

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 was made unlawful under the Employment Equality (Sexual Orientation) Regulations 2003 ('the 2003 Regulations'), in employment or vocational training. As of 1st October 2010, all existing equality legislation (including the 2003 Regulations) was consolidated into the Equality Act 2010 ('The Act').

'The Act' also covers direct discrimination and harassment because of perceived sexual orientation. So for example, treating an employee less favourably because they are thought to be gay, whether or not they actually are, would also be covered. Further, being directly discriminated against or harassed because of someone else's sexuality is also covered under 'The Act'.

Who is covered?

'The Act' includes protection in respect of gay, lesbian and bisexual persons throughout Great Britain. 'The Act' does not cover any other sexual practices or preferences.

Who is protected? - In the employment sphere, 'The Act' applies to recruitment, employment and vocational training. It is unlawful to discriminate against someone because of sexual orientation, from the initial job application process through to dismissal. Under 'The Act', 'employment' is widely defined to include workers, those working under apprenticeships, Crown employees and members of the House of Commons and House of Lords. If you are supplied by your employer to work for another employer (contract workers), or are an office holder (company directors and members of some independent public bodies) you will also be protected. 'The Act' extends still further to the police, barristers, partnerships, providers of vocational training, employment agencies and trade organisations, among others. There is no opt-out clause for small employers.

What is prohibited? - 'The Act' outlaws direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the employer. In fact, employers may be responsible for the acts of their agents, as well as the acts of their employees and in some circumstances the acts of third parties (see harassment below). Importantly, 'The Act' also extends in limited circumstances to discrimination after the working relationship has ended. For instance, if a former employer provides a discriminatory reference, or refuses to provide a reference at all, because of a person's sexual orientation, this could amount to unlawful discrimination.

Discrimination

Direct discrimination - It is unlawful to treat a person less favourably because of sexual orientation. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of sexual orientation
- That you can compare your treatment to someone (actual or hypothetical) with similar characteristics to yourself save for sexual orientation
- That you were subject to disadvantage or detriment as a result of that treatment.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the sexual orientation of the individual being discriminated against.

"An employer is permitted to make use of exceptions in 'The Act' if there is an objectively justifiable occupational requirement to employ someone of a particular sexual orientation".



'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 Act'.

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Indirect discrimination - 'The Act' provides 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 unfavourably because they have been involved in a complaint of discrimination under 'The Act'. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under 'The Act' or the 2003 Regulations; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under 'The Act' or the 2003 Regulations; or
- Doing anything in relation to the discriminator or any other person under or by reference to 'The Act' or the 2003 Regulations; or
- Making allegations that the discriminator or any other person has committed an act which contravenes 'The Act' or the 2003 Regulations. This would include raising a grievance of sexual orientation discrimination.

So for example, if you have made a complaint about sexual orientation discrimination and are later treated unfavourably for doing so, you should be covered by 'The Act'. A protected act must be done in good faith.

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Harassment

Harassment related to sexual orientation is a form of discrimination. It is defined as being:

- 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.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

Employees who experience harassment related to sexual orientation at the hands of a third party in the course of employment can claim against the employer if it can be shown that (i) the employer knew that the employee had been subjected to harassment on more than 2 occasions and (ii) the employer failed to take reasonable action to prevent a further act of harassment by the same or another third party. Third parties can include customers or contractors.

A claim can also be brought if harassment occurs because of an association with someone of a particular sexuality, or if someone is perceived to be of a particular sexuality.

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.

Occupational requirements

An employer is permitted to make use of exceptions in 'The Act' if there is an objectively justifiable 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.

There are further exceptions under 'The Act' which allow religious organisations and organisations with a religious ethos not to employ individuals due to their sexual orientation. However, whilst (for example) the Catholic Church might be able to require its priests to be heterosexual, it will be harder to justify such a requirement for a caretaker.

Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, 'The Act' provides that the claimant is required to establish clear facts which could enable the Tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-sexual orientation based explanation from the respondent, the Tribunal must draw an inference of discrimination.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow a Code of Practice in relation to the way in which they have investigated the employee's grievance or recruited an individual to a post.

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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 28 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 succeeded in an unfair dismissal claim; 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.

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Time limits and the correct legislation

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.

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.

If part of your claim arose before 1st October 2010, you should bring claims under 'The Act' and the 2003 Regulations. 'The Act' will be used in all cases where the claim arose after 1st October 2010 in its entirety. You should seek legal advice if you are unsure about which legislation applies to your claims.


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Contact Us

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

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