Equality
ISLE OF MAN

Isle of Man Government
Reiltys Ellan Vannin

EQUALITY ACT 2017
STATUTORY CODE OF PRACTICE ON EMPLOYMENT

GD No. 2019/0080

This statutory Code of Practice is issued under section 157 of the Equality Act 2017 ("the Act") and applies the provisions of the Equality Act 2017 with effect from 1st January 2020.

The Council of Ministers published its proposals for the Code in accordance with section 157(4) of the Act and consulted such persons as it thought appropriate.

The contents of the Equality and Human Rights Commission Employment Statutory Code of Practice and Supplement to the Statutory Employment Code of Practice have, with the consent of the Commission been used as the basis for this Code, with such modifications as required for its legal and local application in the Isle of Man.

This Statutory Code of Practice is available in alternative formats on request. Please contact equality@gov.im or telephone 01624 687580.

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Foreword

The Equality Act 2017 received Royal Assent in July 2017 and has been brought into force in stages with the final substantive provisions taking effect from January 2020.
This significant legislation has created for the first time in the Isle of Man a comprehensive set of rights and protections for individuals with different protected characteristics (race, sex, disability, age, religion or belief, sexual orientation, gender reassignment, marriage and civil partnership and pregnancy and maternity). As such it gives legislative backing to the Isle of Man Government's strategic objective of an inclusive and caring society.

However, the legislation of itself is not sufficient to help deliver improvements in practice for people, whether in terms of employment, access to goods and services, education or the planning and delivery of public services. It is only through individuals understanding their rights and protections and also organisations and individuals understanding and embracing their responsibilities to support equality, diversity and inclusion that meaningful change happens.

For this reason we are publishing guidance to provide information and examples to help individuals and organisations understand the Equality Act, the protections available and their responsibilities.

This document is a Statutory Code of Practice. This document is intended to be authoritative, comprehensive and technical guidance to the detail of law.

As the Equality Act 2017, an Act of Tynwald, is based largely on the Equality Act 2010, an Act of Parliament, so this Statutory Code follows in large part the equivalent Code of Practice issued by the Equality and Human Rights Commission with such modifications as needed to reflect Manx law and its application in the Isle of Man. Case law and precedent from England and Wales has been retained to assist users of this Code with understanding the operation of the Equality Act 2017 in practice and in the knowledge that such case law is persuasive in the Island's Employment and Equality Tribunal.

This Code has been subject to public consultation prior to finalisation and we thank all those individuals and organisations that have commented and helped contribute to making this Code as helpful as possible to support the Equality Act 2017.

Jane Poole-Wilson
Member of the Legislative Council and Equality Champion

Abbreviations

Convention	European Convention on Human Rights
DfE	Department for Enterprise
DHSC	Department of Health and Social Care
EA	Employment Act 2006
EET Rules 2018	Employment and Equality Tribunal Rules 2018
Equality Act	Equality Act 2017
EADR	Equality Act 2017 (Disability) Regulations 2019
FWR	Flexible Working Regulations 2007
GRA	Gender Recognition Act 2009
LLC	Limited Liability Company
MHSWR	Management of Health and Safety at Work Regulations 2003
MIRS	Manx Industrial Relations Service
MLR	Maternity Leave Regulations 2007 & Maternity Leave (Amendment) Regulations 2007
Para.	Paragraph
Reg.	Regulation
Regs.	Regulations
s.	Section
ss.	Sections
Sch.	Schedule
the Act	the Equality Act 2017
Tribunal	Employment and Equality Tribunal

Chapter 1

Introduction

Purpose of the Equality Act 2017

1.1 The Equality Act 2017 ('the Act') consolidates and replaces most of the previous discrimination legislation for the Isle of Man. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known in the Act as 'protected characteristics'.

1.2 An important purpose of the Act is to unify the legislation outlawing discrimination against people with different protected characteristics, where this is appropriate. There are, however, some significant differences and exceptions, which this Code explains.

1.3 As well as consolidating existing law, the Act makes discrimination unlawful in circumstances not covered previously. Discrimination in most areas of activity is now unlawful, subject to certain exceptions. These areas of activity include, for example: employment and other areas of work; education; housing; the provision of services; the exercise of public functions and membership of associations.

1.4 Different areas of activity are covered under different parts of the Act. Part 3 of the Act deals with discrimination in the provision of services and public functions. Part 4 deals with discrimination in the sale, letting, management and occupation of premises, including housing. Part 5 covers employment and other work-related situations. Part 6 covers education including schools, further education, higher education, and general qualifications bodies. Part 7 deals with discrimination by membership associations. An organisation may have duties under more than one area of the Act because, for example, it employs people and provides services to customers.

Scope of the Code

1.5 This Code covers discrimination in employment and work-related activities under Part 5 of the Act. Part 5 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against in employment, when seeking employment, or when engaged in occupations or activities related to work.

1.6 In Part 5 of the Act, there are some provisions relating to equal pay between men and women. These provisions create an implied sex equality clause in employment contracts, in order to ensure equality in pay and other contractual terms for women and men doing equal work.

1.7 Part 5 also contains sections which make discrimination by trade organisations (including trade unions) and qualifications bodies unlawful.

1.8 This statutory Code applies only to the Isle of Man.

Purpose of the Code

1.9 The main purpose of this Code is to provide a detailed explanation of the Act. This will assist the Employment and Equality Tribunal when interpreting the law and help advocates, advisers, trade union representatives, human resources departments and others who need to apply the law and understand its technical detail.

1.10 The Manx Industrial Relations Service (MIRS) has also produced practical guidance for workers and employers which assumes no knowledge of the law and which may be more helpful and accessible for people who need an introduction to the Act. It can be obtained from MIRS, or downloaded from the MIRS website.

1.11 Guidance about employment legislation can be downloaded from the Department for Enterprise website https://www.gov.im/categories/working-in-the-isle-of-man/employment-rights/

1.12 The Code, together with the practical guidance produced by MIRS will:

- help employers and others understand their responsibilities and avoid disputes in the workplace;
- help individuals to understand the law and what they can do if they believe they have been discriminated

against;
- help advocates and other advisers to advise their clients;
- give the Employment and Equality Tribunal clear guidance on good equal opportunities practice in employment; and
- ensure that anyone who is considering bringing legal proceedings under the Act, or attempting to negotiate equality in the workplace, understands the legislation and is aware of good practice in employment.

Status of the Code

1.13 This Code has been prepared and issued on the basis of powers under the Equality Act 2017. **s. 157**

1.14 The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the Employment and Equality Tribunal and the High Court can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. The Tribunal must take into account any part of the Code that appears to it to be relevant to any questions arising in proceedings.

1.15 If employers and others who have duties under the Act follow the guidance in the Code, it may help them avoid an adverse decision by the Tribunal.

Human rights

1.16 Public authorities have a duty under the Human Rights Act 2001 not to act incompatibly with rights under the European Convention on Human Rights (the Convention).

1.17 Courts and tribunals have a duty to interpret primary legislation (including the Equality Act 2017) and secondary legislation in a way that is compatible with the Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a public authority is involved in the case or not. So in any employment discrimination claim made under the Act, the Employment and Equality Tribunal must ensure that it interprets the Act compatibly with the Convention rights, where it can.

In practice, human rights issues in the workplace are likely to arise in relation to forced labour, privacy and data protection, freedom of expression and thought, trade union activity and harassment.

Large and small employers

1.18 While all employers have the same legal duties under the Act, the way that these duties are put into practice may be different. Small employers may have more informal practices, have fewer written policies, and may be more constrained by financial resources. This Code should be read with awareness that large and small employers may carry out their duties in different ways, but that no employer is exempt from these duties because of size.

How to use the Code

1.19 **Part 1** of the Code, comprising **Chapters 2 to 15**, gives a detailed explanation of the Act.

Chapter 2 explains the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Chapters 3 to 9 cover different types of conduct that are prohibited under the Act.

Chapter 3 explains direct discrimination.

Chapter 4 deals with indirect discrimination as well as explaining the objective justification test.

Chapter 5 covers discrimination arising from disability.

Chapter 6 sets out the duty to make adjustments for disabled people.

Chapter 7 explains the provisions on harassment.

Chapter 8 deals with pregnancy and maternity discrimination.

Chapter 9 covers the remaining types of unlawful conduct: victimisation; instructing, causing or inducing discrimination; aiding contraventions of the Act; and gender reassignment discrimination (absence from work).

Chapter 10 explains the obligations and liabilities of the employer and the corresponding rights of workers.

Chapter 11 deals with the wider work relationships covered by Part 5 of the Act.

Chapter 12 sets out the legal provisions relating to positive action and how employers adopting positive action measures can ensure that such measures are lawful under the Act.

Chapter 13 explains occupational requirements and other exceptions related to work.

Chapter 14 covers pay and benefits including several specific exceptions to the work provisions of the Act.

Chapter 15 explains how the Act can be enforced by individuals and gives an overview of alternatives to litigation.

Part 2, comprising **Chapters 16 to 19**, sets out recommended practice for employers, to help them comply with the Act and to achieve equality of opportunity and outcomes over the whole employment cycle. Public sector employers have specific obligations under the public sector equality duties and will find that this section helps them to meet these obligations.

Chapter 16 discusses how employers can avoid discrimination during the recruitment process.

Chapter 17 explains how discrimination can be avoided during employment and deals with issues such as working hours, accommodating workers' needs, training and development and disciplinary and grievance matters.

Chapter 18 discusses equality policies and implementation of such policies in the workplace.

Chapter 19 explains how discrimination can be avoided during termination of employment.

Additional information is appended at the end of the Code. **Appendix 1** gives further information on the definition of disability under the Act; **Appendix 2** provides information about diversity monitoring; and **Appendix 3** explains how leases and other legal obligations affect the duty to make reasonable adjustments to premises.

Examples in the Code

1.20 Examples of good practice and how the Act is likely to work are included in the Code. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples use different protected characteristics and work-related situations to demonstrate the breadth and scope of the Act.

Use of the words 'employer' and 'worker'

1.21 The Act imposes obligations on people who are not necessarily employers in the legal sense – such as partners in firms, people recruiting their first worker, or people using contract workers. In this Code, these people are also referred to as 'employers' for convenience. The term 'employment' is also used to refer to these wider work-related relationships, except where it is specified that the provision in question does not apply to these wider relationships.

1.22 Similarly, the Code uses the term 'worker' to refer to people who are working for an 'employer', whether or not this is under a contract of employment with that 'employer'. These people include, for example, contract workers, police officers and office holders. The word 'workers' may also include job applicants, except where it is clear that the provision in question specifically excludes them. Where there is a reference to 'employees' in the Code, this indicates that only employees (within the strict meaning of the word) are affected by the particular provision. Protection can also continue beyond the end of the 'employment' relationship in certain circumstances.

References in the Code

1.23 In this Code, 'the Act' means the Equality Act 2017. References to particular Sections, Schedules and Paragraphs of the Act are shown in the margins, abbreviated as 's' 'ss' 'Sch' and 'para' respectively. Occasionally other legislation is also referenced in the margins, notably the Employment Act 2006 ('EA 2006'), the Employment and Equality Tribunal Rules 2018 ('EET Rules 2018') and the Maternity Leave Regulations 2007 (as amended by the Maternity Leave (Amendment) Regulations 2007)) ('MLR').

Changes to the law

1.24 This Code refers to the provisions of the Equality Act 2017 that received Royal Assent on 18 July 2017. There may be subsequent changes to the Act or to other legislation which may have an effect on the duties explained in the Code.

1.25 The Act contains provisions on combined discrimination (dual characteristics) and gender pay reporting. These provisions have not been commenced at the time of writing this Code.

1.26 The excepted provisions at paragraph 15(1) to (3) of Schedule 9 of the Act relating to benefits dependent on marital status have not been commenced as the corresponding UK provisions were found to be incompatible with the European Convention on Human Rights.

1.27 Readers of this Code will need to keep up to date with any developments that affect the Act's provisions, including additional secondary legislation, and should be aware of other codes of practice and guidance issued by the Government.

Further information

1.28 Copies of the Act can be downloaded from www.legislation.gov.im. Copies of regulations and orders made under the Act can be downloaded from www.tynwald.org.im. The text of this Code can be downloaded from the Government website www.gov.im/equality where Word, PDF and accessible versions are also available. Physical copies of the Act, Regulations, Orders and the Code can be purchased from the Tynwald Library on the ground floor of the Tynwald Buildings.

1.29 Guidance about the Equality Act can be obtained by contacting the Isle of Man Government below:

Isle of Man Government
Cabinet Office
3rd Floor
Government Offices
Bucks Road
Douglas
IM1 3PN
Telephone 01624 687580 Email: equality@gov.im

The Equality Act 2017

Code of Practice on employment:

Part 1

Chapter 2

Protected characteristics

Introduction

2.1 This chapter outlines the characteristics which are protected under the Act and which are relevant to the areas covered by this Code.

2.2 The 'protected characteristics' are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

Age

What the Act says

2.3 Age is defined in the Act by reference to a person's age group. In relation to age, when the Act refers to people who share a protected characteristic, it means that they are in the same age group. **s.6(1)**

2.4 An age group can mean people of the same age or people of a range of ages. Age groups can be wide (for example, 'people under 50'; 'under 18s'). They can also be quite narrow (for example, 'people in their mid-40s'; 'people born in 1952'). Age groups may also be relative (for example, 'older than me' or 'older than us'). **s.6(2)**

2.5 The meaning of certain age-related terms may differ according to the context. For example, whether someone is seen as 'youthful' can depend on their role: compare a youthful bartender with a youthful CEO. Age groups can also be linked to actual or assumed physical appearance, which may have little relationship with chronological age – for example, 'the grey workforce'.

2.6 There is some flexibility in the definition of a person's age group. For example, a 40 year old could be described as belonging to various age groups, including '40 year olds'; 'under 50s'; '35 to 45 year olds'; 'over 25s'; or 'middle-aged'. Similarly, a 16 year old could be seen as belonging

to groups that include: 'children'; 'teenagers'; 'under 50s'; 'under 25s'; 'over 14s', or '16 year olds'.

Example: A female worker aged 25 could be viewed as sharing the protected characteristic of age with a number of different age groups. These might include '25 year olds'; 'the under 40s'; 'the over 20s'; and 'younger workers'.

Example: A man of 86 could be said to share the protected characteristic of age with the following age groups: '86 year olds'; 'over 80s'; 'over 65s'; 'pensioners'; 'senior citizens'; 'older people'; and 'the elderly'.

2.7 Where it is necessary to compare the situation of a person belonging to a particular age group with others, the Act does not specify the age group with which comparison should be made. It could be everyone outside the person's age group, but in many cases the choice of comparator age group will be more specific; this will often be led by the context and circumstances. (More detail on how to identify a comparator in direct discrimination cases is set out in paragraphs 3.22 to 3.31.)

Example: In the first example above, the 25 year old woman might compare herself to the 'over 25s', or 'over 35s', or 'older workers'. She could also compare herself to 'under 25s' or '18 year olds'.

Disability

What the Act says

2.8 Only a person who meets the Act's definition of disability has the protected characteristic of disability. When the Act refers to people who share a protected characteristic in relation to disability, it means they share the same disability. **s.7** **s.7(3)(b)**

2.9 In most circumstances, a person will have the protected characteristic of disability if they have had a disability in the past, even if they no longer have the disability. **s.7(4)**

2.10 People who currently have a disability are protected because of this characteristic against harassment and discrimination – including discrimination arising from disability (see Chapter 5) and a failure to comply with the

duty to make reasonable adjustments (see Chapter 6). People who have had a disability in the past are also protected against harassment and discrimination.

2.11 Non-disabled people are protected against direct disability discrimination only where they are perceived to have a disability or are associated with a disabled person (see paragraphs 3.11 to 3.21). In some circumstances, a non-disabled person may be protected where they experience harassment (see Chapter 7) or some other unlawful act such as victimisation (see Chapter 9).

2.12 The Act says that a person has a disability if they have a physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out normal day-to-day activities. Physical or mental impairment includes sensory impairments such as those affecting sight or hearing. **s.7(1)**

2.13 An impairment which consists of a severe disfigurement is treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities. **Sch. 1, para 3**

2.14 Long-term means that the impairment has lasted or is likely to last for at least 12 months or for the rest of the affected person's life. **Sch. 1, para 2(1)**

2.15 Substantial means more than minor or trivial. **s.3(2)**

2.16 Where a person is taking measures to treat or correct an impairment (other than by using spectacles or contact lenses) and, but for those measures, the impairment would be likely to have a substantial adverse effect on the ability to carry out normal day to day activities, it is still to be treated as though it does have such an effect. **Sch.1, para 5**

2.17 This means that 'hidden' impairments (for example, mental illness or mental health conditions, diabetes and epilepsy) may count as disabilities where they meet the definition in the Act.

2.18 Cancer, HIV infection, and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis. **Sch. 1, para 6**

2.19 In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled. **Equality Act 2017 (Disability) Regs. 2019 Reg. 8**

2.20 Progressive conditions and those with fluctuating or recurring effects will amount to disabilities in certain circumstances. **Sch. 1, paras 2(2) & 8**

2.21 For more on the concept of disability, see Appendix 1 to this Code.

Gender reassignment

What the Act says

2.22 The Act defines gender reassignment as a protected characteristic. People who are proposing to undergo, are undergoing, or have undergone a process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment. **s.8(1)**

2.23 A reference to a transgender person is a reference to a person who has the protected characteristic of gender reassignment. **s.8(2)**

2.24 Under the Act 'gender reassignment' is a personal process, that is, moving away from one's birth sex to the preferred gender, rather than a medical process.

2.25 The reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.

Example: A person who was born physically female decides to spend the rest of his life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully passes as a man without the need for any medical intervention. He would be protected as someone who has the protected characteristic of gender reassignment.

Example: A person who was born physically male decides to spend the rest of her life living as a woman. She declares her intention to her manager at work, who makes appropriate arrangements in the workplace and she then starts life at home and work as a woman. After discussion with her doctor and a Gender Identity Clinic, she starts hormone treatment and after several years she goes through gender reassignment surgery. She would be protected as someone who has the protected characteristic

of gender reassignment.

2.26 The Act requires that a person should have at least proposed to undergo gender reassignment. It does not require such a proposal to be irrevocable. People who start the gender reassignment process but then decide to stop still have the protected characteristic of gender reassignment.

Example: A person born physically male lets her friends know that she intends to reassign her sex. She attends counselling sessions to start the process. However, she decides to go no further. She is protected under the law because she has undergone part of the process of reassigning her sex.

2.27 Protection is provided where, as part of the process of reassigning their sex, someone is driven by their gender identity to cross-dress, but not where someone chooses to cross-dress for some other reason.

2.28 In order to be protected under the Act, there is no requirement for a transgender person to inform their employer of their gender reassignment status. However, if a worker is proposing to undergo gender reassignment or is still in the process of transitioning, they may want to discuss their needs with their employer so the employer can support them during the process.

Example: Before a formal dinner organised by his employer, a worker tells his colleagues that he intends to come to the event dressed as a woman 'for a laugh'. His manager tells him not to do this, as it would create a bad image of the company. Because the worker has no intention of undergoing gender reassignment, he would not have a claim for discrimination.

On the other hand, if the employer had said the same thing to a worker driven by their gender identity to cross-dress as a woman as part of the process of reassigning their sex, this could amount to direct discrimination because of gender reassignment.

2.29 Where an individual has been diagnosed as having 'Gender Dysphoria' or 'Gender Identity Disorder' and the condition has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities, they may also be protected under the disability discrimination provisions of the Act.

Gender recognition certificates

2.30 The Gender Recognition Act 2009 (GRA) provides that where a person holds a gender recognition certificate they must be treated according to their acquired gender (see the GRA for details on those who are covered by that Act; see also the Data Protection Act 2018, and legislation applied or made under the Act, which deals with processing special category data which relates to information that is more sensitive).

2.31 Transgender people should not be routinely asked to produce their gender recognition certificate as evidence of their legal gender. Such a request would compromise a transgender person's right to privacy. If an employer requires proof of a person's legal gender, then their (new) birth certificate should be sufficient confirmation.

Marriage and civil partnership

What the Act says

2.32 A person who is married or in a civil partnership has the protected characteristic of marriage and civil partnership. **s.9(1)**

2.33 Marriage covers any formal union between two people which is legally recognised in the Isle of Man as a marriage and includes a marriage between a same-sex couple. A civil partnership refers to a civil partnership between same or opposite sex couples under the Civil Partnership Act 2011, which includes civil partnerships registered both in and outside the Isle of Man and equivalent specified overseas relationships.

2.34 Only people who are married or in a civil partnership are protected against discrimination on this ground. The status of being unmarried or single is not protected. People who only intend to marry or form a civil partnership, or who have divorced or had their civil partnership dissolved, are not protected on this ground. **s.14(4)**

2.35 People who are married or in a civil partnership share the same protected characteristic. For example, a married man, and a woman in a civil partnership, share the protected characteristic of marriage and civil partnership. **s.9(2)(b)**

Pregnancy and maternity

What the Act says

2.36 The Act lists pregnancy and maternity as a protected characteristic. It is unlawful for an employer to subject a woman to unfavourable treatment during the 'protected period' as defined by the Act. Pregnancy and maternity discrimination in the workplace is considered in detail in Chapter 8.

s.5

s.19(6)

Race

What the Act says

2.37 The Act defines 'race' as including colour, nationality, ethnic or national origins and caste.

s.10(1)(a) – (d)

2.38 A person has the protected characteristic of race if they fall within a particular racial group. A racial group can also be made up of two or more distinct racial groups. See paragraph 2.48 for the meaning of 'racial group'.

s.10(2)

Nationality

2.39 Nationality (or citizenship) is the specific legal relationship between a person and a state through birth or naturalisation. It is distinct from national origins (see paragraph 2.44 below).

Ethnic origins

2.40 Everyone has an ethnic origin but the provisions of the Act only apply where a person belongs to an 'ethnic group'. Decisions from the courts of England and Wales have defined 'ethnic group' as meaning that a person must belong to an ethnic group which regards itself and is regarded by others as a distinct and separate community because of certain characteristics. These characteristics usually distinguish the group from the surrounding community. The Manx courts have not as yet been required to interpret whether a Manx person belongs to an 'ethnic group'.

2.41 There are two essential characteristics which an ethnic group must have: a long shared history and a cultural tradition of its own. In addition, an ethnic group may have one or more of the following characteristics: a common language; a common literature; a common religion; a common geographical origin; being a minority; or an oppressed group.

2.42 An ethnic group or national group could include members new to the group, for example, a person who marries into the group. It is also possible for a person to leave an ethnic group.

2.43 Various courts in England and Wales have confirmed that the following are protected ethnic groups: Sikhs, Jews, Romany Gypsies, Irish Travellers, Scottish Gypsies, and Scottish Travellers.

National origins

2.44 National origins must have identifiable elements, both historic and geographic, which at least at some point in time indicate the existence or previous existence of a nation. For example, as England and Scotland were once separate nations, the English and the Scots have separate national origins. National origins may include origins in a nation that no longer exists (for example, Czechoslovakia) or in a 'nation' that was never a nation state in the modern sense.

2.45 National origin is distinct from nationality. For example, people of Chinese national origin may be citizens of China but many are citizens of other countries.

2.46 A person's own national origin is not something that can be changed, though national origin can change through the generations.

Caste

2.47 Caste denotes a hereditary, endogamous (marrying within the group) community associated with occupation and ranked accordingly on a perceived scale of ritual purity. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy are known as Dalit.

Meaning of 'racial group'

2.48 A racial group is a group of people who have or share a colour, nationality or ethnic or national origins. For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination under the Act. **s.10(3)**

2.49 A person may fall into more than one racial group. For example, a 'Nigerian' may be defined by colour, nationality or ethnic or national origin.

2.50 A racial group can be made up of two or more distinct racial groups. For example, a racial group could be 'British Asian' which would encompass those people who are both Asian and who are British citizens. Another racial group could be 'South Asian' which may include Indians, Pakistanis, Bangladeshis and Sri Lankans. **s.10(4)**

2.51 Racial groups can also be defined by exclusion, for example, those of 'non-British' nationality could form a single racial group.

Religion or belief

What the Act says

2.52 The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of any such religion or belief. **s.11(1) & (2)**

2.53 For example, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, irrespective of any other religion or belief they may have or any lack of one.

2.54 The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion).

Meaning of religion

2.55 'Religion' means any religion and includes a lack of religion. The term 'religion' includes the more commonly recognised religions in the Isle of Man such as Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, **s.11(1)**

Rastafarianism and Sikhism. It is for the Employment and Equality Tribunal to determine what constitutes a religion.

2.56 A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion for the purposes of the Act.

Meaning of belief

2.57 Belief means any religious or philosophical belief and includes a lack of belief. **s.11(2)**

2.58 'Religious belief' goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion.

2.59 A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism, Atheism or Environmentalism.

2.60 A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.

2.61 For a philosophical belief to be protected under the Act:

- it must be genuinely held;
- it must be a belief and not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion and importance;
- it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.

Example: A woman believes in a philosophy of racial superiority for a particular racial group. It is a belief around which she centres the important decisions in her life. This is not compatible with human dignity and conflicts with the fundamental rights of others. It would therefore not constitute a 'belief' for the purposes of the Act.

Manifestation of religion or belief

2.62 While people have an absolute right to hold a particular religion or belief under Article 9 of the European Convention on Human Rights, manifestation of that religion or belief is a qualified right which means, it may in certain circumstances be limited against other rights. For example, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) or the right to freedom of expression (Article 10). The Equality and Human Rights Commission has issued guidance: Religion or belief in the workplace: an explanation of recent European Court of Human Rights judgments (2013).

2.63 Manifestations of a religion or belief do not have to be a core component of the religion or belief that is followed. The means by which a person may choose to express their adherence to their religious or philosophical belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination; this would usually amount to indirect discrimination.

Example: An employer has a 'no headwear' policy for its staff. Unless this policy can be objectively justified, this will be indirect discrimination against Sikh men who wear the turban, Muslim women who wear a headscarf and observant Jewish men who wear a skullcap as manifestations of their religion.

2.64 A person does not have to prove that the manifestation of their religion or belief is a core component of the religion or philosophical belief they follow. It may instead be a means by which they choose to express their adherence to their religious belief.

2.65 In a claim of indirect religion or belief discrimination, a complainant does not need to establish that others are also put at a particular disadvantage by a provision, criterion or practice; rather the question is whether the limitation on the complainant's right under the European Convention on Human Rights to manifest their religious beliefs is proportionate given the legitimate aims of the employer. This is because protection of the right to manifest religion under the Convention does not require 'group

disadvantage' to be shown.

Sex

What the Act says

2.66 Sex is a protected characteristic and refers to a male or female of any age. In relation to a group of people it refers to either men and/or boys, or women and/or girls. **ss.12(a) & (b), 3 (2)**

2.67 A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see paragraph 2.22) or sexual orientation (see paragraph 2.68).

Sexual orientation

What the Act says

2.68 Sexual orientation is a protected characteristic. It means a person's romantic or sexual attraction towards: **s.13(1) & (2)**

- persons of the same sex (that is, the person is a gay man or a lesbian);
- persons of the opposite sex (that is, the person is heterosexual); or
- persons of either sex (that is, the person is bisexual).

Not being romantically or sexually attracted to persons of either sex is also a sexual orientation.

2.69 Sexual orientation relates to how people feel as well as their actions.

2.70 Sexual orientation discrimination includes discrimination because someone is of a particular sexual orientation, and it also covers discrimination connected with manifestations of that sexual orientation. These may include someone's appearance, the places they visit or the people they associate with.

2.71 When the Act refers to the protected characteristic of sexual orientation, it means the following: **s.13(3)**

- a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; and

- a reference to people who share a protected characteristic is a reference to people who are of the same sexual orientation.

2.72 Gender reassignment is a separate protected characteristic and unrelated to sexual orientation – despite a common misunderstanding that the two characteristics are related (see paragraph 2.22).

Restrictions on protection under the Act

2.73 For some protected characteristics, the Act does not provide protection in relation to all types of prohibited conduct.

- In relation to marriage and civil partnership, there is no protection from discrimination if a person is unmarried or single (see paragraph 2.34).

- For marriage and civil partnership, there is no protection from direct discrimination by association or perception (see paragraphs 3.18 and 3.21) or harassment (see paragraph 7).

- For pregnancy and maternity, there is no express protection from direct discrimination by association or perception (see paragraphs 3.18 and 3.21); indirect discrimination (see paragraph 4.1); or harassment (see paragraph 7). However, in these three situations, a worker may be protected under the sex discrimination provisions.

- Apart from discrimination by association or perception, protection from direct discrimination because of disability only applies to disabled people (see paragraph 3.35).
- Indirect disability discrimination and discrimination arising from disability only apply to disabled people (see Chapters 4 and 5).
- An employer is only under a duty to make reasonable adjustments for a disabled worker or an actual or potential disabled job applicant (see Chapter 6).

Chapter 3

Direct discrimination

Introduction

3.1 This chapter explains what the Act says about direct discrimination in employment for all of the protected characteristics. It discusses how the requirement for a comparator may be met.

What the Act says

3.2 Direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. **s.14(1)**

3.3 Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances:

- where the protected characteristic is age, and the less favourable treatment can be justified as a proportionate means of achieving a legitimate aim (see paragraphs 3.36 to 3.44); **s.14(2)**
- in relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person (see paragraph 3.35); **s.14(3)**
- where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful (see Chapters 12 to 13).

What is ‘less favourable’ treatment?

3.4 To decide whether an employer has treated a worker ‘less favourably’, a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer’s treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

Example: At a job interview, an applicant mentions she has a same sex partner. Although she is the most qualified candidate, the employer decides not to offer her the job. This decision treats her less favourably than the successful candidate, who is a heterosexual woman. If the less favourable treatment of the unsuccessful applicant is because of her sexual orientation, this would amount to direct discrimination.

3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

Example: A female worker's appraisal duties are withdrawn while her male colleagues at the same grade continue to carry out appraisals. Although she was not demoted and did not suffer any financial disadvantage, she feels demeaned in the eyes of those she managed and in the eyes of her colleagues. The removal of her appraisal duties may be treating her less favourably than her male colleagues. If the less favourable treatment is because of her sex, this would amount to direct discrimination.

3.6 Under the Act, it is not possible for the employer to balance or eliminate less favourable treatment by offsetting it against more favourable treatment – for example, extra pay to make up for loss of job status.

Example: A saleswoman informs the employer that she intends to spend the rest of his life living as a man. As a result of this, he is demoted to a role without client contact. The employer increases his salary to make up for the loss of job status. Despite the increase in pay, the demotion will constitute less favourable treatment because of gender reassignment.

3.7 For direct discrimination because of pregnancy and maternity, the test is whether the treatment is **unfavourable** rather than less favourable. There is no need for the woman to compare her treatment with that experienced by other workers (see Chapter 8). **s.19**

Segregation

3.8 When the protected characteristic is race, deliberately segregating a worker or group of workers from others of a different race automatically amounts to less favourable treatment. There is no need to identify a comparator, because racial segregation is always discriminatory. But it **s.14(5)**

must be a deliberate act or policy rather than a situation that has occurred inadvertently.

Example: A local marketing company which employs predominantly British staff recruits Polish nationals and seats them in a separate room nicknamed 'Little Poland'. The company argues that they have an unofficial policy of seating the Polish staff separately from British staff so that they can speak amongst themselves in their native language without disturbing the staff who speak English. This is segregation, as the company has a deliberate policy of separating staff because of race.

3.9 Segregation linked to other protected characteristics **may** be direct discrimination. However, it is necessary to show that it amounts to less favourable treatment.

Shared protected characteristics

3.10 Direct discrimination can take place even though the employer and worker share the same protected characteristic giving rise to the less favourable treatment. **s.25(1)**

Example: A Muslim businessman decides not to recruit a Muslim woman as his personal assistant, even though she is the best qualified candidate. Instead he recruits a woman who has no particular religious or non-religious belief. He believes that this will create a better impression with clients and colleagues, who are mostly Christian or have no particular religious or non-religious belief. This could amount to direct discrimination because of religion or belief, even though the businessman shares the religion of the woman he has rejected.

'Because of' a protected characteristic

3.11 **'**Because of a protected characteristic' means that the characteristic needs to be a cause of the less favourable treatment, but it does not need to be the only or even the main cause.

3.12 In some instances, the discriminatory basis of the treatment will be obvious from the treatment itself.

Example: If an employer were to state in a job advert 'Italians and Bulgarians need not apply', this could amount to direct discrimination because of race against an Italian or Bulgarian person who might have been eligible to apply for the job but was deterred from doing so because of the statement in the advert. In this case, the discriminatory

basis of the treatment is obvious from the treatment itself.

3.13 In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

Example: During an interview, a job applicant informs the employer that he has multiple sclerosis. The applicant is unsuccessful and the employer offers the job to someone who does not have a disability. In this case, it will be necessary to look at why the employer did not offer the job to the unsuccessful applicant with multiple sclerosis to determine whether the less favourable treatment was because of his disability.

3.14 Direct discrimination is unlawful, no matter what the employer's motive or intention, and regardless of whether the less favourable treatment of the worker is conscious or unconscious. Employers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the worker differently because of a protected characteristic.

Example: An angling magazine produced by an all-male team does not recruit a female journalist. They are genuinely concerned that she would feel unhappy and uncomfortable in an all-male environment. Although they appear to be well-intentioned in their decision not to recruit her, this is likely to amount to direct sex discrimination.

3.15 Direct discrimination also includes less favourable treatment of a person based on a stereotype relating to a protected characteristic, whether or not the stereotype is accurate.

Example: An employer believes that someone's memory deteriorates with age. He assumes – wrongly – that a 60-year-old manager in his team can no longer be relied on to undertake her role competently. An opportunity for promotion arises, which he does not mention to the manager. The employer's conduct is influenced by a stereotyped view of the competence of 60 year olds. This is likely to amount to less favourable treatment because of age.

3.16 An employer cannot base their treatment on another criterion that is discriminatory – for example, where the treatment in question is based on a decision to follow a discriminatory external rule.

Example: An engineering company operates a voluntary redundancy scheme which provides enhanced terms to women aged 55 or older and men aged 60 or older. A woman of 56 is able to take advantage of the scheme and leave on enhanced terms but a man of 56 cannot do this. The company argues that their scheme is based on the original state pension age of 60 for women and 65 for men. The scheme discriminates because of sex against the male workers. The company cannot rely on an external policy which is itself discriminatory to excuse this discrimination, even though that external policy in this case may have been lawful.

3.17 A worker experiencing less favourable treatment because of' a protected characteristic does not have to possess the characteristic themselves. For example, the person might be associated with someone who has the characteristic ('discrimination by association'); or the person might be wrongly perceived as having the characteristic ('discrimination by perception').

Discrimination by association

3.18 It is direct discrimination if an employer treats a worker less favourably because of the worker's association with another person who has a protected characteristic; however, this does not apply to marriage and civil partnership or pregnancy and maternity. In the case of pregnancy and maternity, a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination.

3.19 Discrimination by association can occur in various ways – for example, where the worker has a relationship of parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one.

Example: A lone father caring for a disabled son has to take time off work whenever his son is sick or has medical appointments. The employer appears to resent the fact that the worker needs to care for his son and eventually dismisses him. The dismissal may amount to direct disability discrimination against the worker by association with his son.

Example: A manager treats a worker (who is heterosexual) less favourably because she has been seen out with a person who is gay. This could be direct sexual orientation discrimination against the worker because of

her association with this person.

3.20 Direct discrimination because of a protected characteristic could also occur if a worker is treated less favourably because they campaigned to help someone with a particular protected characteristic or refused to act in a way that would disadvantage a person or people who have (or whom the employer believes to have) the characteristic. The provisions of the Act on instructing, causing or inducing discrimination may also be relevant here (see paragraphs 9.16 to 9.24).

Example: An employer does not short-list an internal applicant for a job because the applicant – who is not disabled himself – has helped to set up an informal staff network for disabled workers. This could amount to less favourable treatment because of disability.

Discrimination by perception

3.21 It is also direct discrimination if an employer treats a worker less favourably because the employer mistakenly thinks that the worker has a protected characteristic. However, this does not apply to pregnancy and maternity or marriage and civil partnership.

Example: An employer rejects a job application form from a white woman whom he wrongly thinks is black, because the applicant has an African-sounding name. This would constitute direct race discrimination based on the employer's mistaken perception.

Example: A masculine-looking woman applies for a job as a sales representative. The sales manager thinks that she is transgender because of her appearance and does not offer her the job, even though she performed the best at interview. The woman would have a claim for direct discrimination because of perceived gender reassignment, even though she is not in fact transgender.

Comparators

3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'. However, no comparator is needed in cases of racial segregation (see paragraph 3.8) or pregnancy and maternity discrimination (see paragraph 3.7 and Chapter 8). **s.14(1)**

Who will be an appropriate comparator?

3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator. **s.24(1)**

Example: When an employer has a vacancy for an IT supervisor, both the senior IT workers apply for promotion to the post. One of them is male and the other is female. Both are of a similar age, have no disability, heterosexual, are non-practising Christians and do not require work permits as they are Isle of Man workers. However, the female worker has more experience than the male counterpart. When the man is promoted, the woman alleges direct sex discrimination. In this case, the comparator's circumstances are sufficiently similar to enable a valid comparison to be made.

Example: The Singapore office of a Manx company seconds a limited number of staff from its Singapore office to work for its IOM head office, alongside locally recruited staff. One of these local workers complains that his salary and benefits are lower than those of a secondee from Singapore employed at the same grade. Although the two workers are working for the same company at the same grade, the circumstances of the Singapore secondee are materially different. He has been recruited in Singapore, reports at least in part to the Singapore office, has a different career path and his salary and benefits reflect the fact that he is working abroad. For these reasons, he would not be a suitable comparator.

Hypothetical comparators

3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

Example: A person who has undergone gender reassignment works in a restaurant. She makes a mistake on the till, resulting in a small financial loss to her employer, because of which she is dismissed. The situation has not arisen before, so there is no actual comparator. But six months earlier, the employer gave a written warning to another worker for taking home items of food without permission. That person's treatment might be used as evidence that the employer would not have dismissed a hypothetical worker who is not transgender for making a till error.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the complainant, but not the same. Looking at these elements together, the Employment and Equality Tribunal may conclude that the complainant was less favourably treated than a hypothetical comparator would have been treated.

Example: An employer dismissed a worker at the end of her probation period because she had lied on one occasion. While accepting she had lied, the worker explained that this was because the employer had undermined her confidence and put her under pressure. In the absence of an actual comparator, the worker compared her treatment to two male comparators; one had behaved dishonestly but had not been dismissed, and the other had passed his probation in spite of his performance being undermined by unfair pressure from the employer. Elements of the treatment of these two comparators could allow the Employment and Equality Tribunal to construct a hypothetical comparator showing the worker had been treated less favourably because of sex.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the complainant as they did. In many cases it may be more straightforward for the Employment and Equality Tribunal to establish the reason for the complainant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the complainant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

Example: After a dispute over an unreasonably harsh performance review carried out by his line manager, a worker of Indian origin was subjected to disciplinary proceedings by a second manager which he believes were

inappropriate and unfair. He makes a claim for direct race discrimination. The Employment and Equality Tribunal might first of all look at the reason for the atypical conduct of the two managers, to establish whether it was because of race. If this is found to be the case, they would move on to consider whether the worker was treated less favourably than hypothetical comparator(s) would have been treated.

3.28 Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the complainant have been treated in that way?'

Comparators in disability cases

3.29 The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself). **s.24(2)(a)**

3.30 It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.

Example: A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights.

Comparators in sexual orientation cases

3.31 For sexual orientation, the Act says that the fact that one person is a civil partner while another is married is not a material difference between the circumstances relating to each case. Nor is the fact that a person is married to, or in a civil partnership with, a person of the same sex while **s.24(3)**

another is married to, or in a civil partnership with, a person of the opposite sex a material difference.

Example: A worker who is gay and is married complains that he was refused promotion because of his sexual orientation. His colleague in an opposite sex civil partnership is promoted instead. The fact that the worker is in a same sex married relationship and the colleague is in an opposite sex civil partnership will not be a material difference in their circumstances, so he would be able to refer to his civil partnership colleague as a comparator in this case.

Advertising an intention to discriminate

3.32 If an employer makes a statement in an advertisement that in offering employment they will treat applicants less favourably because of a protected characteristic, this would amount to direct discrimination. Only people who are eligible to apply for the job in question can make a claim for discrimination under the Act.

Example: A marketing company places an advert on its web site offering jobs to 'young graduates'. This could be construed as advertising an intention to discriminate because of age. An older graduate who is put off applying for the post, even though they are eligible to do so, could claim direct discrimination.

3.33 The question of whether an advertisement is discriminatory depends on whether a reasonable person would consider it to be so. An advertisement can include a notice or circular, whether to the public or not, in any publication, on radio, television or in cinemas, via the internet or at an exhibition.

Example: A dress manufacturing company places an advertisement in a local newspaper for a Turkish machinist. A reasonable person would probably view this as advertising an intention to discriminate because of race.

Marriage and civil partnership

3.34 In relation to employment, if the protected characteristic is marriage and civil partnership, direct discrimination only covers less favourable treatment of a worker because the worker themselves is married or a civil partner. Single people and people in relationships outside of marriage or civil partnership (whether or not they are cohabiting), are not protected from direct discrimination because of their status. **s.14(4)** **s.9(2)**

Example: An employer offers 'death in service' benefits to the spouses and civil partners of their staff members. A worker who lives with her partner, but is not married to him, wants to nominate him for death in service benefits. She is told she cannot do this as she is not married. Because being a cohabitee is not a protected characteristic, she would be unable to make a claim for discrimination.

When is it lawful to treat a person more favourably?

More favourable treatment of disabled people

3.35 In relation to disability discrimination, the Act only protects disabled people, so it is not discrimination to treat a disabled person more favourably than a non-disabled person. **s.14(3)**

Example: An employer with 60 staff has no disabled workers. When they advertise for a new office administrator, they guarantee all disabled applicants an interview for the post. This would not amount to direct discrimination because of disability.

Justifiable direct discrimination because of age

3.36 A different approach applies to the protected characteristic of age, because some age-based rules and practices are seen as justifiable. Less favourable treatment of a person because of their age is not direct discrimination if the employer can show the treatment is a proportionate means of achieving a legitimate aim. This is called the 'objective justification test'. **s.14(2)**

3.37 In considering direct discrimination because of age, it is important to distinguish a rule or practice affecting workers in a particular age group from a neutral provision, criterion or practice applied equally to everyone that may give rise to indirect discrimination (see paragraph 4.6).

3.38 The objective justification test, which also applies to other areas of discrimination law, is explained in more detail in paragraphs 4.26 to 4.33.

3.39 The question of whether an age-based rule or practice is 'objectively justified' – that is, a proportionate means of achieving a legitimate aim – should be approached in two stages:

- First, is the aim of the rule or practice legal and non-discriminatory, and one that represents a real, objective consideration? The range of legitimate aims that can justify less favourable treatment is narrower than the range of aims that can justify other forms of discrimination (such as discrimination arising out of disability) or any other form of indirect discrimination. For an aim to be regarded as legitimate for the purpose of justifying less favourable treatment because of age it must pursue social policy objectives, such as those related to employment policy, the labour market or vocational training. It must be of a public interest nature, distinguishable from purely individual reasons particular to an employer's situation, such as cost reduction or improving competitiveness.

- Second, if the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

3.40 The following is an illustration of an age-based rule that might well satisfy the objective justification test.

Example: A building company has a policy of not employing under-18s on its more hazardous building sites. The aim behind this policy is to protect young people from health and safety risks associated with their lack of experience and less developed physical strength. This aim is supported by accident statistics for younger workers on building sites and is likely to be a legitimate one. Imposing an age threshold of 18 would probably be a proportionate means of achieving the aim if this is supported by the evidence. Had the threshold been set at 25, the proportionality test would not necessarily have been met.

3.41 The following examples illustrate age-based rules that would probably fail the objective justification test.

Example: A haulage company introduces a blanket policy forcing its drivers to stop driving articulated lorries at 55, because statistical evidence suggests an increased risk of heart attacks over this age. The aim of public safety would be a legitimate one which is supported by evidence of risk. However, the company would have to show that its blanket ban was a proportionate means of achieving this objective. This might be difficult, as medical checks for individual drivers could offer a less discriminatory means of achieving the same aim.

Example: A fashion retailer rejects a middle-aged woman as a sales assistant on the grounds that she is 'too old' for

the job. They tell her that they need to attract the young customer base at which their clothing is targeted. If this corresponds to a real business need on the part of the retailer, it could qualify as a legitimate aim. However, rejecting this middle-aged woman is unlikely to be a proportionate means of achieving this aim; a requirement for all sales assistants to have knowledge of the products and fashion awareness would be a less discriminatory means of making sure the aim is achieved.

3.42 Legitimate aims can be summarised as promoting intergenerational fairness and 'dignity' and may include:

- promoting access to employment for younger people;
- the efficient planning of the departure and recruitment of staff;
- sharing out employment opportunities fairly between the generations;
- ensuring the mix of generations of staff so as to promote the exchange of experience and new ideas
- rewarding experience;
- cushioning the blow for long serving employees who may find it hard to find new employment if dismissed; and
- facilitating the participation of older workers in the workforce.

3.43 If it is established that a particular aim is capable of being a legitimate aim, it must also be legitimate in the particular circumstance of the employment concerned.

3.44 Where it is established that a particular aim is legitimate, an employer still has to be able to show that the means used are proportionate, meaning that they are both appropriate to the aim and reasonably necessary to achieve it (paragraphs 4.29–4.33).

Occupational requirements

3.45 The Act creates a general exception to the prohibition on direct discrimination in employment for occupational requirements that are genuinely needed for the job. See Chapter 13 for details. **Sch. 9, para 1**

Chapter 4

Indirect discrimination

Introduction

4.1 This chapter explains indirect discrimination and 'objective justification'. The latter concept applies to indirect discrimination, direct discrimination because of age, discrimination arising from disability and to some of the exceptions permitted by the Act.

4.2 Indirect discrimination applies to all the protected characteristics apart from pregnancy and maternity (although, in pregnancy and maternity situations, indirect sex discrimination may apply).

What the Act says

4.3 Indirect discrimination may occur when an employer applies an apparently neutral provision, criterion or practice which puts workers sharing a protected characteristic at a particular disadvantage. **s.20(1) & (2)**

4.4 For indirect discrimination to take place, four requirements must be met: **s.20(2)**

1. the employer applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular worker;
2. the provision, criterion or practice puts, or would put, people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;
3. the provision, criterion or practice puts, or would put, the worker at that disadvantage; and
4. the employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

What constitutes a provision, criterion or practice?

4.5 The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision.

Example: A factory owner announces that from next month staff cannot wear their hair in dreadlocks, even if the locks are tied back. This is an example of a policy that has not yet been implemented but which still amounts to a provision, criterion or practice. The decision to introduce the policy could be indirectly discriminatory because of religion or belief, as it puts the employer's Rastafarian workers at a particular disadvantage. The employer must show that the provision, criterion or practice can be objectively justified.

Is the provision, criterion or practice a neutral one?

4.6 The provision, criterion or practice must be applied to everyone in the relevant group, whether or not they have the protected characteristic in question. On the face of it, the provision, criterion or practice must be neutral. If it is not neutral in this way, but expressly applies to people with a specific protected characteristic, it is likely to amount to direct discrimination.

Example: A bus company adopts a policy that all female drivers must re-sit their theory and practical tests every five years to retain their category D licence. Such a policy would amount to direct discrimination because of sex. In contrast, another bus company adopts a policy that drivers on two particular routes must re-sit the theory test. Although this provision is apparently neutral, it turns out that the drivers on these two routes are nearly all women. This could amount to indirect sex discrimination unless the policy can be objectively justified.

What does 'would put' mean?

4.7 It is a requirement of the Act that the provision, criterion or practice puts **or would put** people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic. The Act also requires that it puts **or would put** the particular worker at that disadvantage. This allows challenges to provisions, criteria or practices which have not yet been applied but which would have a discriminatory effect if they were. **s.20(2)(b)**

4.8 However, for a claim of indirect discrimination to succeed, the worker must show that they would experience a disadvantage if the provision, criterion or practice were applied to them. **s.20(2)(c)**

Example: The contracts for senior buyers at a large store have a mobility clause requiring them to travel at short notice to any part of the world. A female senior buyer with young children considers that the mobility clause puts women at a disadvantage as they are more likely to be the carers of children and so less likely to be able to travel abroad at short notice. She may challenge the mobility clause even though she has not yet been asked to travel abroad at short notice.

By contrast, a female manager in customer services at the same store might agree that the mobility clause discriminates against women – but, as she is not a senior buyer, she cannot challenge the clause.

What is a disadvantage?

4.9 'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. A 'detriment', which is a similar concept, is something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently.

4.10 Sometimes, a provision, criterion or practice is intrinsically liable to disadvantage a group with a particular protected characteristic.

Example: At the end of the year, an employer decides to invite seasonal workers employed during the previous summer to claim a bonus within a 30 day time limit. By writing to these workers at their last known address, the employer is liable to disadvantage migrant workers. This is because these workers normally return to their home country during the winter months, and so they are unlikely to apply for the bonus within the specified period. This could amount to indirect race discrimination, unless the practice can be objectively justified.

4.11 In some situations, the link between the protected characteristic and the disadvantage might be obvious; for example, dress codes create a disadvantage for some workers with particular religious beliefs. In other situations it will be less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage, in which case statistics or personal testimony may help to demonstrate that a disadvantage exists.

Example: A hairdresser refuses to employ stylists who cover their hair, believing it is important for them to exhibit their flamboyant haircuts. It is clear that this criterion puts at a particular disadvantage both Muslim women and Sikh men who cover their hair. This may amount to indirect discrimination unless the criterion can be objectively justified.

Example: A consultancy firm reviews the use of psychometric tests in their recruitment procedures and discovers that men tend to score lower than women. If a man complains that the test is indirectly discriminatory, he would not need to explain the reason for the lower scores or how the lower scores are connected to his sex to show that men have been put at a disadvantage; it is sufficient for him to rely on the statistical information.

4.12 Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes. It may also be possible to use national statistics to throw light on the nature and extent of the particular disadvantage. The Economic Affairs Division of the Cabinet Office is the principal collator and publisher of Government statistics and publishes a wide range of statistics (see https://www.gov.im/about-the-government/departments/cabinet-office/economic-affairs-division/).

4.13 However, a statistical analysis may not always be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for a statistically significant comparison. In this situation, the Employment and Equality Tribunal may find it helpful for an expert to provide evidence as to whether there is any disadvantage and, if so, the nature of it.

4.14 There are other cases where it may be useful to have evidence (including, if appropriate, from an expert) to help the Employment and Equality Tribunal to understand the nature of the protected characteristic or the behaviour of the group sharing the characteristic – for example, evidence about the principles of a particular religious belief.

Example: A Muslim man who works for a small manufacturing company wishes to undertake the Hajj. However, his employer only allows their staff to take annual leave during designated shutdown periods in August and December. The worker considers that he has been subjected to indirect religious discrimination. In assessing the case, the Employment and Equality Tribunal may benefit from expert evidence from a Muslim cleric or an expert in Islam on the timing of the Hajj and whether it is of significance.

The comparative approach

4.15 Once it is clear that there is a provision, criterion or practice which puts (or would put) people sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances. **s.20(2)(b)** **s.24(1)**

4.16 It is important to be clear which protected characteristic is relevant. In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment. For race, it could be all Africans or only Somalis, for example. For age, it is important to identify the age group that is disadvantaged by the provision, criterion or practice.

Example: If an employer were to advertise a position requiring at least five GCSEs at grades A to C without permitting any equivalent qualifications, this criterion would put at a particular disadvantage everyone born before 1971, as they are more likely to have taken O level examinations rather than GCSEs. This might be indirect age discrimination if the criterion could not be objectively justified.

The 'pool for comparison'

4.17 The people used in the comparative exercise are usually referred to as the 'pool for comparison'.

4.18 In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment and Equality Tribunal will decide which of the pools to consider.

Example: A marketing company employs 45 women, 10 of whom are part-timers, and 55 men who all work full-time. One female receptionist works Mondays, Wednesdays and Thursdays. The annual leave policy requires that all workers take time off on public holidays, at least half of which fall on a Monday every year. The receptionist argues that the policy is indirectly discriminatory against women and that it puts her at a personal disadvantage because she has proportionately less control over when she can take her annual leave. The appropriate pool for comparison is all the workers affected by the annual leave policy. The pool is not all receptionists or all part-time workers, because the policy does not only affect these groups.

Making the comparison

4.19 Looking at the pool, a comparison must be made between the impact of the provision, criterion or practice **on** people **without** the relevant protected characteristic, and its impact on people **with** the protected characteristic.

4.20 The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may in some circumstances be necessary to carry out a formal comparative exercise using statistical evidence.

4.21 The position is different however where the claim is one of indirect religion or belief discrimination. Where the Convention applies to a claim of indirect discrimination connected to religion or belief, it is not necessary to show that others are also put at a particular disadvantage by a provision, criterion or practice; rather the question is whether the limitation of an individual's right to manifest their religious beliefs is proportionate given the legitimate aims of the employer. This is because protection of the right to manifest religion under the Convention does not require 'group disadvantage' to be shown.

Carrying out a formal comparative exercise

4.22 If the Employment and Equality Tribunal is asked to undertake a formal comparative exercise to decide an indirect discrimination claim, it can do this in a number of ways. One established approach involves the Tribunal asking these questions:

- What proportion of the pool has the particular protected characteristic?
- Within the pool, does the provision, criterion or practice affect workers without the protected characteristic?
- How many of these workers are (or would be) disadvantaged by it? How is this expressed as a proportion ('x')?
- Within the pool, how does the provision, criterion or practice affect people who share the protected characteristic?
- How many of these workers are (or would be) put at a disadvantage by it? How is this expressed as a proportion ('y')?

4.23 Using this approach, the Tribunal will then compare (x) with (y). It can then decide whether the group with the protected characteristic experiences a 'particular disadvantage' in comparison with others. Whether a difference is significant will depend on the context, such as the size of the pool and the numbers behind the proportions. It is not necessary to show that that the majority of those within the pool who share the protected characteristic are placed at a disadvantage.

Example: A single mother of two young children is forced to resign from her job as a bus driver when she cannot comply with her employer's new shift system.

The shift system is a provision, criterion or practice which causes particular disadvantage to this single mother. In an indirect discrimination claim, the Employment and Equality Tribunal must carry out a comparative exercise to decide whether the shift system puts (or would put) workers who share her protected characteristic of sex at a particular disadvantage when compared with men.

The Tribunal decides to use as a pool for comparison all the bus drivers working for the same employer. There are 5 female bus drivers, while 80 are men.

It is accepted as common knowledge that men are far less likely than women to be single parents with childcare responsibilities.

- Of the 80 male drivers, three are unable to comply with the new shift system. This is expressed as a proportion of 0.0375.

- Of the 5 female drivers, 2 are unable to comply with the new shift system. This is expressed as a proportion of 0.4.

It is clear that a higher proportion of female drivers (0.4) than male drivers (0.0375) are unable to comply with the shift system.

Taking all this into account, the Tribunal decides that female bus drivers – in comparison to their male counterparts – are put at a particular disadvantage by the shift system.

Is the worker concerned put at that disadvantage?

4.24 It is not enough that the provision, criterion or practice puts (or would put) at a particular disadvantage a group of people who share a protected characteristic. It must also have that effect (or be capable of having it) on the individual worker concerned. So it is not enough for a worker merely to establish that they are a member of the relevant group. They must also show they have personally suffered (or could suffer) the particular disadvantage as an individual.

Example: An airline operates a dress code which forbids workers in customer-facing roles from displaying any item of jewellery. A Christian cabin steward complains that this policy indirectly discriminates against Christians by preventing them from wearing the cross in a necklace. However, because he is no longer a practising Christian and not living by the principles of the Bible, the steward is not put at a particular disadvantage by this policy and could not bring a claim for indirect discrimination.

The intention behind the provision, criterion or practice is irrelevant

4.25 Indirect discrimination is unlawful, even where the discriminatory effect of the provision, criterion or practice is not intentional, unless it can be objectively justified. If an employer applies the provision, criterion or practice without the intention of discriminating against the worker, the Employment and Equality Tribunal may decide not to order a payment of compensation (see paragraph 15.38 and 15.39).

Example: An employer starts an induction session for new staff with an ice-breaker designed to introduce everyone in the room to the others. Each worker is required to provide a picture of themselves as a toddler. One worker is a transgender woman who does not wish her colleagues to know that she was brought up as a boy. When she does not bring in her photo, the employer criticises her in front of the group for not joining in. It would be no defence that it did not occur to the employer that this worker may feel disadvantaged by the requirement to disclose such information.

When can a provision, criterion or practice be objectively justified?

4.26 If the person applying a provision, criterion or practice can show that it is 'a proportionate means of achieving a legitimate aim', then it will not amount to indirect discrimination. This is often known as the 'objective justification' test. The test applies to other areas of discrimination law; for example, discrimination arising from disability (see Chapter 5) or direct discrimination because of age. The range of legitimate aims because of age is narrower than the range of aims that can justify other forms **s.20(2)(d)**

of discrimination (see paragraphs 3.36 to 3.44).

4.27 If challenged in the Employment and Equality Tribunal, it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision, criterion or practice was applied. If challenged, the employer can set out the justification to the Tribunal.

4.28 The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:

- Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?

- If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

What is a legitimate aim?

4.29 The meaning of 'legitimate aim' is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as a legitimate aim provided that risks are clearly specified and supported by evidence. The Tribunal will need to weigh the real needs of the organisation against the discriminatory effects of the requirement.

4.30 Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs may not be able to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

Example: Solely as a cost-saving measure, an employer requires all staff to work a full day on Fridays, so that customer orders can all be processed on the same day of the week. The policy puts observant Jewish workers at a particular disadvantage in the winter months by preventing them from going home early to observe the Sabbath, and could amount to indirect discrimination unless it can be objectively justified. The single aim of reducing costs is not a legitimate one; the employer cannot just argue that to discriminate is cheaper than avoiding discrimination.

What is proportionate?

4.31 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. The Employment and Equality Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

4.32 The term 'proportionate' is not defined by the Act. The Supreme Court of England and Wales confirmed that the means of achieving the legitimate aim will be proportionate if those means are 'appropriate and reasonably necessary'. 'Necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.33 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it.

Example: A food manufacturer has a rule that beards are forbidden for people working in the kitchens. Unless it can be objectively justified, this rule may amount to indirect religion or belief discrimination against the Sikh and Muslim workers in the kitchens. If the aim of the rule is to meet food hygiene or health and safety requirements, this would be legitimate. However, the employer would need to show that the ban on beards is a proportionate means of achieving this aim. When considering whether the policy is justified, the Employment and Equality Tribunal is likely to examine closely the reasons given by the employer as to why they cannot fulfil the same food hygiene or health and safety obligations by less discriminatory means, for example by providing a beard mask or snood.

Chapter 5

Discrimination arising from disability

Introduction

5.1 This chapter explains the duty of employers not to treat disabled people unfavourably because of something connected with their disability. Protection from this type of discrimination, which is known as 'discrimination arising from disability', only applies to disabled people.

What the Act says

5.2 The Act says that treatment of a disabled person amounts to discrimination where: **s.16**

- an employer treats the disabled person unfavourably;
- this treatment is because of something arising in consequence of the disabled person's disability; and
- the employer cannot show that this treatment is a proportionate means of achieving a legitimate aim,

unless the employer does not know, and could not reasonably be expected to know, that the person has the disability. **s.16(2)**

How does it differ from direct discrimination?

5.3 Direct discrimination occurs when the employer treats someone **less favourably** because of disability itself (see Chapter 3). By contrast, in discrimination arising from disability, the question is whether the disabled person has been treated **unfavourably** because of something arising in consequence of their disability.

Example: An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her

disability (the need to take a period of disability-related sick leave).

How does it differ from indirect discrimination?

5.4 Indirect discrimination occurs when a disabled person is (or would be) disadvantaged by an unjustifiable provision, criterion or practice applied to everyone, which puts (or would put) people sharing the disabled person's disability at a particular disadvantage compared to others, and puts (or would put) the disabled person at that disadvantage (see Chapter 4).

5.5 In contrast, discrimination arising from disability only requires the disabled person to show they have experienced unfavourable treatment because of something connected with their disability. If the employer can show that they did not know and could not reasonably have been expected to know that the disabled person had the disability, it will not be discrimination arising from disability (see paragraphs 5.13 to 5.19). However, as with indirect discrimination, the employer may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraph 5.11)

Is a comparator required?

5.6 Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is **no need to compare** a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

Example: In considering whether the example of the disabled worker dismissed for disability-related sickness absence (see paragraph 5.3) amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it.

What is 'unfavourable treatment'?

5.7 For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably. **s.16(1)(a)**

What does 'something arising in consequence of disability' mean?

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability. **s.16(1)(a)**

5.9 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

Example: A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

5.10 So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know or could not reasonably have been expected to know that the person was disabled (see paragraph 5.13).

When can discrimination arising from disability be justified?

5.11 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a 'proportionate means of achieving a legitimate aim'. This 'objective justification' test is explained in detail in paragraphs 4.26 to 4.33. **s.16(1)(b)**

5.12 It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.

What if the employer does not know that the person is disabled?

5.13 If the employer can show that they: **s.16(2)**

- did not know that the disabled person had the disability in question; and
- could not reasonably have been expected to know that the disabled person had the disability,

then the unfavourable treatment does not amount to discrimination arising from disability.

5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'The required knowledge is of the *facts* of the worker's disability. An employer does not also need to realise that those particular facts meet the legal definition of disability (paragraphs 2.8–2.21).

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially. When deciding if a worker is likely to be considered to be disabled, an employer has to form their own judgment and cannot simply rubber-stamp an external occupational health adviser's opinion that the worker is not

disabled.

Example: A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

5.16 However, employers should note that the Act imposes restrictions on the types of health or disability-related enquiries that can be made prior to making someone a job offer or including someone in a pool of successful candidates to be offered a job when one becomes available (see paragraphs 10.21 to 10.39). **s.52**

When can an employer be assumed to know about disability?

5.17 If an employer's agent or employee (such as an occupational health adviser or a human resources officer) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

5.18 Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.

Example: An occupational health (OH) adviser is engaged by a large employer to provide them with information about their workers' health. The OH adviser becomes aware of a worker's disability that is relevant to his work, and the worker consents to this information being disclosed to the

employer. However, the OH adviser does not pass that information on to Human Resources or to the worker's line manager. As the OH adviser is acting as the employer's agent, it is not a defence for the employer to claim that they did not know about the worker's disability. This is because the information gained by the adviser on the employer's behalf is attributed to the employer.

5.19 Information will not be attributed ('imputed') to the employer if it is gained by a person providing services to workers independently of the employer. This is the case even if the employer has arranged for those services to be provided.

Example: An employer contracts with an agency to provide an independent counselling service to workers. The contract states that the counsellors are not acting on the employer's behalf while in the counselling role. Any information obtained by a counsellor during such counselling would not be attributed to the employer.

Relevance of reasonable adjustments

5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).

5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

5.22 Even where an employer has complied with a duty to make reasonable adjustments in relation to the disabled person, they may still subject a disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

Example: The employer in the example at paragraph 5.3 made a reasonable adjustment for the worker who has multiple sclerosis. They adjusted her working hours so that she started work at 9.30 am instead of 9 am.

However, this adjustment is not relevant to the unfavourable treatment – namely, her dismissal for disability-related sickness absence – which her claim concerns. And so, despite the fact that reasonable

adjustments were made, there will still be discrimination arising from disability unless the treatment is justified.

Chapter 6

Duty to make reasonable adjustments

Introduction

6.1 This chapter describes the principles and application of the duty to make reasonable adjustments for disabled people in employment.

6.2 The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.

6.3 The duty to make reasonable adjustments applies to employers of all sizes, but the question of what is reasonable may vary according to the circumstances of the employer. Part 2 of the Code has more information about good practice in making reasonable adjustments in different work situations, such as in recruitment or during employment.

What the Act says

6.4 Discrimination against a disabled person occurs where an employer fails to comply with a duty to make reasonable adjustments imposed on them in relation to that disabled person. **s.22(2)**

What is the duty to make reasonable adjustments?

6.5 The duty to make reasonable adjustments comprises three requirements. Employers are required to take reasonable steps to:

- avoid the substantial disadvantage where a **s.21(3)**

provision, criterion or practice applied by or on behalf of the employer puts a disabled person at a substantial disadvantage compared to those who are not disabled;

- remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled;. **s.21(4)**

- provide an auxiliary aid (which includes an auxiliary service - see paragraph 6.13) where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled. **s.21(5)**

Accessible information

6.6 The Act states that where the provision, criterion or practice or the need for an auxiliary aid relates to the provision of information, the steps which it is reasonable for the employer to take include steps to ensure that the information is provided in an accessible format; for example, providing letters, training materials or recruitment forms in large print or on audio-tape. **s.21(6)**

Avoiding substantial disadvantages caused by physical features

6.7 The Act says that avoiding a substantial disadvantage caused by a physical feature includes: **s.21(9)**

- removing the physical feature in question;
- altering it; or
- providing a reasonable means of avoiding it.

Which disabled people does the duty protect?

6.8 The duty to make reasonable adjustments applies in recruitment and during all stages of employment, including dismissal. It may also apply after employment has ended. The duty relates to all disabled workers of an employer and to any disabled applicant for employment. The duty also applies in respect of any disabled person who has notified the employer that they may be an applicant for work. **Sch. 8, paras 4 & 5**

6.9 In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker and job applicant.

What is a provision, criterion or practice?

6.10 The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions (see also paragraph 4.5).

Example: An employer has a policy that designated car parking spaces are only offered to senior managers. A worker who is not a manager, but has a mobility impairment and needs to park very close to the office, is given a designated car parking space. This is likely to be a reasonable adjustment to the employer's car parking policy.

What is a 'physical feature'?

6.11 The Act says that the following are to be treated as a physical feature of the premises occupied by the employer: **s.21(10)**

- any feature of the design or construction of a building;
- any feature of an approach to, exit from or entrance to a building;
- a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels in or on the premises;
- any other physical element or quality of the premises.

All these features are covered, whether temporary or permanent.

6.12 Physical features will include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building

entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture and temporary or moveable items. This is not an exhaustive list.

Example: Clear glass doors at the end of a corridor in a particular workplace present a hazard for a visually impaired worker. This is a substantial disadvantage caused by the physical features of the workplace.

What is an 'auxiliary aid'?

6.13 An auxiliary aid is something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software. Auxiliary aids include auxiliary services; for example, provision of a sign language interpreter or a support worker for a disabled worker. **s.21(11)**

What disadvantage gives rise to the duty?

6.14 The duty to make adjustments arises where a provision, criterion, or practice, any physical feature of work premises or the absence of an auxiliary aid puts a disabled person at a substantial disadvantage compared with people who are not disabled. **s.21(3), (4) & (5)**

6.15 The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis. **s.3(2)**

6.16 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's. **s.24(1)**

What if the employer does not know that a disabled person is an actual or potential job applicant?

6.17 An employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a disabled person is, or may be, an applicant for work. **Sch. 8, para 18(1)(a)**

6.18 There are restrictions on when health or disability-related enquiries can be made prior to making a job offer or including someone in a pool of people to be offered a job. However, questions are permitted to determine whether reasonable adjustments need to be made in relation to an assessment, such as an interview or other process designed to give an indication of a person's suitability for the work concerned. These provisions are explained in detail in paragraphs 10.25 to 10.27.

What if the employer does not know the worker is disabled?

6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know the facts of the worker's disability and that the worker is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially. The required knowledge is of the *facts* of the worker's disability but an employer does not need to realise that the particular facts of a worker's disability meet the legal definition of disability (paragraphs 2.8 to 2.21). **Sch. 8, para 18(1)(b)**

Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working

arrangements.

6.20 The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

When deciding if a worker is likely to be considered to be disabled, an employer has to form their own judgment and cannot simply rubber-stamp an external occupational health adviser's opinion that the worker is not disabled.

When can an employer be assumed to know about disability?

6.21 If an employer's agent or employee (such as an occupational health adviser, a human resources officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.

Example: In the example in paragraph 5.18, if the employer's working arrangements put the worker at a substantial disadvantage because of the effects of his disability and he claims that a reasonable adjustment should have been made, it will not be a defence for the employer to claim that they were unaware of the worker's disability. Because the information gained by the occupational health (OH) adviser on the employer's behalf is assumed to be shared with the employer, the OH adviser's knowledge means that the employer's duty under the Act applies.

6.22 Information will not be 'imputed' or attributed to the employer if it is gained by a person providing services to

employees independently of the employer. This is the case even if the employer has arranged for those services to be provided.

What is meant by 'reasonable steps'?

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 Many adjustments do not involve making physical changes to premises. However, where such changes need to be made and an employer occupies premises under a lease or other binding obligation, the employer may have to obtain consent to the making of reasonable adjustments. These provisions are explained in Appendix 3. **Sch. 19**

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise.

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as support from the Employment (Persons with Disabilities etc) Scheme 1999) (see paragraph 6.33); and
- the type and size of the employer.

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Can failure to make a reasonable adjustment ever be justified?

6.30 The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for the employer to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made.

What happens if the duty is not complied with?

6.31 If an employer does not comply with the duty to make reasonable adjustments they will be committing an act of unlawful discrimination. A disabled worker will have the right to take a claim to the Employment and Equality Tribunal based on this. **s.22**

Reasonable adjustments in practice

6.32 It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.

Examples of steps it might be reasonable for employers to have to take include:

Making adjustments to premises

Example: An employer makes structural or other physical changes such as widening a doorway, providing a ramp or moving furniture for a wheelchair user.

Providing information in accessible formats

Example: The format of instructions and manuals might need to be modified for some disabled workers (for example, produced in large print, Braille or on audio tape) and instructions for people with learning disabilities might need to be conveyed orally with individual demonstration or in Easy Read. Employers may also need to arrange for recruitment materials to be provided in alternative formats.

Allocating some of the disabled person's duties to another worker

Example: An employer reallocates minor or subsidiary duties to another worker as a disabled worker has difficulty doing them because of his disability. For example, the job involves occasionally going onto the open roof of a building but the employer transfers this work away from a worker whose disability involves severe vertigo.

Transferring the disabled worker to fill an existing

vacancy

Example: An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade.

Altering the disabled worker's hours of work or training

Example: An employer allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also include permitting part-time working or different working hours to avoid the need to travel in the rush hour if this creates a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

Assigning the disabled worker to a different place of work or training or arranging home working

Example: An employer relocates the workstation of a newly disabled worker (who now uses a wheelchair) from an inaccessible third floor office to an accessible one on the ground floor. It may be reasonable to move his place of work to other premises of the same employer if the first building is inaccessible. Allowing the worker to work from home might also be a reasonable adjustment for the employer to make.

Allowing the disabled worker to be absent during working or training hours for rehabilitation, assessment or treatment

Example: An employer allows a person who has become disabled more time off work than would be allowed to non-disabled workers to enable him to have rehabilitation training. A similar adjustment may be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.

Giving, or arranging for, training or mentoring (whether for the disabled person or any other worker)

This could be training in particular pieces of equipment which the disabled person uses, or an alteration to the standard workplace training to reflect the worker's particular disability.

Example: All workers are trained in the use of a particular machine but an employer provides slightly different or longer training for a worker with restricted hand or arm movements. An employer might also provide training in additional software for a visually impaired worker so that he can use a computer with speech output.

Acquiring or modifying equipment

Example: An employer might have to provide special equipment such as an adapted keyboard for someone with arthritis, a large screen for a visually impaired worker, or an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled workers (such as longer handles on a machine).

There is no requirement to provide or modify equipment for personal purposes unconnected with a worker's job, such as providing a wheelchair if a person needs one in any event but does not have one. The disadvantages in such a case do not flow from the employer's arrangements or premises.

Modifying procedures for testing or assessment

Example: A worker with restricted manual dexterity would be disadvantaged by a written test, so the employer gives that person an oral test instead.

Providing a reader or interpreter

Example: An employer arranges for a colleague to read mail to a worker with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader.

Providing supervision or other support

Example: An employer provides a support worker or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence in unfamiliar situations, such as on a training course.

Allowing a disabled worker to take a period of disability leave

Example: A worker who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period.

Employing a support worker to assist a disabled worker

Example: An adviser with a visual impairment is sometimes required to make home visits to clients. The employer employs a support worker to assist her on these visits.

Modifying disciplinary or grievance procedures for a disabled worker

Example: A worker with a learning disability is allowed to take a friend (who does not work with her) to act as an advocate at a meeting with her employer about a grievance. The employer also ensures that the meeting is conducted in a way that does not disadvantage or patronise the disabled worker.

Adjusting redundancy selection criteria for a disabled worker

Example: Because of his condition, a man with an autoimmune disease has taken several short periods of absence during the year. When his employer is taking the absences into account as a criterion for selecting people for redundancy, they discount these periods of disability-related absence.

Modifying performance-related pay arrangements for a disabled worker

Example: A disabled worker who is paid purely on her output needs frequent short additional breaks during her

working day – something her employer agrees to as a reasonable adjustment. It may be a reasonable adjustment for her employer to pay her at an agreed rate (for example, her average hourly rate) for these breaks.

It may sometimes be necessary for an employer to take a combination of steps.

Example: A worker who is blind is given a new job with her employer in an unfamiliar part of the building. The employer:

- arranges facilities for her assistance dog in the new area;
- arranges for her new instructions to be in Braille; and
- provides disability equality training to all staff.

In some cases, a reasonable adjustment will not succeed without the co-operation of other workers. Colleagues as well as managers may therefore have an important role in helping ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act to argue that an adjustment was unreasonable because staff were obstructive or unhelpful when the employer tried to implement it. An employer would at least need to be able to show that they took such behaviour seriously and dealt with it appropriately. Employers will be more likely to be able to do this if they establish and implement the type of policies and practices described in Chapter 18.

Example: An employer ensures that a worker with autism has a structured working day as a reasonable adjustment. As part of this adjustment, it is the responsibility of the employer to ensure that other workers co-operate with this arrangement.

The Employment (Persons with Disabilities etc) Scheme 1999

6.33 The Employment (Persons with Disabilities etc) Scheme 1999 ('the Scheme') may provide financial assistance in respect of individuals with a disability to assist in either finding or retaining employment. Such financial assistance may include:

- help in seeking employment;
- the provision of aids or equipment which would not ordinarily be required for those without a disability or suffering from ill-health;
- alterations to premises, or adaptations to equipment to enable employment;
- help in transport to and from work; and
- help while at work.

However, the Scheme does not diminish any of an employer's duties under the Act. In particular:

- the legal responsibility for making a reasonable adjustment remains with the employer – even where the Scheme is involved in the provision of advice or funding in relation to the adjustment;

- it is likely to be a reasonable step for the employer to help a disabled person in making an application for assistance from the Scheme and to provide on-going administrative support (by completing claim forms, for example).

It may be unreasonable for an employer to decide not to make an adjustment based on its cost before finding out whether financial assistance for the adjustment is available from the Scheme or another source.

More information about the Scheme is available from: https://www.gov.im/categories/working-in-the-isle-of-man/employment-persons-with-disabilities-etc-scheme-1999/.

Chapter 7

Harassment

Introduction

7.1 This chapter explains the Act's general test for harassment. It also explains the provisions on harassment related to a relevant protected characteristic, the provisions on sexual harassment, and less favourable treatment for rejecting or submitting to harassment.

7.2 Unlike direct discrimination, harassment does not require a comparative approach; it is not necessary for the worker to show that another person was, or would have been, treated more favourably. For an explanation of direct discrimination, please see Chapter 3.

What the Act says

7.3 The Act prohibits three types of harassment. These are:

- harassment related to a 'relevant protected characteristic'; **s.27(1)**
- sexual harassment; and **s.27(2)**
- less favourable treatment of a worker because they submit to, or reject, sexual harassment; or **s.27(3)**
- harassment related to sex or gender reassignment.

7.4 'Relevant protected characteristics' are: **s.27(5)**

- Age
- Disability
- Gender Reassignment
- Race
- Religion or Belief
- Sex
- Sexual Orientation

7.5 Pregnancy and maternity and marriage and civil partnership are not protected directly under the harassment provisions. However, pregnancy and maternity harassment may amount to harassment related to sex, and harassment related to marriage or civil

partnership may amount to harassment related to sexual orientation.

Harassment related to a protected characteristic

7.6 This type of harassment of a worker occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of: **s.27(1)**

- violating the worker's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

7.7 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse (including electronic), imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

Example: A female electrician is told by her supervisor in front of her male colleagues that her work is below standard and that, as a woman, she will never be competent to carry it out. The supervisor goes on to suggest that she should instead stay at home to cook and clean for her husband. This could amount to harassment related to sex as such a statement would be self-evidently unwanted and the electrician would not have to object to it before it was deemed to be unlawful harassment.

'Related to'

7.9 Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. It includes the following situations:

a) Where conduct is related to the worker's own protected characteristic.

Example: If a worker with a hearing impairment is

verbally abused because he wears a hearing aid, this could amount to harassment related to disability.

7.10 Protection from harassment also applies where a person is generally abusive to other workers but, in relation to a particular worker, the form of the unwanted conduct is determined by that worker's protected characteristic.

Example: During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment, even though the remarks were not specifically directed at her.

b) Where there is any connection with a protected characteristic.

7.11 Protection is provided because the conduct is dictated by a relevant protected characteristic, whether or not the worker has that characteristic themselves. This means that protection against unwanted conduct is provided where the worker does not have the relevant protected characteristic, including where the employer knows that the worker does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations:

- The worker may be associated with someone who has a protected characteristic.

Example: A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son's disability. The worker could have a claim for harassment related to disability.

- The worker may be wrongly perceived as having a particular protected characteristic.

Example: A Sikh worker wears a turban to work. His manager wrongly assumes he is Muslim and subjects him to Islamaphobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion.

- The worker is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example: A worker is subjected to homophobic banter and name calling, even though his colleagues know he is

not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation.

- The unwanted conduct related to a protected characteristic is not directed at the particular worker but at another person or no one in particular.

Example: A manager racially abuses a black worker. As a result of the racial abuse, the black worker's white colleague is offended and could bring a claim of racial harassment.

- The unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic.

Example: A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.

7.12 In all of the circumstances listed above, there is a connection with the protected characteristic and so the worker could bring a claim of harassment where the unwanted conduct creates for them any of the circumstances defined in paragraph 7.6.

Sexual harassment

7.13 Sexual harassment occurs when a person engages in unwanted conduct as defined in paragraph 7.6 and which is of a sexual nature. **s.27(2)**

7.14 Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

Less favourable treatment for rejecting or submitting to unwanted conduct

7.15 The third type of harassment occurs when a worker is treated less favourably by their employer because that worker submitted to, or rejected unwanted conduct of a sexual nature, or unwanted conduct which is related to sex or to gender reassignment, and the unwanted conduct creates for them any of the circumstances defined in paragraph 7.6. **s.27(3)**

Example: A shopkeeper propositions one of his shop assistants. She rejects his advances and then is turned down for a promotion which she believes she would have got if she had accepted her boss's advances. The shop assistant would have a claim for harassment.

7.16 Under this type of harassment, the initial unwanted conduct may be committed by the person who treats the worker less favourably or by another person. **s.27(3)(a)**

Example: A female worker is asked out by her team leader and she refuses. The team leader feels resentful and informs the Head of Division about the rejection. The Head of Division subsequently fails to give the female worker the promotion she applies for, even though she is the best candidate. She knows that the team leader and the Head of Division are good friends and believes that her refusal to go out with the team leader influenced the Head of Division's decision. She could have a claim of harassment over the Head of Division's actions.

'Purpose or effect'

7.17 For all three types of harassment, if the **purpose** of subjecting the worker to the conduct is to create any of the circumstances defined in paragraph 7.6, this will be sufficient to establish unlawful harassment. It will not be necessary to inquire into the effect of that conduct on that worker.

7.18 Regardless of the intended purpose, unwanted conduct will also amount to harassment if it has the **effect** of creating any of the circumstances defined in paragraph 7.3.

Example: Male members of staff download pornographic images on to their computers in an office where a woman works. She may make a claim for harassment if she is aware that the images are being downloaded and the

effect of this is to create a hostile and humiliating environment for her. In this situation, it is irrelevant that the male members of staff did not have the purpose of upsetting the woman, and that they merely considered the downloading of images as 'having a laugh'.

7.19 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment. **s.27(4)(a)**

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place. **s.27(4)(b)**

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. The Tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the Tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended. **s.27(4)(c)**

Where the employer is a public authority, it may also be relevant in cases of alleged harassment whether the alleged perpetrator was exercising any of her/his Convention rights protected under the Human Rights Act 2001. For example, the right to freedom of thought, conscience and religion or freedom of speech of the alleged harasser will need to be taken into account when considering all relevant circumstances of the case.

Liability of employers for harassment by third parties

7.20 An employer is not usually responsible for discrimination, harassment or victimisation by someone other than their employee or agent (see paragraph 10.20). However, an employer may be responsible for harassment by third parties to employees and job applicants, such as customers or clients where the employer has some degree of control over a situation and there is a continuing course of offensive conduct of which they are aware but do not take action to prevent its recurrence. The failure to

take action may result in ‘unwanted conduct related to a protected characteristic’.

Example: A woman is employed to work in a youth hostel for young men aged 18 to 21. Some of the young men make sexually abusive comments to her and sometimes touch her inappropriately. She has complained to her manager about this many times, but he has done nothing to stop it, by, for example, warning the young men that the conduct is unacceptable and that they may be required to leave the hostel if it does not stop. The employer may be legally responsible for the harassment by the young men.

Chapter 8

Pregnancy and maternity

Introduction

8.1 Specific provisions in the Act protect women from discrimination at work because of pregnancy or maternity leave. These apply during the protected period explained at paragraphs 8.6 to 8.10.

There is also a statutory regime setting out pregnant employees' rights to health and safety protection, time off for antenatal care, maternity leave and unfair dismissal protection.

What the Act says

8.2 It is unlawful discrimination to treat a woman unfavourably because of her pregnancy or a related illness, or because she is exercising, has exercised or is seeking or has sought to exercise her right to maternity leave. **ss.19(1)-(4)**

8.3 In considering whether there has been pregnancy and maternity discrimination, the employer's motive or intention is not relevant, and neither are the consequences of pregnancy or maternity leave. Such discrimination cannot be justified.

8.4 The meaning of 'because of' is discussed in paragraph 3.11. However, unlike in cases of direct sex discrimination, there is no need to compare the way a pregnant worker is treated with the treatment of any other workers. If she is treated unfavourably by her employer because of her pregnancy or maternity leave, this is automatically discrimination.

8.5 Unfavourable treatment of a woman because of her pregnancy or maternity leave during 'the protected period' is unlawful pregnancy and maternity discrimination. This cannot be treated as direct sex discrimination (for which a comparator, actual or hypothetical, is required). **s.19(7)**

In some cases, employers have to treat workers who are pregnant or have recently given birth more favourably than other workers. This is explained at paragraph 8.38**.** Men cannot make a claim for sex discrimination in relation to any special treatment given to a woman in connection with pregnancy or childbirth, such as maternity leave or additional sick leave. **s.14(6)(b)**

The protected period

8.6 The protected period starts when a woman becomes pregnant and continues until the end of her maternity leave, or until she returns to work if that is earlier (but see paragraphs 8.11 to 8.12 below). **s.19(6)**

8.7 The maternity leave scheme is set out in Part VII of the Employment Act 2006 (EA 2006) and the Maternity Leave Regulations 2007 (as amended by the Maternity Leave (Amendment) Regulations 2007)) (MLR).

8.8 The Act refers to the three kinds of maternity leave regulated by the EA 2006:

- Compulsory maternity leave – the minimum two-week period immediately following childbirth when a woman must not work for her employer. All employees entitled to ordinary maternity leave must take compulsory maternity leave.
- Ordinary maternity leave – all pregnant employees are entitled to 26 weeks' ordinary maternity leave (which includes the compulsory leave period), provided they give proper notice.
- Additional maternity leave – pregnant employees are entitled to a further 26 weeks' maternity leave, provided they have been continuously employed for a period of not less than 26 weeks at the beginning of the 14th week before the expected week of childbirth.

8.9 There is no minimum period of qualifying service for ordinary maternity leave but only employees are eligible to take it.

8.10 The protected period in relation to a woman's pregnancy ends either: **s.19(6)**

- if she is entitled to ordinary maternity leave, at the end of the ordinary maternity leave period; or

- if she is entitled to ordinary and additional maternity leave, at the end of the additional maternity leave period; or
- when she returns to work after giving birth, if that is earlier; or
- if she is not entitled to maternity leave, for example because she is not an employee, two weeks after the baby is born.

Unfavourable treatment outside the protected period

8.11 Outside the protected period, unfavourable treatment of a woman in employment because of her pregnancy would be considered as sex discrimination rather than pregnancy and maternity discrimination. **s.19(7)**

8.12 However, if a woman is treated unfavourably because of her pregnancy (or a related illness) after the end of the protected period, but due to a decision made during it, this is regarded as occurring during the protected period. **s.19(5)**

‘Pregnancy of hers’

8.13 For pregnancy and maternity discrimination, the unfavourable treatment must be because of the woman’s own pregnancy. However, a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination. **s.19(2)**

Knowledge of pregnancy

8.14 There is no obligation on a job applicant or employee to inform the employer of her pregnancy until 15 weeks before the baby is due. However, telling the employer triggers the legal protection, including the employer’s health and safety obligations. **Reg. 4 MLR**

8.15 Unfavourable treatment will only be unlawful if the employer is aware the woman is pregnant. The employer must know, believe or suspect that she is pregnant – whether this is by formal notification or through the grapevine.

No need for comparison

8.16 It is not necessary to show that the treatment was unfavourable compared with the treatment of a man, with that of a woman who is not pregnant or with any other worker. However, evidence of how others have been treated may be useful to help determine if the unfavourable treatment is in fact related to pregnancy or maternity leave.

Example: A company producing office furniture decides to exhibit at a trade fair. A pregnant member of the company's sales team, who had expected to be asked to attend the trade fair to staff the company's stall and talk to potential customers, is not invited. In demonstrating that, but for her pregnancy, she would have been invited, it would help her to show that other members of the company's sales team, either male or female but not pregnant, were invited to the trade fair.

Not the only reason

8.17 A woman's pregnancy or maternity leave does not have to be the only reason for her treatment, but it does have to be an important factor or effective cause.

Example: An employer dismisses an employee on maternity leave shortly before she is due to return to work because the locum covering her absence is regarded as a better performer. Had the employee not been absent on maternity leave she would not have been sacked. Her dismissal is therefore unlawful, even if performance was a factor in the employer's decision-making.

Unfavourable treatment

8.18 An employer must not demote or dismiss a woman, or deny her training or promotion opportunities, because she is pregnant or on maternity leave. Nor must an employer take into account any period of pregnancy-related sickness absence when making a decision about her employment.

8.19 As examples only, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the following reasons:

- the fact that, because of her pregnancy, the

woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a limited-term contract;
- the pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations;
- the costs to the business of covering her work;
- any absence due to pregnancy related illness;
- her inability to attend a disciplinary hearing due to morning sickness or other pregnancy-related conditions;
- performance issues due to morning sickness or other pregnancy-related conditions.

This is not an exhaustive list but indicates the kinds of treatment that have been found to be unlawful.

8.20 The following are further examples of unlawful discrimination:

- failure to consult a woman on maternity leave about changes to her work or about possible redundancy;
- disciplining a woman for refusing to carry out tasks due to pregnancy related risks;
- assuming that a woman's work will become less important to her after childbirth and giving her less responsible or less interesting work as a result;
- depriving a woman of her right to an annual assessment of her performance because she was on maternity leave;
- excluding a pregnant woman from business trips.

Other employment rights for pregnant women

8.21 There are separate legal provisions in the Employment Act 2006 protecting employees from dismissal and other disadvantage (except relating to pay) where the reason or principal reason is related to pregnancy or maternity leave. These EA 2006 rights can overlap with the discrimination provisions and if they are breached this may also constitute pregnancy and maternity discrimination.

ss.114 & 65 EA 2006

Example: If an employer fails to consult a woman about threatened redundancy because she is absent on maternity leave, this will be unlawful discrimination**.**

8.22 An employee who is made redundant while on statutory maternity leave is entitled to be offered any suitable alternative vacancy, in preference to other employees. If she is not offered it, she can claim automatically unfair dismissal. **Regs. 11 & 17(2) MLR**

8.23 A woman has a statutory right to return to the same job after ordinary maternity leave. After additional maternity leave, she has a right to return to the same job unless that is not reasonably practicable. If that is the case, she is entitled to be offered a suitable alternative job, on terms and conditions which are no less favourable than her original job. If a woman seeks to return on different terms where she does not have a specific contractual right to do so, a refusal could constitute direct discrimination because of sex, depending on the circumstances. **Regs. 14 & 15 MLR**

8.24 In addition, depending on the circumstances, refusing to allow a woman to return to work part-time could be indirect sex discrimination.

8.25 Parents of dependent children have a right to request flexible working set out in the EA 2006. This right entitles a woman returning from maternity leave to make a request to change her hours and if she does so, her employer must consider her request (see paragraphs 17.7 to 17.11). **ss. 99 – 102 EA 2006**

Health and safety at work

8.26 The Act permits differential treatment of women at work where it is necessary to comply with laws protecting the health and safety of women who are pregnant, who have recently given birth or are breastfeeding. **Sch. 20, para 2**

8.27 Steps taken to protect pregnant workers' health and safety should not result in them being treated unfavourably.

8.28 Employers have specific obligations to protect the health and safety of pregnant women and women who have recently given birth. Where a workplace includes women of childbearing age, and the work or workplace conditions are of a kind that could involve risk to a pregnant woman, a woman who has given birth within **Reg. 15 MHSWR**

the previous six months or who is breastfeeding, or create a risk to her baby, the employer's general risk assessment must include an assessment of such risks.

8.29 In addition, where an employee has given notice in writing that she is pregnant, has given birth within the last six months, or is breastfeeding, the employer must consider the risks in relation to that individual and take action to avoid them. This may involve altering her working conditions or hours of work. For example, as a result of a risk assessment an employer may ensure that the worker takes extra breaks, refrains from lifting, or spends more time sitting rather than standing. **Reg. 15(4) MHSWR**

8.30 If it is not reasonable to do this, or it would not avoid the risk, the employer must suspend the woman from work for as long as is necessary to avoid the risk.

8.31 Before being suspended on maternity grounds, a woman is entitled to be offered suitable alternative work if it is available. If she unreasonably refuses an offer of alternative work, she will lose the statutory right to be paid during any period of maternity suspension. **s.75 EA 2006**

8.32 The Environment Safety and Health Directorate is the regulator for health and safety at work in the Isle of Man. The Directorate's website address is https://www.gov.im/hswi/.

Pay and conditions during maternity leave

8.33 Employers are obliged to maintain a woman's benefits except contractual remuneration during ordinary maternity leave. Unless otherwise provided in her contract of employment, a woman does not have a legal right to continue receiving her full pay during maternity leave.

Non-contractual payments during maternity leave

8.34 The Act has a specific exception relating to non-contractual payments to women on maternity leave. There is no obligation on an employer to extend to a woman on maternity leave any non-contractual benefit relating to pay, such as a discretionary bonus. For the purposes of this exception, 'pay' means a payment of money by way of wages or salary. **Sch. 9, para 14**

8.35 However, this exception does not apply to any maternity-related pay, to which a woman is entitled as a result of being pregnant or on maternity leave. Nor does it apply to any maternity-related pay arising from an increase that the woman would have received had she not been on maternity leave.

Example: A woman on maternity leave is receiving contractual maternity pay, which is worked out as a percentage of her salary. The date of her employer's annual review of staff pay falls while she is on maternity leave. All other staff are awarded a 2% pay rise with immediate effect. If the woman on maternity leave does not receive the increase, this would be unlawful discrimination. Her contractual maternity pay should be recalculated so that it is based on her salary plus the 2% increase given to all her colleagues. Any other benefits linked to salary should also be adjusted to take into account the pay rise. When she returns to work her normal pay must reflect the pay rise.

8.36 Any non-contractual bonus relating to the period of compulsory maternity leave is not covered by the exception, so the employer would have to pay this. Neither does the exception apply to pay relating to times when a woman is not on maternity leave.

8.37 The Equal Pay Code of Practice will contain further information on equal treatment and what may be unlawful discrimination in terms and conditions for pregnant women and women on maternity leave.

Special treatment in connection with pregnancy and childbirth is lawful

8.38 An employer does not discriminate against a man where it affords a woman 'special treatment' in connection with childbirth and pregnancy. **s.14(6)(b)**

Example: A man who is given a warning for being repeatedly late to work in the mornings alleges that he has been treated less favourably than a pregnant woman who has also been repeatedly late for work, but who was not given a warning. The man cannot compare himself to the pregnant woman, because her lateness is related to her morning sickness. The correct comparator in his case would be a non-pregnant woman who was also late for work.

8.39 Treating a woman unfavourably because she is undergoing in vitro fertilisation (IVF) or other fertility treatment would not count as pregnancy and maternity discrimination. This is because a woman is not deemed pregnant until the fertilised ova have been implanted in her uterus. However, such unfavourable treatment could amount to sex discrimination (see paragraph 17.27).

Breastfeeding

8.40 There is no statutory right for workers to take time off to breastfeed. However, employers should try to accommodate women who wish to do so, bearing in mind the following:

- As explained above in paragraph 8.26, where risks to the health and safety of an employee who is breastfeeding have been identified in the employer's risk assessment, and where she has given written notice that she is breastfeeding, it may be reasonable for the employer to alter her working conditions or hours of work. If this is not reasonable or would not avoid the risks identified, the employer should suspend the employee from work for so long as is necessary to avoid the risks; as above, this is subject to the right to be offered alternative work if it is available.

- Employers have a duty to provide suitable workplace rest facilities for women at work who are breastfeeding mothers to use.

- A refusal to allow a woman to express milk or to adjust her working conditions to enable her to continue to breastfeed may amount to unlawful sex discrimination.

Example: An employer refused a request from a woman to return from maternity leave part-time to enable her to continue breastfeeding her child who suffered from eczema. The woman told her employer that her GP had advised that continued breastfeeding would benefit the child's medical condition. The employer refused the request without explanation. Unless the employer's refusal can be objectively justified, this is likely to be indirect sex discrimination.

Chapter 9

Victimisation and other unlawful acts

Introduction

9.1 This chapter explains what the Act says about the unlawful acts of victimisation, instructing, causing or inducing discrimination, and aiding contraventions. It also sets out the provisions on gender reassignment discrimination (absence from work).

Victimisation

What the Act says

9.2 The Act prohibits victimisation. It is victimisation for an employer to subject a worker to a detriment because the worker has done a 'protected act' or because the employer believes that the worker has done or may do a protected act in the future. **s.28(1)**

9.3 A worker need not have a particular protected characteristic in order to be protected against victimisation under the Act; to be unlawful, victimisation must be linked to a 'protected act' (see paragraph 9.5). Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation. **s.28(2)(a) – d)**

Example: A non-disabled worker gives evidence on behalf of a disabled colleague at the Employment and Equality Tribunal hearing where disability discrimination is claimed. If the non-disabled worker is subsequently refused a promotion because of that action, they would have suffered victimisation in contravention of the Act.

9.4 Former workers are also protected from victimisation.

Example: A grocery shop worker resigns after making a sexual harassment complaint against the owner. Several weeks later, she tries to make a purchase at the shop but is refused service by the owner because of her

complaint. This could amount to victimisation.

What is a 'protected act'?

9.5 A protected act is any of the following:

- bringing proceedings under the Act; **s.28(2)(a)**
- giving evidence or information in connection with proceedings brought under the Act; **s.28(2)(b)**
- doing anything which is related to the provisions of the Act; **s.28(2)(c)**
- making an allegation (whether or not express) that another person has done something in breach of the Act; or **s.28(2)(d)**
- making or seeking a 'relevant pay disclosure' to or from a colleague (including a former colleague). **ss.69(3)-(4)**

9.6 A 'relevant pay disclosure' is explained in paragraph 14.11 and 14.12 and will be expanded upon in the Equal Pay Code.

9.7 Protected acts can occur in any field covered by the Act and in relation to any part of the Act. An employer must therefore not victimise a person who has done a protected act in relation to services, for example.

What is a 'detriment'?

9.8 'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards.

Example: A senior manager hears a worker's grievance about harassment. He finds that the worker has been harassed and offers a formal apology and directs that the perpetrators of the harassment be disciplined and required to undertake diversity training. As a result, the senior manager is not put forward by his director to attend an important conference on behalf of the company. This is likely to amount to detriment.

9.9 A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need

to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.

Example: An employer threatens to dismiss a staff member because he thinks she intends to support a colleague's sexual harassment claim. This threat could amount to victimisation, even though the employer has not actually taken any action to dismiss the staff member and may not really intend to do so.

9.10 Detrimental treatment amounts to victimisation if a 'protected act' is one of the reasons for the treatment, but it need not be the only reason.

What other factors are involved in proving that victimisation has occurred?

9.11 Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.

9.12 There is no time limit within which victimisation must occur after a person has done a protected act. However, a complainant will need to show a link between the detriment and the protected act.

Example: In 2016, a trade union staff representative acted on behalf of a colleague in a claim of sex discrimination. In 2019, he applies for a promotion but is rejected. He asks for his interview notes which make a reference to his loyalty to the company and in brackets were written the words 'Tribunal case'. This could amount to victimisation despite the three-year gap between the protected act and the detriment.

9.13 A worker cannot claim victimisation where they have acted in bad faith, such as maliciously giving false evidence or information or making a false allegation of discrimination. Any such action would not be a protected act. **s.28(3)**

9.14 However, if a worker gives evidence, provides information or makes an allegation in good faith but it turns out that it is factually wrong, or provides information in relation to proceedings which are unsuccessful, they will still be protected from victimisation.

9.15 A worker is protected from victimisation by an employer or

prospective employer where they do a protected act which is not in relation to employment. For example, a protected act may be linked to accessing goods, facilities and services provided by the employer.

Instructing, causing or inducing discrimination

What the Act says

9.16 It is unlawful to instruct someone to discriminate against, harass or victimise another person because of a protected characteristic or to instruct a person to help another person to do an unlawful act. Such an instruction would be unlawful even if it is not acted on. **s.99(1)**

Example: A GP instructs his receptionist not to register anyone with an Asian name. The receptionist would have a claim against the GP if she experienced a detriment as a result of not following the instruction. A potential patient would also have a claim against the GP under the services provisions of the Act if she discovered the instruction had been given and was put off from applying to register.

9.17 The Act also makes it unlawful to cause or induce, or to attempt to cause or induce, someone to discriminate against or harass a third person because of a protected characteristic or to victimise a third person because they have done a protected act. **s.99(2) (3) & (8)**

9.18 An inducement may amount to no more than persuasion and need not involve a benefit or loss. Nor does the inducement have to be applied directly: it may be indirect. It is enough if it is applied in such a way that the other person is likely to come to know about the inducement. **s.99(4)**

Example: The managing partner of an accountancy firm is aware that the head of the administrative team is planning to engage a senior receptionist with a physical disability. The managing partner does not issue any direct instruction but suggests to the head of administration that to do this would reflect poorly on his judgement and so affect his future with the firm. This is likely to amount to causing or attempting to cause the head of administration to act unlawfully.

9.19 It is also unlawful for a person to instruct, cause or induce

a person to commit an act of discrimination or harassment in the context of relationships which have come to an end (see paragraphs 10.52 to 10.57).

9.20 The Act also prohibits a person from instructing, causing or inducing someone to help another person to do an unlawful act (see paragraph 9.25 below). **s.100(1)-(3)**

9.21 It does not matter whether the person who is instructed, caused or induced to commit an unlawful act carries it out. This is because instructing, causing or inducing an unlawful act is in itself unlawful. However, if the person does commit the unlawful act, they may be liable. The person who instructed, caused or induced them to carry it out will also be liable for it. **s.99(6)**

When does the Act apply?

9.22 For the Act to apply, the relationship between the person giving the instruction, or causing or inducing the unlawful act, and the recipient must be one in which discrimination, harassment or victimisation is prohibited. This will include employment relationships, the provision of services and public functions, and other relationships governed by the Act. **s.99(7)**

Who is protected?

9.23 The Act provides a remedy for: **s.99(5)**

a) the person to whom the causing, instruction or inducement is addressed; and
b) the person who is subjected to the discrimination or harassment or victimisation if it is carried out,

provided that they suffer a detriment as a result.

Example: In the example in paragraph 9.18, if the head of administration were to experience a detriment as a result of the managing partner's actions, he would be entitled to a remedy against the managing partner. The disabled candidate is also entitled to a remedy if she suffers a detriment as a result of the managing partner's actions.

9.24 In addition, the Attorney General has the power to bring proceedings regardless of whether an individual has actually experienced a detriment. **s.99(5)(c)**

Aiding contraventions

What the Act says

9.25 The Act makes it unlawful knowingly to assist someone discriminate against, harass or victimise another person. A person who helps another in this way will be treated as having done the act of discrimination, harassment or victimisation themselves. It is also unlawful to help a person to discriminate against or harass another person after a relationship covered by the Act has ended, where the discrimination or harassment arises from and is closely connected to the relationship. **s.100(1)**

9.26 The Act also makes it unlawful to help with an instruction to discriminate or with causing or inducing discrimination. **s.100(1)**

What does it mean to help someone commit an unlawful act?

9.27 'Assist' should be given its ordinary meaning. It does not have the same meaning as to procure, induce or cause an unlawful act. The help given to someone to discriminate, harass or victimise a person will be unlawful even if it is not substantial or productive, so long as it is not negligible.

Example: A company manager wants to ensure that a job goes to a female candidate because he likes to be surrounded by women in the office. However the company's human resources (HR) department, in accordance with their equal opportunities policy, has ensured that the application forms contain no evidence of candidates' sex. The manager asks a clerical worker to look in the HR files and let him know the sex of each candidate, explaining that he wants to filter out the male candidates. It may be unlawful for the clerical worker to give the manager this help, even if the manager is unsuccessful in excluding the male candidates.

What does the helper need to know to be liable?

9.28 For the help to be unlawful, the person giving the help must know at the time they give the help that discrimination, harassment or victimisation is a probable outcome. But the helper does not have to intend that this outcome should result from the help.

Example: In the example above, the help will be unlawful unless the clerical worker fails to realise that an act of discrimination is a likely outcome of her actions. But she only needs to understand that discrimination is a likely outcome; she does not have to intend that discrimination should occur as a result of her help.

Reasonable reliance on another's statement

9.29 If the helper is told that they are assisting with a lawful act and it is reasonable for them to rely on this statement, then the help they give will not be unlawful even if it transpires that this help assisted with a contravention of the Act. It is a criminal offence to knowingly or recklessly make a false or misleading statement as to the lawfulness of an act. **s.100(2)** **s.100(3)**

Example: In the example above, the manager might tell the clerical worker that he has a responsibility as manager to balance the sexes in the workforce and the human resources department is mistaken in its approach. If it is reasonable for the worker to believe this, she will escape liability for the discrimination. Whether it is reasonable to believe this depends on all the relevant circumstances, including the nature of the action and the relationship of the helper to the person seeking help to carry out an unlawful act.

If the manager tells the clerical worker that it is all right for her to get the information, either knowing that that is not true or simply not caring whether it is true or not, the manager will not only have civil liability under the Act for discrimination but will also commit a criminal offence.

9.30 'Reasonable' means having regard to all the circumstances, including the nature of the act and how obviously discriminatory it is, the authority of the person making the statement and the knowledge that the helper has or ought to have.

Gender reassignment discrimination - absence from work

What the Act says

9.31 If a transgender worker is absent from work because of gender reassignment, it is unlawful to treat them less favourably than they would be treated if they were absent **s.17(2)(a)**

due to an illness or injury.

Example: A transgender worker takes time off to attend a Gender Identity Clinic as part of the gender reassignment process. His employer cannot treat him less favourably than she would treat him for absence due to illness or injury, for example by paying him less than he would have received if he were off sick.

9.32 It is also discrimination for an employer to treat a transgender person less favourably for being absent because of gender reassignment, compared to how they would treat the same worker for being absent for a reason other than sickness or injury and it is unreasonable to treat them less favourably. **s.17(2)(b)**

Example: A transgender worker tells her boss that she intends to undergo gender reassignment and asks him if she can take an afternoon off as annual leave to attend counselling. The request is brusquely refused although there are sufficient staff members on duty that day to cover for her absence. This could amount to gender reassignment discrimination.

9.33 The Act does not define a minimum or maximum time which must be allowed for absence because of gender reassignment. It would be good practice for employers to discuss with transgender staff how much time they will need to take off in relation to the gender reassignment process and accommodate those needs in accordance with their normal practice and procedures.

Chapter 10

Obligations and liabilities under the Act

Introduction

10.1 Part 5 of the Act sets out the prohibited conduct as it applies in the employment context. It introduces obligations on employers to protect employees from harassment for a wider range of people, and also not to enquire about the disability or health of applicants during the recruitment process. Part 8 sets out the circumstances in which liability for breaches of the Act might be incurred and the defences available against allegations of breaches of the Act.

10.2 This chapter explains the obligations of employers to job applicants and employees; liability of employers, principals, employees and agents for breaches of the Act; and the statutory defences available. In addition, this chapter explains employers' obligations when entering into contracts and the territorial scope of the Act.

Definition of employment

10.3 The Act defines employment broadly and covers a wide category of relationships that constitute work. Employment is defined in the Act as: **s.75**

a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
b) employment as a public sector employee (within the meaning of section 3(2) of the Public Services Commission Act 2015);
c) employment as a relevant member of Tynwald staff.

10.4 The definition of employment in the Act is wider than under many other employment law provisions. So, for example, it covers a wider group of workers than are covered by the unfair dismissal provisions in the Employment Act 2006.

10.5 The fact that a contract of employment is illegal or performed in an illegal manner will not exclude the Employment and Equality Tribunal having jurisdiction to hear an employment-related discrimination claim. This will

be so provided that the discrimination is not inextricably linked to illegal conduct (so as to make an award of compensation appear to condone that conduct).

Example: An employee is aware that her employer is not deducting income tax or National Insurance contributions from her wages which, in this particular situation, is illegal. She queries this but her employer tells her: 'It's the way we do business.' Subsequently, she is dismissed after her employer becomes aware that she is pregnant. She alleges that the reason for her dismissal was her pregnancy and claims discrimination because of her pregnancy. While she knew that her employer was not paying tax on her wages, she did not actively participate in her employer's illegal conduct. The illegal performance of the contract was in no way linked to her discrimination claim. In the circumstances, she may be able to pursue her claim, despite her knowledge of her employer's illegal conduct.

Obligations of employers to job applicants and employees

10.6 An employer has obligations not to discriminate against, victimise or harass job applicants and employees. These obligations also apply to a person who is seeking to recruit employees even if they are not yet an employer. **ss.38 & 39** **s.75(3)**

Example: A man sets up a new gardening business and advertises for men to work as gardeners. A woman gardener applies for a job but is rejected because of her sex. She would be able to make a claim for direct discrimination even though the businessman is not yet an employer as he does not yet have any employees.

What the Act says about employers' obligations to job applicants

10.7 Employers must not discriminate against or victimise job applicants in: **s.38(1) & (3)**

- the arrangements they make for deciding who should be offered employment;
- in the terms on which they offer employment; or
- by not offering employment to the applicant.

What are arrangements?

10.8 Arrangements refer to the policies, criteria and practices used in the recruitment process including the decision making process. 'Arrangements' for the purposes of the Act are not confined to those which an employer makes in deciding who should be offered a specific job. They also include arrangements for deciding who should be offered employment more generally. Arrangements include such things as advertisements for jobs, the application process and the interview stage.

What are terms on which employment is offered?

10.9 The terms on which an employer might offer employment include such things as pay, bonuses and other benefits. In respect of discrimination because of sex or pregnancy and maternity, a term of an offer of employment that relates to pay is treated as discriminatory where, if accepted by the employee, it would give rise to an equality clause or rule; or where the term does not give rise to an equality clause or rule but it nevertheless amounts to direct discrimination. More information on sex equality and maternity clauses will be contained in the Equal Pay Code. **s.38(6)**

10.10 Employers' obligations to job applicants extend to them not making enquiries about disability or health before the offer of a job is made. This is discussed at paragraph 10.21 below. **s.52**

What the Act says about employers' obligations to employees

10.11 Employers must not discriminate against or victimise an employee: **s.38(2) & (4)**

- as to the terms of employment;
- in the way they make access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- by dismissing the employee; or
- subjecting them to any other detriment.

Terms of employment

10.12 The terms of employment include such things as pay, working hours, bonuses, occupational pensions, sickness or maternity and paternity leave and pay. The Act has

specific provisions on equality of contractual terms between women and men, which will be in explained further in the Equal Pay Code.

Dismissals

10.13 A dismissal for the purposes of the Act includes: **s.38(7) & (8)**

- direct termination of employment by the employer (with or without notice);
- termination of employment through the expiry of a limited term contract (including a period defined by reference to an event or circumstance) unless the contract is immediately renewed; and **s.38(7) & (8)**
- constructive dismissal – that is, where because of the employer's conduct the employee treats the employment as having come to an immediate end by resigning (whether or not the employee gives notice). **s.38(7)(b)**

10.14 An employee who is dismissed in breach of the Act does not have to complete a qualifying period of service to bring a claim in the Employment and Equality Tribunal.

Example: An employer decides not to confirm a transgender employee's employment at the end of a six months probationary period because of his poor performance. The employee is consequently dismissed. Yet, at the same time, the employer extends by three months the probationary period of a non-transgender employee who has also not been performing to standard. This could amount to direct discrimination because of gender reassignment, entitling the dismissed employee to bring a claim to the Employment and Equality Tribunal.

Discrimination and unfair dismissal

10.15 Unfair dismissal claims can generally only be brought by employees who have one year or more continuous employment – but many categories of 'automatically unfair' dismissal have no minimum service requirement. For example, where the principal reason for dismissal is related to a request for time off work for family reasons such as maternity or parental leave, there is no minimum qualifying service. **s.132 EA**

10.16 It is automatically unfair to dismiss an employee if the reason for the dismissal would constitute unlawful discrimination under the Equality Act 2017. In such cases, a person can make a claim for unfair dismissal at the same **s.124A EA**

time as a discrimination claim.

Example: An employee who has worked with his employer for six months provides a witness statement in support of a colleague who has raised a grievance about homophobic bullying at work. The employer rejects the grievance and a subsequent appeal. A few months later the employer needs to make redundancies. The employer selects the employee for redundancy because he is viewed as 'difficult' and not a 'team player' because of the support he gave to his colleague in the grievance. It is likely that the redundancy would amount to unlawful victimisation and also be an unfair dismissal.

Detriment

10.17 A detriment is anything which might cause an employee to change their position for the worse or put them at a disadvantage; for example, being excluded from opportunities to progress within their career. The concept of detriment is explained in paragraph 9.8.

Example: An employer does not allow a black male employee an opportunity to act up in a management post, even though he has demonstrated enthusiasm by attending relevant training courses and taking on additional work. He has also expressed an interest in progressing within the business. Instead the employer offers the acting up opportunity to an Asian woman because he perceives Asian people as more hard-working than black people. If the black worker were able to demonstrate that he was better qualified for the acting up position compared to his Asian colleague, he could claim discrimination because of race on the basis that he was subjected to a detriment.

Employers' duty to make reasonable adjustments

10.18 Employers have a duty to make reasonable adjustments in the recruitment and selection process and during employment. Making reasonable adjustments in recruitment might mean providing and accepting information in accessible formats. During recruitment, making reasonable adjustments could entail amending employment policies and procedures to ensure disabled employees are not put at a substantial disadvantage compared to non-disabled employees. (See Chapter 6 for a detailed explanation of the duty to make reasonable **s.38(5)**

adjustments, and Chapters 16 and 17 for information on what employers can do to comply with the law.)

Example: An employer's disciplinary policy provides that they will make reasonable adjustments for disabled employees in the disciplinary procedure. When the employer decides to take disciplinary action against an employee with a hearing impairment, they pay for a palantypist to enable the employee to discuss her case with her union representative and to attend all meetings and hearings pertaining to the disciplinary hearing.

Harassment of job applicants and employees

10.19 Employers have a duty not to harass job applicants or their employees. This duty may extend to harassment by third parties of employees in the course of employment and job applicants. (Chapter 7 provides a detailed explanation of the provisions on harassment; see paragraph 10.20 below on harassment by third parties). **ss.39 & 27(1)**

Harassment by third parties

10.20 Usually an employer will not be responsible for discrimination, harassment or victimisation by someone other than their employee or agent (see paragraphs 10.40 to 10.44). However, it is possible that they could be found to be legally responsible for failing to take action in specific circumstances. These would arise where the employer has some degree of control over a situation where there is a continuing course of offensive conduct of which they are aware but do not take action to prevent its recurrence. **ss.39 & 27(1)**

Example: A woman is employed to work in a hostel for young men aged between 18 and 21. Some of the young men regularly make sexually abusive comments to her and sometimes touch her inappropriately. She has complained to her manager about this many times, but he has done nothing to stop it, by, for example, warning the young men that the conduct is unacceptable and that they might be required to leave the hostel if it does not stop. The employer may be legally responsible for the harassment by the young men.

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Pre-employment enquiries about disability and health

10.21 Except in the specific circumstances set out below, it is unlawful for an employer to ask **any** job applicant about their disability or health until the applicant has been offered a job (on a conditional or unconditional basis) or has been included in a pool of successful candidates to be offered a job when a position becomes available. This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence are questions that relate to disability or health. **s.52**

10.22 It is also unlawful for an agent or employee of an employer to ask questions about disability or health. This means that an employer cannot refer an applicant to an occupational health practitioner or ask an applicant to fill in a questionnaire provided by an occupational health practitioner before the offer of a job is made (or before acceptance into a pool of successful applicants) except in the circumstances set out below.

10.23 This provision of the Act is designed to ensure that disabled applicants are assessed objectively for their ability to do the job in question, and that they are not rejected because of their disability. There are some limited exceptions to this general rule, which mean that there are specified situations where such questions would be lawful.

Exceptions to the general rule prohibiting disability or health-related questions

10.24 There are six situations when it will be lawful for an employer to ask questions related to disability or health. **ss.52(7) & (14)**

Reasonable adjustment needed for the recruitment process

10.25 It is lawful for an employer to ask questions relating to reasonable adjustments that would be needed for an assessment such as an interview or other process designed to assess a person's suitability for a job. This means in practice that any information on disability or health obtained by an employer for the purpose of making adjustments to recruitment arrangements should, as far as **s.52(7)(a)**

possible, be held separately. Also it should not form any part of the decision-making process about an offer of employment, whether or not conditional.

10.26 Questions about reasonable adjustments needed for the job itself should not be asked until after the offer of a job has been made (unless these questions relate to a function that is intrinsic to the job – see below at paragraph 10.32). When questions are asked about reasonable adjustments, it is good practice to make clear the purpose of asking the question.

Example: An application form states: 'Please contact us if you are need any adjustments for the interview'. This would be lawful under the Act.

10.27 It is lawful to ask questions about disability or health that are needed to establish whether a person (whether disabled or not) can undertake an assessment as part of the recruitment process, including questions about reasonable adjustments for this purpose. **s.52(7)(a)**

Example: An employer is recruiting play workers for an outdoor activity centre and wants to hold a practical test for applicants as part of the recruitment process. He asks a question about health in order to ensure that applicants who are not able to undertake the test (for example, because they have a particular mobility impairment or have an injury) are not required to take the test. This would be lawful under the Act.

Monitoring purposes

10.28 Questions about disability and health can be asked for the purposes of monitoring the diversity of applicants. (For information on good practice on monitoring, see Chapter 18 and Appendix 2). **s.52(7)(c)**

Implementing positive action measures

10.29 It is also lawful for an employer to ask if a person is disabled so they can benefit from any measures aimed at improving disabled people's employment rates. **s.52(7)(d)**

Occupational requirements

10.30 There would be a need to demonstrate an occupational requirement if a person with a particular impairment is required for a job. In such a situation, where an employer can demonstrate that a job has an occupational requirement for a person with a specific impairment, then the employer may ask about a person's health or disability to establish that the applicant has that impairment. **s.52(7)(e)**

Example: An employer wants to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states that this is the case. It would be lawful under the Act for the employer to ask on the application form or at interview about the applicant's disability.

National security

10.31 Questions about disability or health can be asked where there is a requirement to vet applicants for the purposes of national security. **s.52(14)**

Function intrinsic to the job

10.32 Apart from the situations explained above, an employer may only ask about disability or health (before the offer of a job is made or before the person is in a pool of candidates to be offered vacancies when they arise) where the question relates to a person's ability to carry out a function that is intrinsic to that job. As explained in paragraphs 16.5 and 16.9, only functions that can be justified as necessary to a job should be included in a job description. Where a disability or health-related question would determine whether a person can carry out this function with reasonable adjustments in place, then such a question is permitted. **s.52(7)(b)**

Example: A construction company is recruiting scaffolders. It would be lawful under the Act to ask about disability or health on the application form or at interview if the questions related specifically to an applicant's ability to climb ladders and scaffolding to a significant height. The ability to climb ladders and scaffolding is intrinsic to the job.

10.33 Where a disabled applicant voluntarily discloses information about their disability or health, the employer must ensure that in responding to this disclosure they only ask further questions that are permitted, as explained above. So, for example, the employer may respond by asking further questions about reasonable adjustments that would be required to enable the person to carry out an intrinsic function of the job. The employer must not respond by asking questions about the applicant's disability or health that are irrelevant to the ability to carry out the intrinsic function.

Example: At a job interview for a research post, a disabled applicant volunteers the information that as a reasonable adjustment he will need to use voice activated computer software. The employer responds by asking: 'Why can't you use a keyboard? What's wrong with you?' This would be an unlawful disability-related question, because it does not relate to a requirement that is intrinsic to the job – that is, the ability to produce research reports and briefings, not the requirement to use a keyboard.

If the employer wishes to ask any questions arising from the person's disclosure of a disability they would need to confine them to the permitted circumstances, and this can be explained to the candidate. In this instance, this might include asking about the type of adjustment that might be required to enable him to prepare reports and briefings.

10.34 This exception to the general rule about pre-employment disability or health enquiries should be applied narrowly because, in practice, there will be very few situations where a question about a person's disability or health needs to be asked – as opposed to a question about a person's ability to do the job in question with reasonable adjustments in place.

Disability and health enquiries after a job offer

10.35 Although job offers can be made conditional on satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks, employers must ensure they do not discriminate against a disabled job applicant on the basis of any such response. For example, it will amount to direct discrimination to reject an applicant purely on the grounds that a health check reveals that they have a disability. Employers should also consider at the same time whether there are reasonable adjustments that should be

made in relation to any disability disclosed by the enquiries or checks.

10.36 If an employer is not in a position to offer a job, but has accepted applicants into a pool of people to be offered a job when one becomes available, it is lawful for the employer to ask disability or health-related questions at that stage.

10.37 Where pre-employment health enquiries are made after an applicant has been conditionally offered a job subject to such enquiries, employers must not use the outcome of the enquiries to discriminate against the person to whom a job offer has been made.

Example: A woman is offered a job subject to a satisfactory completion of a health questionnaire. When completing this questionnaire the woman reveals that she has HIV infection. The employer then decides to withdraw the offer of the job because of this. This would amount to direct discrimination because of disability.

10.38 An employer can avoid discriminating against applicants to whom they have offered jobs subject to satisfactory health checks by ensuring that any health enquiries are relevant to the job in question and that reasonable adjustments are made for disabled applicants (see Chapter 6). It is particularly important that occupational health practitioners who are employees or agents of the employer understand the duty to make reasonable adjustments. If a disabled person is refused a job because of a negative assessment from an occupational health practitioner during which reasonable adjustments were not adequately considered, this could amount to unlawful discrimination if the refusal was because of disability.

Example: An employer requires all successful job applicants to complete a health questionnaire. The questionnaire asks irrelevant questions about mental health and in answering the questions an applicant declares a history of a mental health condition that has previously lasted for more than 12 months. If the employer then refused to confirm the offer of the job, the unsuccessful disabled applicant would be able to make a claim of direct discrimination because of disability.

10.39 It is good practice for employers and occupational health practitioners to focus on any reasonable adjustments needed even if there is doubt about whether the person falls within the Act's definition of disabled person. (See

paragraphs 2.8 to 2.21 and Appendix 1 for further information about the definition of disability).

Liability of employers and principals under the Act

Employers

10.40 Employers will be liable for unlawful acts committed by their employees in the course of employment, whether or not they know about the acts of their employees. **s.97(1) & (3)**

10.41 The phrase ‘in the course of employment’ has a wide meaning: it includes acts in the workplace and may also extend to circumstances outside such as work-related social functions or business trips abroad. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party.

Example: A shopkeeper goes abroad for three months and leaves an employee in charge of the shop. This employee harasses a colleague with a learning disability, by constantly criticising how she does her work. The colleague leaves the job as a result of this unwanted conduct. This could amount to harassment related to disability and the shopkeeper could be responsible for the actions of his employee.

10.42 However, an employer will not be liable for unlawful acts committed by an employee if they can show that they took 'all reasonable steps' to prevent the employee acting unlawfully. It could be a reasonable step for an employer to have an equality policy in place and to ensure it is put into practice. It might also be a reasonable step for an employer to provide training on the Act to employees. (Part 2 of the Code provides detailed explanations of the types of action employers can take to comply with the Act). **s.97(4)**

Principals

10.43 Principals are liable for unlawful acts committed by their agents while acting under the principal’s authority. It does not matter whether the principal knows about or approves of the acts of their agents. An agent would be considered to be acting with the principal's authority if the principal consents (whether this consent is expressed or implied) to the agent acting on their behalf. Examples of agents include occupational health advisers engaged but not employed by the employer, or recruitment agencies. **s.97(2) & (3)**

Example: A firm of accountants engages a recruitment agency to find them a temporary receptionist. The agency only puts forward white candidates, even though there are suitably qualified black and minority ethnic candidates on their books. The firm could be liable for the actions of the agency even though they do not know about or approve of the agency's action.

10.44 The liability of employers and principals does not extend to criminal offences under the Act. **s.97(5)**

How employers and principals can avoid liability

10.45 An employer will not be liable for unlawful acts committed by their employees where the employer has taken 'all reasonable steps' to prevent such acts. **s.97(4)**

Example: An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act.

10.46 An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.

10.47 Reasonable steps might include:

- implementing an equality policy;
- ensuring workers are aware of the policy;
- providing equal opportunities training;
- reviewing the equality policy as appropriate; and
- dealing effectively with employee complaints.

Taking these steps will also help reduce the likelihood that an employer will be found to be legally responsible for any discrimination, harassment or victimisation carried out by a

person who is not their employee or agent, in circumstances where they might otherwise be found to be legally responsible (see paragraphs 7.11 and 10.20 to 10.24 above).

More information on equality policies is set out in Chapter 18.

10.48 A principal will not be liable for unlawful discrimination carried out by its agents where the agent has acted without the authority of the principal, for example, by acting contrary to the principal's instructions not to discriminate.

Example: A hotel (the principal) uses an agency (the agent) to supply catering staff. The hotel management ensures that the agency is aware of the hotel's equality and diversity policy. Despite this, and without the hotel management's knowledge, the agency decides never to send for interview anyone whom they believe to be gay or lesbian. In this case, the agency has acted without the hotel's authority and the hotel would not, therefore, be liable for the unlawful discrimination by the agency.

Employers' and principals' liability for other unlawful acts

10.49 Employers and principals will also be liable for aiding, causing, instructing or inducing their employees or agents to commit an unlawful act. Employers and principals will also be liable for discrimination or harassment of former workers if the discrimination or harassment arises out of and is closely connected to a relationship covered by the Act which has ended (see paragraph 10.52 to 10.57 below).

Liability of employees and agents under the Act

10.50 Employees and agents may be personally liable for breaches of the Act where the employer or principal is also liable. Employees may be liable for their actions where the employer is able to rely successfully on the 'reasonable steps' defence. An agent may be personally liable for unlawful acts committed under their principal's authority. The principal may avoid liability if they can show that the agent was not acting with their authority. **s.98(1) & (2)**

Example: A line manager fails to make reasonable adjustments for a machine operator with multiple sclerosis, even though the machine operator has made the line

manager aware that he needs various adjustments. The line manager is not aware that she has acted unlawfully because she failed to attend equality and diversity training, provided by her employer. The line manager could be liable personally for her actions as her employer's action, in providing training, could be enough to meet the statutory defence.

10.51 However, if the employee or agent reasonably relies on a statement by the employer or principal that an act is not unlawful, then the employee or agent will not be liable. **s.98(3)**

Example: In the example above, the line manager has asked the company director if she needs to make these adjustments and the director has wrongly said, 'I don't think he's covered by the Equality Act because he isn't in a wheelchair, so don't bother.' In this situation, the line manager would not be liable, but the employer would be liable.

Relationships that have ended

What the Act says

10.52 The Act makes it unlawful for employers to discriminate against, harass or victimise employees after a relationship covered by the Act has ended. An employer will be liable for acts of discrimination, harassment or victimisation arising out of the work relationship and which are 'closely connected to' it. **s.96**

10.53 The expression 'closely connected to' is not defined in the Act but will be a matter of degree to be judged on a case-by-case basis.

Example: A worker who receives an inaccurate and negative job reference from her former employer because she is a lesbian could have a claim against her former employer for direct discrimination because of sexual orientation.

10.54 This protection will apply even if the relationship in question came to an end before this section came into force. **s.96(3)**

10.55 This protection includes a duty to make reasonable adjustments for disabled ex-employees who are placed at a substantial disadvantage when dealing with their former employer. **s.96(4)**

Example: A former worker has lifetime membership of a works social club but cannot access it due to a physical impairment. Once the former employer is made aware of the situation, they will need to consider making reasonable adjustments.

10.56 An employee will be able to enforce protection against discrimination or harassment as if they were still in the relationship which has ended. **s.96(3)**

10.57 If the conduct or treatment which an individual receives after a relationship has ended amounts to victimisation, this will be dealt with in the same way as discrimination or harassment occurring after termination of the employment relationship.

Contracts

10.58 The Act prevents employers from avoiding their responsibilities under the Act by seeking to enter into agreements which permit them to discriminate or commit other unlawful acts. **s.137**

Unenforceable terms in contracts and other agreements

10.59 A term of a contract that promotes or provides for treatment that is prohibited by the Act is unenforceable. However, this will not prevent a person who is or would be disadvantaged by an unenforceable term from relying on it to get any benefit to which they are entitled. **s.137(1)**

10.60 In relation to disability only, these provisions on unenforceable terms apply to terms of non-contractual agreements pertaining to the provision of employment services, or group insurance arrangements for employees. **s.137(2) & (3)**

10.61 The Act also says that a term of a contract that attempts to exclude or limit the anti-discrimination provisions of the Act is unenforceable by a person in whose favour it would operate. However, this does not prevent the parties to a claim in the Employment and Equality Tribunal from entering into an agreement to settle the claim, provided the agreement is made with the assistance of an Industrial Relations Officer. (see also paragraph 15.8). **s.139(1)** **s.139(3)(a)**

Removal or modification of unenforceable terms

10.62 A person who has an interest in or is affected by an unenforceable term in a contract can apply to the **s.138(1)**

Employment and Equality Tribunal to have it modified or removed.

Void or unenforceable terms in collective agreements and rules of undertakings

10.63 Any term of a collective agreement will be void insofar as it leads to conduct prohibited by the Act. A rule of an undertaking is unenforceable insofar as it also has that effect. A rule of an undertaking is a rule made by a trade organisation, qualifications body or employer which is applied respectively to members or prospective members, holders of relevant qualifications or those seeking them, and employees or prospective employees. **s.140**

10.64 Employees and prospective employees can apply to the Employment and Equality Tribunal for a declaration that a term is void or that a rule is unenforceable. **s.141**

Application to aircraft and shipping

10.65 The protection to be afforded to workers who work on Manx ships, aircraft or hovercraft, will be set out in an order made under the Act. **s.160**

Chapter 11

Discrimination in work relationships other than employment

Introduction

11.1 As explained in paragraph 1.21 the Act covers a variety of work relationships beyond employment. This Chapter explains the relevant provisions of Part 5 of the Act which focus specifically on these wider work-related provisions. In other respects, however, the employment provisions of the Act apply in the usual way.

Discrimination against contract workers

What the Act says

11.2 Contract workers are protected to a similar extent to employees against discrimination, harassment and victimisation. They are also entitled to have reasonable adjustments made to avoid being put to a substantial disadvantage compared with non-disabled people. **s.40**

11.3 The Act says that it is unlawful for a 'principal' to discriminate against or victimise a contract worker: **s.40(1) & 40(3)**

- in the terms on which the principal allows the contract worker to work;
- by not allowing the contract worker to do or continue to do the work;
- in the way the principal affords the contract worker access to, opportunities to a benefit, facility or service in relation to contract work, or by failing to afford the contract worker access opportunities to such benefit, facility or service.
- by subjecting the contract worker to any other detriment.

11.4 The Act also says that it is unlawful for a principal to harass a contract worker. **s.40(2)**

11.5 The duty to make reasonable adjustments also applies to a principal. **s.40(4)**

Example: A meat packing company uses agency workers who are engaged and supplied by an employment business to supplement its own workforce during times of peak demand. The employment business supplies the company with three agency workers, one of whom is gay. The owner of the company discovers this and asks the agency to replace him with someone who is not gay. By not allowing the gay man to continue to work at the meat packing plant, the company will be liable for discrimination as a 'principal'.

Who is a 'principal'?

11.6 A 'principal', also known as an 'end-user', is a person who makes work available for an individual who is employed by another person and supplied by that other person under a contract to which the principal is a party (whether or not that other person is a party to it). The contract does not have to be in writing. **s.40(5)**

Example: A nurse is employed by a private health care company which sometimes uses an employment business to deploy staff to work in a Department of Health and Social Care (DHSC) hospital. The employment business arranges for the nurse to work at a DHSC hospital. In this case the 'principal' is the DHSC.

Who is a contract worker?

11.7 A contract worker is a person who is supplied to the principal and is employed by another person who is not the principal. The worker must work wholly or partly for the principal, even if they also work for their employer, but they do not need to be under the managerial power or control of the principal. Contract workers can include employees who are seconded to work for another company or organisation and employees of companies who have a contract for services with an employment business. **s.40(7)**

11.8 Agency workers engaged by an employment business may also be contract workers as long as they are employed by the employment business. An agency worker supplied to a principal to do work and paid by an employment business under a contract will also be protected. Self-employed workers who are not supplied through employment businesses are not contract workers but may still be covered by the Act (see paragraph 10.3).

Example: An individual owns X company of which he is

the sole employee. He has a contract for services with an employment business whereby he has to personally do the work. The employment business supplies him to Y company. Although there is no contract between X and Y companies, the employee of X company would be a contract worker and would be protected under the Act.

Example: A self-employed person is supplied by an employment business to a company. The worker is racially and sexually harassed by an employee of the company. Because the worker is not employed, it is unlikely that she will be protected by the Act unless she is able to convince the Tribunal that it is necessary for a contract to be implied between her and the end-user.

11.9 There is usually a contract directly between the end-user and supplier, but this is not always the case. Provided there is an unbroken chain of contracts between the individual and the end-user of their services, that end-user is a principal for the purposes of the Act and the individual is therefore a contract worker. **s.40(5)(b)**

Example: A worker is employed by a nail art business based in a beauty salon, where the salon profited from any sales he made and imposed rules on the way he should behave. In these circumstances, the worker could be a contract worker. The nail art business would be his employer and the salon would be the principal. However, this would not apply if the salon simply offered floor space to the nail art business, the business paid a fixed fee to the salon for the right to sell its own goods and services in its own way and for its own profit, and the nail art business staff in no way worked for the salon.

How does the duty to make reasonable adjustments apply to disabled contract workers?

11.10 The duty to make reasonable adjustments applies to a principal as well as an employer. Therefore, in the case of a disabled contract worker, their employer and the principal to whom they are supplied may each be under a separate duty to make reasonable adjustments. **s.40(4)**

Example: A travel agency hires a clerical worker from an employment business to fulfil a three month contract to file travel invoices during the busy summer holiday period. The contract worker is a wheelchair user, and is quite capable of doing the job if a few minor, temporary changes are made to the arrangement of furniture in the office. It is

likely to be reasonable for the travel agency to make these.

Employer's duty to make reasonable adjustments

11.11 A disabled contract worker's employer will have to make reasonable adjustments if the contract worker is substantially disadvantaged by their own provisions, criteria and practices, by a physical feature of the premises they occupy, or by the non-provision of an auxiliary aid (see Chapter 6). **Sch. 8, para 1**

11.12 The employer of a disabled contract worker is also under a duty to make reasonable adjustments where the contract worker is likely to be substantially disadvantaged by: **Sch.8, para 5(2)–(5)**

- a provision, criterion or practice applied by or on behalf of all or most of the principals to whom the contract worker is or might be supplied, and where the disadvantage is the same or similar in the case of each principal;
- a physical feature of the premises occupied by each of the principals to whom the contract worker is or might be supplied, and where the disadvantage is the same or similar in the case of each principal; or
- the non-provision of an auxiliary aid which would cause substantial disadvantage, and that disadvantage would be the same or similar in the case of all or most of the principals to whom the contract worker might be supplied.

Example: A blind secretary is employed by a temping agency which supplies her to other organisations for secretarial work. Her ability to access standard computer equipment places her at a substantial disadvantage at the offices of all or most of the principals to whom she might be supplied. The agency provides her with an adapted portable computer and Braille keyboard, by way of reasonable adjustments.

Principal's duty to make reasonable adjustments

11.13 A principal has similar duties to make reasonable adjustments to those of a disabled contract worker's employer, but does not have to make any adjustment which the employer should make. So, in effect, the principal is responsible for any additional reasonable adjustments which are necessary solely because of its own provision, criterion or practice, the physical feature of **Sch. 8, para 6**

the premises it occupies or to avoid the non-provision of or failure to provide an auxiliary aid.

Example: In the preceding example, a bank which hired the blind secretary may have to make reasonable adjustments which are necessary to ensure that the computer provided by the employment business is compatible with the system which the bank is already using.

11.14 In deciding whether any, and if so, what, adjustments would be reasonable for a principal to make, the period for which the disabled contract worker will work for the principal is important. It might not be reasonable for a principal to have to make certain adjustments if the worker will be with the principal for only a short time.

Example: An employment business enters into a contract with a firm of accountants to provide an assistant for two weeks to cover an unexpected absence. The employment business proposes a name. The person concerned finds it difficult, because of his disability, to travel during the rush hour and would like his working hours to be modified accordingly. It might not be reasonable for the firm to have to agree, given the short time in which to negotiate and implement the new hours.

11.15 It would be reasonable for a principal and the employer of a contract worker to co-operate with each other with regard to any steps taken by the other to assist the contract worker. It is good practice for the principal and the employer to discuss what adjustments should be made, and who should make them.

Example: The bank and the employment business in the example in paragraphs 11.13 above would need to co-operate with each other so that, for example, the employment business allows the bank to make any necessary adaptations to the equipment which the employment business provided to ensure its compatibility with the bank's existing systems.

Discrimination against police officers

What the Act says

11.16 The Act says that police officers and cadets are to be treated as employees of the Chief Constable under whose direction and control they are serving, or of the **s.41(1) & (2)**

Department of Home Affairs. Police officers include special constables. Police officers and police cadets have the same rights as employees under the Act and therefore have the same protection against discrimination, harassment and victimisation (see Chapter 10) under Part 5. The Chief Constable or the Department of Home Affairs is liable for their unlawful acts against police officers, cadets and applicants for appointment. They are also vicariously liable for unlawful acts committed by one officer against another. **s.97**

Discrimination against partners in a firm

11.17 The Act provides protection to partners in a partnership (firm) and a person seeking to become a partner of a firm, similar to that provided to workers and job applicants against an employer.

What the Act says

11.18 It is unlawful for a firm or a proposed firm to discriminate against or victimise a person: **s.42(1) & (5)**

- in the arrangements they make to determine who should be offered the position of partner;
- in the terms on which they offer the person a position as partner; or
- by not offering the person a position as partner.

Example: An African Caribbean candidate with better qualifications than other applicants is not shortlisted for partnership with an accountancy firm. The firm is unable to provide an explanation for the failure to shortlist. This could amount to direct discrimination because of race.

11.19 Where the person is already a partner of a firm, it is unlawful to discriminate against or victimise that person: **s.42(2) & (6)**

- in the terms of partnership;
- in the way it affords (or by not affording) the person who is a partner access to opportunities for promotion, transfer or training or for receiving any other benefits, facility or service;
- by expelling the person who is a partner; or
- by subjecting the person who is a partner to any other detriment.

Example: A firm refuses a Muslim member access to its childcare scheme because all the other children who

attend the scheme have Christian parents. This could amount to direct discrimination because of religion or belief.

11.20 It is also unlawful for a firm or a proposed firm to subject a partner or member or a person seeking to become a partner or member to harassment. **s.42(4)**

Example: A lesbian candidate who applies to become a partner is subjected to homophobic banter during her partnership interview. The banter is offensive and degrading of her sexual orientation and creates an offensive and degrading environment for her at interview. This would amount to harassment related to sexual orientation.

How does the duty to make reasonable adjustments apply to partners?

11.21 The duty to make reasonable adjustments for disabled partners applies to a firm or a proposed firm in the same way as it applies to an employer (see Chapters 6 and 10). **ss.42(7)**

11.22 Where a firm is required to make adjustments for a disabled partner or a disabled prospective partner, the cost of making the adjustments must be borne by that firm. Provided that the disabled person is, or becomes, a partner, they may be required (because partners share the costs of the firm) to make a reasonable contribution towards this expense. In assessing the reasonableness of any such contribution (or level of such contribution), particular regard should be had to the proportion in which the disabled partner is entitled to share in the firm's profits, the cost of the reasonable contribution and the size and administrative resources of the firm. **Sch. 8, para 7**

Example: A disabled person who uses a wheelchair as a result of a mobility impairment joins a firm of architects as a partner, receiving 20% of the firm's profits. He is asked to pay 20% towards the cost of a lift which must be installed so that he can work on the premises. This is likely to be reasonable.

Discrimination against members of

limited liability companies (LLCs)

11.23 The Act provides protection to members and a person seeking to become a member of an LLC, similar to that provided to workers and job applicants against an employer.

What the Act says

11.24 It is unlawful for the members of an LLC to discriminate against a proposed member in the transfer or assignment of a member's interest: **s.43(2)**

- in deciding whether or not to approve the transfer or assignment;
- in the terms on which the proposed member is to become a member; or
- by not approving the transfer or assignment of the member's interest.

11.25 It is unlawful for the members of an LLC to discriminate against a member: **s.43(3)**

- in the terms of the membership;
- in the way it affords (or by not affording) the person who is a member access to opportunities for promotion, transfer or training or for receiving any other benefits, facility or service;
- by expelling the person who is a member;
- in deciding whether to approve or not the proposed transfer or assignment of the member's interest;
- as to the terms of transfer or assignment for the new member;
- by not approving the transfer or assignment of the member's interest; or
- by subjecting the person who is the member to any other detriment.

Example: A member of an accountancy firm wishes to retire and transfer his interest to another accountant who is Buddhist. The other members, who are all Christian do not approve the transfer and fail to give an explanation. This could amount to direct discrimination because of religion or belief.

11.26 It is unlawful for the members of an LLC to victimise a proposed member: **s.43(5)**

- in the way the members decide whom to offer a membership to;
- in the terms of the membership; or
- by not offering the person a position as a member.

11.27 Where the person is already a member, it is unlawful to victimise that member: **s.43(6)**

- in the terms of the membership;
- in the way it affords (or by not affording) the person with opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- by expelling the person who is a member; or
- by subjecting the person who is a member to any other detriment.

11.28 It is also unlawful for the members of an LLC to harass a member or proposed member. **s.43(4)**

Example: A transgender member of an LLC attends a corporate conference with other members and overhears others members making transphobic banter. The banter is offensive and degrading of her sexual orientation and creates an offensive and degrading environment. This would amount to harassment related to sexual orientation or gender reassignment.

Discrimination against personal and public office holders

11.29 It is unlawful to discriminate against, victimise or harass office holders where they are not protected by other provisions (within Part 5) of the Act. Thus an office holder who is an employee will be protected by the provisions dealing with employment. Whilst an office holder may also be an employee, it is important to note that office holders do not hold their position as employees. An office holder's functions, rights and duties may be defined by the office they hold, instead of or in addition to a contract of employment. **ss.44 - 47 Sch.6 Paras. 1(1) & 1(2)**

11.30 The Act affords protection to those seeking to be appointed or those appointed to personal offices and public offices. Office holders include offices and posts such as directors, non-executive directors, company secretaries, positions on the board of non-departmental public bodies, some judicial positions and positions held by some ministers of religion.

What is a personal office?

11.31 A personal office is an office or post to which a person is appointed to discharge a function personally under the direction of another person (who may be different from the person who makes the appointment) and is entitled to remuneration other than expenses or compensation for loss of income or benefits. **s.44(1), (2) & (11)**

11.32 Where a personal office is also a public office it is to be treated as a public office only. **s.47(4)**

What is a public office?

11.33 A public office holder is a person who is appointed: **s.45(1)&(2)**

- by the Governor, the Governor in Council, the Council of Ministers, the Chief Minister, a Minister or the Appointments Commission; or
- on the recommendation of, or with the approval of, one of those bodies or persons; or
- by or subject to the approval of Tynwald or a Branch of Tynwald.

What the Act says

11.34 It is unlawful for a person who has the power to make an appointment to a personal or public office to discriminate against or victimise a person: **ss.44(3),(5) & 45(3),(5)**

- in the arrangements which are made for deciding to whom to offer the appointment;
- as to the terms on which the appointment is offered; or
- by refusing to offer the person the appointment.

Example: A deaf woman who communicates using British Sign Language applies for appointment as a Chair of a public body. Without interviewing her, the public body making the appointments writes to her saying that she would not be suitable as good communication skills are a requirement. This could amount to discrimination because of disability.

11.35 It is unlawful for a person who has the power to make an appointment to a personal or public office to harass a person who is seeking or being considered for appointment in relation to the office. **ss.44(4) & 45(4)**

11.36 It is also unlawful for a 'relevant person' in relation to a personal office or public office to discriminate against or victimise an office holder: **ss.44(6),(8) & 45(6),(9) & (10)**

- as to the terms of the appointment;
- in the opportunities which are afforded (or refused) for promotion, transfer, training or receiving any other benefit, facility or service;
- by terminating their appointment; or
- by subjecting the person to any other detriment.

11.37 The Act also makes it unlawful for a relevant person to harass an appointed office holder in relation to that office. **ss.44(7) & 45(8)**

11.38 A 'relevant person' is the person who has the power to act on the matter in respect of which unlawful conduct is alleged. Depending on the circumstances, this may be the person who can set the terms of appointment, afford access to an opportunity; terminate the appointment; subject an appointee to a detriment; or harass an appointee. **s.47(6)**

11.39 The duty to make reasonable adjustments applies to those who can make an appointment to personal office and to public office and a 'relevant person' in relation to the needs of disabled office holders. **ss.44(9) & 45(11)**

11.40 In respect of sex or pregnancy and maternity discrimination, if an offer of appointment to an office has a term relating to pay that would give rise to an equality clause if it were accepted, this would be treated as discriminatory. If that is not the case, a term relating to pay will be discriminatory where the offer of the term constitutes direct discrimination. **ss.44(12) & 45(12)**

Who can make appointments to a public office?

11.41 Appointment to a public office can be made by: **s.45(2)**

- the Governor, Governor in Council, the Council of Ministers, the Chief Minister, a Minister or the Appointments Commission; or
- on the recommendation of, or with the approval of, one of those bodies or persons; or
- by or subject to the approval of Tynwald or a Branch of Tynwald.

11.42 Where, in relation to a public office, an appointment is made on the recommendation or is subject to the approval of Tynwald or a Branch of Tynwald it is unlawful for a relevant person to discriminate against or victimise an office holder in all respects as set out in paragraph 11.36 except by terminating the appointment. However, a relevant person does not include Tynwald, the Legislative Council or the House of Keys. **s.45(7) & (10)** **s.47(6)**

Example: The Council of Ministers terminates the appointment of a person who holds office in the Appointments Commission because of the person's religious beliefs. This could amount to discrimination because of religion or belief.

Recommendations and approvals for the appointment to public offices

11.43 The Act says it is unlawful for the Governor, Governor in Council, the Council of Ministers, the Chief Minister, a Minister or the Appointments Commission, who have the power to make recommendations or give approval for an appointment, to discriminate or victimise a person: **s.46(1) & (3)**

- in the arrangements made for deciding whom to recommend for appointment or to whose appointment to give approval;
- by not recommending that person for appointment or by not giving approval to the appointment;
- by making a negative recommendation for appointment.

11.44 It is unlawful for the Governor, Governor in Council, the Council of Ministers, the Chief Minister, a Minister or the Appointments Commission to harass a person seeking or being considered for a public office in relation to that office. **s.46(2)**

11.45 The Governor, Governor in Council, the Council of Ministers, the Chief Minister, a Minister and the Appointments Commission have a duty to make reasonable adjustments to avoid a disabled person being put at a substantial disadvantage compared to non-disabled people. **s.46(4)**

Example: A selection process is carried out to appoint a chair for a public health body. The best candidate for the appointment is a disabled person with a progressive condition who is not able to work full-time because of her disability. The person who approves the appointment should consider whether it would be a reasonable adjustment to approve the appointment of the disabled person on a job-share or part-time basis.

What is a 'relevant body'?

11.46 A relevant body is either the Governor, Governor in Council, the Council of Ministers, the Chief Minister, a Minister, the Appointments Commission or a body established by or in pursuance of an enactment or by the Governor, the Governor in Council, the Council of Ministers, the Chief Minister or a Minister. **s.46(5)**

Example: It could be direct discrimination for a Government Minister responsible for approving the appointment of members of the Parole Committee to refuse to approve the appointment of a person because they are undergoing gender reassignment.

Personal and public offices that are excluded from the Act

11.47 Political offices or posts are excluded from the definition of personal or public offices. Political offices and posts include the office of President of Tynwald; an office of Tynwald held by a member of either branch; an office of the House of Keys held by a member of the House; an office of the Legislative Council held by a member of the Council; the office of Chief Minister; office as a Minister or a member of a Department; office as a member of a Statutory Board (whether or not by virtue of being a member of Tynwald); the office of mayor or office as a councillor for Douglas Borough Council; office as a chairman of Commissioners or as a Commissioner for a local authority; and office as chairperson or a trustee of the Manx Museum and National Trust. **Sch. 6, para 2**

11.48 A dignity or honour awarded by the Crown is also excluded from the definition of personal and public offices. **Sch. 6, para 3**

What the Act says about the termination of an office holder's post

11.49 The provisions on the termination of an office holder's office or post are the same as for termination of employment; that is, it applies to limited term appointments which are not renewed on the expiration of the term of the appointment, and to termination of the appointment by an office holder because of the conduct of a relevant person**.** **s.47(7) & (8)**

Qualifications bodies and trade organisations

11.50 Qualifications bodies and trade organisations have the same obligations as employers in their capacity as employers. They also have separate obligations under the Act to members and prospective members and to those on whom they confer qualifications. **ss.48 & 50**

Employment services

11.51 The Act places obligations on employment service providers that are similar to those placed on employers. The definition of an employment service is set out in paragraph 11.57 below. **s.49**

What the Act says

11.52 An employment service provider must not discriminate against or victimise a person in relation to the provision of an employment service: **s.49(1) & (4)**

- in the arrangements that it makes for selecting people to whom it provides, or offers to provide, the service;
- in the terms on which it offers to provide the service to that person;
- by not offering to provide the service to that person.

Example: An employment agency only offers its services to people with British passports or identity cards. This could be indirect race discrimination as it would put at particular disadvantage, nationals who do not hold a British passport but have the right to live and work in the Isle of Man without immigration restrictions. It is unlikely that the policy could be objectively justified.

11.53 In addition, an employment service provider must not in relation to the provision of an employment service, discriminate against or victimise a person: **s.49(2) & (5)**

- as to the terms upon which it provides the service to that person;
- by not providing the service to that person;
- by terminating the provision of the service to that person; or
- by subjecting that person to a detriment.

Example: A headhunting company fails to put forward women for chief executive positions. It believes that women are less likely to succeed in these positions because they will leave to get married and start a family. This could amount to discrimination because of sex.

11.54 It is also unlawful for an employment service provider to harass, in relation to the provision of an employment service, those who seek to use or who use its services. **s.49(3)**

Example: An advisor for a careers guidance service is overheard by a transgender client making offensive and humiliating comments to a colleague about her looks and how she is dressed. This could amount to harassment related to gender reassignment.

11.55 Under the Act, an employment service provider has a duty to make reasonable adjustments, except when providing a vocational service. The duty to make reasonable adjustments is an anticipatory duty. **s.49(6)**

Example: A woman who has dyslexia finds it difficult to fill in an employment agency's registration form. An employee of the agency helps her to fill it in. This could be a reasonable adjustment for the employer to make.

11.56 However, the anticipatory duty to make reasonable adjustments does not apply to vocational training (that is, training for work or work experience), where the duty is the same as in employment. **s.49(7)**

What are employment services?

11.57 'Employment service' includes: **s.49(8)**

- the provision of or making arrangements for the provision of vocational training, that is, training for employment and work experience;
- the provision of or making arrangements for the provision of vocational guidance, such as careers guidance;
- services for finding people employment, such as employment agencies and headhunters. It also includes the services provided by the Government, for example, the JobCentre, the Disability Employment Service, the Careers Service, and

other schemes that assist people to find employment;
- services for supplying employers with people to do work, such as those provided by recruitment agency businesses.

11.58 The reference to training applies to facilities for training. Examples of the types of activities covered by these provisions include providing classes on CV writing and interviewing techniques, training in IT/keyboard skills, providing work placements and literacy and numeracy classes to help adults into work. **s.49(12)**

Which employment services are excluded?

11.59 The provision of employment services does not include training or guidance in schools or to students at a university or further and higher education institutions. **s.49(9)**

11.60 Those concerned with the provision of vocational services are subject to different obligations which will be explained code of practice on services, public functions and associations under Part 3 of the Act.

Discrimination against local authority members

11.61 Local authority members carrying out their official duties are protected against unlawful discrimination, harassment and victimisation. **s.51**

What the Act says

11.62 A local authority must not discriminate against or victimise a local authority member while they undertake official business: **s.51(1) & (3)**

a) in the opportunities which are afforded (or refused) for training or receiving any other facility; or
b) by subjecting the local authority member to any other detriment.

Example: A commissioner of Polish origin sits on a local commissioner's sheltered housing committee. Officers of the local commissioners often send him papers for meetings late or not at all which means he is often unprepared for meetings and unable to make useful contributions. His colleagues, none of whom are Polish, do not experience this problem. This could amount to direct

discrimination because of race against the commissioner by the local authority.

11.63 It is also unlawful for a local authority to harass a local authority member while they undertake official business. **s.51(2)**

Example: A councillor who is a Humanist regularly gets ridiculed about her beliefs by other councillors and council officers when attending council meetings. This could amount to harassment related to religion or belief.

11.64 It will not be a detriment if a local authority fails to elect, appoint or nominate a local authority member to an office, committee, sub-committee or body of the local authority. **s.51(4)**

Example: A local authority councillor who is a Christian fails to get appointed to a planning committee when another councillor who is an Atheist did get appointed. The Christian councillor would not have a claim under the Act.

11.65 Local authorities are also under a duty to make reasonable adjustments for disabled members of the local authority, who carry out official business, to avoid their being at a substantial disadvantage compared to non-disabled people. **s.51(6)**

Example: A local authority fails to provide a hearing induction loop in the meeting room for a commissioner who is hearing impaired. As a result the commissioner is unable to participate fully in local authority business as she does not hear all of the discussions. By not providing the hearing induction loop, or any other adjustment for hearing impairment, the local authority would have failed to comply with its duty to make reasonable adjustments.

Who is a local authority member?

11.66 A local authority 'member' will usually mean an elected member of a local authority such as a councillor or a commissioner.

What is official business?

11.67 Official business is anything undertaken by a local authority member in their capacity as a member of: **s.51(7)**

a) the local authority;
b) a body to which the local authority member is appointed by their authority or by a group of local authorities, for example a planning committee; or
c) any other public body.

Chapter 12

Positive action

Introduction

12.1 The Act permits employers to take positive action measures to improve equality for people who share a protected characteristic. These optional measures can be used by employers, principals, partnerships, LLCs, those who make appointments to personal and public offices and employment service providers (the term 'employer' is used to refer to all those covered by the provisions). **s.146**

12.2 As well as explaining the general positive action provisions in the Act, this chapter outlines the benefits of using these measures, describes the circumstances when positive action could be appropriate and illustrates the law with examples of approaches that employers might consider taking.

12.3 In certain circumstances, this allows an employer or other body with responsibilities under the provisions addressing 'work' under the Act to treat a person more favourably in recruitment or promotion because they have a particular protected characteristic. Those circumstances are where the employer reasonably thinks (see paragraphs 12.20 to 12.21) that:

- persons who share a protected characteristic suffer a disadvantage connected to the characteristic (see paragraph 12.22); or
- participation in an activity by persons who share a protected characteristic is disproportionately low (see paragraphs 12.26 to 12.29).

12.4 The employer may then treat a person with that characteristic more favourably in connection with recruitment or promotion than another person, so long as the aim of doing so is to enable or encourage persons who share the protected characteristic to overcome or minimise a disadvantage, or participate in that activity.

12.5 However, the more favourable treatment in these

circumstances is only permissible where:

- the person with the particular protected characteristic is 'as qualified' as the competing candidate;
- the employer does not have a policy of treating people who share a protected characteristic more favourably in connection with recruitment or promotion, as compared to those who do not share it; and
- taking the action is a proportionate means of achieving or minimising the relevant disadvantage or participating in the relevant activity (see paragraphs 12.31 to 12.34).

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12.6 This provision essentially allows positive action in recruitment and promotion to a 'tie-breaker'. It allows an employer faced with making a choice between two or more candidates who are of equal merit to take into consideration whether one is from a group that is disproportionately under-represented or otherwise disadvantaged within the workforce.

Example: A counselling service for teenagers has no Muslim employees, but is in an area with a high Muslim population. Where a vacancy arises, two candidates of equal merit are in a tie-breaker situation with the employer having to find some way to choose between them. One candidate is Muslim and the other candidate is not. The service manager could choose to offer the job to the Muslim candidate. This would be allowed under the positive action provisions (provided that taking action is a proportionate means of achieving the aim of increasing the number of the under-represented group employed and the employer does not have a policy of treating that group more favourably in connection with recruitment or promotion), so the non-Muslim candidate could not claim discrimination.

12.7 As to what is meant by 'equal merit', employers should establish a set of criteria against which candidates will be assessed when applying for a job. This can take into account a candidate's overall ability, competence and professional experience together with any relevant formal or academic qualifications, as well as any other qualities required to carry out the particular job.

Example: A retailer advertises for a trainee fashion buyer. One applicant has a degree in French. None of the other

applicants has a degree in any subject. The fact that one candidate has higher academic qualifications than the others does not automatically make that person better qualified for this particular job. The employer will need to decide if that qualification is a relevant factor in assessing who might be best for the job.

12.8 Employers must consider whether candidates are of equal merit in relation to the specific job or position they are applying for. While two candidates may be considered to be of equal merit for one particular post, the same two candidates might not be equally suitable for another job.

12.9 It is lawful for an employer to treat a disabled person more favourably in comparison to a non-disabled person, because of their disability in any circumstances at any stage in the recruitment or promotion process. Employers can also use the positive action provisions to overcome disadvantage or increase the participation of people with a particular form of impairment

Distinguishing positive action and 'positive discrimination'

12.10 Positive action is not the same as positive discrimination, which is unlawful. It may be helpful to consider the Act's positive action provisions within the continuum of actions to improve work opportunities for people who share a protected characteristic.

12.11 First, action taken to benefit those from one particular protected group that does not involve less favourable treatment of those from another protected group, or to eradicate discriminatory policies or practices, will normally be lawful. Examples might include placing a job advertisement in a magazine with a largely lesbian and gay readership as well as placing it in a national newspaper; or reviewing recruitment processes to ensure that they do not contain criteria that discriminate because of any protected characteristic. Such actions would not be classed as 'positive action'.

12.12 Second, there are actions that fall within the framework of the Act's positive action provisions, such as reserving places on a training course for a group sharing a protected characteristic. These actions are only lawful if they meet the statutory conditions for positive action measures and do not exceed the limitations set out in the Act.

Example: A large public sector employer monitors the

composition of their workforce and identifies that there are large numbers of visible ethnic minority staff in junior grades and low numbers in management grades. In line with their equality policy, the employer considers the following action to address the low numbers of ethnic minority staff in senior grades:

- Reviewing their policies and practices to establish whether there might be discriminatory criteria which inhibit the progression of visible ethnic minorities;
- Discussing with representatives of the trade union and the black staff support group how the employer can improve opportunities for progression for the under-represented group;
- Devising a positive action programme for addressing under-representation of the target group, which is shared with all staff;
- Including within the programme shadowing and mentoring sessions with members of management for interested members of the target group. The programme also encourages the target group to take advantage of training opportunities such as training in management, which would improve their chances for promotion.

12.13 Third, there are actions – often referred to as 'positive discrimination' – which involve preferential treatment to benefit members of a disadvantaged or under-represented group who share a protected characteristic, such as setting quotas or targets in order to address inequality. However, these actions do not meet the statutory requirements for positive action, and will be unlawful unless a statutory exception applies (see Chapters 13 and 14).

Example: A computer software company seeks to address the low participation of women directors by interviewing all women regardless of whether they meet the criteria for the role. This would be positive discrimination and is unlawful.

12.14 It is important to note that it is not unlawful for an employer to treat a disabled person more favourably compared to a non-disabled person (see paragraph 3.35).

Voluntary nature of positive action

12.15 Positive action is optional, not a requirement. However, as a matter of good business practice, public and private sector employers may wish to take positive action measures to help alleviate disadvantage experienced in the labour market by groups sharing a protected characteristic; take action to increase their participation in the workforce where this is disproportionately low; or meet their particular needs relating to employment. **s.146**

12.16 In addition, employers who use positive action measures may find this brings benefits to their own organisation or business. Benefits could include:

- a wider pool of talented, skilled and experienced people from which to recruit;
- a dynamic and challenging workforce able to respond to changes;
- a better understanding of foreign/global markets;
- a better understanding of the needs of a more diverse range of customers – both nationally and internationally.

What the Act says

12.17 Where an employer reasonably thinks that people who share a protected characteristic:

a) experience a disadvantage connected to that characteristic; or **s.146(1)(a)**
b) have needs that are different from the needs of persons who do not share that characteristic; or **s.146(1)(b)**
c) have disproportionately low participation in an activity compared to others who do not share that protected characteristic **s.146(1)(c)**

the employer may take any action which is proportionate to meet the aims stated in the Act (the ‘stated aims').

12.18 The 'stated aims' are:

a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage (referred to in this chapter as ‘action to remedy disadvantage’); **s.146(2)(a)**
b) meeting those needs(‘action to meet needs’); or **s.146(2)(b)**
c) enabling or encouraging persons who share the protected characteristic to participate in that activity (‘action to encourage participation in activities’). **s.146(2)(c)**

12.19 Action may be taken when any one or all of these conditions exist. Sometimes the conditions will overlap – for example, people sharing a protected characteristic may be at a disadvantage which may also give rise to a different need or may be reflected in their low level of participation in particular activities.

Example: Research shows that men have low rates of participation in the teaching profession for primary schools. A school governing body seeks to tackle this low participation by offering open days in primary schools to men who might be interested in teaching as a profession. This would be a form of positive action to encourage participation.

What does 'reasonably think' mean?

12.20 In order to take positive action, an employer must reasonably think that one of the above conditions applies; that is, disadvantage, different needs or disproportionately low participation. This means that some indication or evidence will be required to show that one of these statutory conditions applies. It does not, however, need to be sophisticated statistical data or research. It may simply involve an employer looking at the profiles of their workforce and/or making enquiries of other comparable employers in the area or sector. Additionally, it could involve looking at national data such as labour force surveys for a picture of the work situation for particular groups who share a protected characteristic. A decision could be based on qualitative evidence, such as consultation with workers and trade unions.

12.21 More than one group with a particular protected characteristic may be targeted by an employer, provided that for each group the employer has an indication or evidence of disadvantage, different needs or disproportionately low participation.

Action to remedy disadvantage

What is a disadvantage for these purposes?

12.22 'Disadvantage' is not defined in the Act. It may for example, include exclusion, rejection, lack of opportunity, lack of choice and barriers to accessing employment opportunities. Disadvantage may be obvious in relation to

some issues such as legal, social or economic barriers or obstacles which make it difficult for people of a particular protected group to enter into or make progress in an occupation, a trade, a sector or workplace (see also paragraphs 4.9 to 4.14).

What action might be taken to overcome or minimise disadvantage?

12.23 The Act enables action to be taken to overcome or minimise disadvantage experienced by people who share a protected characteristic. The Act does not limit the action that could be taken, provided it satisfies the statutory conditions and is a proportionate way of achieving the aim of overcoming a genuine disadvantage. Such action could include identifying through monitoring, consultation or a review of policies and practices any possible causes of the disadvantage and then: **s.146(2)(a)**

- targeting advertising at specific disadvantaged groups, for example advertising jobs in media outlets which are likely to be accessed by the target group;
- making a statement in recruitment advertisements that the employer welcomes applications from the target group, for example 'older people are welcome to apply';
- providing opportunities exclusively to the target group to learn more about particular types of work opportunities with the employer, for example internships or open days;
- providing training opportunities in work areas or sectors for the target group, for example work placements.

Example: Research shows that women experience significant disadvantage in pursuing careers in technology and engineering, as reflected in their low participation in the profession and their low status within it. Some of the key contributing factors are gender stereotyping in careers guidance and a lack of visible role models. A local third sector organisation, in partnership with employers in the technology and engineering sectors, offers opportunities exclusively to girls and women to learn more about the career choices through a careers fair and information evenings attended by women working in the profession.

Action to meet needs

What are 'different' or 'particular' needs?

12.24 A group of people who share a particular protected characteristic have 'different needs' if, due to past or present discrimination or disadvantage or due to factors that especially apply to people who share that characteristic, they have needs that are different to those of other groups. This does not mean that the needs of a group have to be entirely unique from the needs of other groups to be considered 'different'. Needs may also be different because, disproportionately, compared to the needs of other groups, they are not being met or the need is of particular importance to that group.

Example: An employer's monitoring data on training shows that their workers over the age of 60 are more likely to request training in advanced IT skills compared to workers outside this age group. The employer could provide training sessions primarily targeted at this group of workers.

What action might be taken to meet those needs?

12.25 The Act does not limit the action that employers can take to meet different needs, provided the action satisfies the statutory conditions and is a proportionate means of achieving the aim of meeting genuinely different needs. Such action could include: **s.146(2)(b)**

- providing exclusive training to the target group specifically aimed at meeting particular needs, for example, English language classes for staff for whom English is a second language;
- the provision of support and mentoring, for example, to a member of staff who has undergone gender reassignment;
- the creation of a work-based support group for members of staff who share a protected characteristic who may have workplace experiences or needs that are different from those of staff who do not share that characteristic.

Action to encourage participation in activities

What activities does this apply to?

12.26 This provision applies to participation in any activity where the participation of those who share a protected characteristic is disproportionately low; this can include employment and training. Action to increase participation might include making available training opportunities, open days or mentoring and shadowing schemes.

What does 'disproportionately low' mean?

12.27 The Act says that action can only be taken where the employer reasonably thinks that participation in an activity by people sharing a particular protected characteristic is 'disproportionately low.' This means that the employer will need to have some reliable indication or evidence that participation is low compared with that of other groups or compared with the level of participation that could reasonably be expected for people from that protected group. **s.146(1)(c)**

Example: An employer has a factory in Ballasalla. The factory employs 150 workers. There are only 10 female employees. The 2016 census showed that there were 22,700 economically active males and 20,077 females in the Isle of Man. The factory could show that that the number of females employed is disproportionately low in comparison with the economically active population of the Island overall.

12.28 Participation may be low compared with:

- the proportion of people with that protected characteristic nationally;

Example: A national labour force survey shows women are under-represented at board level in the financial services sector. An employer could take positive action to increase their representation in the sector.

- the proportion of people with that protected characteristic locally;

- the proportion of people with that protected characteristic in the workforce.

Example: A construction company's workforce monitoring data reveals low participation of women in their workforce. They collaborate with the Isle of Man Chamber of

Commerce for the electro-technical, heating, ventilation, air conditioning, refrigeration and plumbing industries to provide information targeting women on apprenticeships in construction.

12.29 Employers will need to have some indication or evidence to show low participation. This might be by means of statistics or, where these are not available, by evidence based on monitoring, consultation or national surveys. For more information on evidence, see paragraph 12.20.

What action could be taken?

12.30 The Act permits action to be taken to enable or encourage people who share the protected characteristic to participate in that activity. Provided that the action is a proportionate means of achieving the aim of enabling or encouraging participation, the Act does not limit what action could be taken. It could include: **s.146(2)(c)**

- setting targets for increasing participation of the targeted group;
- providing bursaries to obtain qualifications in a profession such as journalism for members of the group whose participation in that profession might be disproportionately low;
- outreach work such as raising awareness of public appointments within the community;
- reserving places on training courses for people with the protected characteristic, for example, in management;
- targeted networking opportunities, for example, in banking;
- working with local schools and University College Isle of Man, inviting students from groups whose participation in the workplace is disproportionately low to spend a day at the company;
- providing mentoring.

What does ‘proportionate’ mean?

12.31 To be lawful, any action which is taken under the positive action provisions must be a proportionate means of achieving one of the 'stated aims' described in paragraph 12.18 above. **s.146(2)**

12.32 ‘Proportionate’ refers to the balancing of competing relevant factors. These factors will vary depending on the basis for the positive action – whether it is to overcome a

disadvantage, meet different needs or address under-representation of a particular group. Other relevant factors will include the objective of the action taken, or to be taken, including the cost of the action.

12.33 The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups.

12.34 Organisations need to consider:

- Is the action an appropriate way to achieve the stated aim?
- If so, is the proposed action reasonably necessary to achieve the aim; that is, in all of the circumstances, would it be possible to achieve the aim as effectively by other actions that are less likely to result in less favourable treatment of others?

12.35 Paragraph 4.32 provides a more detailed explanation of proportionality.

Time-limited positive action

12.36 If positive action continues indefinitely, without any review, it may no longer be proportionate, as the action taken may have already remedied the situation which had been a precondition for positive action. This could make it unlawful to continue to take the action.

12.37 Therefore, when undertaking measures under the positive action provisions, it would be advisable for employers to indicate that they intend to take the action only so long as the relevant conditions apply, rather than indefinitely. During that period they should monitor the impact of their action and review progress towards their aim.

Positive action and disability

12.38 As indicated above at paragraph 3.35, it is not unlawful direct disability discrimination to treat a disabled person more favourably than a non-disabled person. This means that an employer, if they wish, can for example restrict recruitment, training and promotion to disabled people and this will be lawful. **s.14(3)**

Example: An employer which has a policy of interviewing all disabled candidates who meet the minimum selection criteria for a job would not be acting unlawfully.

12.39 However, the positive action provisions may still be appropriate to achieve equality of opportunity between disabled people with different impairments. This means that an employer can implement positive action measures to overcome disadvantage, meet different needs or increase participation of people with one impairment but not those with other impairments.

Positive action and the public sector equality duty

12.40 Public authorities which are subject to the public sector equality duties may wish to consider using positive action to help them comply with those duties.

Implementing positive action lawfully

12.41 An employer does not have to take positive action but if they do, they will need to ensure they comply with the requirements of the Act to avoid unlawful discrimination. To establish whether there is any basis to implement a positive action programme, employers should collate evidence, for example through their monitoring data, and analyse that evidence to decide on the most appropriate course of action to take.

12.42 In considering positive action measures, employers might consider drawing up an action plan which:

- sets out evidence of the disadvantage, particular need and/or disproportionately low levels of participation, as appropriate, and an analysis of the causes;
- sets out specific outcomes which the employer is aiming to achieve;
- identifies possible action to achieve those outcomes;
- shows an assessment of the proportionality of the proposed action;
- sets out the steps the employer decides to take to achieve these aims;

- sets out the measurable indicators of progress towards those aims, set against a timetable;
- explains how they will consult with relevant groups such as all staff, including staff support groups and members of the protected group for whom the programme is being established;
- specifies the time period for the programme; and
- sets out periods for review of progress of the measures towards the aim to ensure it remains proportionate.

Chapter 13

Occupational requirements and other exceptions related to work

Introduction

13.1 The Act contains a number of exceptions that permit discrimination that would otherwise be prohibited. Any exception to the prohibition on discrimination should generally be interpreted restrictively. Where an exception permits discrimination in relation to one protected characteristic, for example nationality, employers must ensure that they do not discriminate in relation to other protected characteristics.

13.2 This chapter explains occupational requirements and other exceptions related to work. There are other exceptions that apply to a particular characteristic, for example pregnancy and maternity, and these are dealt with in the relevant chapters throughout the code. Exceptions relating to pay and benefits are covered in Chapter 14.

Occupational requirements

13.3 In certain circumstances, it is lawful for an employer to require a job applicant or worker to have a particular protected characteristic, provided certain statutory conditions are met.

13.4 The exception may also be used by a principal, a firm, an LLC, a person who has the power to appoint or remove office holders and a person who has the power to recommend an appointment to a public office.

What the Act says

13.5 An employer may apply, in relation to work, a requirement to have a particular protected characteristic if the employer can show that having regard to the nature or context of the work:

- the requirement is an occupational requirement;

- the application of the requirement is a proportionate means of achieving a legitimate aim (see paragraphs 4.26 to 4.33); and
- the applicant or worker does not meet the requirement; or,
- except in the case of sex, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

13.6 In the case of gender reassignment and marriage and civil partnership, the requirement is not to be a transgender person, married or a civil partner. **Sch. 9, para 1(3)**

13.7 The requirement must not be a sham or pretext and there must be a link between the requirement and the job.

13.8 Examples of how the occupational requirement exception may be used include some jobs which require someone of a particular sex for reasons of privacy and decency or where personal services are being provided. For example, a unisex gym could rely on an occupational requirement to employ a changing room attendant of the same sex as the users of that room. Similarly, a women's refuge which lawfully provides services to women only can apply a requirement for all members of its staff to be women.

In what circumstances can an employer apply the occupational requirement exception?

13.9 In the case of an employer, firm, LLC or person with the power to appoint or remove an office holder, an occupational requirement may be applied in relation to: **Sch. 9, para 1(2)**

- the arrangements made for deciding whom to offer employment or a position as a partner; or appoint as an office holder;
- an offer of employment, the position of partner or member or appointment of an office holder;
- the provision of access to opportunities for promotion, transfer, training; or
- except in relation to sex, dismissals, expulsions and terminations.

Example: The Department of Health and Social Care (DHSC) decides to set up a health project which would encourage people from the Chinese community to make more use of health services. The DHSC wants to recruit a person of Chinese origin for the post because it involves visiting elderly people in their homes and it is necessary for the post-holder to have a good knowledge of the culture and language of the potential clients. The DHSC does not

have a Chinese worker already in post who could take on the new duties. They could rely on the occupational requirement exception to recruit a health worker of Chinese origin.

13.10 It would be lawful for a principal (end-user) not to allow a contract worker to do work or, except in the case of sex, to continue to do work where the principal relies on the occupational requirement exception.

13.11 In the case of a person who has the power to recommend or approve the appointment of a public office holder, an occupational requirement may only be used in relation to:

- the arrangements that person makes for deciding whom to recommend or approve for appointment;
- not recommending or approving a person for appointment; or
- making a negative recommendation of a person for appointment.

Occupational requirements for the purposes of an organised religion

What the Act says

13.12 The Act permits an employer (or a person who makes, recommends or approves appointments of office holders) to apply a requirement for a person to be of a particular sex or not to be a transgender person, or a requirement relating to marriage, civil partnership or sexual orientation, if the employer can show that: **Sch. 9, para 2(1)**

- the employment is for the purposes of an organised religion;
- the requirement is applied to comply with the doctrines of the religion (the ‘compliance principle’); or
- because of the nature or context of the employment, the requirement is applied to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (the ‘non-conflict principle’); and
- the applicant or worker does not meet the requirement in question; or, except in the case of sex, the employer is not reasonably satisfied that the person meets it.

Example: An orthodox synagogue could apply a

requirement for its rabbi to be a man.

13.13 The requirement must be a proportionate way of meeting the 'compliance' or 'non-conflict' principle. The occupational requirement exception should only be used for a limited number of posts, such as ministers of religion and a small number of posts outside the clergy including those which exist to promote or represent the religion.

When may the occupational requirement exception be applied for the purpose of an organised religion?

13.14 In relation to employment and personal or public offices, the occupational requirement exception may be used in: **Sch. 9, para 2(2)**

- the arrangements made for deciding whom to offer employment or an appointment as an office holder;
- an offer of employment or an appointment to a personal or public office;
- the provision of access to opportunities for promotion, transfer or training; or
- except in the case of sex, the dismissal or termination of an appointment.

13.15 In the case of public offices for which a recommendation is needed for an appointment, the occupational requirement may be used in relation to:

- the arrangements made for deciding whom to recommend or approve for an appointment;
- not recommending or giving approval to an appointment; or
- making a negative recommendation for appointment.

Example: The trustees of a Mosque want to employ two youth workers, one who will provide guidance on the teachings of the Koran and the other purely to organise sporting activities not involving promoting or representing the religion. The trustees apply an occupational requirement for both workers to be heterosexual. It might be lawful to apply the occupational requirement exception to the first post but not the second post because the second post does not engage the 'compliance' or the 'non-conflict' principle.

Occupational requirements relating to religion or belief

What the Act says

13.16 The Act says that where an employer has an ethos based on religion or belief, they are permitted to rely on the occupational requirement exception if they can show that, having regard to that ethos and the nature or context of the work: **Sch. 9, para 3**

- the requirement of having a particular religion or belief is an occupational requirement;
- the application of the requirement is a proportionate means of achieving a legitimate aim; and
- a person does not meet the requirement or the employer has reasonable grounds for not being satisfied that the person meets the requirement.

13.17 To rely on the exception, the employer must be able to show that their ethos is based on a religion or belief, for example, by referring to their founding constitution. An 'ethos' is the important character or spirit of the religion or belief. It may also be the underlying sentiment, conviction or outlook that informs the behaviours, customs, practices or attitudes of followers of the religion or belief.

13.18 The circumstances in which an employer with a religious or belief ethos may apply the exception are the same as those set out at paragraph 13.14.

Example: It could be a lawful use of the exception for a Humanist organisation which promotes Humanist philosophy and principles to apply an occupational requirement for their chief executive to be a Humanist.

What can an employer do to ensure they apply the occupational requirement exception lawfully?

13.19 A failure to comply with the statutory conditions described above could result in unlawful direct discrimination. Some of the issues that an employer may wish to consider when addressing the question of whether the application of an occupational requirement is proportionate to a legitimate aim are:

- Do any or all of the duties of the job need to be

performed by a person with a particular characteristic?

- Could the employer use the skills of an existing worker with the required protected characteristic to do that aspect of the job?

13.20 Employers should not have a blanket policy of applying an occupational requirement exception, such as a policy that all staff of a certain grade should have a particular belief. They should also re-assess the job whenever it becomes vacant to ensure that the statutory conditions for applying the occupational requirement exception still apply.

Employment services

13.21 The Act permits employment service providers, which include those providing vocational training, to restrict access to training or services to people with a protected characteristic if the training or services relate to work to which the occupational requirement exception has been applied. **Sch. 9, para 4**

13.22 The employment service provider can rely on this exception by showing that it reasonably relied on a statement from a person who could offer the work or training in question that having the particular protected characteristic was an occupational requirement. It is a criminal offence for such a person to make a statement of that kind which they know to be false or misleading.

Justifying Retirement Age

13.23 To avoid age discrimination, employers are required to objectively justify any retirement age. Whether the aim of having a retirement age is legitimate will depend on whether it has a social policy objective (see paragraphs 3.36 to 3.44 above).

13.24 This means that the employer must show that the retirement decision or policy is a proportionate means of achieving a legitimate aim (see paragraphs 4.26 to 4.33).

13.25 The first question is whether the aim behind the retirement decision is legitimate. Depending on the situation, the following are examples of aims that might be considered legitimate

- to facilitate workforce planning, by providing a realistic-long term expectation as to when vacancies will arise;

- to provide sufficient opportunities for promotion, thereby ensuring staff retention at more junior levels.

However, the legitimacy of such aims will depend on all the circumstances of the case.

13.26 Even if the aim is a legitimate one, the second question is whether retiring someone at a particular age is a proportionate means of achieving that aim. In determining this, a balance must be struck between the discriminatory effect of the retirement and the employer's need to achieve the aim – taking into account all the relevant facts. If challenged in the Employment and Equality Tribunal, an employer would need to produce evidence supporting their decision

Example: Partners in a law firm are required to retire from the partnership at 65. The firm prides itself on its collegiate culture and has structured its partnership agreement to promote this. The fixed retirement age avoids the need to expel partners for performance management reasons, which the firm thinks would undermine the collegiate environment. While it is possible that fostering a collegiate environment may be a legitimate aim, the firm would need to show that compulsory retirement at 65 is a proportionate means of achieving it. For example, evidence would be needed to support the assumption that the performance of partners reduces when they reach the age of 65.

Provision of services to the public

13.27 The Act says that an employer who provides services to the public is not liable for claims of discrimination or victimisation by an employee under Part 5 of the Act (the employment provisions) in relation to those services. Where a worker is discriminated against or victimised in relation to those services, their claim would be under Part 3 of the Act relating to services and public functions. **Sch. 9, para 16**

Example: If an employee of a women's clothing retailer is denied the services of the retailer because she is a transgender woman, her claim to the Employment and Equality Tribunal would be made under the services provisions of the Act.

13.28 However, where the service provided under the terms and conditions of employment differs from that provided to other employees, or is related to training, the worker can bring a claim in the Employment and Equality Tribunal

under the employment provisions (Part 5).

Example: In the example above, the situation would be different if the same transgender woman's employment contract provided her with a 20% discount on all clothes purchased from her employer, a discount not available to members of the public. If she tried to use the discount and was refused, then she would bring her claim in the Employment and Equality Tribunal under the employment provisions of the Act.

Supported employment for disabled people

13.29 The Act allows some charities to provide employment only to people who have the same disability or a disability of a prescribed description where this is to help disabled people gain employment. **s.152(2)**

Statutory authority

13.30 In relation to age, disability and religion or belief, it is not a contravention of the employment provisions in the Act to do anything that is required under another law. The exception also applies to a requirement or condition imposed pursuant to another law by a member of the Executive. **Sch. 20, para 1**

Educational appointments for religious institutions

13.31 The Act allows schools to reserve the post of head teacher for a person of a particular religion where the governing instrument provides for this. **Sch. 20, para 3**

Crown employment

13.32 The Act permits the Crown or a prescribed public body to restrict employment or the holding of a public office to people of a particular birth, nationality, descent or residence. **Sch. 20, para 4**

Nationality discrimination

13.33 The Act permits direct nationality discrimination and **Sch. 21,**

indirect race discrimination on the basis of residency requirements where other laws, Executive arrangements or Executive conditions make provision for such discrimination. It does not matter whether the laws, instruments, arrangements or conditions were made before or after the Act was passed. **para 1**

Training for non-EEA nationals

13.34 The Act permits an employer to employ or to contract non - EEA nationals who are not ordinarily resident in the Island, where the employment or contract is for the sole or main purpose of training them in skills, for example medical skills. The employer can only rely on the exception if they think that the person does not intend to exercise the skills gained as a result of the training in Great Britain. **Sch. 21, para 4**

Communal accommodation

13.35 An employer does not breach the prohibition of sex discrimination or gender reassignment discrimination by doing anything in relation to admitting persons to communal accommodation or to providing any benefit, facility or service linked to the accommodation, if the criteria set out below are satisfied. **Sch. 21, para 3**

13.36 Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which, for reasons of privacy, should be used only by persons of the same sex. It can also include shared sleeping accommodation for men and for women, ordinary sleeping accommodation and residential accommodation, all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.

13.37 A benefit, facility or service is linked to communal accommodation if it cannot properly and effectively be provided except for those using the accommodation. It can be refused only if the person can lawfully be refused use of the accommodation.

13.38 Where accommodation or a benefit, facility or service is refused to a worker, alternative arrangements must be made in each case where reasonable so as to compensate the person concerned.

Example: At a worksite, the only sleeping accommodation provided is communal accommodation occupied by men. A female worker wishes to attend a training course at the worksite but is refused permission because of the men-only accommodation. Her employer must make alternative arrangements to compensate her where reasonable; for example, by arranging alternative accommodation near the worksite or an alternative course.

13.39 Sex or gender reassignment discrimination in admitting people to communal accommodation is not permitted unless the accommodation is managed in a way which is as fair as possible to both women and men.

13.40 In excluding a person because of sex or gender reassignment, the employer must take account of:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided; and
- the relative frequency of demand or need for the accommodation by persons of each sex.

13.41 The Act permits a provider of communal accommodation to exclude people who are proposing to undergo, undergoing or who have undergone gender reassignment from this accommodation. However, to do so will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim. This must be considered on a case-by-case basis; in each case, the provider of communal accommodation must assess whether it is appropriate and necessary to exclude the transgender person.

Chapter 14

Pay and Benefits

Introduction

14.1 This chapter looks at the implications of the Act for pay and employment benefits, including pensions. Employers must not discriminate directly or indirectly in setting rates of pay or offering benefits to workers. Likewise, they must avoid discrimination arising from disability and, in certain circumstances, may need to consider the duty to make reasonable adjustments to pay or to certain benefits that they provide. The Act also contains a number of specific provisions relating to pay and benefits, including certain exceptions to the general prohibition on discrimination in employment.

Pay

14.2 An employer must not discriminate in setting terms of employment relating to pay, or in awarding pay increases. Pay includes basic pay; non-discretionary bonuses; overtime rates and allowances; performance related benefits; severance and redundancy pay; access to pension schemes; benefits under pension schemes; hours of work; company cars; sick pay; and fringe benefits such as travel allowances.

14.3 Where workers work less than full time hours, employers should ensure that pay and benefits are in direct proportion to the hours worked. This will avoid the risk of the employer putting part-time workers who share a protected characteristic at a disadvantage that could amount to unjustifiable indirect discrimination or that could be unlawful under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2007.

Exception for the minimum wage

14.4 However, there is an exception in the Act which allows employers to base their pay structures for young workers as prescribed by annual Minimum Wage (Young Workers) Regulations. **Sch.9, para 8**

14.5 These Regulations set minimum hourly wage rates, which are lower for young workers over compulsory school age but have not attained 18 years of age. Employers can use the rate of pay set out in the Regulations or may set pay rates that are higher.

14.6 The minimum wage does not need to be paid to apprentices (those individuals under a formal training agreement with their employer and the Department of Education, Sport and Culture who have not attained the age of 19 or have attained the age of 19 but are within the first 12 months of their apprenticeship. An apprentice who has attained the age of 25 is entitled to receive the minimum wage.

Performance related pay and bonuses

14.7 Where an employer operates a pay policy and/or bonus scheme with elements related to individual performance, they must ensure that the policy and/or scheme does not unlawfully discriminate against a worker because of a protected characteristic.

Example: A trade union equality representative obtains statistics which show that the best scores for appraisals are disproportionately awarded to white male workers. As a result, this group is more likely to receive an increase in pay and annual bonuses. The statistics suggest that the policy could be indirectly discriminatory, either through the criteria that have been selected, or the way that these criteria are applied.

14.8 If a worker has a disability which adversely affects their rate of output, the effect may be that they receive less under a performance related pay scheme than other workers. The employer must consider whether there are reasonable adjustments which would overcome this substantial disadvantage.

Example: A disabled man with arthritis works in telephone sales and is paid commission on the value of his sales. His impairment gets worse and he is advised to change his

computer equipment. He takes some time to get used to the new equipment and, as a consequence, his sales fall. It is likely to be a reasonable adjustment for his employer to pay him a certain amount of additional commission for the period he needs to get used to the new equipment.

Equal pay

14.9 The Act gives women and men the right to equal pay for equal work. **ss.56 - 58**

14.10 The provisions on equal pay operate by implying a sex equality clause into each contract of employment. This clause has the effect of modifying any term that is less favourable than for a comparator of the opposite sex. It also incorporates an equivalent term where the comparator benefits from a term not included in the worker's contract. These provisions will be covered in more detail in the Equal Pay Code.

Pay secrecy clauses

14.11 'Pay secrecy clauses' or 'gagging clauses' are terms of employment which seek to prevent or restrict workers from discussing or disclosing their pay. Such terms are unenforceable in relation to a person making or seeking a 'relevant pay disclosure'. This is defined by the Act as a disclosure sought or made for the purpose of finding out whether – or to what extent – any pay differences are related to a protected characteristic. **s.69**

14.12 The disclosure can be made to anyone (including a trade union representative), or requested from a colleague or former colleague. Any action taken by an employer against a worker who makes such a disclosure, or who receives information as a result, may amount to victimisation (see paragraphs 9.2 to 9.15).

Example: An Asian worker thinks he is underpaid compared to a white colleague and suspects that the difference is connected to race. The colleague reveals his salary, even though the contract of employment forbids this. If the employer takes disciplinary action against the white colleague as the result of this disclosure, this could amount to victimisation. But if he had disclosed pay information to the employer's competitor in breach of a confidentiality obligation, he would not be protected by the Act.

14.13 This provision is designed to improve pay transparency and relates to all protected characteristics. Further guidance in relation to the characteristic of sex will be available in the Equal Pay Code.

Benefits

14.14 Employment-related benefits might include canteens, meal vouchers, social clubs and other recreational activities, dedicated car parking spaces, discounts on products, bonuses, share options, hairdressing, clothes allowances, financial services, healthcare, medical assistance/insurance, transport to work, company car, education assistance, workplace nurseries, and rights to special leave. This is not an exhaustive list. Such benefits may be contractual or discretionary.

14.15 Employers must ensure that they do not deny workers access to benefits because of a protected characteristic. Where denying access to a benefit or offering it on less favourable terms either: **ss.14(1) & 38(2)(b)**

- directly discriminates because of the protected characteristic of age, for example, by imposing an age restriction; or
- indirectly discriminates by putting a group of workers sharing a protected characteristic at a disadvantage when compared with other workers,

the employer must be able to objectively justify the rule or practice as a proportionate means of achieving a legitimate aim. **ss.14(2) & 20(2)(d)**

14.16 But cost alone is not sufficient to objectively justify the discriminatory rule or practice. Financial cost may be taken into account only if there are other good reasons for denying or restricting access to the benefit. For more information about the application of the objective justification test, see paragraphs 4.26 to 4.33.

Example: An employer provides a company car to most of their sales staff, but not to those under 25 because of higher insurance costs. This amounts to direct discrimination because of age. The employer may not be able to objectively justify this policy by relying upon cost considerations alone.

14.17 In addition, where a disabled worker is put at a substantial disadvantage in the way that a particular benefit is

provided, an employer must take reasonable steps to adjust the way the benefit is provided in order to avoid that disadvantage.

Example: An employer provides dedicated car parking spaces close to the workplace which are generally used by senior managers. A disabled worker finds it very difficult to get to and from the public car park further away. It is likely to be a reasonable adjustment for the employer to allocate one of the dedicated spaces to that worker.

14.18 Some benefits may continue after employment has ended. An employer's duties under the Act extend to its former workers in respect of such benefits.

Example: An employer provides a workplace nursery. Parents who leave their jobs with the employer are always offered the chance of keeping their nursery place until their child's fifth birthday – but this opportunity is not offered to a lesbian mother of a three year old. If this less favourable treatment is because of sexual orientation, it would amount to direct discrimination.

14.19 The Act also provides some specific exceptions to the general prohibition of discrimination in employment benefits, which are explained below. Exceptions relating to pregnancy and maternity are covered in Chapter 8 and will be covered in the Equal Pay Code.

Exception for service-related benefits

14.20 In many cases, employers require a certain length of service before increasing or awarding a benefit, such as pay increments, holiday entitlement, access to company cars or financial advice. On the face of it, such rules could amount to indirect age discrimination because older workers are more likely to have completed the length of service than younger workers. However, the Act provides a specific exception for benefits based on five years' service or less. **Sch. 9, para 7(1)**

14.21 Length of service can be calculated by the employer in one of two ways: **Sch. 9, para 7(3)**

a) by the length of time that the person has been working for the employer at or above a particular level; or
b) by the total length of time that person has been

working for the employer.

14.22 Length of service may include employment by a predecessor employer.

Example: A local retailer was closing down, making all staff redundant when a buyer agreed to purchaser the business as a going concern. The buyer wished to retain all staff, but re-engage them with new contracts to align with their other business. Each employee preserved continuity of employment from the old business into the new business.

14.23 However, it may still be lawful for the employer to use length of service above five years to award or increase a benefit, provided they reasonably believe that this 'fulfils a business need'. Examples of a business need could include rewarding higher levels of experience, or encouraging loyalty, or increasing or maintaining the motivation of long-serving staff. **Sch. 9, para 7(2)**

14.24 This test of 'fulfilling a business need' is less onerous than the general test for objective justification for indirect discrimination (see paragraph 14.16 above and paragraphs 4.26 to 4.33). However, an employer would still need evidence to support a reasonable belief that the length of service rule did fulfil a business need. This could include information the employer might have gathered through monitoring, staff attitude surveys or focus groups. An employer would be expected to take into account the interests of their workers and not be motivated simply by financial self-interest.

Example: An employer offers one additional day's holiday for every year of service up to a maximum of four years, to reward loyalty and experience. Although this may mean younger staff having fewer holidays than older workers, this approach is permitted by the Act. The same employer also provides free health insurance to all employees with over five years' service and will have to justify this by showing that it actually fulfils a business need – for example, by rewarding experience, encouraging loyalty or increasing staff motivation.

14.25 This exception does not apply to service-related termination payments or any other benefits which are provided only by virtue of the worker ceasing employment. **Sch. 9, para 7(7)**

Exception for redundancy benefits

14.26 The Act provides that it is not an age contravention to pay one employee a lesser statutory redundancy payment than is given to another employee, provided that each amount paid to those employees who qualify for a redundancy payment is calculated on the same basis. **Sch. 9, para 10**

Exception relating to life assurance

14.27 Some employers provide life assurance cover for their workers. An employer may stop offering group insured benefits, for example private medical cover or life assurance, to workers who have reached the age of 65 (or, if greater, the state pensionable age). **Sch. 9, para 11**

Exception relating to child care benefits

14.28 The Act creates an exception for benefits relating to the provision of childcare facilities that are restricted to children of a particular age group. It applies not only to natural parents, but also to others with parental responsibility for a child. **Sch. 9, paras 12(1) – (2)**

14.29 This exception also applies to actions taken to facilitate the provision of child care, including: the payment for some or all of the cost of the child care; helping a parent to find a suitable person to provide child care; and enabling a parent to spend more time providing care for the child or otherwise assisting the parent with respect to childcare they provide. **Sch. 9, para 12(3)**

14.30 The exception covers benefits relating to the provision of care for children aged under 18. **Sch. 9, para 12(4)**

Example: A sales assistant lives with his wife and seven year old stepdaughter, who attends an after school club run by the local authority. He receives childcare vouchers from his employer, but these are restricted to workers with children under 10. This restriction would be lawful. In this case, the sales assistant uses the vouchers to help pay for his stepdaughter's after school club.

Exception for benefits based on marital status

14.31 Benefits which are restricted to married persons and civil partners are lawful under the Act. Workers who are not **Sch. 9, para 15(4)**

married or in a civil partnership can be excluded from such benefits.

14.32 Some employers offer their workers insurance-based benefits such as life assurance or accident cover under a group insurance policy. The Act allows employers to provide for differential payment of premiums or award of benefits based on sex, marital/civil partnership status, pregnancy and maternity or gender reassignment. However, the difference in treatment must be reasonable, and be done by reference to actuarial or other data from a source on which it is reasonable to rely. **Sch. 9, para 17**

14.33 The Act also clarifies that it is the employer, not the insurer, who is responsible for making sure that provision of benefits under such group insurance schemes complies with the above exception. **Sch. 3, para 18**

Example: An employer arranges for an insurer to provide a group health insurance scheme to workers in their company. The insurer refuses to provide cover on the same terms to one of the workers because she is a transgender person. The employer, who is responsible for any discrimination in the scheme, would only be acting lawfully if the difference in treatment is reasonable in all the circumstances, and done by reference to reliable actuarial or other data.

Pensions

Occupational pension schemes

14.34 Employers may provide benefits to current and former workers and their dependants through occupational pension schemes. The schemes are legally separate from the employers and are administered by trustees and managers. The benefits will be in the form of pensions and lump sums. Special provisions apply to such schemes because of their separate legal status and the nature of the benefits they provide.

14.35 An occupational pension scheme is treated as including a 'non-discrimination rule' by which a 'responsible person' must not discriminate against another person in carrying out any functions in relation to the scheme or harass or victimise another person in relation to the scheme. **s.53(1) & (2)**

14.36 A responsible person includes a trustee or manager of a **s.53(4)**

scheme, the employer of members or potential members and a person who can make appointments to offices.

14.37 The provisions of an occupational pension scheme have effect subject to the non-discrimination rule. So, for example, if the rules of a scheme provide for a benefit which is less favourable for one member than another because of a protected characteristic, they must be read as though the less favourable provision did not apply. **s.53(3)**

14.38 There are a number of exceptions and limitations to the non-discrimination rule. The rule does not apply:

- to persons entitled to benefits awarded under a divorce settlement or on the ending of a civil partnership (although it does apply to the provision of information and the operation of the scheme's dispute resolution procedure in relation to such persons);
- in so far as an equality rule applies – or would apply if it were not for the exceptions described in part 2 of Schedule 7 (more information on equality rules, will be available in the Equal Pay Code). **s.53(10)**

14.39 There are also exceptions relating to age and occupational pension schemes. In relation to contributions to personal pension schemes it is lawful for an employer to maintain or apply practices, actions, or decisions relating to age in certain circumstances concerning: **s. 53(8) & Equality Act 2017 (Age Exceptions for Pension Schemes) Order 2019**

- the minimum and maximum age for admission to a scheme;
- the minimum level of pensionable pay for admission (subject to qualifications);
- the use of age criteria in actuarial calculations in the scheme;
- different rates of contributions by an employer to a money purchase scheme according to the age of the workers in respect of whom contributions are made, where this is for certain prescribed purposes; and
- different rates of contributions by an employer to personal pensions by, for example, allowing employers to limit their contributions by reference to a maximum level of pay.

These exemptions apply to the employer or the trustees or managers of a scheme, except in the case of contributions to personal pension schemes, where they apply to the employer only.

14.40 In addition to the requirement to comply with the non-discrimination rule, a responsible person is under a duty to make reasonable adjustments to any provision, criterion or practice relating to an occupational pension scheme which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled. **s.53(11)**

Example: The rules of an employer's final salary scheme provide that the maximum pension is based on the member's salary in the last year of work. Having worked full-time for 20 years, a worker becomes disabled and has to reduce her working hours two years before her pension age. The scheme's rules put her at a disadvantage as a result of her disability, because her pension will only be calculated on her part-time salary. The trustees decide to convert her part-time salary to its full-time equivalent and make a corresponding reduction in the period of her part-time employment which counts as pensionable. In this way, her full-time earnings will be taken into account. This is likely to be a reasonable adjustment to make.

14.41 The Act provides a mechanism for the trustees or managers of occupational pension schemes to make alterations to their schemes to ensure they reflect the non-discrimination rule. As most schemes already give trustees a power of alteration, the mechanism in the Act would only be required if a scheme does not have this. The mechanism would also be needed if the procedure for exercising the power is unduly complex or protracted or involves obtaining consents which cannot be obtained (or which can be obtained only with undue delay or difficulty). **s.54(1) & (2)**

14.42 Under this mechanism, the trustees or managers can make the necessary alterations by resolution. The alteration can have effect in relation to a period before the date of the resolution. **s.54(3) & (4)**

14.43 The rules on occupational pensions for women on maternity leave will be covered in the Equal Pay Code.

Chapter 15

Enforcement

Introduction

15.1 A worker who considers they have been affected by a breach of the Act has a right to seek redress through the Employment and Equality Tribunal. The Tribunal can deal with the unlawful acts that are set out in Parts 3 to 8. However, because litigation can be a costly and time-consuming exercise, employers should deal with complaints relating to a breach of the Act seriously and rigorously, with support from any recognised trade union, or an Industrial Relations Officer, to avoid having recourse to the Tribunal.

15.2 As explained in paragraph 1.21 the term 'employer' refers to all those who have duties in the areas covered by the Code. In this chapter, the term 'complainant' is used to refer to a worker who brings a claim under the Act and the term 'respondent' is used to refer to an employer against whom the claim is made.

15.3 This chapter gives an overview of enforcement by the Tribunal of Part 5 of the Act. It is not intended to be a procedural guide to presenting a claim to the Tribunal. The relevant procedures are set out in the Employment and Equality Tribunal Rules 2018.

15.4 This chapter covers the following:

- obtaining information from an employer;
- settling complaints without recourse to the Tribunal;
- jurisdiction for hearing complaints of discrimination related to work;
- time limits;
- burden of proof; and
- remedies.

Obtaining information from an employer

15.5 A worker who has a complaint under the Act should, as far as possible, seek to raise the complaint with the employer in the first instance. To avoid a claim proceeding to the Employment and Equality Tribunal, the employer should investigate thoroughly any allegations of a breach of the

Act. This would enable the employer to determine whether there is any substance to the complaint and, if so, whether it can be resolved to the satisfaction of the parties.

15.6 A worker who has a complaint under the Act may request information from their employer about the reason for the treatment which is the subject of the complaint. This is an informal method and is separate to other means of obtaining information under the EET 2018 rules. The Manx Industrial Relations Service has produced non-statutory guidance for employers and workers advising how to ask and answer questions in relation to a complaint which may prevent a formal complaint to the Employment and Equality Tribunal.

Settling complaints without recourse to the Employment and Equality Tribunal

15.7 Nothing in the Act prevents the parties settling a claim or potential claim before it is decided by the Employment and Equality Tribunal. An agreement of this nature can include any terms the parties agree to and can cover compensation, future actions by the respondent, costs and other lawful matters.

Example: A worker raises a grievance with her employers alleging discrimination. The employer investigates this and accepts that there is substance to the complaint. The employer agrees to compensate the worker and undertakes to provide mandatory training for all staff to prevent such a complaint arising again.

15.8 The Manx Industrial Relations Service offers a conciliation service for parties in dispute, whether or not a claim has been made to the Employment and Equality Tribunal.

15.9 A claim or potential claim to the Employment and Equality Tribunal can also be settled where an Industrial Relations Officer has promoted a settlement. **s.104**

Jurisdiction for hearing complaints of discrimination in work cases

15.10 The Employment and Equality Tribunal has jurisdiction to determine complaints related to work about a breach of the Act (that is, discrimination, harassment, victimisation, failure to make reasonable adjustments, breach of an equality clause or rule, instructing, causing or inducing and **s.110(1)**

aiding unlawful acts).

15.11 The Tribunal also has jurisdiction to determine an application relating to a non-discrimination rule of an occupational pension scheme (see paragraph 14.35). A responsible person (that is, the trustees or managers of an occupational pension scheme, the employer or a person who can make appointments to offices) can make an application to the Employment and Equality Tribunal for a declaration as to the rights of that person and a worker or member with whom they are in a dispute about the effect of a non-discrimination rule. The Employment and Equality Tribunal can also determine a question that relates to a non-discrimination rule which has been referred to it by the High Court. **s.110(2)** **s.110(3)** **s.112**

15.12 Where proceedings relate to a breach of a non-discrimination rule of an occupational pension scheme, the employer is treated as a party to the proceedings and has the right to appear and be heard. **s.110(5)**

15.13 The Employment and Equality Tribunal jurisdiction does not extend to complaints relating to disability or health enquiries under section 52(1) of the Act (see paragraphs 10.21 to 10.39). Only the Attorney General can enforce a breach of the provisions relating to disability or health enquiries. Cases are brought in the Employment and Equality Tribunal. However, the Tribunal will have jurisdiction to hear a complaint of discrimination where the worker is, for example, rejected for a job as a result of responding to a disability or health enquiry that is not permitted. **s.52(3)**

Time limits

15.14 For work-related cases, the Employment and Equality Tribunal claim must be started within three months of the alleged unlawful act. Where the unlawful act relates to an equality clause or rule different time limits apply; these will be set out in the Equal Pay Code of Practice. **s.113**

15.15 If proceedings are not brought within the prescribed period, the Employment and Equality Tribunal still has discretion to hear the proceedings, if it thinks it is just and equitable to do so (see paragraph 15.22 to 15.24 below). **s.113(1)(b)(ii)**

When does the period for bringing the claim start?

15.16 The Act says that the period for bringing a claim starts with the date of the unlawful act. Generally, this will be the date **s. 113(1)**

on which the alleged unlawful act occurred, or the date on which the worker becomes aware that an unlawful act occurred.

Example: A male worker applied for a promotion and was advised on 12 March 2019 that he was not successful. The successful candidate was a woman. He believes that he was better qualified for the promotion than his colleague and that he has been discriminated against because of his sex. He sent a questions form to his employer within two weeks of finding out about the promotion and the answers to the questions support his view. The worker must start proceedings by 11 June 2019.

15.17 Sometimes, however, the unlawful act is an employer's failure to do something. The Act says that a failure to do a thing occurs when the person decides not to do it. In the absence of evidence to the contrary, an employer is treated as deciding not to do a thing when they do an act inconsistent with doing the thing. **s.113(2) & (3)** **s.113(3)(a)**

15.18 If the employer does not carry out an inconsistent act, they are treated as deciding not to do a thing on the expiry of the period in which they might reasonably have been expected to do the thing. **s.113(3)(b)**

Example: A wheelchair-user asks her employer to install a ramp to enable her more easily to get over the kerb between the car park and the office entrance. The employer indicates that they will do so but no work at all is carried out. After a period in which it would have been reasonable for the employer to commission the work, even though the employer has not made a positive decision not to install a ramp, they may be treated as having made that decision.

15.19 In addition, the Act recognises that where conduct extends over a period, it should be treated as being done at the end of that period for the purposes of calculating when the unlawful act occurred. **s.113(2)(a)**

15.20 If an employer has a policy, rule, or practice (whether formal or informal) in accordance with which decisions are taken from time to time, this might amount to an 'act extended over a period'. So if an employer maintains an unlawful policy which results in a person being discriminated against on a continuing basis or on many occasions, the period for bringing a claim starts when the last act of discrimination occurred, or when the policy, rule or practice is removed.

Example: An employer operates a mortgage scheme for

married couples only. A civil partner would be able to bring a claim to the Employment and Equality Tribunal at any time while the scheme continued to operate in favour of married couples. However, once the scheme ceased to operate in favour of married couples, the time limit for bringing proceedings would be within three months of that date.

15.21 For these purposes, a continuing state of affairs may constitute an act extended over a period. This means that even if the individual acts relied upon are done by different workers and are done at different places, they may be treated as a single act extending over a period. However, a single unlawful act which has continuing consequences will not extend the time period.

Example: A Bulgarian worker is graded on lower pay than her Manx counterpart. The time period for starting proceedings is three months from the date the decision was taken to grade the workers or the date the worker discovered that she was being paid at a lower grade.

What happens if the claim is presented outside the correct time limit?

15.22 Where a claim is brought outside the time limits referred to above, the Employment and Equality Tribunal has discretion to hear the case if it considers it just and equitable to do so. **s.113(1)(b)(ii)**

15.23 In exercising its discretion, the Tribunal will consider the prejudice which each party would suffer as a result of the decision to extend the time limit. This means that the Tribunal will consider what impact hearing the case out of time would have on the respondent and the complainant.

15.24 When the Tribunal considers whether to exercise its 'just and equitable' discretion, it will have regard to all the circumstances of the case including in particular:

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected;
- the extent to which the employer had co-operated with requests for information;
- the promptness with which the complainant bringing the claim acted once they knew of the facts giving rise to the claim; and

- the steps taken by the complainant to obtain

appropriate legal advice once they knew of the possibility of taking action.

Burden of proof

15.25 A complainant alleging that they have experienced an unlawful act must prove facts from which the Employment and Equality Tribunal could decide or draw an inference that such an act has occurred. **s.131**

Example: A worker of Muslim faith applies for promotion but is unsuccessful. Her colleague who is a Mormon successfully gets the promotion. The unsuccessful candidate obtains information after approaching her employer informally in writing asking questions about her treatment. The employer's response shows that she was better qualified for the promotion than her Mormon colleague. The employer will have to explain to the Employment and Equality Tribunal why the Muslim worker was not promoted and that religion or belief did not form any part of the decision.

15.26 The Employment and Equality Tribunal will hear all of the evidence from the complainant and the respondent before deciding whether the burden of proof has shifted to the respondent.

15.27 If a complainant has proved facts from which the Tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on the balance of probabilities that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the Tribunal must find that the act was unlawful. **s.131(2) & (3)**

15.28 Where the basic facts are not in dispute, the Employment and Equality Tribunal may simply consider whether the employer is able to prove, on the balance of probabilities, that they did not commit the unlawful act.

Example: A Jewish trainee advocate complains that he has not been allowed to take annual leave to celebrate Jewish religious holidays and is able to compare himself to a Muslim trainee advocate who has been allowed to take annual leave to celebrate Muslim religious holidays. If these facts are not in dispute, the Tribunal may proceed directly to consideration of whether the law firm has shown that the treatment was not, in fact, an act of religious discrimination.

15.29 The above rules on burden of proof do not apply to proceedings following a breach of the Act which gives rise to a criminal offence. **s.131(5)**

Remedies for unlawful acts relating to work

15.30 The Employment and Equality Tribunal may:

- make a declaration as to the rights of the parties to the claim; **s.114(2)(a)**
- award compensation to the complainant for any loss suffered; **s.114(2)(b)**
- make an 'appropriate' recommendation, that is a recommendation that a respondent takes specified steps to obviate or reduce the adverse effect of any matter relating to the proceedings on the complainant and/or others who may be affected; **s.114(2)(c)**
- award costs if appropriate. **EET Rules Rule 40 & 41**

15.31 Information on remedies in equal pay claims will be contained in the Equal Pay Code.

Declarations of unlawful acts

15.32 The Employment and Equality Tribunal may make a declaration instead of or as well as making an award of compensation or a recommendation. **s.114(2)(a)**

15.33 The amount of compensation that may be awarded by the Employment and Equality Tribunal is subject to statutory limits. **s. 114(6); EA s.144(1)**

What compensation can the Employment and Equality Tribunal award?

15.34 The Employment and Equality Tribunal can award a complainant compensation and an award for injury to feelings. An award for compensation may also include: **s.114(6)**

- past loss of earnings or other financial loss;
- future loss of earnings which may include stigma or 'career damage' losses for bringing a claim;
- personal injury (physical, psychological or psychiatric) caused by the discrimination or harassment.

15.35 Compensation for loss of earnings must be based on the

actual loss to the complainant. The aim is, so far as possible by an award of money, to put the complainant in the position they would have been in if they had not suffered the unlawful act.

15.36 Generally, compensation must be directly attributable to the unlawful act. This may be straightforward where the loss is, for example, related to an unlawfully discriminatory dismissal. However, subsequent losses, including personal injury, may be difficult to assess.

15.37 A worker who is dismissed for a discriminatory reason is expected to take reasonable steps to mitigate their loss, for example by looking for new work or applying for state benefits. Failure to take reasonable steps to mitigate loss may reduce compensation awarded by the Tribunal. However, it is for the respondent to show that the complainant did not mitigate their loss.

Compensation for complaints of indirect discrimination

15.38 Where the Employment and Equality Tribunal makes a finding of indirect discrimination but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant, it must not make an award for compensation unless it first considers whether it would be more appropriate to dispose of the case by providing another remedy, such as a declaration or a recommendation. If the Tribunal considers that another remedy is not appropriate in the circumstances, it may make an award of damages. **s.114(4) & (5)**

15.39 Indirect discrimination will be intentional where the respondent knew that certain consequences would follow from their actions and they wanted those consequences to follow. A motive, for example, of promoting business efficiency, does not mean that the act of indirect discrimination is unintentional.

Employment and Equality Tribunal recommendations

15.40 The Employment and Equality Tribunal can make an appropriate recommendation requiring the respondent within a specified period to take specific steps to reduce the negative impact of the unlawful act on the complainant or the wider workforce. The power to make a recommendation does not apply to equal pay claims. **s.114(3)**

15.41 A recommendation might, for example, require a respondent to take steps to implement a harassment policy more effectively; provide equal opportunities training for staff involved in promotion procedures; or introduce more transparent selection criteria in recruitment, transfer or promotion processes.

Example: The Employment and Equality Tribunal makes a finding that a respondent employer's sickness policy has an indirect discriminatory impact on transgender people generally and an individual transgender worker specifically. The Employment and Equality Tribunal in addition to making a declaration to this effect makes a recommendation to the employer to review the policy and to take steps to remove the discriminatory provision.

15.42 Employment and Equality Tribunal recommendations may focus on processes (such as adoption of an equality policy or discontinuance of a practice or rule).

15.43 Whether a recommendation is made is a matter for the Employment and Equality Tribunal's discretion; the complainant does not have a right to have the Tribunal recommend a course of action or process even if the Tribunal makes a declaration of unlawful discrimination.

Making recommendations affecting the wider workforce

15.44 As mentioned above, the Employment and Equality Tribunal can make recommendations which affect the wider workforce. The Tribunal may consider making a wider recommendation if:

- the evidence in the case suggested that wider or structural issues were the cause of the discrimination and that they are likely to lead to further discrimination unless addressed; and
- It is commensurate (or 'proportionate') to the respondent's capacity to implement it.

15.45 A wider recommendation forms part of the Employment and Equality Tribunal's decision in any particular case.

15.46 A recommendation is not contractually binding between the complainant and respondent (unless the parties make a separate agreement for the decision to have this effect).

What happens if a respondent fails to comply with a Tribunal recommendation?

15.47 If a respondent fails to comply with a recommendation of the Employment and Equality Tribunal which related to the complainant, the Tribunal may: **s.114(7)**

- increase the amount of any compensation awarded to that complainant; or
- order the respondent to pay compensation to the complainant if it did not make such an order earlier.

15.48 A failure to comply with a recommendation could also be adduced in evidence in any later cases against the same organisation.

Remedies in relation to occupational pension schemes

15.49 If the Employment and Equality Tribunal finds that there has been discrimination in relation to: **s.115**

a) the terms on which persons become members of an occupational pension scheme; or
b) the terms on which members are treated;

it may, in addition to the remedies it can make generally, declare that the person bringing the claim has a right to be admitted to the scheme or a right to membership without discrimination. **s.115(3)**

15.50 The Employment and Equality Tribunal's order may also set out the terms of admission or membership for that person. The order may apply to a period before it is made. **s.115(5)**

15.51 However, the Employment and Equality Tribunal may not make an order for compensation unless it is for injured feelings or for a failure by the recipient of an appropriate recommendation to comply with the recommendation. The Tribunal cannot make an order for arrears of benefit. **s.115(4)**

The Equality Act 2017

Code of Practice on employment:

Part 2

Chapter 16

Avoiding discrimination in recruitment

Introduction

16.1 Ensuring fair recruitment processes can help employers avoid discrimination. While nothing in the Act prevents an employer from hiring the best person for the job, it is unlawful for an employer to discriminate in any of the arrangements made to fill a vacancy, in the terms of employment that are offered or in any decision to refuse someone a job (see Chapter 10). With certain limited exceptions, employers must not make recruitment decisions that are directly or indirectly discriminatory. As with other stages of employment, employers must also make reasonable adjustments for disabled candidates, where appropriate.

16.2 Tasks and duties set out in the job description should be objectively justifiable as being necessary to that post. This is especially important for tasks and duties which some people may not be able to fulfil, or would be less likely to be able to fulfil, because of a protected characteristic. Similarly, the job description should not overstate a duty which is only an occasional or marginal one.

Example: A job description includes the duty: 'regular Sunday working'. In reality, there is only an occasional need to work on a Sunday. This overstated duty written into the job description puts off Christians who do not wish to work on a Sunday, and so could amount to indirect discrimination unless the requirement can be objectively justified.

16.3 Where there are different ways of performing a task, job descriptions should not specify how the task should be done. Instead, the job description should state what outcome needs to be achieved.

Example: A job description includes the task: 'Using MagicReport software to produce reports about customer complaints'. This particular software is not accessible to

some disabled people who use voice-activated software. Discrimination could be avoided by describing the task as 'Producing reports about customer complaints'.

16.4 Job descriptions should not specify working hours or working patterns that are not necessary to the job in question. If a job could be done either part-time, full-time, or through job share arrangements, this should be stated in the job description. As well as avoiding discrimination, this approach can also widen the group of people who may choose to make an application.

Example: A job description for a manager states that the job is full-time. The employer has stated this because all managers are currently full-time and he has not considered whether this is an actual requirement for the role. The requirement to work full-time could put women at a disadvantage compared with men because more women than men work part-time or job share in order to accommodate childcare responsibilities. This requirement could amount to indirect discrimination unless it can be objectively justified.

Person specifications

16.5 Person specifications describe various criteria – including skills, knowledge, abilities, qualifications, experience and qualities – that are considered necessary or desirable for someone fulfilling the role set out in the job description. These criteria must not be discriminatory. Discrimination can be avoided by ensuring that any necessary or desirable criteria can be justified for that particular job.

16.6 Criteria that exclude people because of a protected characteristic may be directly discriminatory unless they are related to occupational requirements (see Chapter 13).

Example: Stating in a job description for a secretary that the person must be under 40 would amount to direct age discrimination against people over 40. In some circumstances, age criteria can be objectively justified, but in this case it is very unlikely.

16.7 Criteria that are less likely to be met by people with certain protected characteristics may amount to indirect discrimination if these criteria cannot be objectively justified.

Example: Asking for 'so many years' experience could amount to indirect discrimination because of age unless this provision can be objectively justified.

Example: A requirement for continuous experience could indirectly discriminate against women who have taken time out from work for reasons relating to maternity or childcare, unless the requirement can be objectively justified.

16.8 The person specification should not include criteria that are wholly irrelevant.

Example: A requirement that the applicant must be 'active and energetic' when the job is a sedentary one is an irrelevant criterion. This requirement could be discriminatory against some disabled people who may be less mobile.

16.9 Employers should ensure that criteria relating to skills or knowledge are not unnecessarily restrictive in specifying particular qualifications that are necessary or desirable. It is advisable to make reference to 'equivalent qualifications' or to 'equivalent levels of skill or knowledge' in order to avoid indirect discrimination against applicants sharing a particular protected characteristic if this group is less likely to have obtained the qualification. The level of qualification needed should not be overstated. Employers should avoid specifying qualifications that were not available a generation ago, such as GCSEs, without stating that equivalent qualifications are also acceptable.

Example: Requiring a UK-based qualification, when equivalent qualifications obtained abroad would also meet the requirement for that particular level of knowledge or skill, may lead to indirect discrimination because of race, if the requirement cannot be objectively justified.

16.10 As far as possible, all the criteria should be capable of being tested objectively. For example, attributes such as 'leadership' should be defined in terms of measurable skills or experience.

Health requirements in person specifications

16.11 The inclusion of health requirements can amount to direct discrimination against disabled people, where such requirements lead to a blanket exclusion of people with particular impairments and do not allow individual circumstances to be considered. Employers should also be aware that, except in specified circumstances, it is unlawful to ask questions about health or disability before the offer of a job is made or a person is placed in a pool of people to be offered a job (see paragraphs 10.21 to 10.39).

Example: A person specification states that applicants must have 'good health'. This criterion is too broad to relate to any specific requirement of the job and is therefore likely to amount to direct discrimination because of disability.

16.12 The inclusion of criteria that relate to health, physical fitness or disability, such as asking applicants to demonstrate a good sickness record, may amount to indirect discrimination against disabled people in particular, unless these criteria can be objectively justified by the requirements of the actual job in question.

16.13 Person specifications that include requirements relating to health, fitness or other physical attributes may discriminate not only against some disabled applicants, but also against applicants with other protected characteristics – unless the requirements can be objectively justified.

Example: A person specification includes a height requirement. This may indirectly discriminate as it would put at a disadvantage, women, some disabled people, and people from certain racial groups if it cannot be objectively justified for the job in question.

Advertising a job

16.14 An employer must not discriminate in its arrangements for advertising jobs or by not advertising a job. Neither should they discriminate through the actual content of the job advertisement (see paragraphs 3.32 and 10.6).

Arrangements for advertising

16.15 The practice of recruitment on the basis of recommendations made by existing staff, rather than through advertising, can lead to discrimination. For example, where the workforce is drawn largely from one racial group, this practice can lead to continued exclusion of other racial groups. It is therefore important to advertise the role widely so that the employer can select staff from a wider and more diverse pool.

16.16 Before deciding only to advertise a vacancy internally, an employer should consider whether there is any good reason for doing so. If the workforce is made up of people with a particular protected characteristic, advertising internally will not help diversify the workforce. If there is internal advertising alone, this should be done openly so that everyone in the organisation is given the opportunity to apply.

16.17 Employers should also ensure that people absent from work (including women on maternity leave, those on long-term sick leave, and those working part-time or remotely) are informed of any jobs that become available so they can consider whether to apply. Failure to do so may amount to discrimination.

Content of job advertisements

16.18 Job advertisements should accurately reflect the requirements of the job, including the job description and person specification if the employer uses these. This will ensure that nobody will be unnecessarily deterred from applying or making an unsuccessful application even though they could in fact do the job.

16.19 Advertisements must not include any wording that suggests the employer may directly discriminate by asking for people with a certain protected characteristic, for example by advertising for a 'salesman' or a 'waitress' or saying that the applicant must be 'youthful'.

Example: An employer advertises for a 'waitress'. This suggests that the employer is discriminating against men. By using a gender neutral term such as 'waiting staff' or by using the term 'waiter or waitress', the employer could avoid a claim of discrimination based on this advert.

16.20 Advertisements must not include any wording that suggests the employer might indirectly discriminate. Wording should not, for example, suggest criteria that would disadvantage people of a particular sex, age, or any other protected characteristic unless the requirement can be objectively justified or an exception under the Act applies.

16.21 A job advertisement should not include wording that suggests that reasonable adjustments will not be made for disabled people, or that disabled people will be discriminated against, or that they should not bother to apply.

Example: An employer advertises for an office worker, stating, 'This job is not suitable for wheelchair users because the office is on the first floor'. The employer should state instead, 'Although our offices are on the first floor, we welcome applications from disabled people and are willing to make reasonable adjustments'.

When is it lawful to advertise for someone with a particular protected characteristic?

16.22 Where there is an occupational requirement for a person with a particular protected characteristic that meets the legal test under the Act, then it would be lawful to advertise for such a person; for example, if there is an occupational requirement for a woman (see paragraphs 13.3 to 13.15). Where the job has an occupational requirement, the advertisement should state this so that it is clear that there is no unlawful discrimination.

Example: An employer advertises for a female care worker. It is an occupational requirement for the worker to be female, because the job involves intimate care tasks, such as bathing and toileting women. The advert states: 'Permitted under Schedule 9, part 1 of the Equality Act 2017'.

16.23 An employer can lawfully advertise a job as only open to disabled applicants because of the asymmetrical nature of disability discrimination (see paragraph 3.35).

Example: A private nursery advertises for a disabled childcare assistant. This is lawful under the Act.

16.24 An employer may include statements in a job advertisement encouraging applications from under-represented groups, as a voluntary 'positive action' measure (see Chapter 12). An employer may also include statements about their equality policy or statements that all applications will be considered solely on merit.

Example: The vast majority of workers employed by a local high street retailer are over the age of 40. Consequently, people under the age of 40 are under-represented in the organisation. The retailer is looking to open a new store in St John's and needs to recruit more staff. It would be lawful under the Act for that retailer to place a job advert encouraging applications from all groups, especially applicants under the age of 40.

Recruitment through employment services, the Careers Service or other agencies

16.25 When recruiting through recruitment agencies, the JobCentre, the Careers Service, schools or online agencies, an employer must not instruct them to discriminate, for example by suggesting that certain groups would – or would not be preferred; or cause or induce them

to discriminate (see paragraphs 9.16 to 9.24).

16.26 Any agencies involved in an employer's recruitment should be made aware of the employer's equality policy, as well as other relevant policies. They should also be given copies of the job descriptions and person specifications for posts they are helping the employer to fill.

Application process

General principles

16.27 An employer must not discriminate through the application process. A standardised process, whether this is through an application form or using CVs, will enable an employer to make an objective assessment of an applicant's ability to do the job and will assist an employer in demonstrating that they have has assessed applicants objectively. It will also enable applicants to compete on equal terms with each other. A standardised application process does not preclude reasonable adjustments for disabled people (see below).

Example: An application form asks applicants to provide 400 words stating how they meet the job description and person specification. Applicants are marked for each criterion they satisfy and short-listed on the basis of their marks. This is a standardised application process that enables the employer to show that they have assessed all applicants without discriminating.

Reasonable adjustments during the application process

16.28 An employer must make reasonable adjustments for disabled applicants during the application process and must provide and accept information in accessible formats, where this would be a reasonable adjustment.

16.29 Where written information is provided about a job, it is likely to be a reasonable adjustment for that employer to provide, on request, information in a format that is accessible to a disabled applicant (see paragraphs 6.6 and 6.32). Accessible formats could include email, Braille, Easy Read, large print, audio format, and data formats. A disabled applicant's requirements will depend upon their impairment and on other factors too. For example, many blind people do not read Braille and would prefer to receive information by email or in audio format.

16.30 Where an employer invites applications by completing and returning an application form, it is likely to be a reasonable adjustment for them to provide forms and accept applications in accessible formats. However, a disabled applicant might not have a right to submit an application in their preferred format (such as Braille) if they would not be substantially disadvantaged by submitting it in some other format (such as email) which the employer would find easier to access.

16.31 In employment, the duty to make reasonable adjustments is not anticipatory (see Chapter 6). For this reason, employers do not need to keep stocks of job information or application forms in accessible formats, unless they are aware that these formats will be in demand. However, employers are advised to prepare themselves in advance so they can create accessible format documents quickly, allowing a candidate using that format to have their application considered at the same time as other applicants. Otherwise, employers may need to make a further adjustment of allowing extra time for return of the form, if the applicant has been put at a substantial disadvantage by having less time to complete it.

16.32 Where applications are invited by completing and returning a form online, it is likely to be a reasonable adjustment for the form to be made accessible to disabled people. If on-line forms are not accessible to disabled people, the form should be provided in an alternative way.

16.33 Where an application is submitted in an accessible format, an employer must not discriminate against disabled applicants in the way that it deals with these applications.

Personal information requested as part of the application process

16.34 An employer can reduce the possibility of discrimination by ensuring that the section of the application form requesting personal information is detachable from the rest of the form or requested separately. It is good practice for this information to be withheld from the people who are short-listing or interviewing because it could allow them to find out about a person's protected characteristics (such as age or sex). However, where an applicant's protected characteristics are suggested by information in an application form or CV (for example, qualifications or work history) those who are short-listing or interviewing must not use it to discriminate against the applicant.

16.35 Where information for monitoring purposes is requested as part of an online application process, employers should find a way to separate the monitoring process from the application process. For example, a monitoring form could be sent out by email on receipt of a completed application form.

16.36 Any other questions on the main application form about protected characteristics should include a clear explanation as to why this information is needed, and an assurance that the information will be treated in strictest confidence. These questions should only be asked where they reflect occupational requirements for the post. Questions related to an occupational requirement should only seek as much information as is required to establish whether the candidate meets the requirement (see Chapter 13).

16.37 Applicants should not be asked to provide photographs, unless it is essential for selection purposes, for example for an acting job; or for security purposes, such as to confirm that a person who attends for an assessment or interview is the applicant.

Selection, assessment and interview process

General principles

16.38 Arrangements for deciding to whom to offer employment include short-listing, selection tests, use of assessment centres and interviews. An employer must not discriminate in any of these arrangements and must make reasonable adjustments so that disabled people are not placed at a substantial disadvantage compared to non-disabled people (see Chapter 10). Basing selection decisions on stereotypical assumptions or prejudice is likely to amount to direct discrimination.

16.39 An employer should ensure that these processes are fair and objective and that decisions are consistent. Employers should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions, in some circumstances, it could result in the Employment and Equality Tribunal drawing an adverse inference of discrimination.

16.40 In deciding exactly how long to keep records after a recruitment exercise, employers must balance their need to keep such records to justify selection decisions with their obligations under the Data Protection Act 2018 and legislation applied or made under that Act, to keep personal data for no longer than is necessary.

16.41 The records that employers should keep include:

- any job advertisement, job description or person specification used in the recruitment process;
- the application forms or CVs, and any supporting documentation from every candidate applying for the job;
- records of discussions and decisions by an interviewer or members of the selection panel; for example, on marking standards or interview questions;
- notes taken by the interviewer or by each member of the panel during the interviews;
- each interview panel member's marks at each stage of the process; for example, on the application form, any selection tests and each interview question (where a formal marking system is used);
- all correspondence with the candidates.

16.42 An employer is more likely to make consistent and objective decisions if the same staff members are responsible for selection at all stages of the recruitment process for each vacancy. Staff involved in the selection process should receive training on the employer's equality policy (if there is one).

16.43 An employer should ensure that they do not put any applicant at a particular disadvantage in the arrangements they make for holding tests or interviews, or using assessment centres. For example, dates that coincide with religious festivals or tests that favour certain groups of applicants may lead to indirect discrimination, if they cannot be objectively justified.

Example: An all-day assessment that involves a social dinner may amount to indirect discrimination if the employer has not taken account of dietary needs relating to an applicant's religion – unless the arrangements can be objectively justified.

16.44 An employer is not required to make changes in anticipation of applications from disabled people in general – although it would be good practice to do so. It is only if the employer knows or could be reasonably expected to

know that a particular disabled person is (or may be) applying, and that the person is likely to be substantially disadvantaged by the employer's premises or arrangements, that the employer must make reasonable adjustments. If an employer fails to ask about reasonable adjustments needed for the recruitment process, but could reasonably have been expected to know that a particular disabled applicant or possible applicant is likely to be disadvantaged compared to non-disabled people, they will still be under a duty to make a reasonable adjustment at the interview.

Short-listing

16.45 It is recommended that employers build the following guidelines for good practice into their selection procedures. By doing so, they will reduce the possibility of unlawful discrimination and avoid an adverse inference being made, should the Tribunal claim be made by a rejected applicant.

- Wherever possible, more than one person should be involved in short-listing applicants, to reduce the chance of one individual's bias prejudicing an applicant's chances of being selected.

- The marking system, including the cut-off score for selection, should be agreed before the applications are assessed, and applied consistently to all applications.

- Where more than one person is involved in the selection, applications should be marked separately before a final mark is agreed between the people involved.

- Selection should be based only on information provided in the application form, CV or, in the case of internal applicants, any formal performance assessment reports.

- The weight given to each criterion in the person specification should not be changed during short-listing; for example, in order to include someone who would otherwise not be short-listed.

Guaranteed interviews for disabled applicants

16.46 Some employers may operate a guaranteed interview scheme, under which a disabled candidate will be short-listed for interview automatically if they demonstrate that they meet the minimum criteria for getting the job. As explained above (paragraph 10.29), the Act permits questions to be asked at the application stage to identify disabled applicants for the purpose of a guaranteed interview.

Selection tests and assessment centres

16.47 Ability tests, personality questionnaires and other similar methods should only be used if they are well designed, properly administered and professionally validated and are a reliable method of predicting an applicant's performance in a particular job. If such a test leads to indirect discrimination or discrimination arising from disability, even if such discrimination is not intended and the reason for the discrimination is not understood, the test should not be used unless it can be objectively justified.

16.48 Where tests and assessment centres are used as part of the selection process, it is recommended that employers take account of the following guidelines:

- Tests should correspond to the job in question, and measure as closely as possible the appropriate levels of the skills and abilities included in the person specification.

- Where the purpose of a test is not to ascertain a person's level of proficiency in English, special care should be taken to make sure candidates whose first language is not English understand the instructions. Tests that are fair for speakers of English as a first language may present problems for people who are less proficient in the language.

- Deaf people whose first language is British Sign Language may be at a substantial disadvantage if a test is in English. An employer will need to consider what they should do to comply with the duty to make reasonable adjustments for such applicants.

- All candidates should take the same test unless there is a health and safety reason why the candidate cannot do so, for example because of

pregnancy, or unless a reasonable adjustment is required (see below).

- Test papers, assessment notes and records of decisions should be kept on file (see paragraph 17.4).

16.49 Employers should make adjustments where a test or assessment would put a disabled applicant at a substantial disadvantage, if such adjustments would be reasonable (see Chapter 6). Examples of adjustments which may be reasonable include:

- providing written instructions in an accessible format;
- allowing a disabled person extra time to complete the test;
- permitting a disabled person the assistance of a reader or scribe during the test;
- allowing a disabled applicant to take an oral test in writing or a written test orally.

16.50 The extent to which such adjustments would be reasonable may depend on the nature of the disabled person's impairment, how closely the test is related to the job in question and what adjustments the employer would be reasonably required to make if the applicant were given the job.

16.51 However, employers would be well advised to seek professional advice in the light of individual circumstances before making adjustments to psychological or aptitude tests.

Interviews

16.52 An employer must not discriminate at the interview stage. In reality, this is the stage at which it is easiest to make judgements about an applicant based on instant, subjective and sometimes wholly irrelevant impressions. If decisions are based on prejudice and stereotypes and not based on factors relating to the job description or person specification, this could lead to unlawful discrimination. By conducting interviews strictly on the basis of the application form, the job description, the person specification, the agreed weight given to each criterion and the results of any selection tests, an employer will ensure that all applicants are assessed objectively, and solely on their ability to do the job satisfactorily.

16.53 Employers should try to be flexible about the arrangements made for interviews. For example, a woman with childcare responsibilities may have difficulties attending an early morning interview or a person practising a particular religion or belief may have difficulty attending on certain days or at certain times.

16.54 By the interview stage, an employer should already have asked whether reasonable adjustments are needed for the interview itself. This should have been covered on the application form or in the letter inviting a candidate for interview. However, it is still good practice for the interviewer to ask on the day if any adjustments are needed for the interview.

16.55 The practical effects of an employer's duties may be different if a person whom the employer previously did not know to be disabled (and it would not be reasonable to expect them to have known this) arrives for interview and is substantially disadvantaged because of the arrangements. The employer will be under a duty to make a reasonable adjustment from the time that they first learn of the disability and the disadvantage. However, the extent of the duty is less than might have been the case if they had known (or ought to have known) in advance about the disability and its effects.

16.56 An employer can reduce the possibility of unlawful discrimination by ensuring that staff involved in selection panels have had equality training and training about interviews, to help them:

- recognise when they are making stereotypical assumptions about people;
- apply a scoring method objectively;
- prepare questions based on the person specification and job description and the information in the application form; and
- avoid questions that are not relevant to the requirements of the job.

16.57 It is particularly important to avoid irrelevant interview questions that relate to protected characteristics, as this could lead to discrimination under the Act. These could include, for example, questions about childcare arrangements, living arrangements or plans to get married or to have children. Where such information is volunteered, selectors should take particular care not to allow themselves to be influenced by that information. A woman is under no obligation to declare her pregnancy in a recruitment process. If she volunteers that information, it should not be taken into account in deciding her suitability

for the job.

16.58 Questions should not be asked, nor should assumptions be made, about whether someone would fit in with the existing workforce.

Example: At a job interview a woman is asked: 'You would be the only woman doing this job, and the men might make sexist jokes. How would you feel about this?' This question could amount to direct sex discrimination.

16.59 Except in particular circumstances, questions about disability or health must not be asked at the interview stage or at any other stage before the offer of a job (whether conditional or not) has been made, or where the person has been accepted into a pool of applicants to be offered a position when one becomes available. This is explained in paragraphs 10.21 to 10.39.

References

16.60 References should only be obtained, and circulated to members of the selection panel, after a selection decision has been reached. This can help ensure that the selection decision is based on objective criteria and is not influenced by other factors, such as potentially subjective judgments about a candidate by referees. Employers should send referees copies of the job description and person specification, requesting evidence of the candidate's ability to meet the specific requirements of the job. This is more likely to ensure that the reference focuses on information that is relevant to the job. Where a reference is subjective and negative, it is good practice to give the successful applicant an opportunity to comment on it.

Eligibility to work in the Isle of Man

16.61 The Equality Act contains specific provisions which provide for anything which is required or authorised to be done under the Control of Employment Act 2014 or Immigration legislation not to be in contravention of the Act. Employers must comply with such statutory obligations but should be careful not to - **s.153 & Sch. 21 para 1**

- make assumptions about a person's right to work in the Island based on race, colour, national origin or caste; or
- directly or indirectly discriminate against workers or job applicants by doing things which are not required or authorised under the Control of Employment Act 2014 or Immigration legislation.

16.62 Where the post may be subject to a work permit requirement, the employer may request if the applicant is an Isle of Man worker, requires a work permit at the application stage, or is exempt from the Control of Employment Act 2014.

Job Offers

16.63 As stated at the beginning of this chapter, an employer must not discriminate against a person in the terms on which the person is offered employment. Provisions addressing 'tie-break' situations and the scope for taking positive action are addressed above at paragraph 12.6.

Example: An employer offers a job but extends their usual probation period from three months to six months because the preferred candidate is a woman returning from maternity leave or a person with a disability. This would be discrimination in the terms on which the person is offered employment.

16.64 A refusal to recruit a woman because she is pregnant is unlawful even if she is unable to carry out the job for which she is to be employed. This will be the case even if the initial vacancy was to cover another woman on maternity leave. It is irrelevant that the woman failed to disclose that she was pregnant when she was recruited. A woman is not legally obliged to tell an employer during the recruitment process that she is pregnant because it is not a factor which can lawfully influence the employer's decision (see Chapter 8).

Feedback to short-listed unsuccessful candidates

16.65 Having secured a preferred candidate, it is good practice for an employer to offer feedback to unsuccessful short-listed candidates if this is requested. By demonstrating objective reasons for the applicant's lack of success, based on the requirements of the job, an employer can minimise the risk of any claims for unlawful discrimination under the Act.

Chapter 17

Avoiding discrimination during employment

Introduction

17.1 As explained in Chapter 10, the Act prohibits discrimination, victimisation and harassment at all stages and in all aspects of the employment relationship, including in workers' training and development. It also places employers under a duty to make reasonable adjustments for disabled workers. This chapter takes a closer look at the implications of the Act for a range of issues that are central to the relationship between employers and workers: working hours; sickness and absence; arranging leave from work; accommodating workers' needs; induction, training and development; disciplinary and grievance matters. Where appropriate, it also makes recommendations for good practice.

17.2 Many aspects of the employment relationship are governed by the contract of employment between the employer and the worker, which may be verbal or written. Practical day-to-day arrangements or custom and practice in the workplace are also important; in some cases, these features are communicated via written policies and procedures.

17.3 In many workplaces, a trade union is recognised by the employer for collective bargaining purposes. Where changes to policies and procedures are being considered, an employer should consult with a recognised trade union in the first instance. It is also good practice for employers to consult with trade union equality representatives as a first step towards understanding the diverse needs of workers. The role of trade unions in meeting the training and development needs of their members should also be recognised.

17.4 Where resources permit, employers are strongly advised to maintain proper written records of decisions taken in relation to individual workers, and the reasons for these decisions. Keeping written records will help employers reflect on the decisions they are taking and thus help avoid discrimination. In addition, written records will be invaluable if an employer has to defend a claim in the Employment

and Equality Tribunal.

17.5 It is also useful for employers to monitor overall workplace figures on matters such as requests for flexible working, promotion, training and disciplinary procedures to see if there are significant disparities between groups of people sharing different protected characteristics. If disparities are found, employers should investigate the possible causes in each case and take steps to remove any barriers.

Working hours

17.6 Working hours are generally determined by agreement between the employer and the worker, subject to collective agreements negotiated by trade unions on behalf of workers.

Shops Act s. 23

However, the contract of employment of a shop worker must not include a term obliging him or her to work:

- for more than 5 hours without an interval of at least 30 minutes;
- for a total number of hours, exclusive of intervals allowed for meals and rest in excess of:
  - 10 hours in any 24 hours; or
  - 44 hours in any week.

Flexible working

17.7 There are statutory rules which give employees with caring responsibilities for children or specified adults the right to have a request for flexible working considered. The right is designed to give employees the opportunity to adopt working arrangements that help them to balance their commitments at work with their need to care for a child or an adult.

EA 2006 s.66, 99,100 & 122 & FWR 2007

17.8 The statutory rules are set out in the Employment Act 2006, and expanded in the Flexible Working Regulations 2007(FWR). Under these rules, employees with caring responsibilities who have at least 26 weeks' continuous service are entitled to make a written request for flexible working; that is, to request changes to hours of work, times of work and the location of work. In practice this might mean:

- part-time working, term-time working or home working;
- adjusting start and finish times;
- adopting a particular shift pattern or extended hours

on some days with time off on others.

17.9 Employers have a duty to consider a request for flexible working arrangements within specified timescales, and can refuse only on one of the business-related grounds set out in the statutory rules. The refusal must be in writing and include a sufficient explanation of the decision, based on correct facts. Employers who do not comply with these statutory procedures risk being taken to the Employment and Equality Tribunal and possibly having to pay compensation to the employee. For further details of the flexible working procedures, see https://www.gov.im/categories/working-in-the-isle-of-man/employment-rights/flexible-working/

17.10 It is also important to bear in mind that rigid working patterns may result in indirect discrimination unless they can be objectively justified. Although a flexible working request may legitimately be refused under the statutory rules, such a refusal may still be indirectly discriminatory if the employer is unable to show that the requirement to work certain hours is justified as a proportionate means of achieving a legitimate aim. For example:

- A requirement to work full-time hours may indirectly discriminate against women because they are more likely to have childcare responsibilities.
- A requirement to work full-time hours could indirectly discriminate against disabled people with certain conditions (such as ME). It could also amount to a failure to make reasonable adjustments.
- A requirement to work on certain days may indirectly discriminate against those with particular religious beliefs.

Example: An employee's contractual hours are 9am–3pm. Under the flexible working procedures, she has formally requested to work from 10am–4pm because of childcare needs. Her employer refuses, saying that to provide staff cover in the mornings would involve extra costs. This refusal would be compatible with the flexible working procedures, which do not require a refusal to be objectively justified. However, in some circumstances, this could amount to indirect sex discrimination. Where a refusal to permit certain working patterns would detrimentally affect a larger proportion of women than men, the employer must show that it is based on a legitimate aim, such as providing sufficient staff cover before 10am, and that refusing the request is a proportionate means of achieving that aim.

17.11 Employers should also be particularly mindful of their duty

to make reasonable adjustments to working hours for disabled workers.

Example: A worker with a learning disability has a contract to work normal office hours (9am to 5.30pm in this particular office). He wishes to change these hours because the friend whom he needs to accompany him to work is no longer available before 9am. Allowing him to start later is likely to be a reasonable adjustment for that employer to make.

Rest breaks

17.12 Minimum rest break periods only apply to certain categories of workers.

The Employment of Children (No.2) Regulations 2018 set out restrictions for children employed in 'light employment' aged over 13 but under 16.

Shop workers also have an entitlement to rest breaks dependent on the number of hours worked. Further information in relation to the Shops Act 2000 can be found in the non-statutory guidance 'Isle of Man Employment Rights: a Guide.'

Some employers operate a policy on rest breaks and lunch breaks that is more generous than is required by legislation.

17.13 In considering requests for additional or different breaks, employers should ensure that they do not discriminate because of any protected characteristic. In some circumstances, an employer's refusal to allow additional breaks or flexibility as to when they are taken might amount to indirect discrimination unless it can be objectively justified. When dealing with requests for additional breaks, an employer should consider whether it is possible to grant the request by allowing the person to work more flexible hours.

Example: An observant Muslim requests two additional 10 minute breaks every day to allow him to pray at work. The employer allows other workers to take additional smoking breaks of similar length. Refusing this request could amount to direct discrimination because of religion or belief. On the other hand, if the employer took a consistently strict approach to rest breaks, they could allow the prayer breaks on the understanding that the Muslim worker arrives at work 20 minutes earlier or makes up the time at the end of the day.

17.14 Allowing disabled workers to take additional rest breaks is one way that an employer can fulfil their duty to make reasonable adjustments.

Example: A worker has recently been diagnosed with diabetes. As a consequence of her medication and her new dietary requirements, she finds that she gets extremely tired at certain times during the working day. It is likely to be a reasonable adjustment to allow her to take additional rest breaks to control the effects of her impairment.

Sickness and absence from work

17.15 Sickness and absence from work may be governed by contractual terms and conditions and/or may be the subject of non-contractual practices and procedures. Regardless of the nature of these policies, it is important to ensure that they are non-discriminatory in design, and applied to workers who are sick or absent for whatever reason without discrimination of any kind. This is particularly important when a policy has discretionary elements such as decisions about stopping sick pay or commencing attendance management procedures.

17.16 To avoid discrimination, sickness and absence procedures should include clear requirements about informing the employer of sickness and providing medical certificates. They should also specify the rate and the maximum period of payment for sick pay.

17.17 In order to defend any claims of discrimination, it is advisable for employers to maintain records of workers' absences. Particular care is needed to ensure that sensitive medical information about workers is kept confidential and handled in accordance with the Data Protection Act 2018 and legislation applied or made under that Act.

17.18 When taking attendance management action against a worker, employers should ensure that they do not discriminate because of a protected characteristic. In particular, it will often be appropriate to manage disability, pregnancy and gender reassignment-related absences differently from other types of absence. Recording the reasons for absences should assist that process.

Disability-related absences

17.19 Employers are not automatically obliged to disregard all disability-related sickness absences, but they must disregard some or all of the absences by way of an adjustment if this is reasonable. If an employer takes action against a disabled worker for disability-related sickness absence, this may amount to discrimination arising from disability (see Chapter 5).

Example: During a six-month period, a man who has recently developed a long-term health condition has a number of short periods of absence from work as he learns to manage this condition. Ignoring these periods of disability-related absence is likely to be a reasonable adjustment for the employer to make. Disciplining this man because of these periods of absence will amount to discrimination arising from disability, if the employer cannot show that this is objectively justified.

17.20 Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so.

17.21 However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make.

Example: A woman who has a visual impairment needs work documents to be enlarged. Her employer fails to make arrangements for a reasonable adjustment to provide her with these. As a result, she has a number of absences from work because of eyestrain. After she has received full sick pay for four months, the employer is considering a reduction to half-pay in line with its sickness policy. It is likely to be a reasonable adjustment to maintain full pay as her absence is caused by the employer's delay in making the original adjustment.

17.22 Disabled workers may sometimes require time out during the working day to attend medical appointments or receive treatment related to their disability. On occasions, it may be necessary for them to attend to access needs such as wheelchair maintenance or care of working dogs. If, for example, a worker needs to take a short period of time off each week over a period of several months it is likely to be

reasonable to accommodate the time off.

17.23 However, if a worker needs to take off several days per week over a period of months it may not be reasonable for the employer to accommodate this. Whether or not it is reasonable will depend on the circumstances of both the employer and the worker.

Example: An employer allows a worker who has become disabled after a stroke to have time off for rehabilitation training. Although this is more time off than would be allowed to non-disabled workers, it is likely to be a reasonable adjustment. A similar adjustment may be reasonable if a disability gets worse or if a disabled worker needs occasional but regular long-term treatment.

Pregnancy-related absences

17.24 All pregnancy-related absences must be disregarded for the purposes of attendance management action. Workers who are absent for a pregnancy-related reason have no automatic right to full pay but should receive no less than the contractual sick pay that might be due for the period in question. However, employers have no obligation to extend contractual sick pay beyond what would usually be payable. Sickness absence associated with a miscarriage should be treated as pregnancy-related sickness. Pregnancy-related absence is covered in more detail in Chapter 8.

Example: A worker has been off work because of pregnancy complications since early in her pregnancy. Her employer has now dismissed her in accordance with the sickness policy which allows no more than 20 weeks' continuous absence. This policy is applied regardless of sex. The dismissal is unfavourable treatment because of her pregnancy and would be unlawful even if a man would be dismissed for a similar period of sickness absence, because the employer took into account the worker's pregnancy-related sickness absence in deciding to dismiss.

17.25 Pregnant employees are entitled to paid time off for antenatal care. Antenatal care can include medical examinations, relaxation and parenting classes.

Example: A pregnant employee has booked time off to attend a medical appointment related to her pregnancy. Her employer insists this time must be made up through flexi-time arrangements or her pay will be reduced to reflect the time off. This is unlawful: a pregnant employee is under no obligation to make up time taken off for antenatal appointments and an employer cannot refuse paid time off to attend such classes.

Absences related to gender reassignment

17.26 If a transgender person is absent from work because they propose to undergo, are undergoing or have undergone gender reassignment, it is unlawful to treat them less favourably than they would be treated if they were absent due to illness or injury, or – if reasonable – than they would be treated for absence for other reasons (see paragraphs 9.31 to 9.33).

Example: A worker undergoing gender reassignment has to take some time off for medical appointments and also for surgery. The employer records all these absences for the purposes of their attendance management policy. However, when another worker breaks his leg ski-ing the employer disregards his absences because 'it wasn't really sickness and won't happen again'. This indicates that the treatment of the transgender worker may amount to discrimination because the employer would have treated him more favourably if he had broken his leg than they treated him because of gender reassignment absences.

Absences related to in vitro fertilisation

17.27 There is no statutory entitlement to time off for in vitro fertilisation (IVF) or other fertility treatment. However, in responding to requests for time off from a woman undergoing IVF, an employer must not treat her less favourably than they treat, or would treat, a man in a similar situation as this could amount to sex discrimination. After a fertilised embryo has been implanted, a woman is legally pregnant and from that point is protected from unfavourable treatment because of her pregnancy, including pregnancy-related sickness. She would also be entitled to time off for antenatal care.

17.28 It is good practice for employers to treat sympathetically any request for time off for IVF or other fertility treatment, and consider adopting a procedure to cover this situation. This could include allowing women to take annual leave or unpaid leave when receiving treatment and designating a

member of staff whom they can inform on a confidential basis that that they are undergoing treatment.

Example: A female worker who is undergoing IVF treatment has to take time off sick because of its side effects. Her employer treats this as ordinary sickness absence and pays her contractual sick pay that is due to her. Had contractual sick pay been refused, this could amount to sex discrimination.

Example: Recently an employer agreed, as a one-off request, a week's annual leave for a male worker who wanted to undergo cosmetic dental surgery. Two months later, one of his female colleagues asks if she can take a week's annual leave to undergo IVF treatment. The employer refuses this request, even though the worker still has two weeks leave due to her. She may be able show that the employer's refusal to grant her request for annual leave for IVF treatment amounts to sex discrimination, by comparing her treatment to that of her male colleague.

Maternity, paternity, adoption and parental leave

17.29 When dealing with workers who request or take maternity, paternity, adoption or parental leave, employers should ensure that they do not discriminate against the worker because of a protected characteristic.

17.30 Detailed provisions dealing with maternity, paternity, adoption and parental leave and workers' rights during such leave are set out in other statutes and regulations including:

- the Management of Health and Safety at Work Regulations 2003;
- the Employment Act 2006;
- the Maternity Leave Regulations 2007;
- the Adoption Leave Regulations 2007;
- the Parental Leave (Disabled Child) Regulations 2007.

For copies of the legislation see https://www.gov.im/categories/working-in-the-isle-of-man/employment-rights/employment-legislation/
For more information, please see Chapter 8.

Annual leave

17.31 Annual leave policies and procedures must be applied without discrimination of any kind. It is particularly important for employers to avoid discrimination when dealing with competing requests for annual leave, or requests that relate to a worker's protected characteristic such as religion or belief.

17.32 The Annual Leave Regulations 2007 provide a minimum annual holiday entitlement of 4 weeks, which can include public and bank holidays; however, employers may offer workers more holiday than their minimum legal entitlement. The procedure in the Regulations for requesting annual leave and dealing with such requests may be replaced by agreement between the employer and worker. All policies and procedures for handling annual leave requests should be non-discriminatory in design and the employer must not refuse a request for annual leave because of a protected characteristic.

17.33 A policy leading to a refusal is also an application of a provision, criterion or practice. The policy could be indirectly discriminatory if it places the worker and people sharing the worker's characteristic at a particular disadvantage, unless the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

17.34 A worker may request annual leave for a religious occasion or to visit family overseas. To avoid discrimination, employers should seek to accommodate the request – provided the worker has sufficient holiday due to them and it is reasonable for them to be absent from work during the period requested.

Example: An Australian worker requests three weeks' leave to visit his family in Australia. He works for a large employer, whose annual leave policy normally limits periods of annual leave to a maximum of two weeks at any one time. The two-week limit could be indirectly discriminatory because of nationality, unless it can be objectively justified. In this case, the employer has sufficient staff to cover the additional week's leave. They operate the annual leave policy flexibly, and agree to allow the worker to take three weeks' leave to visit his family.

17.35 Many religions or beliefs have special periods of religious observance, festivals or holidays. Employers should be aware that some of these occasions are aligned with lunar phases. As a result, dates can change from year to year and may not become clear until quite close to the actual

day.

Example: Last year, a Sikh worker took annual leave on 1 and 2 March to celebrate Hola Mohalla. This year, he requests annual leave on 6th and 7th March to celebrate the same holiday. No other staff members in his department have requested leave on these dates. The employer refuses the request but says that the worker can take off the same days as he did last year. Festivals in Sikhism are based on the lunar calendar, so the dates on which they fall differ every year. It could be indirect discrimination for the employer to expect the worker to take annual leave on the same days every year, unless this can be objectively justified.

17.36 Employers who require everyone to take leave during an annual closedown should consider whether this creates a particular disadvantage for workers sharing a protected characteristic who need annual leave at other times, for example, during specific school holidays or religious festivals. This practice could amount to indirect discrimination, unless it can be objectively justified. Although the operational needs of the business may be a legitimate aim, employers must consider the needs of workers in assessing whether the closure is a proportionate means of achieving the aim (see paragraphs 4.26 to 4.33).

Avoiding discrimination – accommodating workers' needs

Dress and business attire

17.37 Many employers enforce a dress code or uniform with the aim of ensuring that workers dress in a manner that is appropriate to the business or workplace or to meet health and safety requirements. However, dress codes – including rules about jewellery – may indirectly discriminate against workers sharing a protected characteristic. To avoid indirect discrimination, employers should make sure that any dress rules can be justified as a proportionate means of achieving a legitimate aim such as health and safety considerations.

17.38 It is good practice for employers to consult with workers as to how a dress code may impact on different religious or belief groups, and whether any exceptions should be allowed – for example, for religious jewellery. The Equality and Human Rights Commission has issued guidance as to

the manifestation of religion or belief in the workplace. See *Religion or Belief in the Workplace: following recent European Court of Human Rights Judgments (2013)*.

Example: An employer introduces a 'no jewellery' policy in the workplace. This is not for health and safety reasons but because the employer does not like body piercings. A Sikh worker who wears a Kara bracelet as an integral part of her religion has complained about the rule. To avoid a claim of indirect discrimination, the employer should consider allowing an exception to this rule. A blanket ban on jewellery would probably not be considered a proportionate means of achieving a legitimate aim in these circumstances.

17.39 In some situations, a dress code could amount to direct discrimination because of a protected characteristic. It is not necessarily sex discrimination for a dress code to set out different requirements for men and women (for example, that men have to wear a collar and tie). However, it may be direct discrimination if a dress code requires a different overall standard of dress for men and for women; for example, requiring men to dress in a professional and business-like way but allowing women to wear more casual clothes. It could also be direct discrimination if the dress code is similar for both sexes but applied more strictly to men than women – or the other way round.

17.40 Where men are required to wear suits, it may be less favourable treatment to require women to wear skirts, if an equivalent level of smartness can be achieved by women wearing trousers, for example. If a male to female transgender person is prevented from wearing a skirt where other women are permitted to do so, this could amount to direct discrimination because of gender reassignment.

Example: An employer's dress code requires men to wear shirts and ties and women to 'dress smartly'. The dress code is not enforced as strictly against women as against men. A male worker has been suspended for continually failing to wear a tie, while no action is taken against female colleagues for wearing T-shirts. This could amount to direct discrimination because of sex.

17.41 Employers should also be aware of the duty to make reasonable adjustments to a dress code in order to avoid placing disabled workers at a substantial disadvantage. For example, in some cases uniforms made of certain fabrics may cause a reaction in workers with particular skin conditions.

Language in the workplace

17.42 A language requirement for a job may be indirectly discriminatory unless it is necessary for the satisfactory performance of the job. For example, a requirement that a worker have excellent English skills may be indirectly discriminatory because of race; if a worker really only needs a good grasp of English, the requirement for excellent English may not be objectively justified. A requirement for good spoken English may be indirectly discriminatory against certain disabled people, for example, deaf people whose first language is British Sign Language. (See Chapter 4 for more information on indirect discrimination).

Example: A supermarket insists that all its workers have excellent spoken English. This might be a justifiable requirement for those in customer-facing roles. However, for workers based in the stock room, the requirement could be indirectly discriminatory in relation to race or disability as it is less likely to be objectively justified.

17.43 In fulfilling the duty to make reasonable adjustments, employers may have to take steps to ensure that information is provided in accessible formats. This requirement is covered in more detail in paragraphs 6.6 and 6.31.

17.44 An employer might also wish to impose a requirement on workers to communicate in a common language – generally English. There is a clear business interest in having a common language in the workplace, to avoid misunderstandings, whether legal, financial or in relation to health and safety. It is also conducive to good working relations to avoid excluding workers from conversations that might concern them.

17.45 However, employers should make sure that any requirement involving the use of a particular language during or outside working hours, for example during work breaks, does not amount to unlawful discrimination. Blanket rules involving the use of a particular language may not be objectively justifiable as a proportionate means of achieving a legitimate aim. An employer who prohibits workers from talking casually to each other in a language they do not share with all colleagues, or uses occasions when this happens to trigger disciplinary or capability procedures or to impede workers' career progress, may be considered to be acting disproportionately.

17.46 English is generally the language of business in the Isle of Man and is likely to be the preferred means of communication in most workplaces, unless other languages are required for specific business reasons. There may be some circumstances where using a different language might be more practical for a line manager dealing with a particular group of workers with limited English language skills.

Example: A construction company employs a high number of Polish workers on one of its sites. The project manager of the site is also Polish and finds it more practical to speak Polish when giving instructions to those workers. However, the company should not advertise vacancies as being only open to Polish-speaking workers as the requirement is unlikely to be justified and could amount to indirect race discrimination.

17.47 Where the workforce includes people sharing a protected characteristic who experience disadvantage within the workplace because of limited English, employers could consider taking proportionate positive action measures to improve their communication skills. These measures might include providing:

- interpreting and translation facilities; for example, multilingual safety signs and notices, to make sure the workers in question understand health and safety requirements;
- English language classes to improve communication skills.

The provisions on positive action are explained in Chapter 12.

17.48 Inappropriate or derogatory language in the workplace could amount to harassment if it is related to a protected characteristic and is sufficiently serious. Workplace policies – if the employer has these in place – should emphasise that workers should not make inappropriate comments, jokes or use derogatory terms related to a protected characteristic (see Chapter 7 on harassment.)
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Example: A male worker has made a number of offensive remarks about a worker who is pregnant, such as ‘women are only good for making babies’. The employer’s equality policy makes it clear that inappropriate and offensive language, comments and jokes related to a protected characteristic can amount to harassment and may be treated as a disciplinary offence. The employer may bring disciplinary proceedings against the male worker for

making offensive comments that relate to the pregnant worker's sex.

Understanding a worker's needs

17.49 The employer's duty to make reasonable adjustments continues throughout the disabled worker's employment (see Chapter 6). It is good practice for an employer to encourage disabled workers to discuss their disability so that any reasonable adjustments can be put in place. Disabled workers may be reluctant to disclose their impairment and the Act does not impose any obligation on them to do so. An employer can help overcome any concerns a disabled worker may have in this regard by explaining the reasons why information is being requested (that is, to consider reasonable adjustments). The employer should also reassure the worker that that information about disability is held confidentially.

Example: An office worker has symptomatic HIV and does not wish to tell his employer. His symptoms get worse and he finds it increasingly difficult to work the required number of hours in a week. At his annual appraisal, he raises this problem with his line manager and discloses his medical condition. As a result, a reasonable adjustment is made and his working hours are reduced to overcome the difficulty.

17.50 Sometimes a reasonable adjustment will not succeed without the co-operation of other workers. To secure such co-operation it may be necessary for the employer, with the disabled worker's consent, to tell their colleague(s) in confidence about a disability which is not obvious. This disclosure may be limited to the disabled person's line manager or it may be appropriate to involve other colleagues, depending on the circumstances.

17.51 However, an employer should obtain a worker's consent before revealing any information about their disability. Employers need to be aware that they have obligations under the Data Protection Act 2018 and legislation applied or made under the Act in respect of personal data.

Example: A factory worker with cancer tells her employer that she does not want colleagues to know of her condition. As an adjustment she needs extra time away from work to receive treatment and to rest. Neither her colleagues nor her line manager need to be told the precise reasons for the extra leave but the line manager will need to know that the adjustment is required in order to implement it effectively.

17.52 If a worker is undergoing gender reassignment, it is good practice for the employer to consult with them sensitively about their needs in the workplace and whether there are any reasonable and practical steps the employer can take to help the worker as they undergo their gender reassignment process. For further information on gender reassignment, please refer to paragraphs 2.22 to 2.31 and 9.33.

Example: A worker will soon be undergoing gender reassignment treatment and the employer has accepted that they want to continue working throughout the transition process. To avoid unresolved questions about which toilet facilities the worker should use, their uniform and communications with other members of staff, the employer should arrange to discuss the situation sympathetically with the worker. The discussion could cover setting a date for using different facilities and uniform; the timescale of the treatment; any impact this may have on the worker's job and adjustments that could be made; and how the worker would like to address the issue of their transition with colleagues.

17.53 Consultation will also help an employer understand the requirements of a worker's religion or belief, such as religious observances. This will help avoid embarrassment or difficulties for those who need to practice their religion or belief at the workplace.

Example: A large employer is aware that their workers come from varied backgrounds. As part of their induction meeting, new workers are given the option of disclosing their religion or belief and of discussing whether there is anything the company can do to help them – such as allowing flexible breaks to accommodate prayer times. Workers do not have to disclose anything about their religion or belief if they do not want to. All information provided is kept confidential, unless the worker consents to its disclosure.

Quiet rooms

17.54 Some religions or beliefs require their followers to pray at specific times during the day. Workers may therefore request access to an appropriate quiet place (or prayer room) to undertake their religious observance.

Some workers with autism, which may be regarded as a disability under the Act, may also benefit from a quiet room.

17.55 The Act does not require employers to provide a quiet room. However, if a quiet place is available and allowing its use for prayer, contemplation or sensory management, does not cause problems for the business or for other workers, an employer with sufficient resources may be discriminating because of religion or belief by refusing such a request – especially if comparable facilities are provided for other reasons.

17.56 On the other hand, employers should be careful to avoid creating a disadvantage for workers who do not need a quiet room (for example, by converting the only rest room), as this might amount to indirect religion or belief discrimination. It would be good practice to consult with all workers before designating a room for prayer and contemplation and to discuss policies for using it, such as the wearing of shoes. If possible, employers may also wish to consider providing separate storage facilities for ceremonial objects.

Example: A large employer has one meeting room which is generally unused. There is also a separate rest room, and the employer has made provision for smokers by permitting them to use an open porch by the back entrance. A group of Muslim workers has asked the employer to convert the small meeting room into a quiet room. Refusing this request may amount to direct discrimination if the Muslim workers have been treated less favourably because of religion or belief, compared to non-Muslim workers.

Food and fasting

17.57 Some religions or beliefs have specific dietary requirements. If workers with such needs bring food into the workplace, they may need to store and heat it separately from other food. It is good practice for employers to consult their workforce on such issues and find a mutually acceptable way of accommodating such requirements.

Example: An orthodox Jewish worker in a small firm has a religious requirement that her food cannot come into direct contact with pork or indirect contact through items such as cloths or sponges. After discussion with staff, the employer allocates one shelf of a fridge for this worker's food, and separate cupboard space for the plates and cutlery that

she uses. They also introduce a policy that any food brought into the workplace should be stored in sealed containers.

17.58 Some religions require extended periods of fasting. Although there is no requirement under the Act, employers may wish to consider how they can support workers through a fasting period. However, employers should take care to ensure that, in doing so, they do not place unreasonable extra burdens on other workers. As well as potentially causing conflict in the workplace, this could amount to less favourable treatment because of religion or belief and give rise to claims of discrimination.

Example: A Muslim doctor is fasting for Ramadan which is an integral part of her religion. The ward manager, in consultation with the other doctors, has agreed to change the ward round so she does not have to see patients who may be eating breakfast during her fasting period. This adjustment to her duties does not amount to unfavourable treatment of non-Muslim staff members, so would not amount to direct discrimination.

Washing and changing facilities

17.59 An employer may require workers to change their clothing and/or shower for reasons of health and safety. Some religions or beliefs do not allow their adherents to undress or shower in the company of others. Insisting upon communal showers and changing facilities, even if segregated by sex, could constitute indirect discrimination as it may put at a particular disadvantage workers sharing a certain religion or belief whose requirement for modesty prevents them from changing their clothing in the presence of others, even others of the same sex. An employer would have to show that this provision, criterion or practice was objectively justified.

17.60 Some needs relating to religion or belief require no change to workplaces. For example, certain religions require people to wash before prayer, which can be done using normal washing facilities. It is good practice for employers to ensure that all workers understand the religion or belief-related observances of their colleagues, to avoid misunderstandings.

Breastfeeding

17.61 Although there is no legal right to take time off to breastfeed, wherever possible employers should try to accommodate workers who wish to do this. Breastfeeding at work is covered in more detail in Chapter 8.

Liability for discrimination outside the workplace

17.62 Employers are liable for prohibited conduct that takes place 'in the course of employment'. This may extend to discrimination and harassment occurring away from work premises or outside normal working hours where there is sufficient connection with work – for example, at team building days, social events to which all workers are invited, business trips or client events (see paragraph 10.41).

17.63 To avoid liability for discrimination and harassment outside the workplace, employers should consider taking steps such as: drafting disciplinary and equality policies that refer to acceptable behaviour outside the office; checking dietary requirements to ensure that all workers have appropriate food during work-related events; and making it clear to workers what is required of them to comply with acceptable standards of behaviour. Employers should also consider whether they need to make any reasonable adjustments to accommodate the needs of disabled workers.

Example: A worker aged 17 has a job in a telephone call centre for a bank. On Friday nights her team colleagues go to a local club to socialise. During this time they talk mainly about work-related issues. The team manager also buys drinks for the team member who has achieved the most sales that week. The worker cannot attend these events as the club has a strict 'over-18s only' policy; she feels excluded and undervalued. This treatment could amount to unjustifiable age discrimination. The manager should consider organising team social events somewhere that accepts under-18s.

Induction, training and development

Induction

17.64 It is important to make sure that induction procedures do not discriminate. Employers should ask themselves whether any changes are needed to remove the indirectly discriminatory effect of a provision, criterion or practice. They must also consider whether any reasonable adjustments are required to enable disabled workers to participate fully in any induction arrangements. In addition, employers may want to consider whether there are any proportionate positive action measures that would help remedy disadvantage experienced by workers sharing a protected characteristic (see also Chapter 12 on positive action).

Example: A worker with a hearing impairment is selected for a post as an engineer. He attends the induction course which consists of a video followed by a discussion. The video is not subtitled and thus the worker cannot participate fully in the induction. To avoid discrimination, the employer should have discussed with the worker what type of reasonable adjustment to the format of the induction training would enable him to participate.

Example: A worker with a learning disability finds it hard to assimilate the material in the employer's induction procedure at the same speed as a colleague who started on the same day. In relation to this worker's induction, it is likely to be a reasonable adjustment for the employer to provide more time, personal support and assistance, such as making available induction materials in Easy Read.

17.65 The induction process is also a good opportunity to make sure all new staff members are trained in the employer's equality policy and procedures. For more information on equality policies, see Chapter 18.

Training and development

17.66 Training and development opportunities, including training provided by a trade union to its members, should be made known to all relevant workers including those absent from the office for whatever reason (see paragraph 16.17 above).

Example: An employee who is on maternity leave asked to be kept updated about training opportunities, so her knowledge would be up to date when she returns to work. During her maternity leave, all other workers have been sent emails updating them on the latest training opportunities but she has not. Excluding this employee is unfavourable treatment and would amount to unlawful discrimination because of pregnancy and maternity.

17.67 However, it will not be appropriate for an employer to contact a worker who is absent for a disability-related reason if the employer has agreed to have limited contact.

17.68 To avoid discrimination, employers should ensure that managers and supervisors who select workers for training understand their legal responsibilities under the Act. It is advisable to monitor training applications and take-up by reference to protected characteristics, taking steps to deal with any significant disparities. Selection for training must be made without discrimination because of a protected characteristic.

Example: An employer has opened a new office overseas and is offering managers the chance of a six-month secondment at the new office to assist in the initial set up. They do not select any of the female managers with children who apply for the secondment, as they assume these women would miss their families and would not perform as well as other managers. This is likely to amount to direct discrimination because of sex.

17.69 Employers should be mindful of their duty to make reasonable adjustments in relation to training and development. For example, if a worker with a mobility impairment is expected to be attending a course, it is likely to be a reasonable adjustment for the employer to select a training venue with adequate disabled access. An employer may need to make training manuals, slides or other visual media accessible to a visually impaired worker (perhaps by having materials read out), or ensure that an induction loop is available for someone with a hearing impairment.

17.70 Employers should also consider whether opportunities for training are limited by any other potentially discriminatory factors. If food is provided at training events, employers should try to make sure that special dietary requirements are accommodated. If resources permit, training and development opportunities should be offered on a flexible basis, to accommodate those who work part-time, who have atypical working patterns or who cannot attend training on a particular day, for example, because of

conflict with a religious festival or a medical appointment.

17.71 Any criteria used to select workers for training should also be regularly reviewed to make sure they do not discriminate.

Example: An employer offers team leading training for staff who wish to develop management skills. Staff must have been with the company for over seven years to apply for a place on this course. This could be indirectly discriminatory because of age, as older staff are likely to have longer service than younger staff. The employer would have to show that the age criterion is objectively justifiable.

17.72 As explained in Chapter 12, employers may want to consider taking positive action to remedy disadvantage, meet different needs or increase the participation of people who share a protected characteristic. Providing training opportunities for a group which is under-represented in the workforce might be one way of doing this. It is also lawful for employers to provide training for disabled workers, regardless of whether the criteria for positive action are met.

Example: An education provider wishes to recruit secondary teachers. It has evidence that almost all of its teachers are recently qualified and under 40. The provider decides to take positive action measures to increase the participation of older teachers. It undertakes a targeted recruitment drive to attract older teachers and recruits several teachers who are returning to teaching after working in industry for many years. In order to update their skills, the provider then offers them additional training on current curriculum and teaching practices.

17.73 Workers who have been absent (for example, on maternity or adoption leave, or for childcare or disability-related reasons) may need additional training on their return to work. It is good practice for employers to liaise with the worker either before or shortly after their return to work to consider whether any additional training is needed.

Appraisals

17.74 An appraisal is an opportunity for a worker and their line manager to discuss the worker's performance and development. Appraisals usually review past behaviour and so provide an opportunity to reflect on recent performance. They also form an important part of a worker's continuing training and development programme.

17.75 The Act does not require employers to conduct appraisals, although it is good practice to do so if resources permit. Where a formal appraisal process is used, the starting point should be that employers take a consistent approach. In particular, they should ensure that in awarding marks for performance they do not discriminate against any worker because of a protected characteristic. This is especially important because low appraisal scores can have a negative impact on pay, bonuses, promotion and development opportunities.

Example: A woman with young children, who works part-time, is given the same performance targets as her full-time colleagues. She fails to meet the targets. When conducting her annual appraisal, her manager gives her a worse score than full-timers. Other part-time workers, who are mainly women, experience similar problems. This practice could amount to indirect sex discrimination; using identical targets regardless of working hours is unlikely to be objectively justified. This could also be considered as less favourable treatment of a part-time worker under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2007.

17.76 Employers should also be aware of the duty to make reasonable adjustments when discussing past performance. For example, they should consider whether performance would have been more effective had a reasonable adjustment been put in place, or introduced earlier. Appraisals may also provide an opportunity for workers to disclose a disability to their employer, and to discuss any adjustments that would be reasonable for the employer to make in future.

Example: An employer installed voice-activated software as a reasonable adjustment to accommodate the needs of a new manager with a visual impairment. The manager takes several weeks to familiarise herself with the software. After six months in post, the manager undergoes an appraisal. In assessing the manager's performance, it would be a reasonable adjustment for the employer to take account of the time the manager needed to become fully familiar with the software.

17.77 To avoid discrimination when conducting appraisals, employers are recommended to:

- make sure that performance is measured by transparent, objective and justifiable criteria using procedures that are consistently applied;
- check that, for all workers, performance is assessed

against standards that are relevant to their role;
- ensure that line managers carrying out appraisals receive training and guidance on objective performance assessment and positive management styles; and
- monitor performance assessment results to ensure that any significant disparities in scores apparently linked to a protected characteristic are investigated, and steps taken to deal with possible causes.

Promotion and transfer

17.78 Issues and considerations that arise on recruitment (see Chapter 16) can arise again in respect of promoting or transferring existing workers to new roles. It is unlawful for employers to discriminate against, victimise or harass workers in the way they make opportunities for promotion or transfer available or by refusing or deliberately failing to make them available. An employer may need to make reasonable adjustments to the promotion or transfer process to ensure that disabled workers are not substantially disadvantaged by the process for promotion or transfer or by the way the process is applied. For the availability of positive action in 'tie-break' situations, see paragraph 12.1 to 12.9 above.

17.79 Failure to inform workers of opportunities for promotion or transfer may be direct or indirect discrimination. To avoid discrimination, employers are advised to advertise all promotion and transfer opportunities widely throughout the organisation. This includes development or deputising opportunities or secondments that could lead to permanent promotion.

17.80 If an employer has an equal opportunities policy and/or recruitment policy and procedures, it would be good practice to ensure that these policies are followed when internal promotions or transfers are taking place. This can help ensure that that selection is based strictly on demonstrable merit. Unless a temporary promotion is absolutely necessary, employers should avoid bypassing the procedures they have adopted for recruiting other staff.

Example: An employer promotes a male worker to the position of section manager without advertising the vacancy internally. There are several women in the organisation who are qualified for the post and who could have applied if they had known about it. The decision not to advertise internally counts as a provision, criterion or practice and could amount to indirect discrimination: if

challenged, the employer would need to be able to objectively justify their decision. Recruiting the man could also amount to direct discrimination, as one or more of the women could argue they have been treated less favourably because of their sex.

17.81 Employers should consider whether it is really necessary to restrict applications for promotion and other development opportunities to staff at a particular grade or level. This restriction would operate as a provision, criterion or practice and, unless it can be objectively justified, could indirectly discriminate by putting workers sharing a protected characteristic at a particular disadvantage.

17.82 Employers must also ensure that women on maternity leave are informed of any jobs that become available and must enable them to apply if they wish to do so. Failure to do so may be unfavourable treatment, and thus could amount to discrimination because of pregnancy and maternity (see also Chapter 8).

17.83 Arrangements for promoting workers or arranging transfers must not discriminate because of disability – either in the practical arrangements relating to selection for promotion or transfer, or in the arrangements for the job itself. It is also important for employers to consider whether there are any reasonable adjustments that should be made in relation to promotion or transfer.

Example: A woman with a disability resulting from a back injury is seeking a transfer to another department. A minor aspect of the role she is seeking is to assist with unloading the weekly delivery van. She is unable to do this because of her disability. In assessing her suitability for transfer, the employer should consider whether reallocating this duty to someone else would be a reasonable adjustment to make.

17.84 Opportunities for promotion and transfer should be made available to all workers regardless of age. Different treatment because of age is only lawful if it can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraphs 3.36 to 3.44).

Example: An employer decides to impose a maximum age of 60 for promotion to the position of technical manager, for which additional training is required. In deciding whether this age restriction is objectively justifiable, the time and costs of training for the post would be relevant, taking into account that an internal candidate would probably need less training than a new recruit. Average staff turnover across all groups should also be considered. The need for a reasonable period of employment before retirement

might also be relevant.

17.85 It would be good practice for employers to build the following guidelines into any policies and procedures they may have relating to promotion and career development:

- If posts are advertised internally and externally, the same selection procedures and criteria should apply to all candidates.
- If appropriate – especially with larger employers – selection decisions based on performance assessments should be endorsed by the organisation's human resources department.

17.86 Employers should not make assumptions about the suitability of existing workers for promotion or transfer.

Example: An employer makes an assumption that a particular woman is unsuitable for promotion because she appears to be of childbearing age and he assumes she might want to have children in the near future. This would amount to direct discrimination because of sex.

Disciplinary and grievance matters

17.87 It is good practice for employers (irrespective of their size) to have procedures for dealing with grievances and disciplinary hearings together with appeals against decisions under these procedures. Where procedures have been put in place, they should not discriminate against workers either in the way they are designed or how the employer implements them in practice. More information about disciplinary and grievance procedures, including a worker's right to be accompanied by a trade union representative or fellow worker, can be found in the Government Code of Practice on Disciplinary and Grievance Procedures 2007.

17.88 An employer may in addition wish to introduce a separate policy designed specifically to deal with harassment. Such policies commonly aim to highlight and eradicate harassment whilst at the same time establishing a procedure for complaints, similar to a grievance procedure, with safeguards to deal with the sensitivities that allegations of harassment often bring.

Example: An employer has a procedure that allows a grievance relating to harassment to be raised with a designated experienced manager. This avoids the possibility of an allegation of harassment having to be raised with a line manager who may be the perpetrator of the harassment.

17.89 Employers should ensure that when conducting disciplinary and grievance procedures they do not discriminate against a worker because of a protected characteristic. For example, employers may need to make reasonable adjustments to procedures to ensure that they do not put disabled workers at a substantial disadvantage. Procedures might also need to be adapted to accommodate a worker at home on maternity leave.

Dealing with grievances

17.90 Employers must not discriminate in the way they respond to grievances. Where a grievance involves allegations of discrimination or harassment, it must be taken seriously and investigated promptly and not dismissed as 'over-sensitivity' on the part of the worker.

17.91 Wherever possible, it is good practice – as well as being in the interests of employers – to resolve grievances as they arise and before they become major problems. Grievance procedures can provide an open and fair way for complainants to make their concerns known, and for their grievances to be resolved quickly, without having to bring legal proceedings.

17.92 It is strongly recommended that employers properly investigate any complaints of discrimination. If a complaint is upheld against an individual co-worker or manager, the employer should consider taking disciplinary action against the perpetrator.

17.93 Whether or not the complaint of discrimination is upheld, raising it in good faith is a 'protected act' and if the worker is subject to any detriment because of having done so, this could amount to victimisation (see paragraphs 9.2 to 9.15).

Disciplinary procedures

17.94 Employers must not discriminate in the way they invoke or pursue a disciplinary process. A disciplinary process is a formal measure and should be followed fairly and consistently, regardless of the protected characteristics of any workers involved. Where a disciplinary process involves allegations of discrimination or harassment, the

matter should be thoroughly investigated and the alleged perpetrator should be given a fair hearing.

17.95 If a complaint about discrimination leads to a disciplinary process where the complaint proves to be unfounded, employers must be careful not to subject the complainant (or any witness or informant) to any detriment for having raised the matter in good faith. Such actions qualify as ‘protected acts’ and detrimental treatment amounts to victimisation if a protected act is an effective cause of the treatment.

Avoiding disputes and conflicts

17.96 To help avoid disputes and conflicts with and between workers with different protected characteristics, employers should treat their workers with dignity and respect and ensure workers treat each other in the same way. If the principle of dignity and respect is embedded into the workplace culture, it can help prevent misunderstandings and behaviour that may lead to prohibited conduct. It is good practice to have a clear policy on 'dignity and respect in the workplace', setting out workers' rights and responsibilities to each other.

17.97 It is also good practice, and in the interests of both employers and their workers, to try to resolve workplace disputes so as to avoid litigation. Employers should have different mechanisms in place for managing disputes, such as mediation or conciliation. Where it is not possible to resolve a dispute using internal procedures, it may be better to seek outside help.

17.98 Employers will sometimes have to deal with complaints about prohibited conduct that arise between members of staff. They can avoid potential conflicts by noticing problems at an early stage and attempting to deal with them by, for example, talking to the people involved in a non-confrontational way. It is important to encourage good communication between workers and managers in order to understand the underlying reasons for potential conflicts. Employers should have effective procedures in place for dealing with grievances if informal methods of resolving the issue fail.

17.99 There may be situations where an employer should intervene to prevent a worker discriminating against another worker or against another person to whom that employer has a duty under the Act (such as a customer). In these circumstances, it may be necessary to take disciplinary action against the worker who discriminates.

Chapter 18

Equality policies and practice in the workplace

Introduction

18.1 There is no formal statutory requirement in the Act for an employer to put in place an equality policy. However, a systematic approach to developing and maintaining good practice is the best way of showing that an organisation is taking its legal responsibilities seriously. To help employers and others meet their legal obligations, and avoid the risk of legal action being taken against them, it is recommended, as a matter of good practice, that they draw up an equality policy (also known as an equal opportunities policy or equality and diversity policy) and put this policy into practice.

18.2 This chapter describes why an employer should have an equality policy and how to plan, implement, monitor and review that policy.

Why have an equality policy?

18.3 There are a number of reasons why employers should have an equality policy. For example:

- it can give job applicants and workers confidence that they will be treated with dignity and respect;
- it can set the minimum standards of behaviour expected of all workers and outline what workers and job applicants can expect from the employer;
- it is key to helping employers and others comply with their legal obligations;
- it can minimise the risk of legal action being taken against employers and workers; and/or
- if legal action is taken, employers may use the equality policy to demonstrate to the Employment and Equality Tribunal that they take discrimination seriously and have taken all reasonable steps to prevent discrimination.

18.4 Equality policies and practices are often drivers of good

recruitment and retention practice. Information on these policies, as well as on equality worker network groups, on the organisation's website and/or in induction packs, send a very positive and inclusive signal encouraging people to apply to work for the organisation. This can indicate that the organisation seeks to encourage a diverse workforce and that, for example, applicants with any religion or belief and/or sexual orientation would be welcome in the organisation.

Example: For one organisation which is part of a multi-national corporation, being sensitive to local contexts is an important part of their operation. All their branches aim to reflect the local communities in which they operate in terms of their customers and their staff. In ethnically mixed areas, they aim to reflect this in the products they sell and in the mix of staff. This makes strong business sense since having a greater ethnic diversity of staff will attract more customers from that group.

Planning an equality policy

18.5 It is essential that a written equality policy is backed by a clear programme of action for implementation and continual review. It is a process which consists of four key stages: planning, implementing, monitoring and reviewing the equality policy.

18.6 The content and details of equality policies and practices will vary according to the size, resources and needs of the employer. Some employers will require less formal structures but all employers should identify a time scale against which they aim to review progress and the achievement of their objectives.

18.7 A written equality policy should set out the employer's general approach to equality and diversity issues in the workplace. The policy should make clear that the employer intends to develop and apply procedures which do not discriminate because of any of the protected characteristics, and which provide equality of opportunity for all job applicants and workers.

Planning the content of equality policies

18.8 Most policies will include the following:

- a statement of the employer's commitment to equal opportunity for all job applicants and workers;
- what is and is not acceptable behaviour at work (also referring to conduct near the workplace and at work-related social functions where relevant);
- the rights and responsibilities of everyone to whom the policy applies, and procedures for dealing with any concerns and complaints;
- how the policy may apply to the employer's other policies and procedures;
- how the employer will deal with any breaches of policy;
- who is responsible for the policy; and
- how the policy will be implemented and details of monitoring and review procedures.

Example: An organisation informs new recruits that abuse and harassment are unacceptable and staff who make offensive, racist or homophobic comments are automatically subject to disciplinary proceedings.

18.9 It will help an employer avoid discrimination if the equality policy covers all aspects of employment including recruitment, terms and conditions of work, training and development, promotion, performance, grievance, discipline and treatment of workers when their contract ends. Areas of the employment relationship are covered in more detail in this Code and cross-references to the relevant chapters/sections are provided below:

- monitoring (see paragraph 18.23 and Appendix 2)
- recruitment (see Chapter 16)
- terms and conditions of work (see Chapter 17)
- pay and benefits (see Chapter 14)
- leave and flexible working arrangements (see Chapter 17)
- the availability of facilities, such as quiet/prayer rooms and meal options in staff canteens (see Chapter 17)
- pensions (see Chapter 14)
- dress codes (see Chapter 17)
- training and development (see Chapter 17)
- promotion and transfer (see Chapter 17)
- grievance and disciplinary issues (see Chapter 17)
- treatment of employees when their contract ends (see Chapter 9)
- health and safety (see Chapter 8 in relation to pregnancy and maternity).

Planning an equality policy – protected characteristics

18.10 It is recommended that adopting one equality policy covering all protected characteristics is the most practical approach. Where separate policies are developed, such as a separate race equality or sex equality policy, they should be consistent with each other and with an overall commitment to promoting equality of opportunity in employment.

Implementing an equality policy

18.11 An equality policy should be more than a statement of good intentions; there should also be plans for its implementation. The policy should be in writing and drawn up in consultation with workers and any recognised trade unions or other workplace representatives, including any equality representatives within the workforce.

18.12 Employers will be of different sizes and have different structures but it is advisable for all employers to take the following steps to implement an equality policy:

- audit existing policies and procedures;
- ensure the policy is promoted and communicated to all job applicants and workers and agents of the employer; and
- monitor and review the policy.

Promotion and communication of an equality policy

18.13 Employers should promote and publicise their equality policy as widely as possible and there are a number of ways in which this can be done. Promoting the policy is part of the process of effective implementation and will help an employer demonstrate that they have taken all reasonable steps to prevent discrimination.

18.14 Employers may use a number of methods of communication to promote their policy, including:

- email bulletins
- intranet and/or website
- induction packs
- team meetings
- office notice boards
- circulars, newsletters

- cascade systems
- training
- handbooks
- annual reports.

18.15 These methods of communication may not be appropriate in all cases. Some workers, for example those in customer-facing or shop floor roles, may not have regular access to computers. Alternative methods of communication, such as notice boards and regular staff meetings, should also be considered. Employers must also consider whether reasonable adjustments need to be made for disabled people so that they are able to access the information.

18.16 Promoting and communicating an equality policy should not be a one-off event. It is recommended that employers provide periodic reminders and updates to workers and others such as contractors and suppliers. Employers should also periodically review their advertising, recruitment and application materials and processes.

Responsibility for implementing an equality policy

18.17 The policy should have the explicit backing of people in senior positions such as the chair, owner, chief executive, or board of directors. Senior management should ensure that the policy is implemented, resourced, monitored and reviewed, and that there is regular reporting on its effectiveness.

Example: When a large company introduces a new equality policy, they might ask an external training company to run training sessions for all staff, or they might ask their human resources manager to deliver training to staff on this policy.

Example: A small employer introducing an equality policy asks the managing director to devote a team meeting to explaining the policy to her staff and discussing why it is important and how it will operate.

Implementing an equality policy – training

18.18 Employers should ensure that all workers and agents understand the equality policy, how it affects them and the plans for putting it into practice. The best way to achieve this is by providing regular training.

18.19 Some workers may need more specific training, depending on what they do within the organisation. For example, line

managers and senior management should receive detailed training on how to manage equality and diversity issues in the workplace.

18.20 The training should be designed in consultation with workers, their workplace representatives and managers and by incorporating feedback from any previous training into future courses.

18.21 Employers should make sure in-house trainers are themselves trained before running courses for other workers. External trainers also need to be fully informed about the employer's policies, including their equality policy.

18.22 Training on the equality policy may include the following:

- an outline of the law covering all the protected characteristics and prohibited conduct;
- why the policy has been introduced and how it will be put into practice;
- what is and is not acceptable conduct in the workplace;
- the risk of condoning or seeming to approve inappropriate behaviour and personal liability;
- how prejudice can affect the way an employer functions and the impact that generalisations, stereotypes, bias or inappropriate language in day-to-day operations can have on people's chances of obtaining work, promotion, recognition and respect;
- the equality monitoring process (see paragraph 18.23 and Appendix 2).

Example: A large employer trains all their workers in the organisation's equality policy and the Equality Act 2017. They also train all occupational health advisers with whom they work to ensure that the advisers have the necessary expertise about the Act and the organisation's equality policy.

Monitoring and reviewing an equality policy

18.23 Equality monitoring enables an employer to find out whether their equality policy is working. For example, monitoring may reveal that:

- applicants with a particular religion or belief are not

selected for promotion;
- women are concentrated in certain jobs or departments;
- people from a particular ethnic group do not apply for employment or fewer apply than expected;
- older workers are not selected for training and development opportunities.

18.24 Equality monitoring is the process that employers use to collect, store and analyse data about the protected characteristics of job applicants and workers. Employers can use monitoring to:

- establish whether an equality policy is effective in practice;
- analyse the effect of other policies and practices on different groups;
- highlight possible inequalities and investigate their underlying causes;
- set targets and timetables for reducing disparities; and
- send a clear message to job applicants and workers that equality and diversity issues are taken seriously within the organisation.

Example: A large employer notices through monitoring that the organisation has been successful at retaining most groups of disabled people, but not people with mental health conditions. They act on this information by contacting a specialist organisation for advice about good practice in retaining people with mental health conditions.

Monitoring an equality policy – law and good practice

18.25 Public sector employers may find that monitoring assists them in carrying out their obligations under the public sector equality duty. For employers in the private sector, equality monitoring is not mandatory. However, it is recommended that all employers carry out equality monitoring. The methods used will depend on the size of the organisation and can be simple and informal. Smaller organisations may only need a simple method of collecting information about job applicants and workers. Larger organisations are likely to need more sophisticated procedures and computerised systems to capture the full picture across the whole of their organisation.

18.26 Monitoring will be more effective if workers (or job applicants) feel comfortable about disclosing personal information. This is more likely to be the case if the employer explains the purpose of the monitoring and if the

workers or job applicants believe that the employer is using the information because they value the diversity of their workforce and want to use the information in a positive way.

18.27 Employers must take full account of the Data Protection Act 2018 and legislation applied or made under that Act when they collect, store, analyse and publish data.

Monitoring an equality policy – key areas

18.28 Employers should monitor the key areas of the employment relationship including:

- recruitment and promotion;
- pay and remuneration;
- training;
- appraisals;
- grievances;
- disciplinary action; and
- dismissals and other reasons for leaving.

18.29 Employers who are carrying out equality monitoring will find it useful to compare progress over a period of time and against progress made by other employers in the same sector or industry.

Monitoring an equality policy – reporting back

18.30 It is important for employers to communicate on a regular basis to managers, workers and trade union representatives on the progress and achievement of objectives of the equality policy. Employers should also consider how the results of any monitoring activity can be communicated to the workforce. However, care should be taken to ensure that individuals are not identifiable from any reports.

Monitoring an equality policy – taking action

18.31 Taking action based on any findings revealed by the monitoring exercise is vital to ensure that an employer's equality policy is practically implemented. There are a number of steps employers can take, including:

- examine decision-making processes, for example recruitment and promotion;
- consider whether training or further guidelines are required on how to avoid discrimination;

- consider whether any positive action measures may be appropriate (see Chapter 12);
- work with network groups and trade union equality representatives to share information and advice;
- set targets on the basis of benchmarking data and develop an action plan.

Reviewing an equality policy and other employment policies

18.32 It is good practice for employers to keep both their equality policy and all other policies and procedures (such as those listed below) under regular review at least annually and to consider workers' needs as part of the process.

18.33 Policies which should be reviewed in light of an employer's equality policy might include:

- recruitment policies;
- leave and flexible working arrangements;
- retirement policies;
- health and safety, for example, emergency evacuation procedures;
- procurement of equipment, IT systems, software and websites;
- pay and remuneration;
- grievance policies, including harassment and bullying;
- disciplinary procedure;
- appraisal and performance-related pay systems
- sickness absence policies;
- redundancy and redeployment policies;
- training and development policies; and
- employee assistance schemes offering financial or emotional support.

18.34 Part of the review process may entail employers taking positive action measures to alleviate disadvantage experienced by workers who share a protected characteristic, meet their particular needs, or increase their participation in relation to particular activities (see Chapter 12). Employers must also ensure they make reasonable adjustments where these are required by individual disabled workers. The review process can help employers to consider and anticipate the needs of disabled workers (see Chapter 6).

Chapter 19

Termination of employment

Introduction

19.1 The employment relationship can come to an end in a variety of ways and in a range of situations. A worker may resign under normal circumstances, or resign in response to the employer's conduct and treat the resignation as a constructive dismissal. On the other hand, an employer may dismiss a worker, for example, for reasons of capability, conduct or redundancy. The Act makes it unlawful for an employer to discriminate against or victimise a worker by dismissing them (see paragraphs 10.11 and 10.13 to 10.16).

19.2 This chapter focuses on termination of employment by the employer, including in redundancy situations. It explains how to avoid discrimination in decisions to dismiss and in procedures for dismissal.

Terminating employment

19.3 Those responsible for deciding whether or not a worker should be dismissed should understand their legal obligations under the Act. They should also be made aware of how the Act might apply to situations where dismissal is a possibility. Employers can help avoid discrimination if they have procedures in place for dealing with dismissals and apply these procedures consistently and fairly. In particular, employers should take steps to ensure the criteria they use for dismissal – especially in a redundancy situation – are not indirectly discriminatory (see paragraph 19.11 below).

19.4 It is also important that employers ensure they do not dismiss a worker with a protected characteristic for performance or behaviour which would be overlooked or condoned in others who do not share the characteristic.

Example: A Muslim worker is dismissed for failing to meet her set objectives, which form a part of her annual performance appraisal, in two consecutive years. However, no action is taken against a worker of the Christian faith, who has also failed to meet her objectives over the same

period of time. This difference in treatment could amount to direct discrimination because of religion or belief.

19.5 Where an employer is considering dismissing a worker who is disabled, they should consider what reasonable adjustments need to be made to the dismissal process (see Chapter 6). In addition, the employer should consider whether the reason for dismissal is connected to or in consequence of the worker's disability. If it is, dismissing the worker will amount to discrimination arising from disability unless it can be objectively justified. In these circumstances, an employer should consider whether dismissal is an appropriate sanction to impose.

Example: A disabled worker periodically requires a limited amount of time off work to attend medical appointments related to the disability. The employer has an attendance management policy which results in potential warnings and ultimately dismissal if the worker's absence exceeds 20 days in any 12-month period. A combination of the worker's time off for disability-related medical appointments and general time off for sickness results in the worker consistently exceeding the 20 day limit by a few days. The worker receives a series of warnings and is eventually dismissed. This is likely to amount to disability discrimination.

19.6 Based on the facts in the example above, it is very likely to have been a reasonable adjustment for the employer to have ignored the absences arising out of the worker's disability or have increased the trigger points that would invoke the attendance policy. By making one or both of these adjustments, the employer could have avoided the possibility of claims for both a failure to make adjustments and discrimination arising from disability.

19.7 Employers must not discriminate against a transgender worker when considering whether to dismiss the worker for absences or other conduct because of gender reassignment (see paragraphs 9.31 to 9.33). To avoid discrimination because of gender reassignment when considering the dismissal of a transgender worker, employers should make provision within their disciplinary policy for dealing with such dismissals.

Example: A transgender worker who experiences gender dysphoria and is considering gender reassignment takes time off from work because of his condition. The employer's attendance management policy provides that absence exceeding eight days or more in a 12-month rolling period will trigger the capability procedure. As the worker has had over eight days off, the employer invokes

the procedure and consequently decides to dismiss him. However, over a previous 12-month rolling period, the worker was absent from work for more than eight days with various minor illnesses. The employer took no action against the worker because they viewed these absences as genuine. The dismissal could amount to an unlawful dismissal because of gender reassignment.

Dismissal for reasons of capability and conduct

19.8 As noted in Chapter 17, employers must not discriminate against or victimise their workers in how they manage capability or conduct issues. To avoid discrimination in any disciplinary decision that leads to a dismissal (or could lead to a dismissal after a subsequent disciplinary matter), employers should have procedures in place for managing capability and conduct issues. They should apply these procedures fairly and in a non-discriminatory way.

Example: A white worker and a black worker are subjected to disciplinary action for fighting. The fight occurred because the black worker had made derogatory remarks about the white worker. The employer has no disciplinary policy and consequently does not investigate the matter. Instead, the employer decides to dismiss the white worker without notice and give the black worker a final written warning. This could amount to a discriminatory dismissal because of race. Had the employer had a disciplinary procedure in place and applied it fairly, they could have avoided a discriminatory outcome.

19.9 Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or their conduct, they must consider whether any reasonable adjustments need to be made to the performance management or dismissal process which would help improve the performance of the worker or whether they could transfer the worker to a suitable alternative role.

How can discrimination be avoided in capability and conduct dismissals?

19.10 To avoid discrimination when terminating employment, an employer should, in particular:

- apply their procedures for managing capability or conduct fairly and consistently;

- ensure that any decision to dismiss is made by more than one individual, and on the advice of the human resources department (if the employer has one);
- keep written records of decisions and reasons to dismiss;
- monitor all dismissals by reference to protected characteristics (see paragraph 18.28 and Appendix 2); and
- encourage leavers to give feedback about their employment; this information could contribute to the monitoring process.

Redundancy

19.11 A redundancy amounts to a dismissal and it is therefore unlawful for an employer to discriminate against or victimise a worker in a redundancy situation. A guide to redundancies is available from the Manx Industrial Relations Service.

19.12 To avoid discrimination, an employer should, in consultation with any recognised trade union, adopt a selection matrix containing a number of separate selection criteria rather than just one selection criterion, to reduce the risk of any possible discriminatory impact.

19.13 Employers should ensure that the selection criteria are objective and do not discriminate directly or indirectly. Many of the selection criteria used in redundancy situations carry a risk of discrimination.

19.14 For example, 'last in, first out' may amount to indirect age discrimination against younger employees; indirect sex discrimination against women who may have shorter service due to time out for raising children; or indirect race discrimination where an employer might have only recently adopted policies that have had the effect of increasing the proportion of employees from ethnic minority backgrounds.

19.15 However, used as one criterion among many within a fair selection procedure, 'last in, first out' could be a proportionate means of achieving the legitimate aim of rewarding loyalty and creating a stable workforce. If it is the only or determinant selection criterion, or given disproportionate weight within the selection matrix, it could lead to discrimination.

Example: An employer wishing to make redundancies

adopts a selection matrix which includes the following criteria: expertise/knowledge required for posts to be retained; disciplinary records; performance appraisals; attendance and length of service. Each person in the pool of employees who are potentially redundant is scored against each criterion from 1 to 4 points on a range of poor to excellent. There is provision in the matrix for deducting points for episodes of unauthorised absence in the prescribed period. Points are also added for length of service. Although length of service does have the potential to discriminate, in this redundancy selection process it is not obviously dominant or necessarily determinative of who will be selected for redundancy. In this context, length of service is likely to be an objectively justifiable criterion.

19.16 'Flexibility' – for example, willingness to relocate or to work unsocial hours, or ability to carry out a wide variety of tasks – may amount to discrimination because of (or arising from) disability or because of sex.

19.17 When setting criteria for redundancy selection, employers should consider whether any proposed criterion would adversely impact upon a disabled employee. If so, the employer will need to consider what reasonable adjustments will be necessary to avoid such discriminatory impact.

Example: A call centre re-tenders for a large contract and has to reduce its price to secure the work in the face of low-cost competition from overseas. The employer therefore decides that attendance records are a particularly important selection criterion for redundancy. This has the potential to disadvantage disabled employees who require additional time off for medical treatment. It is likely to be a reasonable adjustment to discount some disability-related sickness absence when assessing attendance as part of the redundancy selection exercise.

When should employers offer suitable alternative employment?

19.18 During a redundancy exercise, if alternative vacancies exist within the employer's organisation or with an associated employer, these should be offered to potentially redundant employees using criteria which do not unlawfully discriminate.

19.19 However, where there is a potentially redundant female employee on ordinary or additional maternity leave, she is entitled to be offered any suitable available vacancy with the employer, their successor or any associated employer. The offer must be of a new contract taking effect

immediately on the ending of the worker's previous contract and must be such that:

- the work is suitable and appropriate for her to do; and
- the capacity, place of employment and other terms and conditions are not substantially less favourable than under the previous contract.

Example: A company decides to combine their two offices in Douglas. A new organisation structure is drawn up which involves a reduction in headcount. The company intends that all employees should have the opportunity to apply for posts in the new structure. Those unsuccessful at interview will be made redundant. At the time this is implemented, one of the existing members of the team is on ordinary maternity leave. As such, she has a priority right to be offered a suitable available vacancy in the new organisation without having to go through the competitive interview process.

Appendices

Appendix 1

The meaning of disability

1. This Appendix is included to aid understanding about who is covered by the Act. Government guidance on determining questions relating to the definition of disability is available in the Equality Act 2017 (Disability) Regulations 2019 and the document 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'.

When is a person disabled?

2. A person has a disability if they have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

3. However, special rules apply to people with some conditions such as progressive conditions (see paragraph 21 of this Appendix) and some people are automatically deemed disabled for the purposes of the Act (see paragraphs 19 - 21).

What about people who have recovered from a disability?

4. People who have had a disability within the definition are protected from discrimination even if they have since recovered, although those with past disabilities are not covered in relation to section 149 (improvements to let dwelling houses).

What does 'impairment' cover?

5. It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

6. The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

What if a person has no medical diagnosis?

7. There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause.

What is a 'substantial' adverse effect?

8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. **s.3(2)**

9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

What is a 'long-term' effect?

11. A long-term effect of an impairment is one: **Sch.1 para. 2(1)**

- which has lasted at least 12 months; or
- where the total period for which it lasts is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected.

12. Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, and the effects of temporary infections, from which a person would be likely to recover within 12 months.

What if the effects come and go over a period of time?

13. If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur. **Sch.1 para 2(2)**

What are 'normal day-to-day activities'?

14. They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

15. Day-to-day activities thus include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self. Normal day-to-day activities also encompass the activities which are relevant to working life.

What about treatment?

16. Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is, the impairment has been cured). **Sch.1 para. 5(1)**

Does this include people who wear spectacles?

17. No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered. **Sch.1 para. 5(3)(a)**

Are people who have disfigurements covered?

18. People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities. However, they do need to meet the long-term requirement. **Sch.1 para. 3(1)**

Are there any other people who are automatically treated as disabled under the Act?

19. Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. **Sch.1 para. 6**

20. In some circumstances, people who have a sight impairment are automatically treated as disabled under Regulations made under the Act. **Equality Act 2017 (Disability) Regulations 2019 Reg 8**

What about people who know their condition is going to get worse over time?

21. Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition they will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment might well have a substantial adverse effect on such ability in the future. This applies provided that the effect meets the long-term requirement of the definition. **Sch.1 para. 8**

Appendix 2

Monitoring – additional information

What to monitor?

1. It is recommended that employers consider monitoring the list of areas below. This list is not exhaustive and an employer, depending on its size and resources, may wish to consider monitoring additional areas.

Recruitment

- Sources of applications for employment
- Applicants for employment
- Those who are successful or unsuccessful in the short-listing process
- Those who are successful or unsuccessful at test/assessment stage
- Those who are successful or unsuccessful at interview

During employment

- Workers in post
- Workers in post by type of job, location and grade
- Applicants for training
- Workers who receive training
- Applicants for promotion and transfer and success rates for each
- Time spent at a particular grade/level
- Workers who benefit or suffer detriment as a result of performance assessment procedures
- Workers involved in grievance procedures
- Workers who are the subject of disciplinary procedures

Termination of employment

- Workers who cease employment
- Dismissals for gross misconduct
- Dismissals for persistent misconduct
- Dismissals for poor performance
- Dismissals for sickness
- Redundancies
- Retirement
- Resignation
- Termination for other reasons

Considering categories

2. It is recommended that employers ask job applicants and workers to select the group(s) they want to be associated with from a list of categories.

3. Set out below are some of the issues to consider when monitoring particular protected characteristics.

Age

4. Monitoring age may not initially appear as controversial as some of the other protected characteristics.
The following age bands might provide a useful starting point for employers monitoring the age of job applicants and workers:

- 16-17
- 18-21
- 22-30
- 31-40
- 41-50
- 51-60
- 61-65
- 66-70
- 71+

Disability

5. Disclosing information about disability can be a particularly sensitive issue. Monitoring will be more effective if job applicants and workers feel comfortable about disclosing information about their disabilities. This is more likely to be

the case if employers explain the purpose of monitoring and job applicants and workers believe that the employer genuinely values disabled people and is using the information gathered to create positive change. Asking questions about health or disability before the offer of a job is made or a person is placed in a pool of people to be offered a vacancy is not unlawful under the Act where the purpose of asking such questions is to monitor the diversity of applicants (see paragraphs 10.21 to 10.39).

Example: Through monitoring of candidates at the recruitment stage a company becomes aware that, although several disabled people applied for a post, none were short-listed for interview. On the basis of this information, they review the essential requirements for the post.

6. Some employers choose to monitor by broad type of disability to understand the barriers faced by people with different types of impairment.

Example: A large employer notices through monitoring that the organisation has been successful at retaining most groups of disabled people, but not people with mental health conditions. They act on this information by contacting a specialist organisation for advice about good practice in retaining people with mental health conditions.

Race

7. When employers gather data in relation to race, a decision should be made as to which ethnic categories to use.

8. Subgroups are intended to provide greater choice to encourage people to respond. Sticking to broad headings may otherwise hide important differences between subgroups and the level of detail will provide employers with greater flexibility when analysing the data. Employers may wish to add extra categories to the recommended subcategories of ethnic categories. However, this should be considered carefully.

9. Employers should be aware that the way people classify themselves can change over time. It may therefore become necessary to change categories.

Religion and belief

10. Monitoring religion and belief may help employers understand workers' needs (for example, if they request leave for religious festivals) and ensure that staff turnover does not reflect a disproportionate number of people from specific religion or beliefs.

Sex

11. As well as the male and female categories, employers should consider whether to monitor for part-time working and for staff with caring responsibilities, including child-care, elder-care or care for a spouse or another family member. Both groups are predominantly women at a national level and are likely to be so for many employers as well.

Sexual orientation

12. Sexual orientation (and sexuality) may be considered to be a private issue. However, it is relevant in the workplace, particularly where discrimination and the application of equality policies, and other policies, are concerned. The way in which the question is asked is very important, particularly if employers are to ensure that the monitoring process does not create a further barrier.

13. The recommended way to ask job applicants and workers about their sexual orientation is outlined below:

What is your sexual orientation?

- Bisexual
- Gay man
- Gay woman/lesbian
- Heterosexual/straight
- Other
- Prefer not to say

14. Some employers, as an alternative, provide one option ('gay/lesbian') rather than the two options above, and then cross-reference the results of their data on gender in order to examine differences in experiences between gay men and gay woman.

15. It also acknowledges that some women identify themselves as gay rather than as lesbians. The option of 'other' provides an opportunity for staff to identify their sexual orientation in another way if the categories are not suitable.

16. Employers should note that transgender or transgender status should not fall within the section on sexual orientation. It should instead have a section on its own (see paragraph 21 below).

17. In some monitoring exercises, for example, staff satisfaction surveys, it may be appropriate to ask a further question about how open an employee is about their sexual orientation:

If you are lesbian, gay or bisexual, are you open about your sexual orientation (Yes, Partially, No)

- At home
- With colleagues
- With your manager
- At work generally

The results from the above question may indicate wider organisational issues which need to be addressed.

Transgender status

18. Monitoring numbers of transgender staff is a very sensitive area and opinion continues to be divided on this issue. While there is a need to protect an individual's right to privacy, without gathering some form of evidence, it may be difficult to monitor the impact of policies and procedures on transgender people or employment patterns such as recruitment, training, promotion or leaving rates.

19. Because many transgender people have had negative experiences in the workplace, many may be reluctant to disclose or may not trust their employers fully. (In order to obtain more reliable results, some employers have chosen to conduct monitoring through a neutral organisation under a guarantee of anonymity).

20. If employers choose to monitor transgender staff using their own systems, then privacy, confidentiality and anonymity should be paramount. For example, diversity statistics should not be linked to IT-based personnel records that indicate grade or job title, as the small number of transgender workers in an organisation may be identified by these or other variables, compromising confidentiality.

21. Employers should note that it is important to recognise that transgender people will usually identify as men or women, as well as transgender people. In light of this, it is not appropriate to offer a choice between identifying as male, female or transgender.

Appendix 3

Making reasonable adjustments to work premises – legal considerations

Introduction

1. In Chapter 6 it was explained that one of the situations in which a duty to make reasonable adjustments may arise is where a physical feature of premises occupied by an employer places a disabled worker at a substantial disadvantage compared with people who are not disabled. In such circumstances the employer must consider whether any reasonable steps can be taken to overcome that disadvantage. Making physical alterations to premises may be a reasonable step for an employer to have to take. This appendix addresses the issues of how leases and other legal obligations affect the duty to make reasonable adjustments to premises**.**

What happens if a binding obligation other than a lease prevents a building being altered?

2. An employer may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage, charge or restrictive covenant) under which they cannot alter the premises without someone else's consent.

3. In these circumstances, the Act provides that it is always reasonable for the employer to have to request that consent, but that it is never reasonable for the employer to have to make an alteration before having obtained that consent. **Sch. 19 (2)**

What happens if a lease says that

certain changes to premises cannot be made?

4. Special provisions apply where an employer occupies premises under a lease, the terms of which prevent them from making an alteration to the premises. **Sch. 19, para. 3**

5. In such circumstances, if the alteration is one which the employer proposes to make in order to comply with a duty of reasonable adjustment, the Act enables the lease to be read as if it provided: **Sch. 19, para. 3(3) & Equality Act 2017 (Disability) Regs 2019 ('EADR')**

   - for the employer to make a written application to the landlord for that consent;
   - for the landlord not to withhold the consent unreasonably;
   - for the landlord to be able to give consent subject to reasonable conditions; and
   - for the employer to make the alteration with the written consent of the landlord.

6. If the employer fails to make a written application to the landlord for consent to the alteration, the employer will not be able to rely upon the fact that the lease has a term preventing them from making alterations to the premises to defend their failure to make an alteration. In these circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the employer to have made the alteration. **Sch. 19, para. 4 & EADR**

7. Whether withholding consent will be reasonable or not will depend on the specific circumstances. **Regs. 13 & 14 & EADR**

8. For example, if a particular adjustment is likely to result in a substantial permanent reduction in the value of the landlord's interest in the premises, the landlord is likely to be acting reasonably in withholding consent. The landlord is also likely to be acting reasonably if it withholds consent because an adjustment would cause significant disruption or inconvenience to other tenants (for example, where the premises consist of multiple adjoining units).

9. A trivial or arbitrary reason would almost certainly be unreasonable. Many reasonable adjustments to premises will not harm the landlord's interests and so it would generally be unreasonable to withhold consent for them.

10. In any legal proceedings on a claim involving a failure to make a reasonable adjustment, the disabled person **Sch. 19, para. 5**

concerned or the employer may ask the Employment and Equality Tribunal to direct that the landlord be made a party to the proceedings. The Tribunal will grant that request if it is made before the hearing of the claim begins. It may refuse the request if it is made after the hearing of the claim begins. The request will not be granted if it is made after the Tribunal has determined the claim.

11. Where the landlord has been made a party to the proceedings, the Employment and Equality Tribunal may determine whether the landlord has refused to consent to the alteration, or has consented subject to a condition and in each case whether the refusal or condition was unreasonable.

12. If the Employment and Equality Tribunal finds that the refusal or condition is unreasonable it can:

- make an appropriate declaration;
- make an order authorising the employer to make a specified alteration (subject to any conditions); or
- order the landlord to pay compensation to the disabled person.

13. If the Tribunal orders the landlord to pay compensation, it cannot also order the employer to do so.

What about the need to obtain statutory consent for some building changes?

14. An employer might have to obtain statutory consent before making adjustments involving changes to premises. Such consents include planning approval, building regulations approval, registered building consent, Manx Museum and National Trust notice and fire regulations approval. The Act does not override the need to obtain such consents.

15. Employers should plan for and anticipate the need to obtain consent to make a particular adjustment. It might take time to obtain such consent, but it could be reasonable to make an interim or other adjustment – one that does not require consent – in the meantime.

16. Employers should remember that even where consent is not given for removing or altering a physical feature, they still have a duty to make all the adjustments that are reasonable to have to make to remove any substantial disadvantage faced by the disabled worker.