

Sexual Orientation

How the law protects against discrimination based on sexual orientation



Overview

Today's UK society is very diverse, and it is important to ensure that no group or groups are discriminated against, just because they are perceived as 'different'. Discrimination on grounds of sexual orientation is unlawful under the Employment Equality (Sexual Orientation) Regulations 2003 (the Regulations), in employment or vocational training.

The Regulations also cover discrimination on the grounds of perceived orientation. So for example, treating an employee less favourably because it is thought they are gay, whether or not they actually are, would also be covered.

Who is covered?

The Regulations include protection in respect of gay, lesbian and bisexual persons throughout Great Britain. The Regulations do not cover any other sexual practices or preferences.

The legislation covers the whole employment relationship from recruitment on, including contractual terms and conditions (with some exceptions), reasons for dismissal and even post-employment discrimination.

Discrimination

Direct discrimination - It is unlawful to treat a person less favourably on grounds of sexual orientation.

In order to bring a claim of direct discrimination, you must show that you have been less favourably treated on grounds of sexual orientation than another person has or would have been treated. The less favourable treatment does not have to be on the grounds of your own sexual orientation. For example, it would be discriminatory for an employer to treat you less favourably on the grounds of its perception of your sexuality. It is irrelevant whether or not that perception is correct. It is also unlawful to treat someone less favourably due to the sexual orientation of someone they associate with or because they have refused to follow a discriminatory instruction.

The Act requires that 'like must be compared with like', so where, for example, a gay man has been refused a job because of his sexual orientation, his comparator could be a heterosexual person who is in all other respects in the same position as him. An individual can point to a hypothetical comparator. A useful test is the 'but for' test: for example, would I have been treated the same way 'but for' the fact that I am gay, or have a gay friend etc?

If for example a decision is made to dismiss, or not to recruit you because you are gay, or are perceived to be gay, or have gay friends, then the employer may be in breach of the Regulations.

Indirect discrimination - The Regulations provide that a person also discriminates if an arrangement or feature associated with the employment (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all employees, but it -

- Puts a sexual orientation group at a particular disadvantage when compared with another group
- Puts you at that disadvantage; and
- Is not a proportionate means of achieving a legitimate aim.

The PCP must have been applied universally, for example a PCP that all candidates must be married.

Whether or not the PCP puts one sexual orientation group at a particular disadvantage as compared with another will often depend upon the 'pool' of people considered. The employer must satisfy the tribunal that the PCP can be objectively justified. If this is established, a discrimination claim will fail.

Victimisation

It is unlawful to treat a person less favourably because they've made a complaint of discrimination.

Discrimination by way of victimisation occurs when you are treated less favourably than another employee would be treated in similar circumstances because you have done, you are about to do, or you are suspected of doing, a 'protected act'.

You may have done a 'protected act' if you have:

- Brought proceedings against the discriminator or any other person under the Regulations or
- Given evidence or information in connection with proceedings against the discriminator or any other person under the Regulations or
- Otherwise done anything in relation to the discriminator or any other person under or by reference to the Regulations or
- Made allegations that the discriminator or any other person has committed an act which contravenes the Regulations. This would include raising a grievance about sexual orientation discrimination.

So for example, if you have made a complaint about sexual orientation discrimination and are later treated less favourably because you have done so, you should be covered by the Regulations.



"The Regulations include protection in respect of gay, lesbian and bisexual persons throughout Great Britain".

Harassment

Harassment on the grounds of sexual orientation is a form of discrimination. It is defined as being: Unwanted conduct on the grounds of sexual orientation which has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted. When the purpose of the harassment is to violate the person's dignity or to create a hostile environment, the victim will be required to show that he/she perceived the conduct to be offensive. Where the conduct has the effect of violating a person's dignity or creates a hostile environment, the tribunal will not only consider the victim's perception but also whether that conduct reasonably has that effect.

Post-termination discrimination

Once an employee has left, the employer may still be liable if it discriminates against the ex-employee because of their sexual orientation (or because they have done a protected act) and the discriminatory act arises out of and is closely connected to the former employment relationship. For example, if an employer refuses to write a reference for a former member of staff because that person is gay, this would be unlawful.

Genuine occupational requirements

An employer is permitted to make use of exceptions in the Regulations if there is a genuine occupational requirement to employ someone of a particular sexual orientation. However, the employer must prove that there's a genuine reason for making an exception. The circumstances where this would apply are likely to be rare.

Questionnaires: getting the facts together

You can serve a questionnaire on your employer any time before lodging a claim at an Employment Tribunal or within 21 days from the date proceedings were lodged. The questionnaire can be used to ask your employer useful questions relating to the complaint. If your employer fails to reply to the questionnaire, or makes evasive replies, a tribunal may draw an inference of unlawful discrimination.

Remedies

If the tribunal finds that you have been unlawfully discriminated against, it may grant whichever of the following remedies it considers just and equitable:

- A declaration on the rights of the parties
- A recommendation that the employer take a particular course of action
- Re-engagement or reinstatement if the individual has been dismissed and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by your employer's discrimination.

Time limits

Most claims will need to be brought in the employment tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on. Please note that in most cases, this time limit will no longer be extended where an internal grievance is lodged first as the rules relating to this have recently changed.


You will also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code. If your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits.


These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

Contact Us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:

 **0800 916 9015**

 **Email:** enquiries@rjw.co.uk

 **Web:** www.rjw.co.uk

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