

A Guide to the Discrimination Law Discrimination not in employment

For discrimination in employment, see the JACS discrimination law guide (www.jacs.org.je)

Introduction

The Discrimination (Jersey) Law 2013 (the ‘Discrimination Law’) creates important new rights. Since September 2014 people in Jersey have had the right not to be subjected to race discrimination in the provision of goods and services, education, the sale and disposal of property and in relation to the membership of certain clubs. Since that time, the Law has been extended to cover discrimination based on sex, pregnancy and maternity, sexual orientation, gender reassignment and age. The law will be extended to cover disability discrimination on 1 September 2018.

This guide has been compiled by Citizen’s Advice Jersey (CAJ) to assist those who may be affected and describes the way in which the Discrimination Law defines and deals with discrimination. While every effort has been made to ensure that the information presented in this guide is accurate, many of the issues dealt with are ultimately a matter for the Employment and Discrimination Tribunal (the ‘Tribunal’) to decide. Examples given are intended to be illustrative, are not based on real events and are not legally binding precedents.

When does the Discrimination Law apply?

This guide is concerned with discrimination in fields other than employment. **For discrimination in employment, see the JACS discrimination law guide (www.jacs.org.je)**

The Discrimination Law prohibits discrimination in relation to:

- Education
- The provision of goods, facilities and services
- Access to and use of public premises
- The disposal or management of premises
- Members’ clubs

Education

The Discrimination Law prohibits discrimination (other than on the grounds of age) in the treatment of school students in relation to the offer of a place at the school as well as the way in which the student is treated¹. A school is any institution which provides full or part-time education² and covers both the public and private sector.

¹ Article 21

² Education (Jersey) Law 1999, Article 1(1)

Goods, Facilities and Services

Any person who provides goods or services to the public (or a section of the public) is covered by Discrimination Law³. This includes shops, bars, restaurants and pubs as well as businesses such as plumbers, decorators and builders. It also includes any public sector service provided by the States of Jersey or a parish.

It would therefore be unlawful for a shop to discriminate in terms of who it is prepared to serve, or the standard of service it provides to customers. A restaurant will be acting unlawfully if it discriminates in terms of how it treats its customers and a plumber who charges customers extra on the grounds of race or sex will also be discriminating unlawfully. The States must also avoid discriminating in the provision of its services, such as social security or healthcare. However, age discrimination is only prohibited in goods, facilities and services in respect of those who are over 18. It would therefore not be unlawful for a restaurant to refuse to seat unaccompanied children.

Public Premises

Anybody who hires out a public space or controls access to such a space must not discriminate⁴ in terms of who is given access and on what terms⁵. The owner of a playground for example, or a golf-course, or a venue which is hired out for private functions (such as a parish hall) must not discriminate in terms of who is allowed to use the facilities and on what terms.

Disposal or management of premises

The Discrimination Law also covers the sale of property – whether residential or business – and also property rental. It would therefore be discrimination to refuse to sell a house to someone because of their race or sex, charge them additional rent, or attempt to evict them.

This area of the Discrimination Law is subject to important exceptions. It does not extend to age discrimination and there are specific exceptions relating to the private disposal of property or private arrangements such as flat-sharing and taking in paying guests. These are dealt with in detail on page 18.

Clubs

Clubs with 25 or more members must not discriminate in terms of who is admitted to membership and on what terms⁶. A golf club which refuses to admit women, for example, will be acting unlawfully.

³ Article 22

⁴ Except on the grounds of age

⁵ Article 23

⁶ Article 25

This does not prevent specific clubs being formed to serve specific groups however. It would be lawful⁷ for a club aimed at the Portuguese community, for example, to exclude people who had no Portuguese background. Similarly a support group for gay and lesbian people, or a club formed specifically for either men or women, or the over 40s would be permitted under the law. It would not, however, be lawful for a club to exclude non-white members or any other group based on colour.

Charities

A charity may well be covered by the law when it provides services to the public or rents out its premises. However, the law does not prevent charities from restricting the provision of benefits to persons who share a particular characteristic provided that:

- The restriction is in accordance with the charity's constitution
- Is a proportionate means of achieving a legitimate aim and
- Is for the purpose of avoiding or compensating for a disadvantage linked to the protected characteristic.

It will not therefore be unlawful for a charity to be aimed, for example, at addressing violence against women, the vulnerability of certain migrant communities or people with specific disabilities.

The protected characteristics

From September 2018 the Discrimination Law will cover seven protected characteristics, namely:

1. Race
2. Sex
3. Sexual Orientation
4. Gender reassignment
5. Pregnancy and maternity
6. Age
7. Disability

What is meant by race?

The first protected characteristic covered by the Discrimination Law is 'race'. This characteristic has a wide definition⁸. Race covers:

- Colour
- Nationality
- National origins
- Ethnic origins

⁷ Schedule 2, Part 2, paragraph 14

⁸ Schedule 1

While it would obviously be discrimination for a shop to refuse to serve someone who is black, it would also be discrimination to refuse to serve someone because they were, for example, French.

National origins may refer to an individual's original nationality. For example someone may be a British Citizen but originally born in Nigeria. Discriminating against them because of their country of birth would be unlawful.

National origins may also refer to somebody's origin within a wider nationality. It would be unlawful, for example, to discriminate against someone on the grounds that they are Scottish. The Discrimination Law also makes it clear that being of Jersey origin is included within the concept of national origins⁹. This means that discriminating against somebody because they were born in Jersey will be just as unlawful as discriminating against someone because they were born in Poland.

Ethnic origin covers groups that have a clear identity and a long shared cultural history even though they do not share the same nationality or national origin. Roma people, for example, form a particular ethnic group as do Sikhs and Jews. It would therefore be unlawful to discriminate against someone on the grounds that they were ethnically Jewish.

An ethnic origin is not the same as a religious belief, however. The Discrimination Law will not protect someone against discrimination on the grounds that they are Catholic or Muslim for example. In time the Discrimination Law may be amended to include religion as a protected characteristic in its own right.

Nevertheless, it should be borne in mind that certain religious beliefs may be a common feature of some ethnic groups and discrimination based on those beliefs may amount to indirect discrimination (see page 9 for an explanation of indirect discrimination).

What is meant by sex?

Sex is defined as referring to a man or a woman or someone having intersex status. Intersex status means that someone's physical hormonal or chromosomal features are neither wholly male nor wholly female or a combination of both. Everybody is equally protected against discrimination on the grounds of their sex or the way in which their sex is perceived by others.

What is meant by sexual orientation?

Sexual orientation means sexual orientation towards people of the same sex, people of a different sex, or orientation towards both people of the same and different sexes. The law accordingly protects against discrimination on the grounds that someone is – or is perceived to be - gay or lesbian, straight,

⁹ Para 2(6), Schedule 1

bisexual or any other sexual orientation. If a couple is in a civil partnership, then the law specifically provides that it will be discrimination to treat the couple less favourably than if they were married¹⁰.

What is meant by gender reassignment?

A person has the protected characteristic of gender reassignment if he or she is proposing to undergo, is undergoing, or has undergone a process of changing their gender. To have this protected characteristic, there is no need for the person to intend to undergo any particular medical treatment or surgery. The change can be effected by lifestyle or other changes as well as by changing actual physical attributes associated with a particular gender.

What is meant by pregnancy and maternity?

This characteristic is closely connected with sex in that only women give birth. A woman will be protected against discrimination on the grounds that she is, has been, or may become pregnant, as well as the direct consequences of pregnancy. There is also specific protection against discrimination based on the fact that a customer or service user is breastfeeding a child.

What is meant by age?

Everyone has the characteristic of age. It means that a person of a particular age, or of a particular age group. It is important to note that the law protects people who are discriminated against on the grounds that they are ‘too young’ as well as those who are considered to be ‘too old’.

The scope of age discrimination is somewhat narrower than other exceptions. It does not extend to the disposal or management of premises, or the access to and use of public premises. Education is also exempt so that schools can continue to treat students differently on the grounds of age.

What is meant by disability?

A disability is a long-term physical, mental, intellectual or sensory impairment or a disfigurement which can adversely affect a person’s ability to participate or engage in activities such as work, using public transport, eating out and shopping. To qualify as ‘long-term’, the impairment must last, or be expected to last, for six months or more (or for the rest of the individual’s life).

The Law provides that a limited range of conditions cannot be disabilities. A tendency to steal or set fire to things and a tendency to physically or sexually abuse people are not disabilities. The definition of disability is intended to be very wide. A range of conditions that may not typically be thought of as disabilities will fall within the definition.

A practical guide to disability discrimination is available on the website.¹¹

¹⁰ Article 6(3)

¹¹ <https://www.cab.org.je/>

What is discrimination?

The Discrimination Law defines four kinds of discrimination

- Direct Discrimination
- Indirect Discrimination
- Harassment
- Victimisation

Each of these is dealt with separately below.

Direct Discrimination

Direct discrimination occurs when one person treats another less favourably because of a protected characteristic¹².

‘Less favourably’ means less favourably than other people are, or would be, treated. It is not necessary to find another person who has actually been treated more favourably than the individual in question. The issue is whether that individual would have been treated more favourably were it not for the protected characteristic in question.

While there are some limited exceptions where direct discrimination is not unlawful, these will only apply in limited circumstances. In most cases, less favourable treatment because of a protected characteristic will be unlawful. In particular, no one may seek to justify an act of discrimination based on any generalisation about the characteristics of people who share a protected characteristic.

Tony runs a small family restaurant, which prides itself on having a quiet and relaxing atmosphere. George and five of his friends book a table for six, but when Tony sees that all six guests are male he refuses to seat them. He believes that six men at a restaurant table are likely to be too noisy and will disturb the other guests.

This will be unlawful discrimination. Assuming that a group of men will be noisy is an assumption based on sex. Tony will not be able to argue that, in his experience, the assumption is a fair one.

There is an important exception to this rule in relation to age. Direct age discrimination will not be unlawful if it is a ‘proportionate means of achieving a legitimate aim’. This is the same test used in relation to indirect discrimination (described below). If a business or service provider can show why it is important to treat people differently on the basis of age then there will be nothing wrong with them doing so – provided that they do not go further than is required to meet their legitimate needs. For example a bar may choose to adopt an ‘over 21s’ policy and argue that this leads to a different and quieter atmosphere that

¹² Article 6

customers appreciate. It could also be reasonable for a gym to run a ‘seniors only’ session or for a financial adviser to run a series of seminars for the over 50s.

The protected characteristic must be the reason for the less favourable treatment but this does not mean it must be the sole reason. If the individual would have been treated more favourably but for his or her sex or race, for example, then this will usually be sufficient to show direct discrimination. Nor does motivation matter. It is no excuse for a business to say that it is concerned about the attitudes of its other customers. If there is less favourable treatment because of a protected characteristic, then that is enough.

Julie is a trans woman who wants to buy clothing from a shop run by Sheila. As she is browsing, Sheila approaches her and asks her to leave. Sheila is very apologetic and explains that a number of customers have said that they are put off by Julie’s appearance and are worried that they may have to share the changing room with her.

This would be unlawful discrimination. The reason that Sheila turns Julie away is the fact that she is a trans woman. The fact that Sheila is responding to the wishes of other customers is irrelevant. Asking Julie to leave is an act based on gender reassignment and amounts to direct discrimination.

Nor can a service provider discriminate on the basis that he or she disapproves of the person in question – even if this disapproval is based on a strongly held religious conviction.

Mark and Peter want to hold a party to celebrate the first anniversary of their civil partnership ceremony. They book a hall owned by a local church to hold the party but when the church discovers the nature of the celebration the booking is cancelled because it does not accord with the values of the church.

This will be unlawful discrimination. If the church rents out its premises to members of the public it must not discriminate on the grounds of sexual orientation. If the church would have honoured a booking celebrating a wedding anniversary it must do the same in the case of a civil partnership.

Direct discrimination can also be unconscious in the sense that the discriminator may not be aware of the reason for the treatment. Provided that it can be shown that the reason was in fact a protected characteristic then this will be sufficient. Those dealing with members of the public should be aware of the risk of unconscious bias in the way in which they treat customers and potential customers

Mark is a waiter working in a Michelin starred restaurant. When he is taking an order from Phil and April – who are both aged 20 – he is worried that they will not be able to afford the bill and tells them that they will have to provide their credit card before he will accept their order. When they complain to the manager, Mark denies that he has any age-related bias. He simply believed that Phil and April did not look as if they would be able to afford the meal. However he is unable to explain what it was about their appearance that gave him that impression.

In the absence of a reasonable explanation for Mark’s assumption, it is likely that Phil and April would succeed in a discrimination claim. It would seem that Mark made an unconscious assumption about the sort of person who could afford to eat in the restaurant.

In most cases it is the characteristic of the individual claiming discrimination that is relevant. However, the Discrimination Law does not require the less favourable treatment to be specifically because of the characteristics of the claimant. If an individual is treated less favourably because of somebody else’s race, for example, then this will still be direct discrimination.

Direct discrimination is also possible if the discriminator is mistaken about someone’s characteristics. If a customer is refused service because the shopkeeper believes that she is Polish then this will be direct discrimination even if the employer turns out to be mistaken. Similarly, if someone working in a bar refuses to serve someone who he thinks is gay then this will be discrimination based on sexual orientation. There will be no need to consider exactly how the individual would choose to define his own sexual orientation.

It is important to note that for the purposes of disability discrimination only, positive discrimination is permitted, meaning that a person who does not have a disability (or does not have the same disability) cannot argue that they have been treated less favourably.

De Carteret’s Farm Shop has been working with a local charity for people with learning disabilities. It decides to recruit a new shop assistant and specifies that it will give preference to candidates with learning disabilities. This would not be direct discrimination.

In addition, if a person with a disability is treated less favourably because of something associated with their disability (but not the disability itself), and the difference in treatment is not a proportionate means of achieving a legitimate aim this will be an act of discrimination. For example, where a person is refused service because they have a guide dog, the reason for the treatment (the dog) arises in consequence of his disability.

Indirect discrimination

Indirect discrimination can arise in relation any of the protected characteristics apart from pregnancy and maternity¹³.

Indirect discrimination happens when an unjustifiable ‘provision, criterion or practice’, although applied to everyone, causes a particular disadvantage to people who share a protected characteristic¹⁴. For example:

- A requirement to speak a particular language will cause a particular disadvantage to people from a country where that language is not generally spoken
- A cafe that applies a “no hats or headwear” rule in the same way to all customers may cause a particular disadvantage to those from an ethnic group, such as Sikhs and Jews), who may cover their heads as part of their religion and would not be able to use the cafe
- A help centre’s policy of providing advice in person only, not by phone or email, may put people with mental health problems like agoraphobia at a disadvantage if they can’t leave their homes to travel to the centre
- A shop that only allows people who are in employment to pay for goods in instalments may cause a particular disadvantage to older (retired) people.

Julie runs a local cafe. As an incentive to attract new customers she offers a 10 per cent discount to any customer who can show that they have lived in Jersey for the past 10 years.

This could amount to indirect discrimination because on average, people from other countries are less likely to have lived in Jersey over that period.

Whether the practice is lawful or not will depend on whether Julie can show that it is a ‘proportionate means of achieving a legitimate aim’.

Attracting new customers is certainly a legitimate aim, and it is understandable that Julie cannot give a 10 per cent discount to everyone. However the Tribunal will have to decide in the circumstances whether it is proportionate to limit the discount to those who meet the residence requirement given the discriminatory impact that it has.

For a provision, criterion or practice to cause a particular disadvantage to a group there is no need for it to adversely affect all members of the group.

Indirect discrimination will only be established where the provision, criterion or practice in question does cause that disadvantage to the person claiming.

¹³ Article 7(4)

¹⁴ Article 7

A provision, criterion or practice does not have to amount to an absolute requirement in order to amount to indirect discrimination. A mere preference will be enough if it can be shown that this causes a ‘particular disadvantage’.

The key difference between direct and indirect discrimination is that indirect discrimination will only be unlawful if the provision, criterion or practice is unjustifiable in that the person cannot show that it is a ‘proportionate means of achieving a legitimate aim’¹⁵.

Justification is a two-part test. The first requirement is to show the legitimate reason that underlies the provision, criterion or practice. The second is to show that the provision, criterion or practice is a proportionate means of achieving that aim. The Tribunal will have to decide this issue by weighing up all the circumstances of the case but the Discrimination Law specifies¹⁶ that the matters to be taken into account should include:

- The nature and extent of the disadvantage caused
- How feasible it would be to overcome or mitigate the effects of that disadvantage and
- Whether the disadvantage caused is disproportionate when placed alongside the aim that is sought

Claire’s local pub uses flashing lights and strobe effects in the evenings. Claire has photo-sensitive epilepsy and so she cannot go to the pub to meet her friends. This may cause her a particular disadvantage. However, the pub’s choice of lighting might be justified as a proportionate means of achieving the legitimate aim of entertaining their customers by providing an enjoyable environment for them.

Overall the issue of justification is a balancing exercise. The greater the disadvantage caused to the group in question, the more compelling the reason for the provision, criterion or practice must be. One important factor is likely to be whether the same aim can be achieved in a less discriminatory way.

¹⁵ Article 7(2)(d)

¹⁶ Article 7(3)

A dentist's practice will only take on a new patient on the completion of a detailed form. Aniko has recently arrived in Jersey from Hungary and speaks very little English. She does not understand the form and is unable to complete it. The dentist's practice refuses to take her on as a new patient.

Aniko could claim indirect discrimination based on the fact that people who share her national origin are significantly less likely to be able to complete the form in English. The dental practice could argue that the details on the form are important and so their requirement has a legitimate aim behind it.

The issue for the Tribunal might turn on whether it would have been possible for the practice to gather the information needed without requiring Aniko to deal with the written form. Could Aniko have been interviewed? What translation services are available? Ultimately it is for the Tribunal to decide where to strike the right balance.

Reasonable Adjustments: A new form of indirect discrimination (from 1 Sept 2018) is a failure to make reasonable adjustments where that results in a substantial disadvantage to a disabled person, when compared to a person who is not disabled.

The Law introduces three specific duties to take reasonable steps to avoid that disadvantage, which must be at no cost to the disabled person –

1. When a provision, criterion or practice puts a disabled person at a substantial disadvantage

C.I. Cinema introduces 'relaxed screenings' of new releases on one Sunday each month. With subtle changes to the environment - including lower sound levels, the lights kept on at a low level and no trailers or adverts - the experience is more positive for people who are autistic, as well as people who have sensory impairments.

2. Where the absence of an auxiliary aid puts the individual at a particular disadvantage (from 1 Sept 2018)

A dyspraxic school pupil is allowed more time in each of her GCSE exams and is also allowed to use a computer so that she can type her answers as she writes very slowly

A duty to make reasonable adjustments only arises when the employer or service provider knows or ought reasonably to have known of both the individual's particular disability and the disadvantage that is being caused to them.

3. Where a substantial disadvantage is caused by the physical features of premises (from 1 Sept 2020)

Le Breton’s Department Store in St Helier has three steps running along the whole width of the shop. In order to make the rear half of the shop accessible to wheelchair users, a ramp is installed at one end of the steps at a sufficiently gentle angle that wheelchair users can easily gain access to the whole store.

Reasonable adjustments means making improvements that are both practical and manageable relative to the size and context of the business. A separate guide¹⁷ sets out some practical tips for making reasonable adjustments in providing services to the public and in the workplace. In judging whether or not an adjustment is reasonable the Tribunal will take the following factors into account:

- The effectiveness of the adjustment in removing the disadvantage
- The extent to which the adjustment is a practical option
- The extent to which the need for the adjustment could have been anticipated
- The cost of any steps that need to be taken to make the adjustment
- The extent of the financial, administrative and other resources available to the employer or service provider (including any provided by a third party)
- The characteristics and size of the employer or service provider in question

Harassment

The third kind of discrimination defined by the Discrimination Law is harassment¹⁸. Harassment is unwanted conduct which is related to a protected characteristic which has either the purpose or the effect of:

- Violating a person’s dignity or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

In the context of delivering services, the most likely scenario is harassment arising in the way in which an employee of a business speaks to a customer.

Charlotte takes her car to her local garage for a service. In the customer service area, calendars are displayed that feature photos of topless women. Charlotte feels very uncomfortable and asks the mechanic to take them down. The mechanic refuses, makes lewd comments about Charlotte’s physical appearance and makes rude gestures. Charlotte leaves the garage. She would be likely to succeed in a claim for sexual harassment. The behaviour of the mechanic is related to Charlotte’s sex and has created a humiliating and offensive environment for her.

¹⁷ <https://www.cab.org.je/>

¹⁸ Article 28

The use of racially or sexually derogatory terms, inappropriate jokes, or simply rude and aggressive behaviour could all amount to harassment, depending on the circumstances.

Harassment can arise because of either the purpose or effect of what somebody says or does. It is no defence to a claim for harassment that the person in question did not intend to cause any offence. If the effect of the unwanted conduct meets the required standard then this will be sufficient.

Barbara goes to a local coffee shop after work. In the course of serving her, the barista strikes up a conversation with her and compliments her on her appearance. His conversation becomes increasingly intrusive and personal and Barbara begins to feel uncomfortable. When she asks the barista to leave her alone he becomes hostile and tells her that she should be flattered to receive his attention. Barbara later sees the barista laughing with a colleague and looking in her direction. She finishes her coffee and leaves.

The conduct of the barman may well amount to harassment. It should have been clear to him that his conduct was unwanted, it caused an offensive environment for Barbara and was clearly related to her sex.

One difficulty with defining harassment is that what is harmless banter for one individual may be extremely offensive for another. In judging the effect of conduct the Discrimination Law requires the Tribunal to take the following into account:

- The perception of the person alleging harassment
- The circumstances of the case and
- Whether a reasonable person could regard the conduct as having that effect.

There is therefore a careful balance to strike. The fact that somebody perceives a comment as racist or sexist, for example, is relevant but not definitive. If no reasonable person could form such a view then it is unlikely that a claim of harassment will be upheld.

If conduct is not unwanted, it cannot amount to harassment. But whether conduct is unwanted or not is an objective question. It is no defence to a claim of harassment to argue that the harasser did not realise that the conduct was unwanted. When engaging in conduct which is related to a protected characteristic and which could potentially cause offence, the person in question must bear the risk that the conduct will be unwanted and may amount to harassment.

There will be cases, however, in which conduct that could amount to harassment is held not to do so because the employee in question is found not to have been offended. Each case will depend on the specific circumstances of the case.

Victimisation

The fourth kind of discrimination defined by the Discrimination Law is victimisation¹⁹.

For the Discrimination Law to be effective it is important that people are free to make complaints of discrimination in good faith, without fear of reprisal. The Discrimination Law therefore provides that discrimination occurs when, for example, a service provider treats a customer less favourably because the customer has:

- Made a complaint under the Discrimination Law
- Brought proceedings against any person under the Discrimination Law
- Given evidence or given information in connection with the Discrimination Law
- Done anything in connection with the Discrimination Law
- Made any allegation that a person has acted in contravention of the Discrimination Law.

This is a wide-ranging protection which essentially means that any allegation of breach of the Discrimination Law or any activity supporting another individual's complaint is likely to be protected.

Importantly, the protection does not depend on the discrimination complaint itself being well-founded. Even if an individual is wholly mistaken and wrongly believes that he or she has been discriminated against, it will still be unlawful for a service provider to take any action against them.

Mary has been renting a flat for the past year that is managed by a small estate agency run by Mark. Six months ago she complained that the agency gives the first choice of its best properties to white people, although after mediation and assurances from Mark, she took no further action.

Mark was very upset at the allegation, which is wholly false although it appears that Mary did genuinely believe it. When Mary decides to look for another property, Mark refuses to offer her any viewings as he thinks it is best if she finds a house through someone else.

This would be unlawful victimisation. The fact that Mary's initial allegation was wholly without foundation does not matter. Mark is still treating Mary less favourably than other clients because of the allegation that she made.

The only exception to the rule is where the complainant has given false information or made a false complaint in bad faith. Bad faith can generally be taken to mean either that the individual knows that the allegation is false or is acting from some ulterior motive in making the complaint.

¹⁹ Article 27

It is not enough, however, to believe that the complainant was acting in bad faith – this must actually be true. The Tribunal is likely to require clear evidence of this before holding that an employee has lost the right not to be victimised.

Omar has made several complaints about the service he has received from his dry cleaners. He has tried to claim that his suits were put to the back of the queue because he is from Iraq, despite the lack of any evidence to support his allegations. On one occasion he admits to the junior assistant that he only raises the Iraqi issue in the hope that ‘her boss’ will find the complaint so embarrassing that he will offer a full refund.

When the owner of the business hears of this he refuses to serve Omar again. This would not be victimisation. Omar had an ulterior motive in making his complaint and was not acting in good faith. His complaints are not therefore protected.

Giving instructions to discriminate

As well as being under a duty not to discriminate against customers or members of the public, a business will also be acting unlawfully if it instructs one of its employees to act in a discriminatory manner²⁰. If it does so, the employee who has been given the instruction will be able to bring tribunal proceedings against the employer.

Alan is employed as a doorman in a nightclub owned by Peter. Peter tells Alan that he should not allow women to enter the club unless they are ‘dressed to impress’ which he explains means that they are wearing fashionable dresses and high-heeled shoes. No similar rule is applied in relation to men who will be admitted provided they are not wearing trainers. Alan refuses to comply with this instruction and is dismissed as a result.

Not only would Alan’s dismissal be unfair but he will also be able to bring an action against his employer on the grounds that he was instructed to commit a prohibited act. It will not matter that no act of discrimination actually took place.

A complaint under this heading can be made by the person who is given the discriminatory instruction or the subject of the intended discrimination (irrespective of whether any discrimination actually takes place). However in order to bring a complaint the individual must have suffered a detriment as a result of the employer’s actions.

The Tribunal is likely to give a wide definition to the concept of detriment in this context. It will not be limited to financial loss but is likely to include being upset at the nature of the instruction being given. However, where the detriment is of a less tangible nature, that fact is likely to be reflected in any award of compensation made by the Tribunal.

²⁰ Article 30

Who is liable for discrimination?

Acts of discrimination committed by a business are often committed by an employee acting on the employer’s behalf. For example, a shop assistant employed by a retailer may make act in a discriminatory way even though it is the strict policy of the company as a whole not to discriminate.

The Discrimination Law does not allow employers to hide behind the fact that acts of discrimination are committed by employees without the employer’s permission. The employer will be liable for anything done by one of its employees acting in the course of his or her employment, even if it is done without the employer’s knowledge or approval²¹.

Tony is employed by Best Restaurants Ltd as the manager of one of its three restaurants. He believes that disabled customers will put off some of his regular customers and so he makes sure that anyone with a noticeable disability is always seated at the back of the restaurant, away from the windows. When a customer complains to the company, they apologise immediately and Tony is disciplined.

Nevertheless, the customer will still be able to bring a discrimination claim against Best Restaurants Ltd. Tony was acting in the course of his employment when he committed the act of discrimination and so they are responsible. The fact that they apologised and took action after the fact does not affect this, although it may influence the amount of compensation that the Tribunal subsequently awards.

The only circumstance in which the employer will not be liable for the discriminatory acts of its employees is if it can prove that it has taken all reasonably practicable steps to prevent the employee from acting in a discriminatory manner.

Note that it is only preventative measures that can support this defence. It is not enough for the employer to show that it took reasonable steps to deal with a situation once the act of discrimination had actually taken place.

What steps are practicable to prevent discrimination will vary according to the circumstances. However the Tribunal is likely to look for the following:

- A clear policy adopted by the employer emphasising that discrimination will not be condoned or tolerated
- Training for managers and appropriate staff on equality issues and the need not to discriminate
- A company culture which takes complaints of discrimination seriously and does not tolerate discriminatory conduct on the part of employees.

²¹ Article 32

Where these are in place, it is likely that a Tribunal will hold that the employer is not liable for acts of discrimination committed by employees.

The issue of the employer’s liability for the acts of employees is likely to be particularly important in the context of harassment. Sexist or racist jokes and insults are highly unlikely to be specifically endorsed or authorised by an employer but if they are committed ‘in the course of employment’ then the employer will still be liable.

There is no formal definition of what ‘in the course of employment means’ and in most situations it will be a matter of common sense. A shop assistant serving a customer is clearly acting in the course of employment but is unlikely to be doing so if he or she bumps into the same customer in the street after work.

One aspect of the test may well be whether the employer is in a position to control what the employee does in the context in question. In most cases the employer will be liable for actions that take place in the workplace or during normal working hours, but will not be liable for what happens wholly outside of work.

Individual liability

In a case of discrimination, it is not only the service provider who will be liable. Any individual who knowingly aids another in doing something prohibited by the discrimination law is also individually liable²². What is more, an employee for whose act the employer is deemed to be liable is also individually liable for that act and can be sued as an individual.

This means that a customer with a discrimination claim may be pursuing that claim against more than one party. He or she may be suing the business and also the individual employee who committed the act of discrimination in question. If the claim is upheld the Tribunal will be able to apportion liability for compensation between the parties according to what it considers to be just and equitable.

Anna attempts to rent a flat from Marcus but is turned down. Anna uncovers evidence that Marcus did not want the estate agents to show her around the flat because she is pregnant. Anna successfully sues both Marcus and the estate agents who had done nothing to discourage Marcus and had gone along with his wishes.

The Tribunal finds that the discrimination was instigated by Marcus but is highly critical of the estate agents who, as professionals, should have known better and explained the legal position to Marcus. They order the estate agents to pay 60 per cent of the compensation and Marcus to pay the remaining 40 per cent.

²² Article 31

How are claims brought?

Individuals who believe that they have been the victims of discrimination or other conduct prohibited by the Discrimination Law may present a claim to the Tribunal within 56 days (or 8 weeks) of the last discriminatory act occurring²³.

In an employment case, the claim will be referred to the Jersey Advisory and Conciliation Service (JACS) who will explore the possibility of the parties agreeing a settlement of the dispute before the case is referred to the Tribunal for hearing.

In a case that does not relate to employment, the claim will be referred to Citizens Advice . If both parties agree, a Community Mediation Service mediator will be appointed to attempt to achieve a mediated settlement. If both parties reach agreement, a mediated settlement agreement will be drawn up which both parties sign as full and final settlement of the issue and the case will not progress to a Tribunal hearing.

If a case is not settled by mediation and a Tribunal hearing is arranged, the Tribunal will consider evidence and representations from both sides before reaching its decision. If it concludes that discrimination has taken place then it may do one or more of the following:

- Make a declaration of the rights of both sides
- Order a payment of compensation
- Make a recommendation that the employer take action which will alleviate the adverse effect of the discrimination on the claimant.

Compensation may reflect both financial loss and a sum for hurt and distress and must not exceed £10,000. Within that overall limit, the amount awarded for hurt and distress must not exceed £5,000.

²³ Article 37

Alison is in the process of buying house but the deal falls through when the owner discovers that she is married to a woman. She succeeds in her discrimination claim and the Tribunal orders the vendor to pay her compensation.

In working out the compensation the Tribunal hears that as a result of the deal falling through she incurred additional legal expenses of £1,345 and had spent a further £900 on surveys and building estimates. She was also unable to find a new property before the completion date of the sale of her old property and was forced to rent a house instead.

The Tribunal awards her £2,245 in relation to her wasted expense and a further £2,000 which represented the additional rent she had to pay (over and above the mortgage costs she would in any event have incurred). Finally the Tribunal awards £3,000 for hurt and distress, noting that losing the house in such circumstances was traumatic and upsetting for her. In

Exceptions

There are some circumstances in which it is not unlawful to treat people less favourably on the grounds of a protected characteristic²⁴.

In particular, an individual will not be acting unlawfully if he or she is simply complying with another law or court, ruling or for the purposes of safeguarding national security.

Nor will race discrimination be unlawful if it is done pursuant to a policy adopted by the States of Jersey or a Ministerial Decision where the implementation of the policy applies criteria based upon a person's birth or length of residency in Jersey and the act is for the purpose of promoting employment or other opportunities, or for the purpose of providing access to facilities and services²⁵.

The owner of residential property, for example, is therefore entitled to act in compliance with the applicable law and guidelines laid down by the States when it comes to issues such as residency requirements without fear that this will amount to unlawful discrimination.

Exceptions Relating to Housing

Although the Discrimination Law applies to the sale or disposal of property²⁶, it is not intended to cover purely private arrangements for the sale or other disposal of a home. The Discrimination Law therefore provides²⁷ that it does not apply to the **private disposal** of premises by an owner-occupier.

²⁴ Schedule 2

²⁵ Paragraph 3, Schedule 2

²⁶ The protection in this area does not extend to age discrimination

²⁷ Schedule 2, Part 2, para 13(1)

In this context, 'private' means that the owner does not use the services of an estate agent to dispose of the premises and also does not publish any advertisement in connection with its disposal.

This means that a home-owner who is simply choosing who to sell his or her home to is not at risk of a discrimination claim. However if that home-owner advertises the house as being for sale in the local paper or online or in some other way then the Discrimination Law will apply.

Similarly the Discrimination Law will be engaged if the home-owner uses the services of an estate agent. Importantly it does not matter whether the discrimination actually occurs through the estate agent or not. Once an estate agent is engaged the rule against discrimination applies to the disposal, however it eventually takes place.

The other main exception in relation to housing is in the disposal of small premises. Discrimination by a person will not be unlawful where the person in question (or a close family member) resides, and intends to continue to reside, in another part of the premises and where part of the premises will be shared between that person and the other residents.

In other words, the Discrimination Law intends to exclude situations such as flat-sharing where the owner of the premises is renting out a room in the flat and will continue to share living space with his or her flat-mate.

The exception will not, however, apply where a house has been divided into self-contained units, one of which is being rented out. The owner of the property in that case will not be sharing any living space with the tenants. This is a business relationship rather than a predominately personal one and the law against discrimination will apply.

Another limitation is that the flat-sharing exception will only apply to small premises. To qualify as small premises a property must have a number of characteristics. Most importantly the overall premises must not be large enough to accommodate more than two separate households in addition to the owner, or no more than six persons in total.

Jon lives in a house owned by his parents which has six bedrooms. Five of them are rented out on an individual basis. Although two of them are large enough to accommodate a couple, each has only one tenant. All six housemates share the kitchen, bathroom and living areas.

This is not small premises because it accommodates more than two additional households and could accommodate 8 individuals. The Discrimination Law will apply when each bedroom is let out.

Anisa lives with her partner in a three bedroom house and rents out two bedrooms to two other couples. All six residents share the kitchen and living space.

This is small premises because the property is only big enough for two additional households.

The total number of people living in the house does not matter and the Discrimination Law will not apply when an individual room is rented out.

Single sex services

There is a specific exception²⁸ in relation to services that are aimed at members of a particular sex. A service provider may choose either to provide a service purely for members of one sex or may choose to provide those services separately for members of different sexes.

To take advantage of this exception the service provider must show that its approach is a proportionate means of achieving a legitimate aim and that in the case of the provision of separate services, it would be less effective to provide a joint service. If the service is to be provided to people of one sex only, then not only must that approach be a proportionate means of achieving a legitimate aim, but the service provider must show that at least one of the following conditions is met:

- Only people of one sex have a need of the service
- The service is also provided jointly for people of different sexes and it would be insufficiently effective were it to be provided only jointly
- The extent to which the service is required by people of different sexes makes it not reasonably practicable to provide separate services and a joint service would be less effective
- The service is provided at a place which is, or is part of, a hospital or another establishment for people requiring special care, supervision or attention

²⁸ Paragraph 16, Schedule 2

- The service is likely to be used by two or more people at one time and the circumstances are such that a person of one sex might reasonably object to the presence of a person of a different sex
- There is likely to be physical contact between the person to whom the service is provided and another person who might object if they were not both of the same sex

The law is intended to provide for common sense exceptions when it would be reasonable to expect separate services to be provided for members of different sexes. These provisions would, therefore, allow:

- The provision of health services (such as prostate or breast-cancer screening) which are appropriately targeted at members of a particular sex
- A sports centre running a women only fitness class or swimming session
- A sauna running separate sessions for men and women
- A support group for members of a particular sex dealing with an issue that affects members of that sex in a particular way – eg a weight loss group aimed specifically at men
- A refuge providing support and emergency accommodation for female victims of domestic violence

Where the service includes the provision of communal living accommodation a specific exception may apply provided the accommodation is managed in a way that is as fair as possible to people of different sexes²⁹

A separate provision³⁰ deals with sport and competitions, providing that discrimination on the grounds of sex or gender reassignment is permitted in relation to participation in ‘gender-affected activity’ – where the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average competitors of another sex. The law does not, therefore, prevent a sports centre from – for example - running a women’s football team or a men’s basketball team.

Age-related concessions

It is not unlawful to give a concession to members of a particular age group. A leisure centre may therefore offer discounted membership to people who have reached a particular age without having to show any separate justification for this. Discounted entry to a cinema, cheaper tickets at the Theatre – and even discount vouchers in a department store can all be provided on the basis of age without acting in breach of the law.

²⁹ Para 20, Schedule 2

³⁰ Para 21, Schedule 2

Age-restricted services

There are obviously some services where a provider is obliged to discriminate - for example by refusing to serve alcohol to someone who is under 18. While anyone who is under 18 would be unable to claim in any event, there is obviously a risk that the employer may discriminate against someone who looks as though they are under 18 but in fact isn't.

This exception allows the service provider to refuse to serve someone who looks as though they are under the required age and who fails to provide proper identification when asked to do so. If a bar manager therefore refuses to serve a 21 year-old customer because he looks like he is just 17 and has no valid ID then that will not be unlawful discrimination.

Disability

The Law also provides some exceptions that are specific to disability.

Public service vehicles: These services will have the same duty not to discriminate in the way they treat individuals. However, there is no duty to make reasonable adjustments in the provision of public service vehicles such as buses and taxis. Accessibility is dealt with as a matter of contract.

Building Bye-laws: A person will not be responsible for being unable to undertake a reasonable adjustment if to do so would be a breach of the Building Bye-Laws (Jersey) 2007.

School admissions: A limited exception allows schools to continue to set entry standards based on high ability or aptitude. It does not excuse the school from its general duty not to discriminate nor its duty to make reasonable adjustments in accommodating pupils with a disability.

Sport and competitions: An exception ensures that the application of the rules of international sporting competitions (such as the Paralympics) will not be disability discrimination.

Ministerial or States policies: An exception allows policies to be applied where they make resources available to promote the employment of, or opportunities for, disabled people or to improve access to services and facilities.