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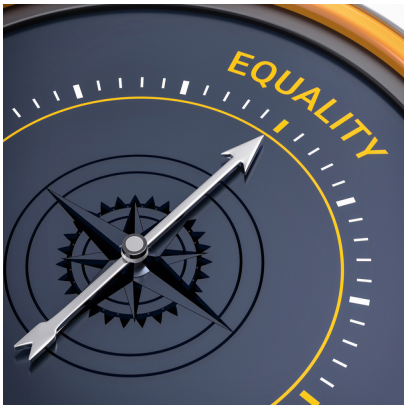

Discrimination law: HR guide

Description

Introduction

Employers need to understand our **discrimination law**, and should take measures to prevent discrimination occurring in the workplace. This guide provides some key information.

Protected characteristics

Our equality law is concerned with the following protected characteristics:

- age
- gender reassignment
- pregnancy and maternity leave
- race including colour, nationality, ethnic or national origin
- sex
- marriage and civil partnership
- disability
- sexual orientation
- religion or belief

Direct discrimination

It is unlawful to discriminate directly against a job applicant or employee by treating them less favourably because of a protected characteristic.

For example, if a female and male employee committed the same misconduct but only the female employee was disciplined this could be direct **discrimination**.

Another example of direct **discrimination** could be if an employer chose to recruit a white employee instead of a black employee, who both had similar level of qualifications, because the employer thought

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that the white employee would be a better cultural fit in the organisation.

The **discrimination** need not be because of the victimâ??s protected characteristic, except in marriage and civil partnership instances (when the **discrimination** must be because that person is married or a civil partner). It is unlawful to treat someone less favourably because of their association with someone who has a protected characteristic. For example, a heterosexual employee could bring a direct **discrimination** claim if they were treated less favourably because they had a gay friend.

If a person is wrongly perceived to have a protected characteristic they will still be protected provided the treatment is because of that perception. An illustration of this could be an employee who was being treated less favourably because of a wrong belief that the person is Hindu.

Indirect discrimination

Indirect **discrimination** occurs when

- an employer applies a provision, criterion or practice that applies in the same way to everybody but disadvantages people who share a protected characteristic;
- The individual is disadvantaged; and
- The discrimination cannot be objectively justified.

An example of indirect **discrimination** could be where an employer has a policy not to allow employees to work part-time hours. This could be indirectly discriminatory on the basis that the policy of not allowing staff to work part-time disadvantages women as more women than men have child caring responsibilities. The individual would have to be personally disadvantaged by the policy. In this type of case it would be difficult to justify the **discrimination**.

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Harassment

Harassment related to a prohibited characteristic is prohibited.

It happens where a person engages in unwanted conduct related to a protected characteristic and the conduct has the purpose or effect of violating the other personâ??s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them.

An example of harassment could be an employee making an ageist joke which upsets another employee.

Victimisation

A person must not suffer a detriment because they have alleged discrimination, brought a discrimination claim or given evidence or information in relation to discrimination proceedings. An example of victimisation could be if an employee brings a discrimination claim for lack of promotion and is then is overlooked as a result of bringing the claim.

Vicarious liability

For the purposes of the equality legislation, anything done by an employee in the course of their employment is treated as having also been done by the employer, irrespective of whether the

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employeeâ??s acts were done with the employerâ??s knowledge or approval.

However, an employer has a defence if it can show that it took â??all reasonable stepsâ?? to prevent the employee from doing the discriminatory act. Steps could include having an anti-discrimination policy which is regularly reviewed and communicated to the workforce, warning employees of the seriousness of unlawful discrimination and that it is likely to be deemed gross misconduct, keeping adequate records showing employees are familiar with the policies, providing regular equal opportunitiesâ?? training and keeping records of the training and handling complaints thoroughly and promptly.

A few protected characteristic anomalies

An employee who claims direct discrimination must show that they have been treated less favourably than an actual or hypothetical comparator. This is not required for pregnancy or maternity discrimination .

Unequal treatment between men and women in terms of pay and conditions of employment is of unlawful. There are specific provisions in the equality legislation setting out the protection in more detail.

Direct age discrimination can be objectively justified, unlike for the other protected characteristics. A situation when direct age discrimination might be justified is when an employer promotes the recruitment of younger workers to create a more balanced workforce.

Apart from harassment related to a protected characteristic, there are two other definitions of harassment in our equality legislation. Harassment could include conduct of a sexual nature and less favourable treatment because of an employeeâ??s rejection of or submission to harassment of a sexual nature or harassment related to sex or gender reassignment.

There is a duty to take â??reasonable stepsâ?? to prevent sexual harassment to employees in the course of their employment. The steps that employers should be taking would be similar to the steps that employers would need to rely on for the general defence to discrimination claims as outlined, above. If the employer has been found to have breached its duty to take reasonable steps to avoid the sexual harassment, compensation could be uplifted by up to 25%. The new employment legislation will make the duty stronger with a requirement for employers to take â??allâ?? reasonable steps to prevent sexual harassment.

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The new employment legislation will also introduce employer liability for third party harassment unless the employer took all reasonable steps to prevent this. This will cover all types of harassment not just sexual harassment.

There are other types of unlawful disability discrimination, which are:

- discriminating by treating a job applicant or employee unfavourably because of something arising as a result of disability without justification.
- failing to comply with the duty to make reasonable adjustments where a disabled job applicant or employee is placed at a substantial disadvantage.
- asking job applicants pre-employment health questions unless for a permitted reason.

There are some limited exceptions when discrimination may be lawful comprising occupational requirements (including religious requirements), statutory provisions, positive action, national security and providing benefits to the public. There are also a number of exceptions specific to age discrimination.

This guide is intended for guidance only and should not be relied upon for specific advice.

If you need any advice on **discrimination law** or have other employment law queries please do not hesitate to contact me on 020 3797 1264.

Do check mattgingell.com regularly for updated information.

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