
Version Control	Date Published	Review Status
1.0	August 2021	August 2022

DISCRIMINATION AND EQUALITY IN EMPLOYMENT POLICY

Purpose and Scope

The Wellington Practice is committed to ensuring that all staff know about and actively promote how we work with each other without discrimination.

INTRODUCTION

Of all of the different areas of employment legislation, that which addresses discrimination and equal opportunity is perhaps the most complex and misunderstood, and issues that arise can be difficult to deal with in the workplace. On the other hand, the development of our multi-cultural society would inevitably have brought with it issues as individual differences bring about conflicts within workplaces founded on individual prejudices. Resistance and negativity would hopefully give way to acceptance and tolerance, but from a legislative perspective, what was sought was positivity and promotion, to build a society that was integrated through work.

The Equality Act 2010 brought together, within a single piece of legislation, a number of elements of statute relating to anti-discrimination previously found in several pieces of legislation. It went beyond those matters that just relate to employment, in that it references many aspects of public life such as the provision of education, premises, services and transport. It sought to bring within it a modern approach to promoting equality across society, as well as giving the basis for action against those persons committing discriminatory acts.

In terms of the employment-related aspects, it repealed much of the previous discrimination legislation that went back as far as 1970 and also captured the impact of important judgements found in cases brought under previous legislation. It sought to provide consistency in its approach to all aspects of unlawful discrimination. Unusually for a piece of legislation, the Act itself provides explanatory notes on each page which, although they are not to be regarded as authoritative, are most informative as regards implementation and meaning.

The Act recognises the diversity within society and clearly has at its heart an aim, not just in employment, to provide equality in its approach to the treatment of all of the differences that make up societal diversity, and to provide protection and a means of redress where such differences give rise to discriminatory treatment. However, in dealing with the subject from a legislative perspective, it has created a complex area of law.

PROTECTED CHARACTERISTICS

Obviously as a term, discrimination is broad and not all discrimination is unlawful, so the first aspect that the Act addresses is the identification of what are termed 'protected characteristics'; in other words, those characteristics where discriminatory treatment of an individual or group is clearly unlawful. Most of the protected characteristics were to be found in the Acts and Regulations that had been repealed, but within the Equality Act some definitions were amended to provide for greater consistency.

The protected characteristics are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

Given the clarity as to what these protected characteristics relate to, what the Act did give real focus to was the definition of the types of conduct that would be considered as discriminatory in relation to these characteristics, and this is known as 'prohibited conduct' - though not every element of prohibited conduct as defined by the Equality Act can be seen to apply to every protected characteristic. But successful understanding of the promotion of equality of opportunity and managing the workplace, so as to avoid discrimination, lies greatly in the understanding of prohibited conduct.

PROHIBITED CONDUCT AND DISCRIMINATION

The acts of prohibited conduct that apply generally, though with some specific exceptions, to the protected characteristics are:

- Direct discrimination
- Indirect discrimination
- Gender reassignment discrimination
- Pregnancy and maternity discrimination (at work)
- Discrimination arising from disability
- The duty to make adjustments
- Harassment
- Victimisation

There are some aspects of conduct in relation to specific protected characteristics that are permissible, where the applicable circumstances are expressly stated as lawful within the Equality Act.

The general definition of discrimination is that a person treats another less favourably than he treats, or would treat, others because of a protected characteristic possessed by the other person. Where many people struggle is not in the recognition of the discriminatory acts where there is a direct consequence of the conduct, but in recognising just how certain acts can still have discriminatory consequences. The Equality Act went much further than previous legislation in its explanation of such conduct. It should be noted that the term 'less favourably' requires a comparator for the discrimination to be drawn.

DIRECT DISCRIMINATION

Direct discrimination is the easiest form of discrimination to recognise, because the act of discrimination is so clearly one that is associated with the definition described as 'less favourable treatment'; but there are some implications that provide subtlety to the understanding of direct discrimination.

Direct discrimination can also occur when a person is treated less favourably because of their association with a person who has a protected characteristic. For example, a mother who directly receives less favourable treatment because she has to care for a disabled child could claim that she has been subject to associative discrimination. If an individual is treated less favourably because the other person assumes that individual has a protected characteristic, it would be considered as perceptive discrimination. An example would be where an individual is not granted an interview because there is a presumption that the person is of a certain race.

The use of the term 'would treat' recognises that a person may give some indication, perhaps in a badly worded response to a verbal enquiry, that an individual would not be considered for a role because of a protected characteristic, and this would be classed as deferred discrimination. If the individual was able to reasonably demonstrate that he/she genuinely intended to apply for a role but didn't because of the response he/she received to her enquiry, the intention to treat less favourably that was to be found in the response they received would be deferred discrimination. The candidate would nevertheless need to demonstrate that he/she was qualified for the role.

Whilst that sounds straightforward enough, there are some notable qualifications or exceptions.

- Less favourable treatment on the grounds of age is permissible where it can be demonstrated that it is a proportionate way of achieving a legitimate aim.
- Within the Equality Act, certain types of treatment do not constitute discrimination, where a person without a disability is not treated the same way. Conversely, more favourable treatment of a disabled person is also permissible.
- The protected characteristic of marriage or civil partnership is not covered by associated discrimination.
- Whilst segregation is less favourable treatment in respect of race discrimination, congregation is not, where it arises due to the wishes of those concerned.
- Sex as a protected characteristic does not apply to a breastfeeding woman, though health and safety legislation requires suitable facilities to be provided; and a man

cannot complain of less favourable treatment when such special treatment arises due to a woman's pregnancy or childbirth.

- In cases relating to pregnancy or maternity discrimination, the test for discrimination is not one of being treated less favourably, but whether the person has been subjected to unfavourable treatment, for which no comparator is required.

It is the performance of the act itself that gives rise to direct discrimination, not the intentions behind it; hence an aim that was of laudable intent may still give rise to an act that is considered to be discriminatory. Therefore it should be viewed as a purely objective consideration of what was done, without consideration of why, unless 'the why' falls within an exemption as specified in the Equality Act itself. There must be, or would be, an outcome that is less favourable by virtue of the act committed, or that would be committed, of which the protected characteristic lies at its heart.

In cases of direct discrimination, it is of no relevance that the alleged discriminator possesses the same protected characteristics as the person against whom the alleged discrimination has taken place.

INDIRECT DISCRIMINATION

Indirect discrimination arises where a person:

- Applies a criterion, practice or provision which is discriminatory in relation to the other person's protected characteristic
- Applies a criterion, practice or provision to a person who does not share the protected characteristic, that results or would result in disadvantage to those who have a protected characteristic, or
- It puts a person with that characteristic at a disadvantage, and
- It cannot be shown that it is a proportionate means of achieving a legitimate aim

For example, if a job was advertised as involving regular and frequent travel outside the area with overnight stays, it would constitute indirect (perceived) discrimination on the grounds of sex in relation to a woman with young children to care for, who was otherwise genuinely qualified and could otherwise be considered for the role, unless the criterion was justifiable as a proportionate means of achieving a legitimate aim, which the employer would be required to demonstrate. Thus, unlike direct discrimination, the discrimination can be justified, and indeed must be justified to survive a successful claim. The need for the provision to be applied must be real and reasonably applied, so an Employment Tribunal would look to objectively balance the needs of the business with the effect of the discriminatory provision within its considerations.

Indirect discrimination applies to all protected characteristics except for pregnancy and maternity.

COMPARATORS

Fundamentally in the cases of both direct and indirect discrimination, as well as the duty upon an employer to make adjustments, the requirement is for a comparator to be materially the same in terms of his/her characteristics, including the material circumstances that apply

to both the person with a protected characteristic and their comparator. It is down to an Employment Tribunal to consider each case on the basis of fact and degree, to determine that a proper comparison is being made. If there is no actual comparator, an Employment Tribunal may envisage a hypothetical comparator in the same situation, but again, that comparator must be materially the same.

HARASSMENT

The Equality Act defines three types of harassment.

- The committing of unwanted conduct for the purpose or effect of violating that other person's dignity, or creating an intimidating, hostile, degrading or offensive environment, regardless of the reason behind it. This applies to all protected characteristics apart from pregnancy and maternity, and marriage and civil partnership.
- Engaging in any form of unwanted verbal or non-verbal or physical conduct of a sexual nature that has the effect of violating a person's dignity, or creating an intimidating, hostile, degrading or offensive environment for that person. This applies to all protected characteristics.
- Where one or more person's engage in conduct of a sexual nature, or that is related to gender reassignment or sex, with the purpose or effect of violating another person's dignity, or creating a hostile, degrading, humiliating or offensive environment, and because that person refuses to submit to the conduct, then he/she is treated less favourably than he/she would have been, had he/she not rejected or submitted to the conduct. This applies to all protected characteristics.

For it to be considered that the conduct does constitute harassment, as well as the circumstances of the case, it is relevant for there to be due consideration of the perceptions of the person being harassed. It is the unwelcome or uninvited nature of the behaviour that forms the unwanted nature of the harassment. It can occur within a single act, multiple acts or be characteristic of the ongoing nature of the relationship.

VICTIMISATION

Victimisation takes place when one person victimises another on the grounds of a protected characteristic, if that person is subject to a detriment because he has carried out a protected act in:

- Bringing proceedings under the Equality Act
- Giving evidence in relation to proceedings under the Act
- Doing any other things for the purpose, or in connection with, the Act
- Making an allegation that another person has contravened the Act

All that is required for a claim to succeed is that the alleged victimiser was motivated in his/her actions by the fact that the victim had carried out a protected act. It relies on the perception of the employee who is alleging the victimisation; but it must be reasonable to hold that perception, and there must have been some detriment incurred. A claim of victimisation does not require there to be a comparator.

DISCRIMINATION, VICTIMISATION AND HARASSMENT IN EMPLOYMENT

Subject to those exceptions that will be outlined in this section, an employer must not discriminate against or victimise a person who possesses a protected characteristic:

- In any arrangements relating to decisions as to whom an offer of employment should be made.
- As to the terms under which a person would be employed. (This does not apply to sex or pregnancy or maternity, unless an offer was made which was accepted, in which case the rules regarding equality would apply, or unless the term was directly discriminatory.)
- By not offering employment.

Discrimination can be associative, perceived or deferred. Even though no person has been identified, a job advert can be discriminatory, as can interview questions or a statement made during an interview.

Minor differences between the terms of employment offered to men and women may only be ignored on the basis that they fall under the 'de minimis' rule, but terms should be considered under the applicability of an equality clause. Discrimination or victimisation can occur in the way people are afforded opportunities to training, promotion, transfer and receipt of any other benefit; in the reason or the way that they are dismissed.

However, there may be a legitimate occupational requirement, and there is no unlawful discrimination if the application of that requirement is a proportionate means of achieving a legitimate aim.

An employer must not commit harassment, and the liability of an employer will also cover acts of harassment committed by its employees, under the legal concept of vicarious liability, because the act is committed within the 'course of employment'.

AGE

It is direct discrimination to treat a person less favourably because of their age unless the treatment is a means of achieving a legitimate aim. Associative, perceived and deferred discrimination can apply to age-related cases. If an employer treats an employee less favourably because that employee has caring responsibilities for an elderly relative, then that would constitute discrimination.

The repeal of the default retirement age does not preclude an employer from setting a retirement age. However, the employer would need to demonstrate that having compulsory retirement was a proportionate means of achieving a legitimate aim. The guidance from the courts to such an approach would indicate that there should be a wider general public interest arising from the justification, not just one that relates to the specific needs of the business. Hence, a default retirement age may still be lawful in certain occupations where if it were not in place, the age profile of the business could provide a serious detriment to the business. However, it should be considered that it is best that a more constructive approach be taken, where individual circumstances will dictate whether an individual is still capable of fulfilling the role.

One challenge that arose through bringing age within the scope of discrimination legislation was the effect on the long-standing and wide practice of awarding benefits to employees based on length of service. In general it is lawful to apply a service-related criterion, certainly where its relationship was to service of less than 5 years, but beyond that, the employer will need to show that it achieved a legitimate aim or need of the business, such as encouraging staff loyalty.

Whilst age has the impact of making length of service an unsafe criteria in any selection for redundancy, on the grounds that it discriminates against younger workers, it can still be used in certain cases, for example where it is part of a selection matrix as a proportionate means to achieve a trade union agreed employment policy that delivers a peaceable process for carrying out the redundancy selection.

The making of enhanced redundancy payments based on service is permissible providing they follow the specific multipliers applied within the recognised calculations for statutory redundancy payments.

DISABILITY

A person has a disability if he/she has a physical or mental impairment that has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities. Disability within the Equality Act does not necessarily compare with disability as defined under other legislation.

Firstly, therefore, there must be the existence of a physical or mental impairment. A physical impairment must be real and not imagined, even if the person is truly convinced that they are suffering an impairment. However, where physical symptoms do exist, regardless of whether or not there may be a physical cause, there may be an impairment. If the existence of an impairment is disputed, it is for the claimant to prove its existence. And whilst a medical adviser can express an opinion as regards diagnosis, prognosis or impact of, or on, day-to-day activities, it is actually down to an Employment Tribunal to determine whether or not a person is disabled for the purpose of their claim. Physical and mental illnesses are to be treated alike.

Addictions to alcohol, nicotine or other substances are not of themselves a disability, but they can cause some physical or mental impairment that can be a disability. Certain behaviours such as kleptomania or sexual abuse are not disabilities, nor is hay fever, though

if it aggravates another condition, it could be classed as a disability.

Progressive illnesses such as HIV or cancer are deemed to be disabilities from the point in time that they are diagnosed, though certain types of cancer that respond to quick and effective treatments may be excluded.

Anyone who is certified or registered as blind or partially sighted is automatically classified as disabled.

For a disability to exist, it must have substantial and long-term effects, which can be taken to mean that it has lasted for 12 months or is likely to last for at least 12 months or more.

Where an impairment ceases to have a substantial effect on the ability of a person to carry out day-to-day activities, but is likely to re-occur, it continues to be a disability. An Employment Tribunal will look to adjudge the likelihood of recurrence based on the date that the alleged act of discrimination took place.

An impairment is to be treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities if:

- Measures are being taken to treat or correct it
- But for those measures, the impairment would be likely to have such effect

Measures are taken to include medical treatment and prosthetic aids but not such things as spectacles or contact lenses required to correct eyesight.

In assessing whether a disability has a substantial adverse effect, account must be taken of the likely effect upon the person's capability should the treatment or corrective measure in place be withdrawn. The perspective of an Employment Tribunal in determining whether or not an impairment has a substantial adverse effect must be on what the individual cannot do or is only able to do with difficulty, not on what they can do.

The view that an impairment has a substantial effect on a person's ability to carry out normal day-to-day activities is not one to be taken in relation to carrying out their job; but evidence as to how that person carries out his work activities is relevant, provided that the duties carried out can be regarded as normal day-to-day activities. Where the impairment has a fluctuating impact on the performance at work and is exacerbated by conditions at work, then the ability of the employee to carry out normal day-to-day activities both whilst at work and whilst not at work, should be taken into account in determining whether the impairment has a substantial and long-term effect.

Discrimination based on disability arises where that person is treated unfavourably because of something arising in consequence of that person's disability, and it cannot be shown that the treatment is a proportionate means of achieving a legitimate aim. Therefore a comparator is not required, as it is the overall reasonableness of approach that will be considered. For example, an employee who because of his disability is unable to comply with a reasonable health and safety related work requirement, and any adjustment that could be made in response would not mitigate that risk to health and safety, is not protected by virtue of their disability. If an employee is unable to work in his/her role as there are no

reasonable adjustments available that would facilitate continuation in the role, then dismissal would be fair if no other role could be made available.

A dismissal due to disability requires it to be shown that the disability-related reason existed within the employer's mind when that decision to dismiss was taken.

Within the Equality Act, there is no breach of the employment provisions if, having due regard to the nature or context of the work, a requirement to have or not to have a particular disability is an occupational requirement, and the requirement is a proportionate means of achieving a legitimate aim, which would not be achieved by that particular person.

The Equality Act does not prevent more favourable treatment of a person with a disability.

Within the recruitment process, there is nothing that prohibits an employer from requiring an applicant to submit to medical assessment, but if a disability is revealed, the employer must make sufficient enquiries into the effect of the disability and the steps that might be taken to reduce or remove the disadvantages that disabled person would otherwise be subject to.

However, a job candidate must not be asked about his health before being offered a job or included in a pool of selection for a job. To do so, does not itself contravene the Act but any reliance on information given as a result may contravene the Act to the extent that it may have influenced the decision not to offer the job or progress the application.

It is not unlawful to ask questions that relate to the health of a candidate for the purposes of:

- Establishing whether a candidate is able to comply with a requirement to undergo an assessment, designed to give an indication of the applicant's suitability for the role, or whether there would be a duty on the employer to make reasonable adjustments in relation to such an assessment
- Establishing whether a candidate will be able to fulfil specific functions that are an intrinsic part of the role
- Monitoring diversity within the workplace
- Establishing whether the employer can take positive action, or
- If a specific disability is a pre-requisite for the role, and the requirement is an occupational requirement and its application is a proportionate means of achieving a legitimate aim

Employers do have a duty in relation to disability, to make reasonable adjustments and there are three elements to this:

The first is to be found in any provision, criterion or practice that puts a person with a disability at a substantial disadvantage compared to a person who is not disabled. The employer is obliged to take reasonable steps to avoid that disadvantage. It can relate to the provision of information where the format of information may need to be different to deal with the requirements of a specific candidate for a job. An example would be using a signer at an interview if a candidate were deaf, where the deafness itself was not otherwise a barrier to doing the job. It may be that some rearrangement of working hours or re-allocation of duties would provide reasonable adjustment to accommodate a disabled person.

The second element lies in the existence of physical features that could act to disadvantage a disabled person. Such features may be found in the design or construction of premises including access and egress, or the design, layout or specification of fixtures and fittings within a building such as workstations or equipment or the materials in use. The requirement is, insofar as is practical and reasonable, to remove or carry out modifications, or otherwise devise a method of avoiding the impact of such a feature. Buildings, particularly older ones, may not have been designed with disabled access in mind. For example, it may be possible to build a ramp to overcome stepped access. However, this may not be possible without major work that is beyond being reasonable. The obligation on the employer is to consider all means that could be deployed and in due consideration of practicalities and indeed, cost, as well as the level of success that the adjustment will provide.

A building modification may require the permission of a landlord who may reasonably withhold consent. The employer, in seeking consent, would discharge his duties, even if consent was refused, but certainly wouldn't have discharged his obligations if he didn't actually seek consent, unless there were other significant factors that made the modification unreasonable. If the job was normally based on an upper floor of a building but there was no lift, then it may be reasonable to appoint a person who required a wheelchair and allow them to work on the ground floor. However, if that then placed a burden on another employee who was constantly running up and down the stairs to enable the disabled employee to continue working, and there was no other way of working effectively, then that would probably be an unreasonable level of adjustment.

The third element is that an employer must take reasonable steps to provide auxiliary aids or an auxiliary service where necessary to avoid the disadvantage. It may be the acquisition of a software package to overcome the effect of the disability. Allowing the employee to have time off work to attend rehabilitation may be a reasonable adjustment.

In determining what is reasonable, there is a balance that may consider the operational needs of the employer, including the interests of other employees, as well as the extent to which any adjustment would eradicate the discriminatory effect. Any adjustments must relate to the performance of the job and in taking a view, an Employment Tribunal would also take consideration of the nature of the employer's activities, the business size and indeed any financial undertaking required. Continuing to pay sick pay to a disabled employee who is off sick for a reason relating to their disability when it would not be paid to an able-bodied employee would not constitute detrimental treatment, because to continue making payments wouldn't serve the purpose of helping to get that employee back to work.

GENDER REASSIGNMENT

This protected characteristic arises where a person proposes to undergo, is undergoing or has undergone a process to bring about reassignment of their sex through changes to his/her physiology or other attributes related to his/her sex. The definition includes transsexuals and it is also not necessary for a person to be under medical supervision for the purpose of reassignment. A person having undergone gender reassignment that provides for formal recognition of the acquired gender under the Gender Recognition Act 2010, then becomes entitled to be treated in all respects as any other person of the acquired gender.

An absence from work for gender reassignment treatment is to be treated no less favourably than would be the case should the absence be related to sickness or injury, or for some other reason and there is no good reason for the treatment to be less favourable.

MARRIAGE AND CIVIL PARTNERSHIP

Whilst the law does not preclude discrimination against someone on the basis that they are a single person of either sex, an act that favours such a person would amount to discrimination against a married person or a person in a civil relationship.

Harassment does not apply, in respect that is unwanted conduct, other than it is harassment of a sexual nature.

PREGNANCY AND MATERNITY

The period of maternity starts at such time as a woman is carrying a fertilised egg, and may be taken to also include an advanced stage of IVF treatment; and ends by virtue of giving birth either around the due date or prematurely, or upon a miscarriage or abortion. Protection from discrimination can only occur where the employer is made aware of the pregnancy or there are symptoms from which the employer can reasonably suspect that a woman is pregnant.

This is a protected characteristic where more favourable treatment is permitted. A rule that applies equally to men and women that would adversely impact a pregnant woman would be discriminatory. Such discrimination could arise where a woman was sick for a period of time due to her pregnancy that exceeded a specific ruling on dismissal due to sickness absence that applied equally to men and women, and where she was dismissed under such a rule; the reason for dismissal being related to her pregnancy.

In relation to pregnancy, the protected period for cases of unfavourable treatment (therefore requiring no comparator) in relation to work, begins at the start of the period of pregnancy and ends upon completion of any additional maternity leave or when she returns to work following pregnancy, if earlier; or, where she does not have such rights, at the end of two weeks beginning with the end of the pregnancy.

Unfavourable treatment due to being on maternity leave or exercising a right, or seeking to exercise a right to ordinary or additional maternity leave, would constitute discrimination.

Any unfavourable treatment of a woman because of her pregnancy in relation to her applying for, or remaining in employment, would constitute discrimination, regardless of the motivation that lay behind the treatment.

When a maternity leave period ends, thus ending the special protection afforded under it, unfavourable treatment will only be unlawful where a man would have been treated more favourably. So, for example, where a woman is dismissed because of her absence from work and that absence was caused by pregnancy, and the dismissal took place beyond the

period of maternity leave allowed under national law, the dismissal would only be unfair if she was treated less favourably than a man would have been.

Where a decision is made within the protected period, but not enacted until following the end of that protected period, the treatment is still considered to have taken place within the protected period.

RACE

The concept of race encompasses colour, nationality, national or ethnic origins; where ethnicity is something that is wider than race, by virtue of being part of a distinct community possessing certain characteristics including a long shared history, a cultural tradition and other factors that sets the group apart within the wider community. British-born Sikhs would retain their ethnicity as would gypsies. Jews would fit into three classifications, being an ethnic group, a racial group and a religious group.

Direct discrimination is based on the existence of less favourable treatment and occurs regardless of motive. It is the act itself which discriminates. Where an employer acts to discriminate because of concerns that there would be negative action by other employers, it would be direct discrimination. Less favourable treatment would include segregation but not congregation which is based on the wishes of all those concerned. Associative discrimination founded in racial discrimination would occur, for example, if the manager of a hotel was instructed not to allow Arabic guests and he refused to obey the instruction and was consequently dismissed and claimed unfair dismissal.

Indirect discrimination by virtue of some application of a discriminatory provision will be unlawful where it puts a person at a disadvantage, unless it can be demonstrated that it is a proportionate means of achieving a legitimate aim, applied in a reasonable manner that balances the needs of those applying the discrimination to the claimant's racial group. Requiring a Sikh employee to replace his normal cultural headwear with a respiratory headset that would not accommodate his headwear, working in an area where the equipment is essential, would be reasonable.

Where the requirement for an employee to be of a particular race can be justified as an occupational requirement, then it is not unlawful if it can be demonstrated that it is a proportionate means of achieving a legitimate aim. However, care must be taken as demonstrated in the case of a Local Authority whose decision to limit vacant posts in its housing benefits department to applicants from Afro-Caribbean or Asian communities was overturned, putting aside the argument that the roles included the promotion of welfare of a particular racial group, because the courts saw the roles as principally managerial in nature.

RELIGION OR BELIEF

All religions and religious beliefs are covered, and belief can also be taken to include any religious or philosophical belief. It also covers a lack of belief as found in atheism or humanism. Whilst a philosophical belief may be difficult to define, to be considered 'real', such a belief must be genuinely held. It must clearly be a belief and not an opinion or view

based on the present state of information available. It must appertain to an aspect of human life that is significant and substantial, and must have attained sufficient level of cogency, seriousness, cohesion and importance to be credibly regarded as a belief. It must also be a belief that is worthy of respect in democratic society, not be incompatible with human dignity and not be in conflict with the fundamental rights of others. The employer must also know or be aware of the religious or philosophical belief; otherwise it cannot be held liable for an otherwise discriminatory act.

The belief must therefore be something more than a belief founded on information or in logic. It was long considered that political persuasions, such as communism or socialism, were excluded, but it is for an Employment Tribunal to determine what does constitute a philosophical belief. For example, a belief that climate change is man-made is, where genuinely held, a philosophical belief, and that whilst support of a political party would not qualify, it is now considered that a belief based on some political philosophy such as Marxism or communism could qualify. A belief in spirituality was been held to be a religious belief. It should also be noted that there is no protection for any racist or homophobic political philosophy because such belief would not be worthy of respect in a democratic society and in any event would contravene the European Convention on Human Rights.

It is recognised that conflict can arise between an employee's religion and the employer's requirements. The European Court of Human Rights found that an employee who wore a discreet but visible cross as a sign of her Christian faith, did not sufficiently contradict the wish of her employer in respect of wearing their uniform in aspects such as company image, and there was no real encroachment of the interest of others. However in that same judgement, an employee of another employer failed to gain a finding in her favour, recognising that her employer's requirement for her to remove her cross was based on a health and safety requirement that took greater priority than her belief. In another case, an employer who dismissed an employee for distributing homophobic literature amongst colleagues was not protected on the grounds of his religious belief, but the dismissal was fair on the grounds of failing to obey the lawful instruction of his employer.

A female Muslim school teacher who was instructed to remove her veil whilst teaching was not directly discriminated against on the grounds of her religious belief, because any other female teacher would also not have been permitted to wear any veil for any other reason. Neither was there any indirect discrimination as the requirement of the employer in this case was a proportionate means of achieving a legitimate aim, though it is possible that the application of a dress code that adversely affects persons of certain religions could, depending upon the circumstances, amount to indirect discrimination.

Certain exemptions exist within the provisions of the Equality Act where it can be demonstrated that the employment is for the purposes of organised religion, or the post is an occupational requirement and the application of the requirement is a proportionate means of meeting the doctrines of the religion. The nature or context of the work must determine the requirement where it relates to an organised religion, though there is also a general exception where a person with an ethos based on religion does not contravene the Act by applying, in relation to work, a requirement to be of a particular religion or belief, and it can be demonstrated that with due regard to that ethos and the nature of the work, it is an occupational requirement, it is intended to meet a legitimate aim and the person to whom it is applied does not meet it. A requirement to lead or assist in the observance of a liturgical

practice or promoting the religion would provide acceptable reason, but it must still be a proportional means of achieving a legitimate aim.

SEX

Sex refers to that biological state of being either a man or a woman. Treatment of a person less favourably than others would be treated because of their sex constitutes discrimination regardless of the motive behind it. Hence it is important to be aware of inbuilt prejudices and the danger of making stereotypical assumptions. The test of discrimination is an objective one based on the existence of the cause rather than a belief on the part of the recipient.

Direct discrimination requires an actual comparator to be identified, though an Employment Tribunal may create a hypothetical comparator by carefully drawing inferences upon the available evidence. Discrimination will also arise if persons of one sex are given preferential treatment that merely seek to redress an imbalance of the sexes, but positive action is permitted in certain circumstances such as recruitment where under-representation is a genuine issue.

Indirect discrimination, unlike direct discrimination, does allow a defence of justification where it can be argued that it is reasonably necessary for the action or practice to provide for achievement of a legitimate end. Indirect discrimination would occur where a woman is faced with a requirement that would generally place women at a disadvantage such as where she would face difficulties with child-minding provision, unless that requirement could be demonstrated as a proportionate means of achieving a legitimate aim. An Employment Tribunal found that an employer, who as part of a cost-saving plan introduced a new shift system that a single mother with a young child was not prepared to work and who resigned in response, had acted to discriminate as it should have recognised that its changes would have disproportionately disadvantaged women. However, if the employer can demonstrate a reasonable need on their part, and that can include economic factors such as cost, thereby providing an objective balance in their approach, then the approach could be acceptable.

As well as being important to recognise an approach that is even-handed, it is important to distinguish between discrimination between the sexes which is permissible, such as the application of reasonable differences in the requirements imposed on men and women within a dress code where the requirements of the dress code are applied in an even-handed manner; and the impermissible discrimination against one or another of the sexes.

In determining whether there has been a discriminatory act, the comparison must be based on the application of materially similar circumstances. Where a woman does not possess the physical characteristics necessary to do the job, because perhaps she isn't tall enough or doesn't possess the physical strength, then provided the decision is not based on an assumption, there is no direct discrimination because the reason for the treatment was not related to the protected characteristic, in that the same rationale would have applied to any man on the same basis to the same effect.

It may be seen that there is scope for overlap between discrimination on the grounds of sex and that discrimination which lies in marriage and pregnancy, and indeed a specific case

may satisfy the criterion for discrimination in respect of both.

Where the characteristics of one sex or the other form a specific requirement of the role, taking due account of the nature or context of the work, then the requirement may well be a proportionate means of achieving a legitimate aim. Nevertheless, it is a stringent test to be applied, to demonstrate that the occupational requirement is essential to the role and not merely one of several factors, thereby placing a heavy burden of proof on an employer seeking to rely on an occupational requirement, such as the need for a person of a particular sex to maintain considerations of decency or privacy, or where the job involves living in a private home, or the job necessarily involves working in a country whose laws or customs prevent a woman doing the job.

SEXUAL ORIENTATION

Sexual orientation refers to the sexual orientation of a person to another person of the same sex or persons of either sex (bisexual). It does not cover particular sexual practices or predilections. A criterion applied that is indirectly discriminatory would include advertising a job as suitable for a married couple, as it technically discriminates against a homosexual couple, and even a couple who are in a civil partnership as it is not a marriage as such.

Harassment occurs according to the objective nature of the alleged act, not the specific circumstances of the victim; hence homophobic abuse constitutes harassment of an individual even where that individual is not homosexual and that fact is known to the harassers. The conduct is nevertheless unwanted and based upon sexual orientation. It also covers harassment that occurs in relation to a person's association with another person who does possess the protected characteristic.

For a particular sexual orientation to constitute an occupational obligation, it does place a heavy burden of proof in order to demonstrate that it is either a proportionate means of achieving a legitimate aim, or that it is for the purpose of an organised religion and a specific sexual orientation is essentially required to meet the doctrines of the religion or avoid conflict with the religious convictions of a significant number of the religion's followers.

GENERAL APPLICATIONS OF THE EQUALITY ACT

The Act applies to persons who are employed, and that extends beyond the normal Contract of Employment or apprenticeship contract to encompass any person engaged to personally provide their services, and therefore captures self-employed persons where such persons have an obligation to personally perform the work as an integral part of the contract, though the application is not necessarily negated by the inclusion of some limited right of substitution.

There would be no discrimination if the act was necessary to comply with an enactment such as would be provided for the special protection of women or certain educational appointments.

Certain acts would constitute discrimination post-employment if that discrimination arises in connection to the relationship that used to exist between the parties, and the act would have been discriminatory had it occurred during the relationship. A refusal to give a reference would be such an example, if the reason lay in discrimination.

A key risk for employers lies in the behaviour of their employees towards each other, as vicarious liability lies with the employer where the discriminatory act is carried out “in the course of employment”. In such cases, the only possible defence of an employer is to demonstrate that it would have been beyond 'reasonably practicable' to expect him to have done more to prevent such discrimination; hence there is an emphasis on having a policy and procedures in place and on training employees. It is possible for the victim to take action against the individual employee for liability, and indeed a claim may be made against both employer and the alleged offender, and they may be held jointly liable.

An employer may take 'positive action' in recruiting or promoting a person with certain characteristics because they are under-represented within their workforce, provided that the person possesses equal qualification to others and in this respect qualification means work experience, skills and other competences. The action taken must be a proportionate means of achieving the aims of overcoming any disadvantage associated with the characteristic otherwise enabling a person who is disadvantaged to participate in the activity. Positive discrimination is unlawful but positive action isn't. More favourable treatment isn't permitted by the Act other than in relation to maternity and pregnancy.

Care must be taken in the drafting of job advertisements as a job advertisement is part of the arrangements made for 'deciding to whom to offer employment'. An advert that is discriminatory can be directly discriminatory even though there is no identifiable complainant. Therefore the use of words such as 'young' or 'attractive' may be seen as placing the job beyond some who may otherwise apply. Even care must be taken in the use of terms such as 'junior' where it may preclude certain candidates. The term must refer to a genuine occupational classification, rather than the age requirement for the candidate. A person who submits a claim based on the discrimination within a job advertisement will only succeed in their claim if they can demonstrate a genuine intention to apply for the role and if basing a claim for discrimination on that advert, having applied for the role and been unsuccessful, will only succeed in a claim if the person pursued the role with a genuine intent. Otherwise the person could not be considered to have suffered a detriment, or been treated unfavourably or put at a disadvantage.

A contract term that constitutes, promotes or provides for treatment that is prohibited by the Equality Act is unenforceable and a person who has an interest in the contract may apply to the courts for such a ruling.

EMPLOYERS' OBLIGATIONS

Whilst the legislation defines the obligation of employers and provides appropriate means of redress for those discriminated against, and subject to harassment or victimisation, what sets this area of legislation apart from many other areas of employment law is that, in addition to the compliance issues for an employer in dealing managerially with its employees

and indeed its prospective employees, there is real risk to any employer that lies in the treatment of its employees generally in respect of their colleagues in terms of harassment or victimisation, whether intended or not, where such behaviour impacts upon the protected characteristics of those colleagues.

Given that there is no specific length of qualifying period for claims of unfair dismissal (including constructive dismissals arising from resignations) founded in acts of discrimination, and the level of Employment Tribunal awards for such unfair dismissals tend towards the high side of the monetary spectrum, particularly given that there is no capping or maximum compensatory award for an unfair dismissal that is based on discrimination and a breach of a protected characteristic, many employers do too little to protect themselves from the risks, even without consideration of enjoying the positive aspects of a diverse workplace.

As a minimum, employers need to have a policy in place and robust procedures to deal with possible breaches of the policy and its requirements, and to encourage and enable employees to raise concerns or bring issues to the attention of management. And management must recognise their obligations to act upon such issues. To fail to do so, sends a message that negative behaviour is tolerated, and merely encourages a poor situation to deteriorate further, that will almost inevitably lead to harm to the employer.

Taking positive steps such as specific communications and employee training around diversity and equal opportunities, and promotion of an appropriate culture, can send a clear message of what is acceptable behaviour and what is unacceptable, and quell potential issues before they manifest themselves, that makes the investment in time and money relatively minor compared to the costs associated with the realisation of potential risks in terms of the time spent in dealing with such issues, the damage to reputation and the financial implications for failure.