Guernsey Discrimination in Employment Guide

Contents

Disclaimer **1**

Introduction

The employment life-cycle **2**

Protected Grounds

Prohibited conduct – types of discrimination **3**

Direct discrimination

Worked examples 4

- Sex
- Marital status
- Gender reassignment 5
- Pregnancy, maternity and adoption
- Disability 6
- Race 7
- Carer status
- Sexual orientation 8
- Religion or belief 9
- Age

Exceptions – direct discrimination 10

- Genuine occupational requirement
- Positive action
- Freedom of expression 11
- Safeguarding (employment)
- Employees and family situations
- Qualifications
- Employment of people with a particular disability
- Employment for the purposes of an organised religion
- Senior leadership positions: schools with a religious ethos
- Other exceptions

Direct discrimination by association **12**

Discrimination arising from a disability

Indirect discrimination **14**

Worked examples 15

- Sex
- Marital status
- Gender reassignment
- Disability
- Race
- Carer status 16
- Sexual orientation
- Religion or belief
- Age

Indirect discrimination - objective justification

Victimisation **17**

Harassment **18**

Duty to make reasonable adjustments for a disabled person **19**

- Discrimination – failure to make reasonable adjustments
- Reasonable adjustments – physical features 20
- Disproportionate burden

Advertisements **21**

Causing, instructing or inducing another to commit a discriminatory act

Who is liable?

Employer requests for information **22**

Equal pay and equal treatment

Discussions about pay **23**

Complaints in the Tribunal **24**

Remedies **25**

Non-discrimination notices **28**

Guernsey discrimination in employment guide

Disclaimer

This guide has been prepared to provide a high level overview of Guernsey's discrimination law in the context of employment. It does not constitute legal advice and readers should always seek specific advice from Bedell Cristin in relation to their specific circumstances.

As at 1 March 2023, guidance notes have not yet been released by the States of Guernsey (the "**States**") in relation to the Prevention of Discrimination (Guernsey) Ordinance, 2022 (the "**New Ordinance**"). Therefore, where examples have been provided in this guide, they are based on experiences in other jurisdictions – predominately, in Jersey and the United Kingdom ("**UK**").

This guide will be updated as and when the States release their guidance on the New Ordinance, and as the case law surrounding the New Ordinance develops.

Introduction

Guernsey has had an enabling discrimination law in place since 2005 which provides the States with the ability to legislate in respect of discrimination by way of Ordinance, without requiring royal assent. However, only discrimination on certain grounds is covered by the discrimination Ordinances currently in force at the date of writing. In particular, discrimination, in the field of employment, on the grounds of sex, marital status and gender reassignment has been unlawful since the enactment of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, and since 2016, pregnancy and maternity/adoption leave have also been protected grounds by virtue of the Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016 (together, the "**Existing Legislation**").

From October 2023, the New Ordinance will also make discrimination unlawful on the grounds of disability, race, carer status, sexual orientation and religion or belief, in not only employment but also in other circumstances, such as goods and services, education, accommodation, and clubs and associations. Additional grounds of age and the protected characteristics outlined in the Existing Legislation will be incorporated and introduced in 2024, and in 2028, provisions regarding the duty to make reasonable adjustments to physical features, and the right to equal pay and equal treatment will be introduced.

This guide focuses solely on discrimination in employment and provides a high-level overview of the Existing Legislation and the New Ordinance (jointly the "**Laws**"), together with worked examples. It details the different types of discrimination, the grounds on which it is unlawful to discriminate (the "**Protected Grounds**"), explores who is liable, explains how to make a complaint and outlines the remedies available under the Laws.

The employment life-cycle

All Guernsey employers are required to comply with the provisions of the Laws and all Guernsey employees, applicants for employment and contract workers are protected. The Laws cover each stage of the employment life-cycle from recruitment through to dismissal.

For the purposes of this guide, we will be focused only on the employment relationship and, for convenience, will refer to 'employers' and 'employees' (albeit the Laws also apply to contractors, agency workers, vocational trainees, partners in a partnership and public office holders).

In relation to employment, the Laws prohibit discrimination in relation to any of the Protected Grounds (defined below) in respect of all candidates for employment, work experience students, employees and contract workers. Any action taken in relation to any of these categories of individuals, which results in a detriment, is protected by the Laws. Discrimination can occur at any stage of the employment life-cycle from recruitment to the terms and conditions offered for employment or engagement and the opportunities for promotion, training, development or transfer, through to dismissal, post termination and the provision of references post termination.

Protected Grounds

The Existing Legislation prohibits discrimination on the basis of five Protected Grounds:

- sex;
- marital status;
- gender reassignment;
- pregnancy; and
- maternity/adoption leave

The New Ordinance contains six more Protected Grounds:

- disability;
- race;
- carer status;
- sexual orientation;
- religion or belief; and
- age (as part of phase 2, expected in 2024).

The Protected Grounds under the Existing Legislation are also due to be incorporated into the New Ordinance in 2024, as part of phase 2. At that time, it is expected that the New Ordinance will replace the Existing Legislation in its entirety and all discrimination law in Guernsey will then be contained in the New Ordinance. Guernsey will ultimately have eleven Protected Grounds in respect of which discrimination will be prohibited.

Prohibited conduct - types of discrimination

Seven types of discrimination are (or will be) prohibited under the Laws:

- **direct discrimination** - when an individual is treated less favourably than others due to one or more of the Protected Grounds;
- **discrimination by association** - when, by virtue of their association with a person with a Protected Ground, an individual is treated less favourably than others;
- **indirect discrimination** - where an organisational policy, applicable to all, places those with Protected Grounds at a disadvantage;
- **discrimination arising from disability** - where an employee has been treated unfairly and this is connected to a disability;
- **failure to make reasonable adjustments -** where an employer has failed to remove or reduce a disadvantage associated with a disability.
- **victimisation -** when an individual is subjected to a detriment because they have done a protected act under the Laws; and
- **harassment -** unwanted conduct towards an individual relating to a Protected Ground that is intended to offend, humiliate, degrade or intimidate.

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

Direct discrimination

A person directly discriminates against another if, because of a Protected Ground, they treat them less favourably than they treat or would treat others. In an employment context, an employee will be directly discriminated against if, because of a Protected Ground, the employer, or any of its employees or agents, treats that employee less favourably than other employees.

The New Ordinance makes express provision that the Protected Ground which is the reason for the less favourable treatment may be a past, present, future or imputed characteristic. In other words, at the time of the less favourable treatment, the characteristic either previously existed, exists, could or would exist in the future or is perceived to exist.

For an employee to show that they have been treated less favourably (save in limited circumstances), they normally need to compare themselves to other employees who do not have the same Protected Ground but whose circumstances are not materially different. 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.

When considering less favourable treatment, it is for the Guernsey Employment and Discrimination Tribunal (the "**Tribunal**") to decide whether a particular treatment was 'less favourable'. The fact that an individual considers that they have been treated less favourably does not itself establish that there has been less favourable treatment.

Worked examples

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

Sex

A person discriminates against a woman if, on the ground of her sex they treat her less favourably than they treat or would treat a man. This is to be read as applying equally to the treatment of men.

A claim of direct sex discrimination requires that the complainant is treated less favourably than another person on the ground of their sex.

When identifying a comparator, the Tribunal must identify an actual or hypothetical comparator of the opposite (or different) sex against which to judge the less favourable treatment.

Direct sex discrimination can occur against a job applicant or employee at any stage of the employment relationship.

Examples of direct sex discrimination could include not paying a female employee the same salary as a male employee for doing the same work or refusing to recruit a female in an all-male workforce.

Marital status

A person discriminates against a married person of either sex if, on the ground of his or her marital status they treat that person less favourably than they treat or would treat an unmarried person of the same sex.

This Protected Ground applies only to married persons (or persons who are separated, where the marriage has not yet been formally dissolved) and not to civil partnerships. It does not extend to persons who are single, engaged to be married, co-habiting, divorced or widowed, but it does apply to same-sex married couples.

It is necessary to show that a person was treated less favourably because of their marital status and not, for example, because they were married to a particular individual.

When identifying a comparator, the Tribunal will generally identify an actual or hypothetical person in an equivalent relationship with an individual, but who is not their common-law spouse.

Examples of direct discrimination linked to marital status have been held to include:

- an employer who does not promote or hire a recently married individual on the presumption that they plan to start a family (and want to take time off work); or
- a senior female police officer who was refused a transfer into the same division as her husband because of concerns over issues of competency and the compellability (or rather the ability to compel) of spouses within the judicial system.

Gender reassignment

A person discriminates against another person if they treat them less favourably than they treat or would treat other persons, and do so on the ground that the subject intends to undergo, is undergoing or has undergone gender reassignment.

Gender reassignment refers to the process that is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex. It includes any part of such a process.

For example, an employer who refuses to recruit a person because they have undergone a gender transformation or because they are transsexual will directly discriminate on the basis of gender reassignment.

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, injury or some other cause.

Pregnancy, maternity and adoption

A person shall not, in relation to employment by them at an establishment in Guernsey, discriminate against a woman who has given birth to a living child or has given birth to a child whether living or dead after 24 weeks of pregnancy or has adopted a child.

The protection extends to a person who has taken, or sought to take, maternity or adoption leave and to a person who has returned to work at the end of a period of such leave. It also includes treating a person unfavourably when taking, or seeking to take, time off work to attend antenatal appointments.

Treating a person unfavourably for any reason associated with their pregnancy or their maternity or adoption leave is automatically direct discrimination. As such, there is no need to establish less favourable treatment and, therefore, no need to identify a comparator.

Examples of direct pregnancy and maternity related discrimination could include refusing to employ or promote a woman because she is pregnant; preventing an employee from returning to work because they are breastfeeding; or refusing to recruit a young, recently married female due to a concern that they will soon become pregnant (this could also be discrimination on the ground of marital status).

POINTS OF NOTE

- Intention and motive are irrelevant to claims of direct discrimination, so even a well-intended action can be discriminatory. For example, if an employer is concerned about the welfare of a pregnant employee who may be exposed to chemical compounds, they should conduct a risk assessment, take account of all the relevant circumstances and consult with the employee concerned before making any decision concerning their employment.
- Irrespective of her length of service, a woman who is dismissed whilst pregnant is entitled to be given written reasons for her dismissal.
- In a case where pregnancy related dismissal is an issue, the onus of proving an absence of discrimination rests with the employer (see above regarding the requirement to provide reasons for dismissal).

– 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.
– Unlike in Jersey, employers are not exempt from liability where they aim to recruit a person on a limited term contract for a project that must be completed within a particular time frame and a person is not recruited because their pregnancy and likely timing of absence on parental leave would interfere with the completion of the project.

Disability (to be introduced under the New Ordinance)

The Protected Ground of 'disability' refers to where a person has one or more long-term physical, mental, intellectual or sensory impairments which have lasted or are expected to last for six months or more or until the end of the person's life.

'Impairment' is defined broadly by the New Ordinance as:

a) "the total or partial absence of one or more of a person's bodily or mental functions, including the absence of a part of a person's body;
b) the presence in the body of organisms or entities causing, or likely to cause, chronic disease or illness;
c) the malfunction, malformation or disfigurement of a part of a person's body;
d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction; or
e) a condition, illness or disease which affects a person's thought processes, perception of reality, social interactions, emotions or judgement or which results in disturbed behaviour."

Where one or more of these 'impairments' are 'long-term' (i.e. where such impairment lasts or is expected to last for longer than six months or until the end of their lives), a person will be deemed to have a disability for the purposes of the New Ordinance. Unlike in the UK, once a long-term impairment has been identified, there is no need to prove that an individual is disabled.

In calculating the six-month period to determine if an impairment is 'long term', any periods of remission where the impairment has the potential to reoccur and any periods where symptoms have been controlled by medical treatment are included.

If there is any doubt as to whether the impairment can be classified as 'long-term', medical evidence may be obtained from a registered health professional, special educational needs coordinator or occupational health practitioner.

An employer will directly discriminate against an employee if they treat them less favourably than other employees 'because of' their disability. For example, if a job offer is withdrawn after a candidate discloses that they have a disability or if an employee's application for a new role is rejected (in circumstances where they suffer from anxiety and depression) because of a concern that they would not be able to handle the new role due to their poor mental health.

It would also be direct discrimination if an employer treats a person less favourably because of an imputed characteristic. For example, if an employer refuses to employ a person because they are perceived to have a disability or because the employer makes an assumption about how a disability may deteriorate over time (for example, cancer or neurodegenerative diseases).

POINT OF NOTE

– An employer will not directly discriminate against an employee who does not have a disability if they treat a disabled person more favourably than them for the purpose of removing or mitigating a disadvantage suffered as a result of their disability. For example, by adjusting absence records to allow for a certain level of disability related absence or creating a work-based support group for employees who share a particular disability.

*See also **Discrimination arising from a disability**.*

Race (to be introduced under the New Ordinance)

The Protected Ground of 'race' includes a person's colour, nationality, ethnic origin, national origin (including being of Bailiwick origin) and descent (including caste).

Race refers to an individual's colour or their nationality (including their citizenship). It can also refer to an individual's ethnic or national origins (and descent), which may not be the same as their current nationality. For example, an employee may have South African national origins and be living in Guernsey with a British passport. Race also covers ethnic and racial groups. This means a group of people who all share the same protected characteristic of ethnicity or race.

Direct race discrimination would occur, for example, if an employer chose to recruit a white-skinned European person rather than a dark-skinned Asian person who was more qualified for the role because the employer believed that they would fit in better with the existing workforce.

The Jersey case of *Sharma v Barchester Healthcare Limited, Waterhouse and Reid* involved circumstances at a work event where Mrs. Reid threw an Indian colleague's jacket on the floor telling Mr. Sharma that it smelled of 'Indian curry'. The Jersey Employment and Discrimination Tribunal (the "**Jersey Tribunal**") found that the conduct was unfavourable and considered whether Mrs. Reid would have behaved in this manner towards a hypothetical comparator (i.e. someone who was not Indian). It concluded that she would not have done and, therefore, found that Mr. Sharma had been subject to less favourable treatment and had been directly discriminated against. Both Mrs. Reid and Mr. Sharma's employer were liable to pay compensation to Mr. Sharma *(see **Remedies**).*

POINTS OF NOTE

– An employer will not directly discriminate against a candidate for a role where they impose a requirement that belonging to a particular race is essential for the job (e.g. for a role as an undercover reporter in Iran the employer could say that it only wants to employ Iranian nationals).
– An employer can take positive action to encourage or develop people in a particular racial group that are under-represented or disadvantaged. For example, an accountancy firm that gets very few applications for its graduate recruitment program from Polish candidates, could set up a work experience and mentoring program for Polish student to encourage them into accounting. *See **Exceptions** generally.*

Carer status (to be introduced by the New Ordinance)

A person has 'carer status' if they provide care or support on a continuing, regular or frequent basis for a person with a disability of a nature which requires such care or support, and they live with or are a close relative of them.

The concept of 'carer status' is not new; it has long been recognised indirectly in the UK and Jersey, with claims being based on discrimination by association in the context of disability. Carer status has not, however, previously been granted specific stand-alone protection as a Protected Characteristic in discrimination legislation.

To be regarded as a 'close relative', the carer or the subject must be the spouse, partner, child, sibling, parent or grandparent of, or the parent or child of a spouse or partner of the other.

The New Ordinance does not define what constitutes care on a 'continuing, regular or frequent basis', but it allows for evidence to be obtained from a registered health professional, special educational needs coordinator, occupational health practitioner or social worker as to the nature of the subject's disability and the care needs arising from it.

A person will not be afforded carer status if they provide the care or support in a professional capacity, although they will not lose carer status if they are reimbursed for expenses incurred in connection with the care and support they provide.

An example of direct discrimination on the ground of carer status would be not offering a job to an applicant because they have a disabled child, on the assumption that they would take too much time off to care for them.

POINT OF NOTE

– An employer will not directly discriminate in circumstances where they treat an employee with carer status more favourably than another employee for the purpose of removing or mitigating a disadvantage suffered as a result of that status. For example, allowing an employee with carer status to come into work thirty minutes later each day because they are providing necessary care to their disabled spouse or child.

Sexual orientation (to be introduced by the New Ordinance)

The Protected Ground of 'sexual orientation' refers to a person's sexual orientation towards people of the same sex, different sex or both sexes.

A person's sexual orientation depends on whether they are attracted to their own sex (individuals who are gay and lesbian), the opposite sex (individuals who are heterosexual) or both (individuals who are bi-sexual).

Examples of discrimination based on a person's sexual orientation could include an employer refusing to employ a gay couple to run a pub because of a belief that it would upset the customers or making a heterosexual woman redundant from a gay bar (because she was not gay).

It would also be unlawful for an employer to treat a person less favourably because of an imputed characteristic. For example, if an employer refuses to employ a person because it believes that the individual is gay.

Religion or belief (to be introduced by the New Ordinance)

The Protected Ground of 'religion or belief' refers to any religion or lack of, or any religious or philosophical belief or lack of.

What may be considered 'a religion or belief' is not specifically defined in the New Ordinance. However, given the identical wording to the UK Equality Act, we would expect the UK position to be persuasive. In terms of the definition of religion in the UK; Christianity, Buddhism, Baha'i faith, Hinduism, Islam, Judaism, Sikhism, Rastafarianism, Jainism and Zoroastrianism are all listed as recognised religions.

In relation to what constitutes a 'belief', we would expect such belief to meet the following criteria:

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

When determining what amounts to a 'belief', the Tribunal will make a subjective assessment based on the particular facts of the case and to what extent the belief affects how a person lives their life. For example, even within the same religion, a person could be part of the mainstream Christian religion, but hold additional beliefs which are not widely shared by other Christians.

For example, it would be an act of direct discrimination if an employer earmarks an employee for redundancy because they are of a recognised religion. Similarly, employees without a religious faith are protected against discriminatory acts.

Direct discrimination can also occur if an employee is treated less favourably because of an imputed characteristic. For example, if an employee of Asian origin was treated less favourably because of the employer's mistaken belief that they are Muslim.

The scope of the 'religion or belief' Protected Ground is intentionally wide-ranging and, if the UK position is adopted in Guernsey, a belief in climate change, a belief against fox hunting and a belief that lying is always wrong, amongst many, many others, could be held to be protected beliefs.

Age (to be introduced as part of phase 2 by the New Ordinance)

Age is due to be introduced as a Protected Ground in 2024 as part of phase 2 of the New Ordinance and, as such, wording on the definition of Age discrimination has not yet been released.

Examples of direct age discrimination could 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, refusing an older employee training opportunities on the basis that the business will not receive the long-term benefits of the investment or engaging in any conduct which results in the forced retirement of an employee.

This section of the New Ordinance has not yet been drafted, so it remains to be seen what (if any) statutory exemptions and exceptions will be included (e.g. in relation to occupational pension schemes).

Exceptions - direct discrimination

The following is a summary of the relevant employment related exceptions in the New Ordinance. These describe circumstances in which a discriminatory act is not considered to be unlawful.

Genuine occupational requirement

This limited exception applies where, having regard to the nature or context of the work, there is a 'genuine occupational requirement' for the discriminatory act based on a person's Protected Ground. It cannot, however, be used to justify discriminatory treatment more generally.

With regard to sex and gender reassignment discrimination, the Existing Legislation refers to situations, for example, where the job needs to be held by a particular sex to preserve decency or privacy (e.g. where a role requires a person to fit ladies' underwear or swimwear), where the job holder is required to perform intimate physical searches, where the essential nature of the job calls for a particular sex for reason of physiology (but excluding strength or stamina) or in dramatic performances or other entertainment for reasons of authenticity.

The New Ordinance is more general in its approach, specifying that the employer must be able to show that the discriminatory 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.

Positive action

The New Ordinance provides that an employer can take any action aimed at ensuring equality (or a greater degree of equality) in relation to a Protected Ground, without opening itself up to discrimination claims brought by an employee who does not possess the relevant Protected Ground, if that action is aimed at achieving:

- the prevention, compensation for or removal of any disadvantage or inequality connected with a Protected Ground;
- the promotion of equality of opportunity on any of the Protected Grounds, including in relation to recruitment and promotion; or
- catering for the special needs of persons, or a category of persons, who, because of a Protected Ground, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.

For example, it would not be unlawful for an employer to select a candidate with learning difficulties over two other candidates of equal merit in order to address the under-representation of people with learning difficulties within the organisation.

Similarly, no discriminatory act will occur if a person who provides supported employment, for example, Grow Ltd and the Guernsey Employment Trust, treats persons who have a disability more favourably than those who do not have that disability.

POINT OF NOTE

- There is no requirement for an employer to offer employment, promote, retain or offer training or any other benefit associated with employment to a person who cannot fulfil one or more of the essential functions of the post.

Freedom of expression

The New Ordinance provides that an expression of an opinion, political view, religious belief or any implied or actual view or position on any subject does not, by and of itself, constitute an act of discrimination.

However, this exception cannot be relied on in claims of victimisation or harassment *(see **Harassment**)*, and will only apply if the person expressing the opinion or view did not do so:

- with the purpose of violating an employee's dignity or creating an intimidating, hostile or degrading, humiliating or offensive environment for an employee; or
- where it would not have appeared to a reasonable person that the conduct would have had that effect.

Safeguarding (employment)

An employer will not be required to, and therefore will not commit a discriminatory act by refusing to, recruit, retain or promote an employee or job/work experience applicant where the employer reasonably believes that that person has committed or has a tendency to commit a criminal offence (punishable by imprisonment), which includes acts of physical or sexual abuse or viewing indecent images of under 18s.

Employees and family situations

An employer will not commit a discriminatory act by granting an employee's request for flexible working, providing benefits for employees with care responsibilities for family members, including parents and those with the Protected Ground of carer status, or by providing benefits to employees for family situations. For example, granting a period of paid leave to an employee where a family member has become ill.

Qualifications

This only applies to the Protected Ground of race. An employer will not discriminate against a job applicant or an employee by requiring that the person holds a certain qualification where it is reasonably necessary for the role and the employer would require the same qualification from those who do not share the same racial group. For example, the requirement to hold a solicitor's practising certificate in England and Wales.

Employment of people with a particular disability

This only applies to certain employer organisations (including Grow Ltd and the Guernsey Employment Trust) who provide supported employment, permitting them to treat persons having the same disability or a prescribed disability more favourably than those who do not have that disability.

Employment for the purposes of an organised religion

Under the New Ordinance, an employer will not commit a discriminatory act by requiring an employee to be of a particular religion or religious denomination, or by considering that an employee's conduct is incompatible with the tenets of a specific religion, when they are employed to represent or promote that religion.

Senior leadership positions: schools with a religious ethos

This exception relates to the Protected Ground of religion or belief and provides that, when appointing, promoting or remunerating a head teacher, deputy/assistant head teacher or head of religious education in a school, preference can be given to persons whose religious opinions accord with the religious tenets of the school, who attend religious workshops in accordance with those tenets, or who give or are willing to give religious education at the school in accordance with those tenets.

Other exceptions

Other exceptions include any action which is necessary for the purposes of complying with:
- the Population Management (Guernsey) Law, 2016 (in respect of race and carer status);
- legislative or judicial authority;
- the law of another country; or
- national security.

Direct discrimination by association

A person will discriminate against another person if they treat them, by virtue of their association with a third person, less favourably than they treat or would treat others who are not so associated, where similar treatment of the third person would constitute discrimination because of a Protected Ground.

Strictly speaking, this is a type of direct discrimination but, under the New Ordinance, it is a stand-alone form of discrimination in its own right.

In an employment context, an employee will be directly discriminated against if they are treated less favourably because of a Protected Ground possessed by a person they are associated with. For example:
- a manager treats a heterosexual worker less favourably because they have been seen out with a person who is gay;
- a manager refuses to promote an employee because their partner is black; or
- an employee with a transgender partner is not appointed to a position which involves a lot of client entertaining on the assumption that clients may be made uncomfortable by the partner's transition.

Discrimination arising from a disability

A person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of their disability.

An employer who treats an employee unfavourably because of something arising as a consequence of the employee's disability, rather than because of the disability itself, will be guilty of discrimination.

This requires an assessment of the thought process of the employer – i.e. what was the reason for the relevant treatment; and was that treatment due to 'something' arising from the employee's disability. The relevant unfavorable treatment must be 'because of' the disability and it must be because of something that occurs 'in consequence' of that disability. For example, dismissing an employee for disability related absences that triggered an employer's attendance management policy could constitute discrimination arising from a disability, or disciplining an employee for misconduct arising from a serious mistake made at work where that mistake was as a consequence of their disability.

An employee only needs to show that they have been treated 'unfavourably' because of something arising from their disability, not 'less favourably'. Therefore, a comparator is not required.

A two limbed test is then applied to determine firstly whether an employee has been treated 'unfavourably' and secondly, whether the employer has a legitimate justification for the unfavourable treatment. In respect of that first limb, it is necessary to define the relevant treatment, and then to consider whether that treatment is unfavourable to the employee. If the answer to the latter question is yes, it is then necessary to move to the second limb of the test which explores whether there is a valid justification for the unfavourable treatment.

It may often be the case that an employee can satisfy the first limb of the test and demonstrate that there has been unfavourable treatment, and as such, prima facie discrimination arising from a disability. However, the second limb of the test is just as important and concerns a consideration of (a) whether there is an objective justification for the unfavourable conduct, or (b) whether the employer had knowledge (actual or constructive) of the disability or the disadvantage.

An employer's justification – a 'proportionate means of achieving a legitimate aim'

An otherwise discriminatory act can be justified by an employer demonstrating that the unfavourable treatment was a 'proportionate means of achieving a legitimate aim'.

A 'legitimate aim' is the reason behind the unfavourable treatment. For example, the legitimate requirements of a business or the health and safety of employees.

To be 'proportionate', the unfavourable treatment must be an appropriate way of achieving that legitimate aim and be a reasonably necessary means of doing so.

To determine whether an employer's action can be justified as a proportionate means of achieving a legitimate aim, a balancing exercise must be conducted of three questions:

1. Was the employer's 'aim sufficiently important?;
2. Could the employer's aim have been achieved by alternative less discriminatory means (including reasonable adjustments)?; and
3. Does the legitimate aim outweigh the discriminatory effects on the employee?

For example, and drawing from determined cases in comparable jurisdictions:

– the withdrawal of a secondment offer to a high-risk employee was found not to be discriminatory as it was a proportionate means of achieving the aim of protecting the health and safety of the employee and no lesser measures could have achieved that aim; and
– the provision of a 'below standard' performance rating to an employee with chronic kidney disease (that caused them to have extreme fatigue which in turn affected their concentration and the quality of their work), resulted in the 'unfavourable treatment' of no pay rise. The UK Employment Tribunal (the "**UK Tribunal**") found that the employer had failed to make allowances for the consequences of their disability and had, therefore, given them a 'below standard' rating, which was not a proportionate means of achieving the aim of effective employee performance management.

The outcome may have been different in the second case example above if the employer had considered making reasonable adjustments to remove or minimise the unfavourable treatment. For example, by talking to the employee about their specific situation or obtaining relevant medical evidence to assist the employer in deciding what, if any, adjustments could be made to avoid the employee being disadvantaged and whether such adjustments would be reasonable in all the circumstances.

See also ***Indirect Discrimination – Objective Justification****.*

An employer's defence – knowledge

Knowledge is a pre-condition to an employer's liability.

An employer will not discriminate against an employee where it did not know, or could not reasonably have been expected to know, that the employee was disabled. This exemption does not apply to a lack of knowledge of the consequences of the disability, only to the existence of it.

POINTS OF NOTE

- Employees do not have a duty to disclose a disability to their employers (or potential employer).
- Employers are expected to do all they reasonably can to find out if an employee has a disability. What is reasonable in any particular situation will depend on an objective assessment of all the relevant circumstances.

An employer's defence – reasonable adjustments

Where an employer has made reasonable adjustments in an attempt to alleviate an identified unfavorable treatment, or where adjustments have been sought that are not considered to be reasonable, they will have a legitimate defence.

In the context of absences arising from disabilities (which is a common basis of discrimination arising from a disability complaint), reasonable adjustments could include, for example, recording absences arising directly from a disability separately from standard absences, increasing the number of absent days the employee can have before a review is triggered or extending an employee's sick pay entitlement for a limited period.

Importantly, though, there is no authority that requires employers to always discount disability related absences or to continue to pay sick pay once a contractual entitlement is exhausted. These are adjustments that should be considered, and where reasonable, could be applied, but each situation will be assessed on its particular circumstances and UK case law has suggested that such adjustments will not be considered reasonable as a matter of course.

To support an employer's position in respect of the reasonableness of adjustments sought, medical evidence could be obtained to consider whether the periods of absence are actually directly attributable to the disability and whether they are reasonable for someone with that particular disability. By taking these steps, an employer will be in a better position to demonstrate that any unfavourable treatment is a proportionate means of achieving a legitimate aim.

Indirect discrimination

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

Employees are protected from indirect discrimination in respect of all Protected Grounds with the exception of pregnancy and maternity. This is because pregnancy is a gender specific condition and, therefore, it will always be direct discrimination.

Worked examples

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

Sex

Indirect sex discrimination can occur, for example, when an employer adopts a practice of holding weekly team meetings at 8am on Mondays or 4.30pm on Fridays or requiring all employees to work full time. Both may cause a particular disadvantage to employees who have responsibility to care for school age children. A case on point determined by the Guernsey Tribunal recognised that:

> *"[A] male is less likely, in our culture, to be the primary carer for a schoolchild than a female and therefore is more likely to be able to comply with a change in provision that requires increased scheduled/contracted working hours per week. It is a detriment to more females than males when an employer requires such a change; this is indirect discrimination".*

It may be that in the post-Covid world with flexible working and childcare responsibilities being more evenly distributed, this position may be revisited.

Marital status

Indirect marital status discrimination is unlikely, but can occur if a policy or practice puts married people at a particular disadvantage. It is difficult to identify examples of indirect discrimination on the basis of marital status, but a ban on recruiting people who have children might disadvantage married job applicants.

Gender reassignment

Indirect gender reassignment discrimination can occur if a rule or policy at work 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'. A transgender employee who does not bring in a photo for fear of repercussions and gets chastised in front of everyone for not joining in may have a claim for indirect discrimination if they can show that they were put at a particular disadvantage.

Disability

With the separate ground of discrimination arising from a disability, indirect discrimination claims on the basis of disability are less common, however indirect disability discrimination can occur if an employer applies a policy or practice which places a disabled employee at a particular disadvantage. For example, if an employer applies a rest break policy stating that everyone has to have their lunch break at the same time with no other breaks throughout the day, this may put employees with type 1 diabetes at a disadvantage if they need to eat between meals to regulate their diabetes.

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 having a dress code which means that employees of African-Caribbean ethnicity are prohibited from wearing their hair in cornrows in the workplace.

Carer status

Indirect discrimination on the basis of carer responsibilities occurs if a rule or policy at work puts carers at a particular disadvantage when compared to others without caring responsibilities.

For example, a UK Tribunal found that when a senior lending manager, who was the principal carer for her disabled mother and was employed on a homeworker contract, was told that senior managers could not work from home and was dismissed because she could not comply, the UK Tribunal held that she had suffered a particular disadvantage because of her association with her mother's disability. The employer was unable to objectively justify the need for managers to be office-based and, therefore, the requirement resulted in indirect associative discrimination.

Under the New Ordinance, which grants 'carer status' specific stand-alone protection, carers in Guernsey will be protected from discrimination on the basis of their carer status, rather than by the backdoor of associative discrimination as in the UK decision above.

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 and thus excludes employees in civil partnerships.

Religion or belief

An employer may commit a discriminatory act if it adopts a practice or policy which puts or would put a person of a particular religion or belief at a particular disadvantage. For example, if an employer does not allow an employee reasonable time off to pray or requires them to work on a religious day of rest. *See **Objective Justification** below.*

Age (to be included in phase 2)

Indirect age discrimination can occur if an employer applies a criterion 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.

Indirect discrimination - objective justification

An employer can justify indirect discrimination if it can demonstrate that its actions were a proportionate means of achieving a legitimate aim. In other words, it is for the employer to prove that:

– the reason behind the discrimination was the pursuit of a genuine legitimate aim; and
– the measures taken to achieve that aim were appropriate and proportionate.

The New Ordinance does not provide any further guidance in this regard. Given the similarity to the wording in the UK Equality Act, it is likely that UK case law will be persuasive in determining whether an employer's actions can be justified. In that respect, it has been accepted that a 'legitimate aim' must be genuine and correspond to a 'real business need'. For example, ensuring the health and safety of employees may be considered a legitimate aim. Further, the employer's actions must actually contribute to pursuing that aim.

Cost can be considered a legitimate aim, although it will unlikely ever be a stand-alone aim. It can, however, be taken into account as part of the justification when balanced with other good reasons, such as effecting changes to enable the conduct of an efficient service or phasing out discriminatory pay.

In demonstrating that measures taken were 'appropriate', an employer must show that its discriminatory actions were 'reasonably necessary' in order to achieve the legitimate aim. Put another way, could the aim be achieved in a less discriminatory way? If it could, then the employer's actions are likely to be discriminatory.

The Tribunal will weigh the business needs of the employer against the particular disadvantage suffered by those with a Protected Ground. If the business need justifies the conduct and outweighs the disadvantage suffered by a particular employee (or group of employees), then the employer will be able to rely on the objective justification defence.

For example:

- If a job advert for a fund administrator stated that applicants must have spent ten continuous years working in funds, then applying this criterion could be indirect sex discrimination because it is likely to cause a particular disadvantage to women if they have taken time away from their career to have a family. The employer's aim in recruiting someone with the necessary skills and qualifications is clearly a legitimate aim but applying the criterion 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 which applicants need to have and setting out the main duties of the job, showing applicants what is expected of them.
- The UK Tribunal considered a case where a Muslim security guard was refused time off to attend the mosque over lunchtimes because his employer had to ensure that it had the requisite number of security guards on site throughout operational hours to avoid losing the contract. The security guard claimed that this requirement put himself and other Muslims at a particular disadvantage. His claim was rejected after the UK Tribunal balanced the employer's operational needs against the discriminatory effect on the security guard and found that the requirement for security guards to remain on site was a proportionate means of achieving a legitimate aim.

Victimisation

This form of discrimination occurs when an employer subjects an employee to a detriment because of something they have done under the Laws. This includes them making an allegation or complaint or bringing proceedings against either their current employer or any other person/employer or giving evidence or information in connection with discrimination proceedings brought by another person.

Victimisation can also occur if an employer knows or suspects that the employee has made, or intends to make, a complaint (under the Laws) or has supported, or intends to support, another to do so. A prospective new employer may also be liable for victimisation if they refuse to employ someone who has made a claim or given evidence against a previous employer in a discrimination case.

In the Jersey case of *Flanagan v Island Greetings Limited*, the Jersey Tribunal found that Mr. Flanagan was treated less favourably by his employer when he was selected for redundancy after lodging grievances concerning what he considered to be 'disgusting homophobic chat'. The Jersey Tribunal found that Mr. Flanagan had been victimised and that the employer's actions were discriminatory.

POINT OF NOTE

– Where an individual has made a false complaint or allegation, if the complaint had been made in bad faith or if the employee had given false evidence or information, any action taken by an employer would not be considered victimisation.

Harassment

Whilst not a stand-alone offence in the Existing Legislation (where sexual harassment needs to meet the direct discrimination test), harassment has been included as a stand-alone offence in the New Ordinance.

Harassment is defined as occurring when an employee is subjected to unwanted conduct related to a Protected Ground, or of a sexual nature, that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Harassment could include conduct where an employee is subjected to unwanted conduct and, because they reject or fail to submit to the conduct, they are treated less favourably as a result. For example, an employee being turned down for promotion because they rejected their boss's sexual advances.

In determining whether conduct violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment, the Tribunal will consider:

– the perception of the employee;
– the circumstances of the case; and
– whether it is reasonable for the conduct to have that effect.

In the case of *Sharma v Barchester Healthcare Limited, Waterhouse and Reid*, the Jersey Tribunal found that the one incident (of throwing Mr. Sharma's coat on the ground declaring that it smelt of Indian Curry) constituted unwanted conduct and that, whilst the incident did not have the intent of violating Mr. Sharma's dignity or creating one of the prohibited environments, it did have the effect of violating his dignity. In reaching this conclusion, the Jersey Tribunal took into account, relevantly, Mr. Sharma's perception and whether a reasonable person could regard the conduct as having that effect. Consequently, the Jersey Tribunal found that the incident constituted an act of harassment and awarded Mr. Sharma £900 for hurt and distress. Whilst not binding in Guernsey, we would expect this decision to be persuasive.

POINT OF NOTE

– In the context of harassment, where the person expressing the 'opinion, political view, religious belief or any implied or actual view' did so without the purpose of violating another person's dignity or creating an intimidating, hostile or degrading, humiliating or offensive environment for them or where it would have appeared to a reasonable person that the conduct would have had that effect, the New Ordinance recognises the right of an individual's freedom of expression and does not deem such expression by and of itself as an act of discrimination.

Duty to make reasonable adjustments for a disabled person

Discrimination – failure to make reasonable adjustments

If an employer applies a provision, criterion or practice that puts a disabled person at a 'substantial disadvantage' (i.e. a disadvantage which is more than minor or trivial) in comparison to other non-disabled people, that does not, in itself, result in an act of unlawful discrimination. Rather it triggers a positive and reactive obligation on the part of an employer. In particular, a duty to make reasonable adjustments to avoid that substantial disadvantage.

So when does that duty arise?

1. When there is a provision, criterion or practice applied by or on behalf of the employer;
2. Where a physical feature of premises occupied by an employer; or
3. Where the lack of an auxiliary aid, places a disabled person at a substantial disadvantage compared with people who are not disabled.

Where a Disabled Person is placed at a substantial disadvantage compared to others who are not disabled (or affected by 'something' arising from such disability), the employer must take such steps as are reasonable to avoid that disadvantage. Failure to do so will amount to discrimination. This obligation will equally apply in relation to a job applicant or a person who has applied for work experience as to an employee.

Critically though, an employee must be able to fulfil one or more of the essential functions of the post and there is no obligation on an employer to offer employment or continue to employ an employee who cannot fulfil those functions.

When considering the duty to make reasonable adjustments, it is necessary firstly to identify the policy, criteria or practice which puts the individual at a disadvantage. For example, the requirement to comply with attendance targets generally. Then, an employer must consider what adjustment could reasonably be applied. For example, discounting disability related absences up to a certain level.

When determining what is a possible 'reasonable adjustment', a two stage test can be applied:

1. whether the adjustment is appropriate and necessary?; and
2. whether the adjustment would impose a disproportionate burden on the employer?
   *See **Disproportionate burden**.*

Under the New Ordinance, the obligation to make reasonable adjustments will not be triggered until the employer knows, or should reasonably be expected to know, that the employee is disabled and/or is aware of the substantial disadvantage suffered by the employee. *See **An employer's defence – knowledge**.*

Employers should always consult with relevant employees to seek their views as to what measures they would require in order to avoid the disadvantage and what they would consider to be a reasonable adjustment, although it is not necessary for an employer to adopt those views verbatim.

Employers are not expected to provide items of personal equipment that the employee would be reasonably expected to own themselves (e.g. a pair of glasses or a hearing aid), however they may be expected to take reasonable steps to provide a necessary auxiliary aid (equipment or a service) to a disabled person so they are not put at a substantial disadvantage compared to others (e.g. a stand up desk).

An employer cannot require a disabled person to contribute any costs in relation to making the reasonable adjustments.

Reasonable adjustments - physical features

An employer will need to take reasonable steps to make adjustments to a physical feature of the business premises which places individuals with a Protected Ground at a substantial disadvantage. This provision is not due to come into force until 2028.

By way of example, the Jersey Tribunal in *Christine Priaulx v Valla Limited* confirmed that "the purpose of making a reasonable adjustment ... is to facilitate a return to work" and that, by refusing to consider a request for a stand up desk (as recommended by medical advice), the employer prevented the individual from returning to work and was therefore guilty of discrimination.

The design or construction of the building, access to and from the building or the approach, and its fixtures and fittings must avoid putting a disabled person at a substantial disadvantage compared to other non-disabled employees. This could be achieved by removing the physical feature in question, altering it or by providing a reasonable way of avoiding it. This could be as simple as allocating the employee a desk space with better accessibility or changing the light bulbs to a softer light. Adjustments that involve a greater amendment to the physical premises or workplace would be subject to the disproportionate burden test.

Disproportionate burden

Employers are required to consider any requests for reasonable adjustments, but they are not necessarily obliged to agree to them. In particular, an employer will not be required to take steps to avoid a disadvantage to a disabled person (by making a particular reasonable adjustment) where to do so would impose a disproportionate burden on the employer.

What constitutes a 'disproportionate burden' will very much depend on the circumstances of each case, the employee concerned, the disability involved, the size of the employer and the resources available to them to make the adjustment. The onus is on the employer to prove that a disproportionate burden exists and that decision making process will generally involve a balancing act of all the relevant circumstances of the particular situation.

An employer's defence

Direct discrimination:	Exceptions allowed within the law - genuine occupational requirement; positive action; freedom of expression; safeguarding; employees and family situations; qualifications; employment leadership positions in religious schools; other *(See **page 10**)*
Indirect discrimination:	Objective Justification – the employer's actions were a proportionate means of achieving a legitimate aim; in order words, the reason behind the discriminatory conduct was the pursuit of a genuine legitimate aim; and the measures taken to achieve that aim were appropriate and proportionate *(See **page 15**)*
Discrimination arising from a disability:	– Objective justification *(See **page 13**)* – Lack of knowledge of the disability (either actual or constructive) *(See **page 13**)*
Reasonable adjustments – failure to make reasonable adjustments:	– Disproportionate burden *(See **page 9**)* – Lack of knowledge of the disability or of the substantial disadvantage *(See **page 9**)*

Advertisements

Under the Existing Legislation, job adverts where the job description has a sexual connotation (such as 'waiter', 'salesgirl', 'postman' or 'stewardess') shall be taken to indicate an intention to discriminate, unless the advert contains an indication to the contrary.

The New Ordinance will introduce similar provisions in relation to each of the new Protected Grounds.

It is worth noting that this also applies to the publishers of adverts. A publisher will, however, avoid liability if they can show that they were told that it would not be discriminatory and it was reasonable for the publisher to rely on that. For example, if a local newspaper publishes an advert for a 'salesgirl' but, after questioning it, is incorrectly told by the employer that it has been approved by their lawyers.

Proceedings in relation to adverts can only be brought by the Committee for Employment & Social Security (the "**Committee**") (under the Existing Legislation) or the Director of Employment and Equal Opportunities Service (the "**Director**") (under the New Ordinance) and are dealt with by way of non-discrimination notices (see below).

Causing, instructing or inducing another to commit a discriminatory act

An employer or employee must not cause, instruct, procure or induce another to commit a discriminatory act. For example, telling an employee to shun a co-worker because they are gay.

This applies to any attempts to procure or induce another to commit a discriminatory act and includes providing or offering any benefit or subjecting, or threatening to subject, an employee to any detriment. Any offer or threat does not have to be made directly to the employee if it is made in such a way that it is likely to be heard by them.

Any proceedings can only be brought by the Committee (under the Existing Legislation) or the Director (under the New Ordinance) by issuing a non-discrimination notice (see below).

Who is liable?

Both employers and employees can be liable for acts of discrimination in the workplace. Individual employees can also be named as respondents.

Where an act occurs 'in the course of employment', an employer will be held to be vicariously liable for the discriminatory acts of their employees, even where these are committed without their knowledge or approval. This is likely to include acts committed at work social events and posts on social media as well as conduct within the workplace during working hours.

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

In order to avoid liability, an employer must be able to show that it took all reasonably practical steps to ensure that the discriminatory acts did not occur. Reasonably practicable steps may include:

- having a clear anti-discrimination or anti-harassment policy which is regularly reviewed and updated;
- providing written directions in advance of social and client events;
- having a code of conduct that is consistently enforced and about which all staff are regularly reminded;
- providing a sufficient level of training to all employees on a regular basis in respect of discrimination, harassment and victimisation; and/or
- maintaining appropriate records.

Under the Existing Legislation, an employee may escape liability for a discriminatory act 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.

Similarly, under the New Ordinance, an employee may also escape liability if they can show that they were following the instructions or policies of their employer and it was reasonable for them to do so.

Employer requests for information

Under the New Ordinance, an employer is not permitted to request or require information about a Protected Ground during the recruitment process if it indicates, or might reasonably be understood as indicating, that the employer intends to commit a discriminatory act. For example, if an employer asks a prospective employee about their sexual orientation or whether they have any children.

This will not apply, however, if the information is used solely for the employer's diversity monitoring.

It will also not apply if the request is necessary to ascertain whether the employer has a duty to make reasonable adjustments in connection with the recruitment process, or to establish whether the person will be able to carry out an intrinsic function of the work, either before or after the employer has made any necessary reasonable adjustments. This latter exception may only be applied after a job offer has been made.

Any proceedings alleging a breach of this obligation can only be brought by the Director by issuing a non-discrimination notice (see below).

Equal pay and equal treatment

Under the Existing Legislation

The Existing Legislation prohibits less favourable treatment on the basis of sex. This extends to any actions in relation to the terms and conditions offered to an employee, and what an employee is paid. Whilst this does not create a direct 'right' to equal pay or treatment, it does create a right to not be treated less favourably than a relevant comparator.

A recent case in the Tribunal has confirmed that a failure to pay a female partner the same as her comparative male counterpart without reasonable objective justification was discriminatory. The case of *Mrs Katherine D Hitchins v Babbé LLP* involved a female partner of a law firm whose pay was significantly below that of her fellow male partners. The Tribunal identified a male partner who was also a head of department and at the same level of the partnership. They had similar responsibilities in managing their departments' budgets and were responsible for monitoring the performance of their team members.

However, the male partner was paid 57% more. The employer could not show that the reason for the pay difference was anything other than related to her sex and, therefore, found the pay disparity to amount to direct sex discrimination.

Under the New Ordinance

In 2028, the New Ordinance will introduce a right whereby, if an employee with a particular Protected Ground is employed to do work which is the same as, or broadly similar to, that of a comparator who does not have the particular Protected Ground, the employee's terms of employment shall be deemed to include an equal pay clause.

The equal pay clause will relate to pay or any other financial benefit relating to an employee's employment (including membership of, or rights under, an occupational pension scheme) and will effectively include a term, or modify a less favourable term, in the employee's contract to make it the same as the comparator's corresponding term.

The equal treatment clause will not relate to pay but to the terms and conditions of employment (e.g. working hours, holiday entitlement and entitlement to breaks), and will again effectively include a term, or modify a less favourable term, in the employee's contract to make it the same as the comparator's corresponding term.

When considering equal pay, the comparator must be a real person, employed by the same employer or a group company, and both the employee and the comparator must be employed in Guernsey within three years of each other. When considering equal treatment, the same conditions apply save that the comparator does not need to be a real person.

Defence of material factor

The implied equal pay and equal treatment clauses will have no effect if the employer can show that the difference between the terms is due to a material factor and not because of a particular Protected Ground. It will also have no effect if that factor is a proportionate means of achieving a legitimate aim.

For example, if an employer has a board-approved pay and remuneration policy, which defines the parameters within which decisions regarding pay can be made, and applies this policy in a consistent and objective way, they will be well placed to objectively justify decisions made in relation to remuneration.

Discussions about pay

Under the New Ordinance, a term in an employee's contract of employment that prevents or restricts an employee from making or seeking a 'relevant pay disclosure' will not be enforceable. A 'relevant pay disclosure' refers to a disclosure where an employee makes or seeks information to ascertain a connection between pay and having (or not having) a particular Protected Ground. This restriction applies to disclosures by current or former employees.

An employee will also be protected from victimisation in these circumstances.

Complaints in the Tribunal

Under the Existing Legislation

An employee who believes that they have been discriminated against under the Existing Legislation can make a complaint to the Tribunal by completing a claim form (Form ET1). No fee is payable to submit the form and legal representation is not mandatory.

The complaint must be made within three months of the last discriminatory act or, if the Tribunal is satisfied that it was not practicable for the complaint to be made within that period, they may exercise a discretion to 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 by submitting a response form. This must be done within 21 days.

A conciliation officer is then appointed and given six weeks to see if the parties can reach a settlement without the need to refer the matter for a hearing. This process is undertaken over email or the telephone directly with the conciliation officer and not between the parties. Conciliation is not compulsory and either party can refuse to engage in the process. If conciliation is successful, the complaint is settled and the claim withdrawn.

Failing conciliation, the complaint is referred back to the Tribunal for a case management meeting where dates for hearing are set and orders are made 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 will be 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. The Tribunal 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 recoverable costs of the successful party in bringing or defending the appeal.

Under the New Ordinance

The complaint procedure under the New Ordinance is very similar, although different forms may be required to be completed. However, prior to submitting a complaint to the Tribunal, parties are encouraged (but not obliged) to engage in pre-complaint conciliation. New procedural rules will also come into effect which will guide the Tribunal process and the conduct of the hearing.

Remedies

Under the Existing Legislation

If the Tribunal upholds a complaint of discrimination on the grounds of sex, marital status, gender reassignment, pregnancy/maternity and/or adoption leave, it will order an employer to pay an employee compensation equivalent to three months' pay. If the employee is paid on a weekly basis, the compensatory sum shall be one week's pay multiplied by 13.

Joined complaints

If an employee argues that they were dismissed on the grounds of sex discrimination and makes a complaint of sex discrimination and unfair dismissal, the Tribunal may hear and determine both complaints at the same time. If successful in both of those claims, the Tribunal will order an employer to pay compensation equivalent to three months' pay for the discriminatory act(s) and an additional compensatory award, equal to six months' pay, for unfair dismissal.

Under the New Ordinance

Under the New Ordinance, if the Tribunal upholds a complaint of discrimination on the grounds of disability, race, carer status, sexual orientation, religion or belief, it has the ability to order an employer to pay an employee or contract worker compensation of up to six months' pay as well as an amount payable for injury to feelings, hurt or distress, not exceeding £10,000. Note the difference in compensation with the maximum award being 'up to' six months' pay, not a blanket 3 months' pay as is currently provided for in the Existing Legislation. (*See **summary table** on next page).*

The same compensatory award is payable where an employer victimises or harasses an employee or contract worker and where it has been necessary to infer an equal treatment provision into an employee's contract. Note that these remedies do not apply to equal pay (*See below).*

This compensatory award will also be payable where an employer fails to make reasonable adjustments for a disabled person.

If, however, the Tribunal considers that an award based on pay is inappropriate, either because the complainant does not have a usual amount of pay or, due to the circumstances of the complaint, has never received any pay, the Tribunal may, alternatively, award a sum equal to the amount of any financial loss suffered up to a maximum of £10,000, as well as an amount payable for injury to feelings, hurt or distress up to a maximum of £10,000.

No guidance is given as to what matters the Tribunal may take into consideration in determining the quantum of compensation for injury to feelings, hurt and distress, but it may include factors such as whether the discrimination caused the person to lose their job, the seriousness of the discrimination and the length of time that the discrimination continued.

SUMMARY TABLE	Compensation	Injury to feelings, hurt or distress	Financial loss
Discrimination (single complaint) (including a failure to make reasonable adjustments)	Up to 6 months' pay	Up to £10,000	Up to £10,000 (if an award of compensation based on pay is not appropriate)
Unfair dismissal	6 months' pay	N/A	N/A
Joined discrimination complaints	Up to 9 months' pay	Up to £10,000	Up to £10,000 (if an award of compensation based on pay is not appropriate)
Unfair dismissal and discrimination	Up to 9 months' pay	Up to £10,000	
Failure to make reasonable adjustments	Up to 6 months' pay	Up to £10,000	
Victimisation	6 months' pay	Up to £10,000	Up to £10,000 (if an award of compensation based on pay is not appropriate)
Inference of an equal treatment clause	Up to 6 months' pay	Up to £10,000	
Equal pay	Up to 6 years in arrears of back pay		

Non-financial awards

Under the New Ordinance, the Tribunal has the power to make a non-financial award. Such award would constitute an order that an employer take practicable action to obviate or reduce the adverse effect on the employee of any act to which the complaint related. If an employer can show that such an order would impose a disproportionate burden on the employer, a non-financial award would not be considered appropriate.

Joined complaints

If an employee makes more than one complaint under the New Ordinance against their employer (e.g. the complaints relate to different Protected Grounds) and the complaints relate to the same facts and circumstances, the Tribunal may decide to hear and determine the complaints together. The Tribunal may also join complaints if an employee makes a complaint under the New Ordinance against their employer and one or more other respondents, the complaints relate to the same facts and circumstances and there is sufficient connection between the respondents (e.g. they work for the same employer).

Where the complaints are joined in this way, if a calculation based on pay is appropriate, the maximum total award will be up to nine months' pay as well as an amount for injury to feelings, hurt and distress up to a maximum of £10,000. Where it is not appropriate to base the compensatory award on pay, it will be based on financial loss up to a maximum of £10,000 and an amount for injury to feelings, hurt and distress up to a maximum of £10,000.

However, these maximum award limits do not apply if a complaint of victimisation is part of the joined complaints. In these circumstances, the appropriate limit for the victimisation complaint will be an amount equivalent to six months' pay as well as an amount payable for injury to feelings, hurt or distress not exceeding £10,000.

Where the Tribunal has joined complaints under the New Ordinance and the employee has also made a complaint to the Tribunal for unfair dismissal and the complaints relate to the same facts and circumstances, these complaints may also be joined. In these circumstances, the maximum award will be up to nine months' pay as well as an amount for injury to feelings, hurt and distress up to a maximum of £10,000.

Again, these maximum award limits do not apply if a complaint of victimisation is part of the joined complaints. As above, the appropriate limit for the victimisation complaint will be an amount equivalent to six months' pay and an amount payable for injury to feelings, hurt or distress not exceeding £10,000.

Reduction of award in certain cases

Under the Laws, a compensatory award can be reduced by a just and equitable amount if the Tribunal finds that the employee unreasonably refused an offer by the employer which, if accepted, would have had the effect of putting the employee in the same position in which they would have been if the act which founded the complaint had not occurred.

Equal pay

If, because of a disparity of pay or other financial benefit, it has been necessary to infer an equal pay clause into an employee's contract, then a compensatory sum will be payable equal to the arrears of pay which would put the employee into the same position they would have been in had the equal pay clause been given effect from the introduction of this provision.

The equal pay provision is not due to be introduced until 2028 and the maximum time period during which a sum equal to arrears of pay can be calculated is six years. So, for example, if an employee successfully claimed in 2035 that an equal pay clause should have been inferred into their contract dating back to 2025, they would only receive a compensatory sum equal to arrears of pay from 2028 until 2034.

Non-discrimination notices

Non-discrimination notices feature in the Existing Legislation and under the New Ordinance, however, to date, they have been rarely applied.

If the Committee (under the Existing Legislation) or the Director (under the New Ordinance) is satisfied that an employer is committing, or has committed, a discriminatory act, they may serve on them a non-discrimination notice requiring them to cease the discriminatory act. Where this involves changes to the employer's practices or other arrangements, the employer must inform the Committee or Director that they have affected the changes, what the changes are, and that they have taken reasonable steps to inform any other persons concerned.

Under the Existing Legislation, non-discrimination notices can be served by the Director, for example, in relation to discriminatory advertising, recruitment and promotion policies or unreasonably refusing time off to pregnant employees for ante-natal appointments. If an employer fails to comply with any requirement contained in a non-discrimination notice they will be guilty of an offence and liable to pay a fine not exceeding £10,000.

Under the New Ordinance, non-discrimination notices can be served, for example, in relation to discriminatory advertising, recruitment policies and procedures, where an employer requests information about a Protected Ground or in circumstances where an employer has instructed an employee to commit a discriminatory act. If the employer fails to comply with any requirement contained in a non-discrimination notice, they may be liable to pay a financial penalty up to a maximum of £10,000. In deciding whether to impose a financial penalty and the amount thereof, the Director must take into consideration the following factors:

- whether the failure was brought to the attention of the Director by the person concerned;
- the seriousness of the failure;
- whether or not the failure was inadvertent;
- what efforts, if any, have been made to rectify the failure and to prevent a recurrence;
- the potential financial consequences to the person concerned and to third parties of imposing a penalty; and
- the penalties imposed by the Director in other cases (if any).

All non-discrimination notices issued under the Laws are kept on a public register.