

A summary of the law on:
Sex Discrimination



THOMPSONS NI

The Sex Discrimination (NI) Order 1976 (SDO) outlaws discrimination on the grounds of sex and marital status in employment, education, transport and the provision of goods and services.

This information sheet is solely concerned with the employment aspects of the SDO.

Who does the SDO apply to and when?

The SDO applies to all employees and workers (including job applicants), apprentices, contract and agency workers, office holders, the police, the self-employed and members of the armed forces.

There is no qualifying period of service required under the SDO, so a worker is protected from the time they apply for a job. Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to that period of employment such as something detrimental that was said in a reference. It applies to all discrimination in the workplace such as selection for a job, promotion or transfer; training, employment benefits and dismissal or any other disadvantage such as harassment. If a worker is discriminated against in their contractual terms of employment, then the Equal Pay Act applies.

Whilst this booklet refers to women in the majority of examples, it should be noted that the law applies equally to both men and women.

Who is Liable?

Responsibility for sex discrimination usually lies with the employer, but if another employee or worker is found to have discriminated, then the employer will normally be “vicariously” liable for them as well. This covers not only incidents of discrimination occurring in the actual 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 relates to the conduct of another employee, it is advisable to name them as well as the employer in the any application to the Tribunal.

Employers can defend a complaint of discrimination 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, claimants can still pursue their claim against the individual employee who discriminated against them.

Types of Discrimination

There are four types of unlawful sex discrimination in relation to employment – direct discrimination; indirect discrimination; harassment; and victimisation.

Direct Sex Discrimination

Direct sex discrimination is when an employer treats a woman less favourably than a man, because of her sex or marital status. It is also direct discrimination to treat a woman less favourably because she is pregnant or has taken maternity leave. This includes a pregnancy-related illness. The employee bringing the claim has to make a comparison between how she was treated and how a man (either actual or hypothetical) would have been treated, except for cases of alleged pregnancy and maternity discrimination when a comparator is not required. It is irrelevant whether or not the employer intended to discriminate. Once the person has shown that the employer did discriminate against them directly, employers cannot offer a defence as there is none for these claims.

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

- In an interview for a job the employer only asks female applicants about their domestic circumstances.
- A man with inferior qualifications, and/or less experience than a woman is appointed to the job or the promotion for which they both applied.
- A woman who takes time off for pregnancy or maternity leave is demoted when she returns to work.

Indirect Sex Discrimination

Indirect discrimination applies to policies and practices which, in reality, disadvantage one gender considerably more than another although on the face of it, they seem to apply to both sexes equally. For example, a requirement to work full time might be more of a bar for women than men.

To prove indirect discrimination, Tribunals have to consider four questions:

- Has the employer imposed a provision, criterion or practice?
- Does it put women at a particular disadvantage when compared with men?
- Does it disadvantage that woman?
- Can the employer show that the provision, criterion or practice is proportionate to the aim they are trying to achieve?

Employers can defend indirect discrimination, but they have to show that the provision, criterion or practice:

- Can be objectively justified on grounds other than sex
- Corresponds to a real need on the part of the employer
- Is appropriate to meeting that need
- Is necessary to meet that need

This is a particularly complex area of discrimination law and anyone considering bringing a claim will need specialist advice.

Examples of indirect discrimination are:

- Any benefit which results from length of service may work against women who have taken time out from work to bring up their children.
- Height or weight requirements which 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.

Harassment

There are three grounds that constitute unlawful harassment under the SDO.

The first is when an individual is subjected to unwanted conduct relating to their sex that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Even if that individual is not the butt of the unwanted conduct but feels that their dignity has been violated or that an offensive environment has been created as a result, they are also protected by the legislation.

The second is when someone engages in unwanted verbal, non verbal or physical conduct of a sexual nature that has the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The third is when someone treats the woman less favourably because she rejected the unwanted conduct.

Conduct is only regarded as harassment when all the circumstances are taken into account (including the perception of the woman at the receiving end of it) and if it is reasonable to conclude that it could have had that effect.

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.
- Isolation or exclusion from workplace related activities including social activities.

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 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.

Victimisation

Some women may be deterred from exercising their rights under the SDO or from supporting others who wish to exercise their rights in case they are victimised by their employer. The Order guards against this by making it unlawful for an employer to victimise an individual because she has brought a discrimination claim, 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, the person has to show that they were treated less favourably than someone who had not taken any of these steps, and that their treatment was because they had pursued a discrimination case, had given evidence or had made allegations of discrimination.

Exceptions

There are two main circumstances when the SDO does not provide protection against discrimination:

- The genuine occupational qualification (GOQ)
- Positive action

Genuine Occupational Qualification (GOQ)

Employers are allowed to discriminate under the SDO when a person's sex is a "genuine occupational qualification" (GOQ) for the job. For instance, if the job needs either a man or a woman for reasons of authenticity, perhaps for a job as an actor or a model.

Or, for reasons of decency or privacy, either a man or a woman may be needed if the job involves physical contact or people may be undressing (e.g. in a changing room). Or the job may involve providing personal services such as counsellors for female victims of domestic violence.

A GOQ exception will not apply if an employer already has enough staff of the other sex who could take on the duties of the job without too much inconvenience.

Positive Action

Positive action means giving preferential treatment to an individual or group of people to prevent, or compensate for, past disadvantages suffered by that individual or group. It is not the same as positive discrimination, which involves treating people more favourably on grounds of sex and is unlawful.

The SDO states that employers can:

- provide training to people of a particular sex which would fit them for particular work if in the preceding 12 months there were none (or very few) of them doing that sort of work, or
- run a recruitment campaign to encourage members of a particular sex to apply for certain kinds of work, as long as there were none (or very few of them) doing that particular kind of work in the preceding 12 months.

Proving Discrimination

Proving sex discrimination is not straightforward. A woman complaining of discrimination has to prove, on the balance of probabilities, that her employer discriminated against her on the grounds of her sex. 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.

Once an employee has established facts from which a Tribunal could conclude that there had been discrimination then the burden shifts to the employer to show that they did not discriminate against her.

Not surprisingly, it is rare to find overt evidence of direct discrimination. Few employers are prepared to admit that they have discriminated against someone and those who are aware of the law may have taken steps to appear to have acted lawfully. Whether or not discrimination can be proved will often depend on what inferences a Tribunal can draw from the primary facts. However, there usually will need to be some factual basis upon which the Tribunal can make its finding. It therefore helps if the claimant can produce any relevant letters or documents. In cases of sexual harassment, it is useful if the claimant makes a note of the key incidents and the dates on which they took place.

Serving a Questionnaire

Given the difficulty of proving discrimination, claimants are allowed to serve a Questionnaire on their employer to obtain information to ascertain the strength of their claim and to establish as far as possible, what the facts are and the reason for their treatment. This information can be used as evidence at any Tribunal hearing. If the employer fails to answer the questions within eight weeks, or does so in an evasive or equivocal manner, a Tribunal may use such facts to draw an inference of unlawful discrimination. Questionnaires have to be served within three months of the act of discrimination, or within 21 days of lodging a Tribunal application (although an extension of time can be sought from the Tribunal if this is missed). Serving a Questionnaire does not count as raising a formal grievance.

Tribunal Claims and Time Limits

The time limit for lodging a claim with the Tribunal is three months from the act complained of (or the last act complained of if a series of acts can be considered as a single continuing act of discrimination e.g. ongoing sexual harassment). No extensions are available unless the Tribunal considers it just and equitable in the circumstances of the case. This is relatively rare.

Lodging a Grievance

While it is not a legal requirement that a person lodges an internal grievance prior to bringing a claim for sex discrimination, it is strongly advisable to do so. This creates the possibility that the matter might be successfully resolved in the workplace. In the first instance a worker should try to resolve the matter informally with their employer. If it is not possible to resolve the matter informally, the worker should, without unreasonable delay, raise the matter formally, in writing, setting out the nature of the grievance and how it might be resolved. Even if any such workplace resolution is unlikely, it is still advisable to lodge a grievance with the employer as any failure to do so may result in any compensation awarded if the claim is successful being reduced by up to 50%.

It should be noted that lodging a grievance does not result in the time limit being extended - the time limit remains three months from the act complained of even if the grievance proceedings are not completed when the three month deadline expires.

Code of Practice

The Equality Commission produces a Code of Practice on the prevention of Sex Bias in Recruitment and Selection and Guidance on the prevention of sexual harassment. While these do not impose formal legal obligations, evidence of any departure by the employer from good practice as recommended by the Code can be put in evidence before Tribunals and must be taken into account. While a Tribunal is not obliged to take account of any departures from the Guidance, it will generally do so. Copies can be obtained from the Equality Commission for Northern Ireland: www.equalityni.org.

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 by up to 50% if the claimant failed to use the internal 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 her. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that she 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.

Gender Equality Duty

In addition to obligations under the SDO, Section 75 of the Northern Ireland Act 1998, places public authorities under a duty to have due regard to the need to promote equality between various groups including between men and women.

This means that service providers and public sector employers have to design employment and services with the different needs of women and men in mind.

This information sheet provides a summary of the rights of employees in relation to Sex Discrimination. This information should not be taken as a comprehensive statement of the law in this area. You are advised to take advice from your union representative before taking any action based on this information.

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