employment tribunal within three months of the act complained of. This time limit is extended by three months to allow the statutory grievance procedure to take place.

When the act complained of is dismissal, then the time limit runs from the date on which the contract terminated and not the date on which notice is given. If the discrimination is in a form which continues, for example a continuing exclusion from a benefit or a continuing course of harassment, then the three month time limit does not start to run until that discrimination finishes.

A tribunal may allow an application to proceed even after the three month time limit if, in the circumstances of the case, it considers it just and equitable to do so.

There are also time limits for serving the questionnaire. If it is lodged before the tribunal proceedings have started, then it must be served on the employer within three months of the act complained of. If it is sent to the employer after tribunal proceedings have begun, then it must be sent within 21 days of the tribunal application being lodged. After these time limits, a questionnaire may still be served but only with the permission of the tribunal.

## REMEDIES

- There are three remedies available to a tribunal:
  - Declaration.
  - Compensation.
  - Recommendation.

### Declaration

A declaration states the rights of the applicant and in what respect the employer and any employee has acted unlawfully.

### Compensation

Compensation is awarded for injury to feelings and financial losses, if there are any. There is no limit on the amount of compensation that a tribunal may award, and interest is also payable.

Compensation can also include loss of earnings, past and future, loss of pension and any other outlays associated with the discrimination.

The amount of compensation that tribunals award in relation to injury to feelings can vary, depending on the extent to which the individual's feelings have been injured. Their age and vulnerability may be considered, and also the severity of the discrimination. An award of £750 is at or nearer the minimum. In a recent case, the Employment Appeal Tribunal decided that £12,000 compensation for injury to feelings caused by serious and prolonged discrimination was not excessive, though was at the upper end of the range of awards.

Where the employee has been seriously effected by the discrimination, particularly in harassment cases, this may lead to illness and depression.

Compensation for personal injury can also be claimed as part of the tribunal application. A medical report will be needed to support a personal injury claim.

Compensation may be reduced if the applicant failed to follow the statutory grievance procedure.

If a personal injury claim is pursued as part of a sex discrimination case then it may not also be possible for the individual to pursue a separate personal injury claim through the Civil Courts arising out of the same circumstances.

### Recommendations

The tribunal's powers to make recommendations are limited to recommendations for action that will benefit the individual employee and lessen the effect of the discrimination on her. Recommendations may include, for example, that all members of management be trained an equal opportunities, that the employee who has been discriminated against be provided with additional training or mentoring, or be invited to interview in relation to future job applications.

If the employer fails to comply with a recommendation, then a tribunal may order that the employee's compensation be increased.

## DISCRIMINATION ON THE GROUNDS OF GENDER REASSIGNMENT

Since 1 May 1999, it is unlawful for an employer to discriminate against another person on the grounds that they intend to undergo, are undergoing or have undergone gender reassignment. This covers less favourable treatment due to an employee's absence for gender reassignment treatment.

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