

Summary of the law on SEXUAL ORIENTATION DISCRIMINATION



The Employment Equality (Sexual Orientation) Regulations 2003 ("the Regulation"), protects employees from discrimination on the grounds of sexual orientation in employment, training and (from 2007) the provision of goods, facilities and services both in the public and private sectors.

This booklet is solely concerned with the employment aspect of the Regulation.

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Who do the Regulations apply to?

The Employment Equality (Sexual Orientation) Regulations 2003 ("the Regulations") prohibit employers from discriminating on grounds of sexual orientation in employment, training and (from 2007) the provision of goods, facilities and services in both the public and private sectors.

As a result of the 2005 Civil Partnership Act which gave legal recognition to same sex couples, employers also have to ensure that staff in a civil partnership receive the same benefits as married couples.



Who do the Regulations protect?

The Regulations provide protection for all workers - including heterosexuals. They also protect people who are discriminated against because of their perceived sexual orientation. For example, if a man was being bullied because other people thought he was gay (even though he wasn't) then he would be protected by the Regulations.



What is the scope of the Regulations?

The Regulations make it unlawful for employers to discriminate against or harass job applicants and workers in a range of circumstances, starting at the recruitment stage.

They apply to the terms and conditions of employment that are offered such as pay, promotions, transfers, dismissals and opportunities for training. They also offer protection after the person has left their job if the discrimination or harassment has something to do with the previous employment relationship, such as saying something detrimental in a reference.



Where do the Regulations apply?

They apply to anyone working wholly or partly in Great Britain. The employer must have a place of business in Britain and the work must be for the purpose of that business. The worker must be ordinarily resident in Britain when they apply for the job or at any time during their employment.

The Regulations can also cover people who work outside the UK if they can satisfy some very specific criteria. They should seek advice from their union about whether the Regulations apply to them.



What discrimination do they outlaw?

The Regulations outlaw four types of discrimination – direct, indirect, harassment and victimisation.

Direct discrimination

Direct discrimination means treating a worker less favourably than someone else because of their sexual orientation (or instructing someone to directly discriminate against them).

This involves comparing how an employer treats one worker of a particular orientation compared to someone else with a different orientation. Employers cannot justify direct discrimination unless they can show that a genuine occupational requirement applies (see below).

Indirect discrimination

This means applying a provision, criterion or practice which disadvantages people of a particular sexual orientation, unless it can be justified. To make out a justification defence, employers have to show a real business need, that the practice is proportionate to what they want to achieve and that there is no other way of achieving it.



Harassment

Harassment is defined as subjecting someone to unwanted conduct that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. This includes behaviour that is offensive, frightening or in any way distressing.

It may not always be targeted at an individual but may be part of a general culture which an individual finds distressing. It does not matter whether the harassment is intentional or unintentional.

Victimisation

This means treating someone less favourably because they made or intend to make allegations of discrimination on the grounds of sexual orientation, or because they have given or intend to give evidence under the Regulations.



What do the Regulations exclude?

There are four main exceptions allowed under the Regulations:

- Genuine occupational requirement (GOR)
- Working for an organised religion
- Benefits dependant on marital status
- Positive action

Genuine occupational requirement (GOR)

This exception allows employers to treat job applicants differently on the ground of sexual orientation if they can show a genuine need to recruit someone of a particular orientation to do that job.

They can also rely on the GOR exception when promoting, transferring or training someone for a post and also when dismissing someone from a job, if a GOR applies to that job. It cannot, however, be used to justify victimisation or harassment.

When considering whether a GOR applies, employers have to show:

- That the reason for wanting someone of a particular orientation is a genuine and decisive requirement for the job
- That the requirement is “proportionate” in the particular case. In other words, that it is an appropriate way to achieve their aim and there is no other way of doing it
- That the person either does not meet the requirement to be of a particular orientation, or the employer is not satisfied and it is reasonable in all the circumstances for them not to be satisfied



The GOR exemption is only likely to apply to a few jobs and it has been narrowly construed by the courts and Tribunals.

Working for an organised religion

There is a further exemption if the job involves working for an “organised religion”. This allows the employer to apply a GOR to comply with the doctrines of the religion or to avoid conflicting with the religious convictions of its followers. This exception would apply to jobs for members of the clergy and other staff working for the religion and has been very narrowly applied by the courts.

There is a slightly different three stage test for this GOR to apply. The employer has to show:

- That the person would be employed by an organised religion
- That the requirement complies with the doctrines of the religion; or avoids conflicting with the strongly held religious convictions of a significant number of its followers
- That the person either does not meet the requirement, or the employer is not satisfied that they do, and it is reasonable in all the circumstances for them not to be satisfied



Benefits dependant on marital status

The Regulations state that an employer can still provide certain benefits that are restricted to opposite sex married employees or same sex couples in a civil partnership.

So, for example, employers can refuse survivor benefits in their occupational pension scheme to opposite sex unmarried couples and same sex couples who are not in a civil partnership.

Positive action

Positive action is allowed under the Regulations if it would prevent, or compensate for, past disadvantages. This should not be confused with positive discrimination (which is unlawful) which means treating someone more favourably on grounds of sexual orientation.

The Regulations allow employers to restrict some vocational training to disadvantaged groups to take up particular work. Trade organisations, such as trade unions, can provide training or “encouragement” for disadvantaged groups to take up posts in their organisations. They can also encourage people of a particular sexual orientation to apply for jobs.



Tribunal claims and time limits*

Although most issues should be resolved in the workplace, there are times when this is not possible. If a worker decides to pursue a claim, they must lodge their claim at an employment Tribunal within three months of the incident being complained about. This time limit is extended by three months, however, where the action complained of started before 6 April 2009 to allow the statutory grievance procedure to take place.

Unless there are special circumstances (such as threats or continuing harassment by the employer) the employee must write to the employer raising a grievance and wait for 28 days before bringing a discrimination claim to a Tribunal. This applies even if the complaint relates to disciplinary action short of dismissal or another grievance. If they do not do that, the Tribunal will not be able to hear the claim. Where the action complained of started on or after 6 April 2009, the employee should still raise a grievance but even if they do, the time limit is not extended.

*REFERS TO LEGAL CHANGES EFFECTIVE FROM 6 APRIL 2009.



What remedies are available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations

Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

Compensation

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

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

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



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

Recommendations

The Tribunal's powers to make recommendations are limited to actions that will benefit the individual employee and lessen the effect of the discrimination on them. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that the worker complained about.

For instance, they might include a requirement for all members of management to be trained in equal opportunities, or for the employee who has been discriminated against to be provided with additional training or mentoring, or to be invited to interview in relation to future job applications.

If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.







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