



# Discrimination in Employment at a Glance | 1

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The Discrimination (Jersey) Law 2013 (the “**Discrimination Law**”) came into force on 1 September 2014 prohibiting acts of discrimination in relation to, *inter alia*, employment. Initially the Discrimination Law applied to race but has now been extended to sex and other related characteristics and most recently age.

## Who is Protected?

### Employees

When in employment, whether under a contract of service or an apprenticeship, as a volunteer or temporary worker or as a partner in a partnership, an employer must not discriminate against an employee:

- as to terms of employment;
- in the way access is afforded, or by not affording access to opportunities for promotion;
- by dismissing the employee; or
- by subjecting the employee to any other detriment.

## What is Protected?

Discrimination on the grounds of the following protected characteristics:

### Race which covers:

- colour;
- nationality;
- national origins; and
- ethnic origins.

### Sex and other related characteristics which includes:

- sex – whether an individual is a man, woman or has intersex status.
- sexual orientation – this covers a sexual orientation towards people of the same sex, a different sex or both people of the same sex or different sex.
- gender reassignment – defined in the Discrimination Law as a person who is proposing to undergo, is undergoing or who has undergone a process or part of a process for the purpose of reassigning gender. The process includes a social process and does not need to be a medical one.
- pregnancy and maternity – protecting against discrimination on the grounds that a woman is, has been, or may become pregnant as well as the direct consequences of pregnancy such as absences from work and maternity leave.

### Age

Regulations have been drafted to extend the Discrimination Law to protect against disability discrimination. These new regulations are expected to come into force on 1 September 2018.

## Prohibited Conduct



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The Discrimination Law prohibits discriminatory behaviour in the workplace on the basis of a protected characteristic. The Discrimination Law applies to the recruitment process, throughout the employment relationship and continues to apply after the termination of the employment.

### Direct discrimination

A person discriminates against another (the “**Subject**”), if because of a protected characteristic, the person treats the Subject less favourably than the person treats or would treat others.

Direct discrimination may also arise from less favourable treatment because of an employee’s association with someone with a protected characteristic or where they are perceived to have a protected characteristic regardless of whether an individual’s perception was right or wrong.

There is no specific defence to direct discrimination but such acts may not be unlawful if they fall within one of the exceptions contained in the Discrimination Law such as the genuine occupational requirement (referred to below). With regards to direct age discrimination, it may be justified if the discriminatory conduct complained of was a proportionate means of achieving a legitimate aim.

### Indirect discrimination

A person discriminates against another person (the “**Subject**”) if the person applies to the Subject a provision, criterion or practice (“**PCP**”) which is discriminatory in relation to the Subject’s protected characteristic.

Indirect discrimination may be justified by an employer if they can demonstrate that the PCP is a proportionate means of achieving a legitimate business aim. In considering the application of this justification, the following are taken into consideration:

- the nature and extent of the disadvantage caused by the conduct complained of;
- the feasibility of overcoming or mitigating the effects of the disadvantage caused; and
- whether the disadvantage caused is disproportionate to the aim of the employer.

### Victimisation

A person victimises another person (the “**Subject**”) if, the person treats the Subject less favourably than that person would treat others and does so because the Subject has either:

- made a complaint under the Discrimination Law;
- instituted proceedings against the person or any other person under the Discrimination Law;
- given evidence or information in connection with proceedings brought by any person under the Discrimination Law;
- otherwise done anything for the purposes of or in connection with the Discrimination Law in relation to the person or any other person; and/or
- alleged that the person or any other person has committed an act which is prohibited under the Discrimination Law.



Protection against victimisation may not be afforded where any of the acts listed above have been done in bad faith e.g. making a false allegation.

### Harassment

A person harasses another person (the “**Subject**”) if the person engages in unwanted conduct towards the Subject that is related to a protected characteristic and which has the purpose or effect of:

- violating the Subject’s dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the subject.

The protection extends to harassment of a sexual nature and includes being treated less favourably because of the Subject’s rejection of or submission to the conduct.

### **General Exceptions**

The Discrimination Law provides that in some circumstances it is not unlawful to treat people less favourably. Such circumstances include the following:

- acts done under legislative or judicial authority e.g. complying with a legal requirement or court ruling which includes acts done in compliance with the applicable law of another country;
- acts done pursuant to a policy of the States of Jersey or a Ministerial decision; and
- selection for domestic employment.

Other than more favourable treatment in the selection for employment or promotion, “positive action” taken by employers with the aim of:

- enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage;
- meeting the needs of those who share a protected characteristic which are different to those who do not share it; or
- enabling or encouraging participation by persons who share a protected characteristic

is permitted under the Discrimination Law.

### Genuine occupational requirement

An employer may require that an employee has a particular protected characteristic. Such a requirement is not discriminatory if the employer can show that, having regard to the nature or context of the work –

- it is an occupational requirement;
- the application of the requirement is a proportionate means of achieving a legitimate aim; and
- the person to whom the employer applies the requirement does not meet it.

An example of the application of the general occupational requirement would be where an employee of a particular sex is required in the context of the provision of public facilities such as changing rooms or



toilets in the interests of privacy or decency.

Further exceptions which are specific to particular protected characteristics may also be available depending on the protected characteristic concerned.

### **Who is liable?**

Generally, employers are vicariously liable for anything done by their employees during the course of their employment. The employer's liability for its employees is not restricted to the workplace during business hours and may extend to situations closely connected to the workplace such as work related social events.

It is a defence for an employer to show that it took such steps as were reasonably practicable to prevent the employee from doing the act, or acts of that description. If successful, the employer may be exonerated and the employee may be found to be liable in their personal capacity. It is no defence for an employer to assert that the employee was acting without the employer's knowledge or permission or in ignorance of the law.

An employee who has committed an act of discrimination can be held personally liable for their actions regardless of whether the employer is also liable. An employee will have a defence where a statement was made to them by the employer that the act complained of was not prohibited and it was reasonable for the employee to rely on this statement.

Where a claim is brought against the employer and the employee is successful, the Jersey Employment and Discrimination Tribunal ("**JEDT**") may apportion any compensation award between the employer and employee as it sees fit.

It should be born in mind that even if a claim is successfully defended, the employer and/or employee is likely to have been subject to adverse publicity which may have already caused reputational damage.

### **Remedies**

In the event of a successful claim the JEDT may do one or more of the following:

- declare the rights of the parties in relation to the act to which the complaint relates;
- award compensation for any hurt and distress caused as a result of the discriminatory act complained of (subject to a maximum of £5,000) and damages in respect of any financial loss arising from the discriminatory act not exceeding £10,000. In aggregate the total compensation for both hurt and distress and financial loss cannot exceed £10,000;
- recommend that the employer take, within a specified period, action to remove or lessen the adverse effect on the complainant of any act of discrimination to which the complaint relates.

Other areas to which the Discrimination Law applies but not covered by this note are:

- education;
- provision of goods, facilities and services;
- access to public premises;



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- the disposal and management of premises; and
- clubs

For further information on the development and implications of the Discrimination Law please see the associated articles. Should you require further assistance, please contact [Dexter Flynn](#) or [Stephanie Habin](#).

*This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.*