

A summary of the law on:

Sexual Orientation Discrimination



THOMPSONS NI

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

This information sheet is solely concerned with the employment aspect of the Regulations.

Who do the Regulations apply to and when?

The Regulations provide protection for all workers whether homosexual, bisexual or heterosexual from discrimination on sexual orientation grounds. They protect people who are discriminated against because of their actual and/or 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.

The Regulations apply 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 Regulations, 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, terms and conditions of employment, employment benefits and dismissal or any other disadvantage such as harassment.

Who is Liable?

Responsibility for 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 workplace, 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 sexual orientation discrimination in relation to employment – direct discrimination; indirect discrimination; harassment; and victimisation.

Direct discrimination

Direct discrimination means treating a worker less favourably than someone else because of their actual/perceived 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 (actual or hypothetical) with a different orientation. It is irrelevant whether or not the employer intended to discriminate. Employers cannot justify direct discrimination unless they can show that a genuine occupational requirement applies (see below).

The following example could give rise to a claim for direct discrimination:

- A straight man with inferior qualifications, and/or less experience than a man perceived to be gay is appointed to the job or the promotion for which they both applied. The man perceived to be gay could have a claim for direct discrimination on the basis of his actual or perceived sexuality whether he is gay or not.

Indirect discrimination

Indirect discrimination applies to policies and practices which, in reality, puts individuals at a disadvantage because of their sexual orientation.

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

- Has the employer imposed a provision, criterion or practice?
- Does it put a sexual orientation group at a particular disadvantage when compared with another group?
- Does it disadvantage individual in question?
- 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 sexual orientation
- 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.

An example of indirect discrimination

- A pub advertises for a “husband and wife” to manage it and a gay couple are rejected for the post on the basis that they are not a traditional married couple. The gay couple (as other gay couples would be) are disadvantaged by the selection criterion and thus the business would need to be able to justify the criterion to avoid a finding of discrimination.

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.

Examples of harassment include the following:

- Physical abuse.
- Threatening to “out” someone against their wishes.
- 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 their working environment has become intimidating, hostile or offensive.

Single incidents can constitute harassment, though generally speaking, a one-off incident would have to be more serious.

Victimisation

Some workers may be deterred from exercising their rights under the Regulations or from supporting others who wish to exercise their rights in case they are victimised by their employer. The Regulations guard against this by making it unlawful for an employer to victimise an individual because they have brought a sexual orientation discrimination claim, given evidence in a sexual orientation discrimination case or made an allegation of sexual orientation 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 sexual orientation discrimination case, had given evidence or had made allegations of sexual orientation discrimination.

Exceptions

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 a significant number 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.

Proving Discrimination

Proving sex discrimination is not straightforward. A worker complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them on the grounds of sexual orientation. This means that the Tribunal does not have to be certain, but they have to think it more likely than not that the treatment was on the grounds of actual/perceived sexual orientation.

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.

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 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 3 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 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 sexual orientation 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 3 months from the act complained of even if the grievance proceedings are not completed when the 3 month deadline expires.

Equality Commission Guidance

The Equality Commission produces Guidance on the law in relation to sexual orientation. 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 them. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that was 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.

Equality Duty

In addition to obligations under the Regulations, 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 groups of different sexual orientations.

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

This information sheet provides a summary of the rights of employees in relation to Sexual Orientation 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 the this information.

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