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# SEXUAL ORIENTATION DISCRIMINATION

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The Employment Equality (Sexual Orientation) Regulations 2003 outlaw discrimination in employment and vocational training on the grounds of sexual orientation.

Who is protected?

- ▶ The Regulations apply to **workers**. These include:
  - job applicants and people applying to train or training to be a barrister
  - apprentices and people on work experience
  - self-employed people
  - agency workers
  - some office holders for example, clergy, magistrates and employment tribunal members
  - members of the armed forces
  - police officers
  - partners in a business

What are the grounds?

- ▶ Sexual orientation is defined in the Regulations as being:
  - sexual orientation towards people of the same sex (lesbians and gay men)
  - sexual orientation towards people of the opposite sex (heterosexual)
  - sexual orientation towards people of both sexes (bisexual)

This means that people are protected whatever their sexual orientation, but the legal definition does not include practices such as sado-masochism or paedophilia.

However, the Regulations *do* protect a worker from being discriminated against on grounds of the orientation of those with whom they associate, such as friends or family.

What is Discrimination?

- ▶ **Direct discrimination** is where a person is treated less favourably at work because of their sexual orientation. An example is when a person has appropriate qualifications and experience for a job but is not appointed because they are gay. A worker will usually have a stronger case if they can point to an actual person of different orientation, a **comparator**, who was treated more favourably in similar circumstances. If there is no actual comparator it is useful to ask the question, 'Had this worker been of a different sexual orientation, would the employer have treated them the same way?' Direct discrimination cannot be justified, although there are some exceptions for genuine occupational requirements and for positive action. It is possible to claim direct sexual orientation discrimination on the grounds that the employer *perceived* the worker to be, for example, gay, whether this was true or not and treated them less favourably for this reason.

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**Indirect discrimination** is where an employer applies a provision, requirement or practice equally to all workers, but which in practice disadvantages people with a particular sexual orientation. An example would be a rule that restricts employment benefits such as cheap travel to opposite sex partners. Indirect discrimination can be justified if it is shown to be an unavoidable business need.

**Harassment** is unwanted conduct that creates an intimidating, hostile, degrading, humiliating or offensive environment. For example a worker has a son who is gay and people at work tell jokes about gay people. The worker may complain of harassment on grounds of sexual orientation, though it is not his own sexuality that is the butt of the jokes.

**Victimisation** is where a worker is treated less favourably because of something they have done under or in connection with the Regulations. For example, a worker who has given evidence to an Employment Tribunal for a colleague who has brought a case under these Regulations is seen by her manager as a 'troublemaker', so is not promoted even though she has the necessary skills and experience.

## Genuine Occupational Requirement

- ▶ In limited cases it is lawful for an employer to treat people differently if it is a genuine occupational requirement (GOR). For example an organisation that provides advice to people who are gay or lesbian may advertise for a gay or lesbian advice worker. The employer must be able to show that the requirement is essential. In addition, if there are already existing workers who are capable of carrying out the required work and the work can be reasonably distributed amongst them, the GOR exemption cannot be claimed.

The Regulations also allow an employer to discriminate on the grounds of sexual orientation where the employment is for the purposes of an organised religion. The employer will need to establish that the requirement is necessary to comply with religious doctrine or, because of the nature of the work and the context in which it is carried out, to avoid conflicting with the 'strongly held religious convictions of a significant number of the religion's followers.' This exception was intended to cover only a narrow range of employment such as ministers or those who promote or represent the religion. It should not apply to all jobs in a religious organisation. An employer could not argue that a nurse in a care home, or a teacher in a school run by a particular religious organisation, should be heterosexual, unless s/he is expected to promote and represent the religion as part of her duties.

## What to do if you think you have been harassed

- ▶ **All** harassment should be taken seriously. However it may sometimes be possible to stop offensive behaviour without immediately taking legal action. Your first response may depend on the circumstances. If an incident is very threatening or unpleasant,

you should take stronger action at once. You do not have to disclose what your sexuality is in order to tackle harassment. In cases of persistent harassment, you should tackle it in stages as follows:

- Ask the harasser to stop, with support from other workers if necessary. Discrimination can happen accidentally or through thoughtlessness.
- If this fails, report the harassment verbally to management. If you are a union member, tell your union what is happening. Keep a written record of when incidents occur, including, what exactly happened, what you did and who witnessed them.
- Put your complaint in writing and ask for action to be taken at once, using your company's grievance procedure if there is one. The ACAS code of Conduct: Discipline & Grievance Procedures lays down minimum practices that employers and employees should follow.
- There may be an occasion where the harasser is involved with the management or the union structure. You should still ask the harasser to stop, and ask to speak to someone higher up.
- You may want to take a case for discrimination to an Employment Tribunal. See below for how to do this. Remember you must send in your claim within **3 months** of the most recent act of harassment/discrimination.

*In some cases, you may be able to take a criminal case under the Protection from Harassment Act 1997. You might qualify for financial assistance from the Legal Services Commission (previously Legal Aid) to help you do this.*

## Taking action against discrimination

- ▶ Find out if your company has an equal opportunities or an anti-harassment policy. If so, you may be able to use these to help your case. If your workplace does **not** have an equal opportunities policy, encourage your union to work with your employer to implement one.

If you think you are being discriminated against in any way, you should first try to settle the matter through negotiation and following your organisation's grievance procedure. However, if you feel this would not be appropriate, then you can take a case to an Employment Tribunal, see

<http://www.employmenttribunals.gov.uk/FormsGuidance/formsGuidance.htm>

Ensure you act in good time as your claim must be submitted within a 3 month time limit - see below. In some very limited circumstances this may be extended.

If these actions fail, or if there are reasons why they are inappropriate, you can send your employer an official questionnaire (from trade unions, or the Department for Business, Innovation and

Skills or downloadable from the internet at  
<http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file25460.pdf>

This is called the **Question and Answer procedure**. It asks your employer for evidence of their equal opportunities policies and employment practice. The answers to the questions can help you to decide if it is worth starting a discrimination case. The replies can also be used as evidence at an Employment Tribunal.

What to do if you think you have suffered discrimination

- ▶ Complaints of discrimination are taken to an Employment Tribunal (ET). **You must register your claim with the Employment Tribunal within 3 months of the date of the action complained of.** Where there has been discrimination over a period of time, the 3 month period runs from the date of the last act of discrimination.

Legal remedies

- ▶ If an ET finds that there has been unlawful discrimination, it can make one or more of the following orders:
  - **Declaration order.** This declares that your rights have been violated and tells your employer to end the discriminatory practice. If it continues, you can claim compensation.
  - **Recommendation order.** This recommends specific action to reduce the adverse effects of the discrimination. For example, if you were refused a job or a promotion because of discrimination, then although you would not be given preferential treatment at another interview, the next interview panel would be told that your previous application was rejected because of discrimination and that this time they must comply with the Regulations.
  - **Compensation order.** This requires your employer to pay you damages, including compensation for 'injury to feelings'. There is no upper limit to the amount of compensation that can be awarded.

Further information

- ▶ **TELEPHONE:** PERS Advice Line 01924 428030  
**EMAIL:** admin@PERS.org.uk

**WRITE:**  
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