

*Jersey Discrimination
in Employment
Guide*

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Jersey discrimination in employment guide

Disclaimer

This guide is a high-level overview summary of discrimination law in Jersey. It is not intended to cover all aspects of each topic nor is it intended to refer to all possible examples of particular types of discrimination, as every case will be entirely fact specific. It has been designed to highlight issues and provide general commentary on each topic. It is not intended to be legal advice and should not be relied upon as such.

Introduction

The Discrimination (Jersey) Law 2013 (the “**Law**”) has been in force since 1 September 2014 and prohibits discrimination in employment, education, goods and services, clubs and premises. This guide focuses on discrimination in employment and provides a high-level overview of the Law, together with worked examples. It details the different types of discrimination, explores who is liable, explains how to make a complaint and outlines the remedies available. We also define the seven characteristics on the grounds of which it is unlawful to discriminate, which are age, disability, gender reassignment, pregnancy and maternity, race, sex, and sexual orientation (the “**Protected Characteristics**”).

In summary, the Law applies to all Jersey employers, regardless of their size, and covers each stage of the employment life cycle from recruitment through to dismissal and beyond. For example, providing references. Discriminatory acts are prohibited against employees, partners in a partnership, vocational trainees and apprentices, agency workers and volunteers. For the purposes of this guide, we will be focused on the employment relationship only and will refer to employers and employees. The Law prohibits discrimination in relation to any of the Protected Characteristics (defined below) in respect of:

- **selection for employment:**
 - the arrangements made for the purposes of determining who should be offered employment;
 - the determination of who is offered employment; or
 - the basis on which that employment is offered.
- **employees:**
 - the terms and conditions offered to an employee;
 - the denial or limitation of access to opportunities for promotion, transfer, training or other benefit;
 - the dismissal of an employee;
 - the selection of an employee for redundancy; or
 - subjecting an employee to any other detriment.
- **contract workers:**
 - the terms and conditions offered to a contract worker;
 - allowing or not allowing the worker to work;
 - denying a worker access to any benefits associated with the work undertaken; or
 - subjecting them to any other detriment.

Protected Characteristics

The Law prohibits discrimination against persons on the basis of seven specific Protected Characteristics.

The specific characteristics protected under the Law include:

- **age:** where a person is of a particular age group;
- **disability:** where a person has one or more long-term (i.e. six months or more) physical, mental, intellectual or sensory impairments which can adversely affect their ability to engage or participate in an activity;
- **gender reassignment:** where a person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of gender reassignment by changing the person's physiological or other attributes that are associated with a particular gender;
- **pregnancy and maternity:** where a person is pregnant, has been pregnant, has recently given birth, is breastfeeding or is on maternity leave;
- **race:** this includes colour, nationality, national origin (including being of Jersey origin) and ethnic origin. Reference to a person who has a particular Protected Characteristic is a reference to a person of a particular racial group;
- **sex:** a man, a woman or a person who has intersex status (i.e. having physical, chromosomal, hormonal or genetic features that are neither wholly male nor female, a combination of male or female, or neither male nor female); and
- **sexual orientation:** sexual orientation towards people of the same sex, different sex or both sexes.

Under the enabling legislation, there is scope for further characteristics to be introduced in the future. These may include characteristics which are protected in other jurisdictions (e.g. the UK). For example, marriage and civil partnership, religion or belief.

Types of discrimination

The Law prohibits four kinds of discrimination:

- direct discrimination;
- indirect discrimination;
- victimisation; and
- harassment.

The following explains each of these forms of discrimination and how they apply to each of the Protected Characteristics.

Direct discrimination

A person directly discriminates against another person (the “**subject**”) if, because of a Protected Characteristic, that person treats the subject less favourably than the person treats or would treat others. In an employment context, an employee will be directly discriminated against if, because of a Protected Characteristic, the employer, or any of its employees or agents, treats that employee less favourably than it treats or would treat other employees.

For an employee to show that they have been treated less favourably, they need to compare themselves to other employees who do not have the same Protected Characteristic but whose circumstances are

not materially different to the employee. This is known as identifying a comparator. There is, however, no requirement to find an actual comparator, a hypothetical comparator will suffice, as the comparison is focused on how the employer treats or would treat other employees when compared to the subject.

Direct discrimination can occur in three ways:

- **ordinary discrimination:** where an employee is treated differently because of an actual Protected Characteristic they possess;
- **discrimination by perception:** where an employee is treated differently because of a Protected Characteristic other people think the employee possesses, regardless of whether the perception is correct; or
- **discrimination by association:** where an employee is treated differently because of a Protected Characteristic possessed by a person they are associated with. For example, if a non-disabled employee is treated less favourably because they have a disabled child or refusing to promote an employee because their partner is black.

Case law has determined that the Protected Characteristic must be more than a merely trivial factor in the treatment complained of, and that the discriminator's intention or motive is irrelevant.

The following outlines worked examples of direct discrimination in relation to each Protected Characteristic.

Age

The Protected Characteristic of 'age' refers to circumstances where a person is of a particular age group (whether old or young).

Examples of direct age discrimination include not employing a person because they are considered to be too old or too young, forcing an employee to retire at a certain age or engaging in any conduct which results in the forced retirement of an employee. It would also include refusing an older employee training opportunities on the basis that the business won't receive the long-term benefits of the investment.

Age discrimination can be objectively justified by an employer by demonstrating that the discriminatory act (e.g. forced retirement) was a proportionate means of achieving a legitimate aim. In other words, there must be a good business reason behind the act. This may include being on the basis of health and safety, for legal reasons or being on efficiency grounds. Economic reasons can also be relied upon, but not if the forced retirement is purely a cost saving exercise. Employers must also show that the reason is important enough to outweigh the discriminatory effect on the employee and that there was no alternative other than the retirement.

There are three other statutory exceptions in the Law when considering age discrimination. The first relates to redundancy payments, which are calculated by length of service. If an older employee receives a higher payment than others because they have worked with the employer for longer, this will not be discriminatory provided that the payments are calculated using the same formula regardless of age. Similarly, an employer will not be regarded as having discriminated against an employee by paying them less than the minimum wage where the employee does not qualify for that minimum rate of pay because of their age.

Disability

The Protected Characteristic of disability refers to where a person has one or more long-term (i.e. six months or more) physical, mental, intellectual or sensory impairments which can adversely affect their ability to engage or participate in an activity.

An employer will directly discriminate against an employee if they treat that employee less favourably than they treat or would treat other employees because of that person's disability. For example, if a job offer is withdrawn after a prospective employee tells the potential employer that they have a disability or if an employee who suffers from anxiety and depression asks if they can apply for a different position but is told they cannot because they have a mental health condition.

The Employment and Discrimination Tribunal (the "**Tribunal**") has determined that the threshold for someone to be regarded as 'disabled' is not high and that many people who would perhaps not consider themselves as 'disabled' in fact have a disability in so far as the concept is understood by the Law. For example, those needing spectacles because of impaired eye-sight are likely to be considered to be 'disabled' pursuant to the Law.

The Law prescribes that a severe disfigurement would also be included, except where the disfigurement consists of:

- a tattoo; or
- a piercing of the body for decorative or other non-medical purposes, including any object attached through the piercing for such purposes.

The following are not considered to be a disability:

- a tendency to set fires;
- a tendency to steal; or
- a tendency to physical or sexual abuse of other persons.

Direct discrimination on the basis of disability cannot be objectively justified. However, if an employer can show that they did not know, and could not have been reasonably expected to know, that the employee had the disability, they will not be regarded as having unlawfully discriminated against the employee.

An employer will also directly discriminate against a disabled employee if they treat them unfavourably because of something arising as a consequence of the employee's disability. For example, by instigating disciplinary proceedings against an employee with a poor attendance record when most of the absences have been disability related absences. However, an employer can avoid a finding of discrimination arising as a consequence of an employee's disability if they can show that there was an 'objective justification' for their actions by showing that treatment is a proportionate means of achieving a legitimate aim.

It is also worth noting here that an employer will not directly discriminate against another employee who does not have that particular disability if they treat the disabled employee more favourably than them as a result of that particular disability. For example, if an organisation for deaf people specifies that it will give preference to candidates who are deaf and are competent in sign language in a recruitment campaign, this is unlikely to constitute discrimination.

Gender reassignment

The Protected Characteristic of 'gender reassignment' refers to a person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of gender reassignment by changing the person's physiological or other attributes that are associated with a particular gender.

Direct gender reassignment discrimination will occur, for example, if an employer refuses to recruit a person because they have undergone a gender transformation or because they are transsexual.

It would also include treating a transgender person's absence from work, because they are undergoing any part of the transgender process, less favourably than if the absence were due to sickness or injury.

Pregnancy and maternity

The Protected Characteristic of 'pregnancy and maternity' refers to when a person is pregnant, has been pregnant, has recently given birth, is breastfeeding or is on maternity leave.

Examples of direct pregnancy and maternity related discrimination include refusing to employ a person because they are pregnant or not promoting a female employee because she is pregnant.

Direct discrimination could also include treating a woman less favourably (other than in relation to pay) because of any illness she suffers as a result of her pregnancy during the protected period or seeking, or exercising, her right to parental leave. The protected period begins at the start of the pregnancy and completes at the end of her period of parental leave (or when she returns to work, if earlier) or, if she does not have the right to parental leave, 18 weeks after giving birth.

There are, however, two very limited exceptions.

Firstly, in relation to recruitment. An employer can refuse to recruit a pregnant woman where the aim is to recruit a person on a limited term contract to undertake a work project that is required to be completed within a particular time frame AND there are no plans to renew the contract, AND the likely timing of her absence on parental leave would interfere with completion of the project.

Secondly, in relation to terms and conditions. An employer will not be deemed to have discriminated against an employee on parental leave in circumstances where the employee receives less pay than she or another employee would receive for an equivalent absence on sick leave.

Direct discrimination on the basis of maternity can also include treating a woman less favourably because she is breastfeeding. Under the Employment (Jersey) Law 2003, an employee can request a temporary variation to her terms of employment for the purpose of breastfeeding and to provide her with reasonable breaks to enable her to breastfeed. An employer is also obliged to provide an employee with adequate facilities for breastfeeding.

Intention and motive are irrelevant when determining discrimination in respect of this Protected Characteristic, and so even a well-intended reason can be discriminatory. If an employer is concerned for an employee's welfare (e.g. in relation to exposure to chemical compounds), it should conduct a risk

assessment, take account of all the relevant circumstances and consult with the employee concerned before making any decision concerning her employment. Case law has demonstrated that even if the intentions are good, it is not for an employer to make assumptions in respect of a particular employee and doing so could result in a finding of direct discrimination.

It is worth noting here that, when considering whether a man has been discriminated against, no account should be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

Race

The Protected Characteristic of 'race' includes a person's colour, nationality, national origin (including being of Jersey origin) and ethnic origin.

Direct race discrimination would occur, for example, if an employer chose to recruit a white person rather than an Asian person who was more qualified for the role because the employer believed they would fit in better with the other white employees.

Less favourable treatment with regards to race also includes segregating the employee from others. Racial segregation is always discriminatory so there is no need to find a comparator in this instance.

In the case of *Sharma v Barchester Healthcare Limited, Waterhouse and Reid* ("the Sharma case") it was claimed that the Third Respondent, Mrs Reid, threw Mr Sharma's jacket on the floor telling him that it smelled of 'Indian curry'. The Tribunal considered whether Mrs Reid would have behaved in this manner towards a hypothetical comparator. It determined that the correct comparator would be an individual whose jacket smelled of curry and who had hung that coat on top of Mrs Reid's coat, but who did not share Mr Sharma's Protected Characteristic.

The Tribunal was satisfied that it was the fact that Mr Sharma was Indian which prompted Mrs Reid to refer to the smell as being of 'Indian' curry. The Tribunal did not believe that she would have used the word 'Indian' to describe the smell of curry to someone who was not Indian. Further, in the context of Mrs Reid's overall conduct towards Mr Sharma, the Tribunal also did not accept that Mrs Reid would have thrown a hypothetical comparator's jacket on the floor. Consequently, the Tribunal concluded that this constituted less favourable treatment and, therefore, direct race discrimination.

Sex

The Protected Characteristic of 'sex' refers to a man, a woman or a person who has intersex status (i.e. having physical, chromosomal, hormonal or genetic features that are neither wholly male nor female, a combination of male or female, or neither male nor female).

Examples of direct sex discrimination could include not paying a female employee the same salary as a male employee for doing the same work, refusing to recruit a female in an all-male workforce or refusing to recruit a young, recently married female due to a concern that they will soon become pregnant.

Sexual orientation

The Protected Characteristic of 'sexual orientation' refers to the orientation of people of the same sex, different sex or both sexes.

Direct discrimination on the basis of sexual orientation will occur, for example by refusing to employ a gay couple to run a pub because of a belief that it would upset the customers and be disastrous for business.

It would also include treating a person in a civil partnership less favourably than a married person and vice versa.

Exceptions to direct discrimination claims

Genuine occupational requirement

This exception applies where, having regard to the nature or context of the work, there is a 'genuine occupational requirement' for the discriminatory act on the basis of a person's Protected Characteristic. The employer must be able to show that the act is a proportionate means of achieving a legitimate aim, and that the employee or prospective employee does not meet, or the employer has reasonable grounds for being satisfied that they do not meet, that genuine occupational requirement. The exception applies to:

- recruitment;
- access to opportunities for promotion;
- transfer or training;
- dismissal;
- refusal to allow a contract worker to work or continue to work;
- determining who should be invited to become a partner in the partnership;
- denying a partner access or limiting a partner's access to any benefit arising from being a partner in the partnership; and
- expelling a partner from a partnership.

This exception only applies in limited circumstances and cannot be used to justify discriminatory treatment more generally. Examples of a 'genuine occupational requirement' include dismissing a male supervisor but retaining a female supervisor in a role which requires a woman for reasons of privacy and decency (e.g. bra fitting) or requiring a person of a particular race or age for an acting role for reasons of authenticity.

Positive action

If an employer reasonably believes that:

- persons who share a Protected Characteristic suffer a disadvantage connected to the characteristic;
- persons who share a Protected Characteristic have needs that are different from the needs of persons who do not share it; or
- participation in an activity by persons who share a Protected Characteristic is disproportionately low;

then an employer can take certain proportionate action to:

- enable or encourage persons who share the Protected Characteristic to overcome or minimise that disadvantage;
- meet those needs; or
- enable or encourage persons who share the Protected Characteristic to participate in that activity;

without opening itself up to discrimination claims brought by people who do not hold the relevant Protected Characteristic.

An example would be the creation of a work-based support and mentoring group for employees who share a Protected Characteristic who have different needs to those who do not share that characteristic.

This exception does not apply, however, to treating a person or employee more favourably in recruitment or promotion decisions.

Organised religion

This exception relates to recruitment for the purposes of an organised religion, where the person recruited is required to be of a particular religion, of a particular sex, to have a particular sexual orientation or to be, or not to be, a transgender person. The permitted discrimination, however, must only relate to the recruitment of persons required to conduct religious services as an essential part of their role and not to the employment of other persons or the provision of services.

Other exceptions

Three other exceptions will apply if the discriminatory act is necessary for the purposes of complying with:

1. legislative or judicial authority;
2. the law of another country; or
3. national security.

Indirect discrimination

Indirect discrimination occurs when an employer equally applies a seemingly neutral provision, criterion or practice (e.g. a policy, procedure or requirement) but such requirement puts the employee and others who share a particular characteristic at a particular disadvantage.

Employees are protected from indirect discrimination in respect of all Protected Characteristics with the exception of pregnancy and maternity, although protection on the basis of sex would likely extend to situations concerning women who are pregnant or on maternity leave.

The following outlines worked examples of indirect discrimination in relation to each Protected Characteristic.

Age

Indirect age discrimination can occur if an employer equally applies a criteria or practice which results in a particular disadvantage to employees of a certain age or age group. For example, a job advert stating that a teacher vacancy “would suit candidates in the first five years of their career” could put older employees at a particular disadvantage.

It should be noted that the Law provides a specific exception to indirect age discrimination, and expressly states that the provision of benefits to employees based on their length of service does not constitute indirect discrimination.

Disability

Indirect discrimination can occur if an employer applies a provision, criterion or practice that puts a disabled employee at a ‘substantial disadvantage’ (i.e. which is more than minor or trivial), in comparison to other non-disabled employees. This does not in itself, however, result in an act of unlawful discrimination, rather it triggers a further obligation on the part of an employer.

Where an employee is at a substantial disadvantage, the employer must make reasonable adjustments to avoid that disadvantage. Failure to do so will amount to indirect discrimination. The requirement to make reasonable adjustments has been recently considered by the Tribunal to be a ‘duty’ which is owed by the employer to the employee so as to enable people to stay in employment.

For example, an employer must take reasonable steps to provide a necessary auxiliary aid or service to a disabled employee so they are not put at a substantial disadvantage compared to other non-disabled employees by not having it.

Similarly, an employer must take reasonable steps to make adjustments to a physical feature of the business premises. For example, access to and from the building or fixtures and fittings to avoid a disabled person being placed at a substantial disadvantage compared to other non-disabled employees. This could be done by removing the physical feature in question, altering it or by providing a reasonable way of avoiding it.

The obligation to make reasonable adjustments will only apply if the employer knows, or should reasonably have known, that the employee has a particular disability and that a substantial disadvantage would be caused to that employee by either the physical feature of the premises, the application of the provision, criterion or practice or a failure to provide an auxiliary aid or service.

The obligation on the employer is to take ‘reasonable steps’ to avoid a disabled employee being placed at a substantial disadvantage. So what is reasonable? Relevant matters may include:

- the extent to which the likelihood of the substantial disadvantage was reasonably foreseeable and whether the steps taken are, or would be if taken, proportionate to that likelihood;
- the extent to which the steps taken are, or would be if taken, effective in preventing or removing the substantial disadvantage;
- the practicality and costs of any steps taken or which might be taken; and
- the resources, nature and size of the employer.

The case of Christine Priaulx v Valla Limited (the “**Priaulx case**”) involved an employee who had been absent from work due to an injury to her back. Medical evidence provided that a non-seated role would support her return to work. The employee herself requested similar adjustments. In particular, she requested a stand up desk. The employer was not prepared to consider making any reasonable adjustments until a point was reached where they were satisfied that Ms Priaulx was able to return to work.

The Tribunal considered that such an approach was absurd stating that *“it is axiomatic that the purpose of making a reasonable adjustment in circumstances such as these is to facilitate a return to work. The lack of the adjustment was the main impediment to the return to work; [Ms Priaulx] was then dismissed because she was not able to return to work. It is difficult to escape the conclusion that whether inadvertently or not, the [Employer], by failing to make the requested adjustments prevented [Ms Priaulx’s] return to work;a stand-up desk is neither novel or expensive. Moreover, such a piece of furniture could be hired at relatively little expense to evaluate how effective the adjustment was”*.

Gender reassignment

Indirect gender reassignment discrimination can occur if a rule or policy at work which applies to all employees puts transgender people at a particular disadvantage. For example, a requirement for new employees to bring in a photograph of themselves as a toddler to an induction session to ‘break the ice’. If any of them had undergone a gender reassignment since then, it could cause them significant embarrassment.

Race

Indirect race discrimination can occur if an employer applies a policy or procedure that people of a particular racial or ethnic group or nationality are less likely to be able to meet than other people and this places them at a disadvantage. Examples may include an employer requiring prospective employees to have English as a first language or UK qualifications.

Sex

Examples of indirect sex discrimination could include adopting a practice to hold weekly team meetings at 8am on Mondays or 4.30pm on Fridays as a round-up of the week or requiring all employees to work full time. This may cause a particular disadvantage to employees who have responsibility to care for young children.

Sexual orientation

Indirect sexual orientation discrimination can occur where a workplace provision, criterion or practice puts people of a particular sexual orientation at a particular disadvantage. For example, if an employer offers a free bus pass to its employees and their spouses but the policy only extends to the husband or wife of the employee.

An employer's defence: objective justification

An employer can justify indirect discrimination if it can demonstrate that its actions were a proportionate means of achieving a legitimate aim. The Law prescribes that an employer's long-term objective of reducing inequality in employment in respect of the Protected Characteristics of race or sex is always to be regarded as a legitimate aim.

In determining whether the application of a provision, criterion or practice can be shown to be proportionate, the matters to be taken into account shall include:

- the nature and extent of the disadvantage;
- how feasible it is to overcome or mitigate the disadvantage; and
- whether it is disproportionate to the legitimate aim of the employer.

For example, if a job advert for a fund administrator stated that applicants must have spent 10 years working in funds, applying this criteria could be indirect age discrimination because it will cause a particular disadvantage to younger people. The employer's aim in recruiting someone with the necessary skills and qualifications is clearly a legitimate aim but applying the criteria is unlikely to be justified as the same aim could be achieved in a less discriminatory way, for example, by specifying the experience and knowledge applicants need to have and setting out the main duties of the job, showing applicants what is expected of them.

Victimisation

This form of discrimination occurs when an employer treats an employee less favourably because they have made, or supported another to make, a complaint under the Law. Supporting another may include giving evidence or providing information in relation to a complaint.

In the case of *Flanagan v Island Greeting Limited, Ferreira and Wozniak* (the "Flanagan case") the Tribunal found that Mr Flanagan was treated less favourably by his employer when he was selected for redundancy and when his working hours were reduced following a shift swap because he had told his employer that he was seeking advice on his position under the Law as a result of what he considered to be 'disgusting homophobic chat' and then acted on that advice by lodging grievance letters with his employer. The Tribunal found that these were acts of victimisation for the purposes of the Law.

Victimisation can also occur if an employer believes or suspects that the employee has made or intends to make a complaint or support another to do so.

A prospective new employer can be liable for victimisation if they refuse to employ someone who has given evidence against a previous employer in a discrimination case.

However, the protection under the Law does not apply if the employee has made a false complaint or allegation, if the complaint is made in bad faith or if the employee gives false evidence or information.

Harassment

Harassment occurs when an employee is subjected to unwanted conduct related to a Protected Characteristic that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Harassment can also occur if the employee is subjected to unwanted conduct of a sexual nature, or conduct relating to sex, sexual orientation or gender reassignment which violates their dignity or creates an environment as set out above, and because the employee rejects or fails to submit to the conduct, they are treated less favourably as a result.

In determining whether the conduct violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment the matters to be taken into account shall include:

- the perception of the employee;
- the circumstances of the case; and
- whether a reasonable person could regard the conduct as having that effect.

In the Sharma case, the Tribunal made a finding of fact that Mrs Waterhouse, the Second Respondent, shouted at Mr Sharma. The Tribunal also drew inferences from Mrs Waterhouse's evidence that she held a conscious bias against Indian and Bangladeshi men, believing that they are disrespectful of working women. The Tribunal was satisfied that the incident occurred because of Mr Sharma's race and that, although it was only one occasion, it constituted unwanted conduct.

The Tribunal did not find that the incident had the purpose of violating Mr Sharma's dignity nor creating one of the prohibited environments. The evidence showed that, up until this point, Mrs Waterhouse and Mr Sharma had a good working relationship. However, the Tribunal found that the incident had the effect of violating Mr Sharma's dignity or creating a prohibited environment for him. In reaching this conclusion, the Tribunal took into account Mr Sharma's perception, the other circumstances of the case and whether a reasonable person could regard the conduct as having that effect. Consequently, the Tribunal found that the incident was an act of harassment against Mr Sharma.

Instructing or assisting an employee to commit a discriminatory act

An employer or employee must not instruct or induce another to commit a discriminatory act. For example, telling a colleague to bully or harass another employee. This applies whether or not the instruction or inducement results in the act.

Similarly, a person must not knowingly aid another to commit a discriminatory act. If they do, they shall be treated as having personally done the act.

However, they will avoid liability if they can show that the person committing the act told them that it was not discriminatory, they relied on that statement and it was reasonable for them to rely on that statement.

Who is liable?

Employers and employees can both be liable for acts of discrimination in the workplace.

An employer can be held to be vicariously liable for the discriminatory acts of their employees even where committed without their knowledge or approval. Each case will be determined on its own facts, but it will be necessary to establish that the discriminatory act(s) occurred in the course of employment. This is likely to include work social events as well as conduct within the workplace.

In order to avoid liability, an employer must be able to show that it took all necessary and reasonably practical steps to ensure that discriminatory acts do not occur. For example, by having a clear anti-discrimination or anti-harassment policy which is regularly reviewed and updated and by providing a sufficient level of training to all staff in respect of discrimination, harassment and victimisation, with appropriate records kept of the training given on a periodic basis.

An employee may escape liability for an act committed in the course of employment if they can show that their employer told them that the act was not discriminatory, they relied on that and it was reasonable for them to rely on it. This applies irrespective of the employer's liability.

Making a complaint

An employee who believes that they have been subjected to a discriminatory act or conduct can make a complaint to the Tribunal by completing a claim form. No fee is payable to submit a form and legal representation is not mandatory.

The complaint must be made within eight weeks of the last discriminatory act or, if the Tribunal is satisfied that it was not practical for the complaint to be made within that period, they may allow extra time. Where the discriminatory act consists of a failure to do something that failure is to be treated as occurring when the person in question decided on it.

Upon receipt of the employee's complaint, the employer is given the opportunity to formally respond. This must be done within 21 days.

A conciliation officer is then appointed to see if the parties can reach a settlement without the need to refer the matter for a hearing. Conciliation is, however, not compulsory and either party can refuse to engage in the process.

Failing conciliation, the complaint will be referred back to the Tribunal for a case management meeting. Generally, orders are made during the case management meeting for the disclosure of documents (by both parties), the preparation of written witness statements, the preparation of bundles and, in some cases, for the exchange of written submissions.

Subsequently, a hearing is convened before either a single chairperson or a panel including a chairperson and two lay side members. At the hearing the employee generally goes first, giving evidence and calling any witnesses to give evidence. It is then the turn of the employer and any witnesses the employer decides to call. Once all the evidence has been heard, each party has the opportunity to sum up its case before the

Tribunal retires to consider its decision. They will then deliver their decision together with reasons and deal with any compensation awards. Alternatively, the Tribunal may reserve their judgment and the parties will receive a full written decision, setting out any compensation awards, within six weeks of the hearing date.

Either party can appeal against the Tribunal's decision to the Royal Court on a point of law only. Unlike the Tribunal, which is a no-costs jurisdiction, the unsuccessful party in the Royal Court can be ordered to pay the costs of the successful party in bringing or defending the appeal.

Remedies

If the Tribunal upholds a complaint of discrimination, it may do one or more of the following:

- make a declaration of the rights of both parties;
- order an employer to pay an employee compensation for any financial loss, not exceeding £10,000, and hurt and distress, not exceeding £5,000. Both sums taken together should not exceed £10,000 in respect of each complaint of discrimination;
- recommend that the employer take, within a specified period, action which will obviate or reduce the adverse effect of the discriminatory act on the employee. If the employer does not comply with the recommendation without reasonable justification, the Tribunal may then make a compensatory award in accordance with the above or increase the compensatory award, subject to the maximum amounts, if one has already been made; or
- in respect of claims concerning breastfeeding, make orders to reconsider a refused application and/or order back-pay and/or up to four weeks' pay in compensation.

The matters that the Tribunal may take into consideration in determining the quantum of compensation for hurt and distress include:

- the extent to which there has been a campaign of discrimination or harassment;
- whether the discrimination caused the person to lose their job;
- the seriousness of the discrimination; and
- the length of time that the discrimination continued.

In the Flanagan case, the Tribunal set out the amounts it considered would form the bands of compensation for any 'hurt and distress' suffered in successful discrimination cases before it. The three bands of compensation for hurt and distress are as follows:

- the top band, for the most serious cases, will normally be between £4,000 and £5,000;
- the middle band, for serious cases which do not fall in the top band, will normally be between £1,500 and £4,000; and
- the lowest band, for less serious cases, will normally be between £500 and £1,500. (The lower end of this scale has since been reduced to £200 in the 2017 case of *Bisson v JSPCA*).

The employee must, however, provide evidence of the extent of hurt and distress suffered, otherwise no award will be made.

If the employer is held vicariously liable for the actions of its employee, the Tribunal may order that the payment of compensation be apportioned in a way that is just and equitable.

Examples of compensatory awards

In the Flanagan case, Mr Flanagan was awarded £1,800 compensation for victimisation. This was ordered to be paid by the employer. He was also awarded a total of £1,450 compensation for homophobic harassment, of which £435 was to be paid by the employer, with £870 and £145 to be paid by the Second and Third Respondent respectively.

In the Sharma case, the Tribunal found that the nature of Mrs Reid's harassment of Mr Sharma was serious, that it fell at the top end of the middle band of the scale of compensation as set out in Flanagan and that £4,000 compensation was appropriate. Mrs Waterhouse's harassment of Mr Sharma was considered by the Tribunal to fall within the lower band of compensation and it made a compensatory award of £900. As the employer accepted vicarious liability for the harassment and stated that it would cover all the compensation payable, the Tribunal elected not to split these awards.

The Tribunal noted that, whilst these acts did not lead directly to Mr Sharma losing his job, the less favourable treatment was serious and, in its view, led to a workplace culture where it became acceptable to be disrespectful to Mr Sharma. It considered that these acts of discrimination fell at the lower end of the middle band of compensation as set out in Flanagan and concluded that the employer should pay compensation of £2,300, making a total compensatory award of £7,200. In this case, the Tribunal also strongly recommended that the employer provided diversity training to its staff urgently and that it did so on a regular basis.

In the Prialx case:

- in relation to the failure to make reasonable adjustments (indirect discrimination), Ms Prialx was awarded £3,750 for hurt and distress. No separate award was made in relation to financial loss;
- in relation to being subjected to unfavourable treatment (direct discrimination, unpaid sick pay) Ms Prialx was awarded £9,670.64 (financial loss) and £329.36 for hurt and distress. The Tribunal commented that the award for hurt and distress would have been £3,000 but, owing to its jurisdictional limits in this regard, it was reduced as above; and
- in relation to being subjected to unfavourable treatment (direct discrimination, unpaid notice pay), Ms Prialx was awarded £3,453.80 (financial loss) and £1,500 for hurt and distress