



Employment Guide: Sex Discrimination in the Workplace

Note: This Employment Guide is intended to provide general guidance only. It does not constitute legal advice and should not be relied upon as doing so.

What is sex discrimination in employment?

Under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, it is unlawful to discriminate within the workplace on the grounds of:

- sex
- marital status (only married people are protected) or
- gender reassignment (sex change)

This protection applies equally to both men and women and extends only to the area of employment in Guernsey (it does not extend to goods and services provision).¹

What is direct discrimination?

Direct discrimination occurs when a person is treated less favourably than another person because of their sex, marriage or gender reassignment. For example, if a university advertised for male tutors only because the university assumed female tutors would not fit in, this would be direct discrimination against female employees. Equally, if a flower shop rejects a male candidate because the employer assumes that the male employee will be less satisfactory in the role than a female employee, this would be direct discrimination. This type of less favourable treatment, based on a person's actual sex, marital status or on the grounds of gender reassignment is considered to be a "detriment".

Treating a person less favourably for a reason connected to pregnancy, giving birth after 24 weeks of pregnancy, adopting a child or taking or seeking to take maternity, adoption leave or time off for ante-natal appointments² would be direct discrimination.

¹ Please note that rights under the Sex Discrimination Ordinance are not limited to existing or ex-employees but are also available in other areas of the 'employment field' for example, to job applicants, contract workers, trade unions and partnerships.

² Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016
<http://www.guernseylegalresources.gg/article/151268/Maternity-Leave-and-Adoption-Leave-Guernsey-Ordinance-2016>

Employees who intend to undergo, are undergoing or have undergone a sex change (gender reassignment) are also protected from discrimination in employment.

Direct discrimination is easy to spot, for instance an advert for a female hairdresser or a male builder.

What is indirect discrimination?

Indirect discrimination is less obvious and occurs when an employer applies a practice, policy or rule in the company which applies to all employees but which adversely affects one sex more than the other (or married persons more than single persons). For instance consider an employer who is proposing changing hours of work of employees to start earlier in the morning. It is possible that this may cause difficulties for women who generally have the major responsibilities for young children and this policy may, therefore, indirectly discriminate against women.

However, an important difference between direct and indirect discrimination is that there is a defence of justification for indirect discrimination; there is no such defence for direct discrimination. If the practice or policy cannot be justified, irrespective of sex or marital status, this may be indirect discrimination and may be unlawful. Indirect discrimination can be justified if the employer can show that the practice or policy is a proportionate means of achieving a legitimate aim.

It is also important to ensure that part-time employees are treated no less favourably than full time employees; this is because the majority of part-timers are women and thus any less favourable treatment could be indirectly discriminating against women.

It is ultimately for the Employment and Discrimination Tribunal (the body which hears sex discrimination complaints) to determine whether any discriminatory practice or policy may be justified.

For example an advertisement stating “filing clerk required....must be over 6’ tall” could constitute indirect discrimination because fewer women than men would be tall enough to apply for the job. It seems unlikely that the requirement for the post holder to be over 6’ could be justified.

Alternatively, an advertisement for cabin crew for an airline to be between 5’2” and 6’ tall (adversely affecting male applicants who may be taller than 6’) may be justified on the following grounds; that in view of height restrictions in the cabin there would be health and safety implications for those over 6 feet tall who would have to spend the flight stooped over due to low ceiling height or shorter than 5’2” who may struggle to access overhead lockers.

Victimisation

The Ordinance also provides protection against victimisation, i.e. where individuals have suffered less favourable treatment from their existing or future employer because:

- they have brought or intend to bring a sex discrimination complaint
- given evidence/information to support another employee's complaint
- complained about something at work which might amount to discrimination

Harassment

Harassment in the workplace may be defined as unwanted, unreasonable or offensive conduct (physical, verbal or otherwise of a sexual nature) or any other conduct based on sex which affects the dignity of men and women in the workplace. Employers may wish to ensure they have clear policies in place to ensure such behaviour is not tolerated. The employer should:

- take the complaint seriously
- explain how the complaint will be dealt with
- conduct a full investigation
- ensure that disciplinary action is implemented, if appropriate
- make sure that an employee does not suffer any reprisals as a result of reporting the harassment

Scope of protection against discrimination in the employment field

This includes protection against discrimination in:

- the recruitment/advertising/selection of new employees (applicants are protected as well as existing employees)
- the terms of the offer of employment, including pay, pensions and benefits (including maternity and adoption policy provisions)
- access to promotion, transfer, training and other benefits
- dismissal or any other detriment (e.g. selection for redundancy, sexual harassment)³

What action should I take if I believe I have been discriminated against?

You will need to gather information to support your case. For example if you believe you have been discriminated against during recruitment procedures ask for feedback on why you did not get the job and assess the reasons given. If you think that you are being treated differently at work keep a record of your treatment and how it differs from how your colleagues are treated. Keep a note of witnesses to any perceived discriminatory treatment.

For inequality in pay, it is helpful to gather information on members of the opposite sex doing the same or broadly similar job that you are doing to assess whether there are obvious reasons for the difference in pay. This information (subject to Data Protection

³ Please also refer to the guides 'Equal Opportunities in the Workplace' and 'Bullying and Harassment at Work'.

considerations) should include; job title, job description, qualifications, length of service, hours of work and pay.

For harassment, you should keep a diary of incidents and make a note of any witnesses. It may be helpful to talk to a friend or trusted colleague. If it is possible, you should ask the harasser to stop and explain that you find their behaviour objectionable. This can be done in writing.

For victimisation, you should keep a diary of any adverse treatment that you feel is due to you complaining about discrimination, and note any witnesses to it.

Approaching the employer and grievance procedures

You should let your employer know that you are unhappy about the way you have been treated. If this does not resolve matters, you may wish to take matters forward by raising a formal grievance for which the employer may have a policy.⁴ If this does not resolve matters, and all the information you have gathered indicates that you have been discriminated against, you may take your case to the Employment and Discrimination Tribunal.⁵

What are the time limits for making a complaint?

A complaint must be submitted within a period of three months beginning on the day the discriminatory act complained of was done. An act extending over a period is treated as having been done at the end of the period and the three months' time limit starts from the end of that period.

What happens if a sex discrimination complaint is made?

When a complaint is received, the conciliation officers have a duty to try to assist the parties in reaching a settlement (without the need for a Tribunal hearing) through advice, assistance or by conciliation.

If the complaint is settled by conciliation, this brings the matter to a close. Further information can be found in the guide 'Conciliation for Individuals'.

If the complaint is not settled through conciliation, the claim may proceed to a hearing.

How long do I need to have worked for my employer to make a complaint of sex discrimination?

There is no qualifying period of employment necessary to complain of sex discrimination and no age limit to bring a complaint.

⁴ For further information refer to the guide 'Raising and Handling Grievances'.

⁵ For further information please refer to the guidance notes 'Making a Complaint to the Employment & Discrimination Tribunal' and 'Responding to a Complaint to the Employment and Discrimination Tribunal'.

What is the amount of the award?

Where a tribunal finds in favour of the Applicant on the basis they have suffered a detriment on the grounds of sex discrimination, it shall award:

- a) a sum equal to three months' pay or
- b) where the Applicant is paid on a weekly basis, one week's pay multiplied by 13.

If an applicant successfully argues they were dismissed on the grounds of sex discrimination the award shall be:

a sum equal to 6 month's pay or
where the Applicant is paid on a weekly basis, one week's pay multiplied by 26

The above award for unfair dismissal can only be reduced in very specific circumstances where the Tribunal finds that the complainant unreasonably refused an offer of reinstatement by the employer. In the case of sex discrimination a reduction in the award could only be made where an offer had been refused which, if accepted, would have the effect of putting the complainant in the position in which he/she would have been had the act which initiated the complaint not occurred.

Exceptions to the Ordinance

There are exceptions to the Ordinance which permit the employer to confine a job to persons of one sex (i.e. may recruit, train, transfer or promote persons of one sex only) when being a member of that sex can be considered a GENUINE OCCUPATIONAL QUALIFICATION (GOQ). A full list of GOQs may be found within the Ordinance at sections 7, 8 & 9⁶

Two examples of GOQs are:

Physiology/Authenticity e.g. modelling work; where a person of a specific sex is required for reasons of physiology or, in dramatic performances or other entertainment, for authenticity. However, this GOQ excludes strength or stamina, so employers will **not** be able to ask only for male applicants because there is heavy lifting in the job. It is the ability to lift to a certain requirement, not the sex of the person applying, which is the relevant factor.

Decency or Privacy: where the job would involve close physical contact by a member of the opposite sex and there would be reasonable objection to this e.g. the employee is likely to work in circumstances where people of the opposite sex are in a state of undress or using sanitary facilities and may reasonably object to the job holder being of the opposite sex. For example, a male care assistant whose job involves helping men dress or use the toilet.

⁶ <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=67566&p=0>

The other notable exception is that it is not unlawful to discriminate by giving special treatment to women in connection with pregnancy or childbirth e.g. provision of paid maternity leave.

Employer liability

Employers can also be held liable for the discriminatory acts of their employees. In, for example, a sexual harassment complaint an individual employee (the harasser) can be named as liable for the discrimination as well as the employer. Whilst both the employer and employee can be liable for unlawful discrimination, it will be a defence for the employer if it can prove that practicable steps were taken to prevent the employee from committing the discriminatory act. For example, that the employer had implemented an equal opportunities and anti-harassment policy and had trained staff in relation to discrimination issues.

Employees may also bring civil claims for damages for stress-related illnesses if they believe they have been the victim of bullying and/or sexual harassment.

Clear, concise and easily accessible policies and procedures may assist organisations to prevent discrimination within the workplace.

Non-discrimination Notices

The Committee *for* Employment & Social Security also has a duty to act on cases of alleged discriminatory practices and can issue non-discrimination notices. The penalty for failure to act in accordance with a non-discrimination notice is a fine not exceeding level 5 on the uniform scale of fines. Examples of discriminatory practices include discriminatory advertising, recruitment, training, promotion policies, unreasonably refusing an employee to return to work for a period of up to ten “keeping in touch days” during maternity/ adoption leave or unreasonably refusing time off to pregnant employees for ante-natal appointments.

Other forms of discrimination

It is also important to be alert to other forms of discrimination, for example, discrimination on the grounds of disability, race, age or religious belief.

Whilst there is currently no legislation governing these other forms of discrimination, failure to address discriminatory issues can cause loss of goodwill and affect staff morale and business reputation. In addition poor or inappropriate treatment of an employee, for whatever reason, could form the basis of a constructive unfair dismissal complaint. Employers should focus on appropriate and reasonable behaviour to avoid potential such claims.

Promoting equal opportunities can reap benefits by contributing to staff motivation and promoting a positive working environment.

Contact Information

For further advice

- Check www.gov.gg/employmentrelations
- Email employmentrelations@gov.gg
- Contact the **Employment Relations Service**, Edward T Wheadon House, Le Truchot, St Peter Port, GY1 3WH
- Telephone number: **01481 220026**