



## Employment

# Sex Discrimination - A Guide for Employers in Guernsey

May 2009

## Introduction

This briefing note addresses the issue of sex discrimination in the workplace. It is intended to be used as a guide and not as a substitute for legal advice. If you would like to find out more about this or any other employment related matter a member of our legal team would be delighted to assist you. Please refer to page five for our contact details.

The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 came into force on 1 March 2006. The Ordinance outlaws all discrimination on grounds of:

- sex;
- gender reassignment; or
- marital status

in employment.

The Ordinance also provides a procedure for complaints of discrimination to be made to the new Employment and Discrimination Tribunal.

The Ordinance defines the three types of sex-based discrimination, which are: direct discrimination, indirect discrimination and victimisation. It also defines gender reassignment-based discrimination and marital status-based discrimination. This paper focuses on sex-based discrimination.

### Three Definitions

**Direct Discrimination:** the favourable or less favourable treatment of one person over another.

**Indirect Discrimination:** putting some sort of obstacle in the way of someone with which they find it difficult to comply because of their

gender.

Victimisation of someone on account of their being involved in a sex discrimination complaint under the Ordinance is itself discrimination.

### **How might the employee show that they have been directly discriminated against?**

The employee will have to show that:

- they have been treated less favourably than a person of a different gender; and
- the reason for the less favourable treatment is on the grounds of their gender, i.e. but for the fact she was a woman, she would not have received the less favourable treatment.

In order to prove that they have been discriminated against, the employee will have to find someone with whom to compare themselves. This person must be in the same or similar position to the person bringing the complaint. The employee will also have to show that their less favourable treatment was as a result of their gender and not for other reasons such as poor performance or behaviour.

### **What happens if an employer gives an employee special treatment because she is pregnant. Will this count as sex discrimination against the men in the office?**

The Ordinance deals with this point specifically and states that male employees cannot allege sex discrimination on the grounds that a woman is treated more favourably on grounds of her pregnancy or maternity.

This means that if time off is given to female employees for ante-natal check-ups men in the office cannot complain about sex discrimination and do not have to be granted similar time off.

**What happens if an employer interviews a man and a woman for the same job? Does sex discrimination need to be considered?**

It is unlawful to discriminate on the grounds of gender in relation to the arrangements an employer makes for the purpose of determining who should be offered employment and any arrangements during employment. This means that an employer cannot discriminate against either sex when doing any of the following:

- drawing up job specifications;
- advertising positions available;
- instructing an employment agency;
- interviewing (e.g. do not ask the employee if they are married, it should not affect their ability to do their job!);
- deciding how much to pay someone;
- deciding on whether to promote someone;
- deciding on whether to offer a person a bonus;
- deciding on whether to give some employees access to better facilities or benefits;
- deciding to dismiss someone.

**What if an employee discriminates against someone without the permission of the employer?**

Any act of discrimination committed by a person in the course of their employment will be treated as done by the employer (whether or not it was done with the employer's knowledge or approval) as well as by the person committing the act.

Employers and employees may therefore be held responsible under the Ordinance for discriminatory acts - although the main responsibility will lie with the employer to ensure that no discrimination takes place in the first place.

**Is there any way of avoiding a claim as an employer as a result of the actions of employees?**

If an employer can prove that they took such steps as were reasonably practicable to prevent a particular employee from committing a discriminatory act, it will have a good defence to any claim.

Please contact us for details on what reasonable practicable steps can be taken to prevent a claim.

**If a male employee is required for a specific role, do women have to be considered as well?**

An employer can specify the sex of the employee if there is a genuine occupational qualification for that employment. Examples of genuine occupational qualification include:

- Where the essential nature of the job calls for a man/woman for reasons of physiology or authenticity (excluding physical strength or stamina);
- Where the job needs to be held by a man/woman to preserve decency or privacy;
- Where the place of employment is a single sex establishment for people requiring special care;
- Where the job is one of two to be held by a married couple.

Further advice is available upon request.

### **How is discrimination determined?**

The test that the Tribunal will apply to see whether someone has been discriminated against is a subjective one. The Tribunal will look at how the conduct is perceived by the person alleging sex discrimination, rather than the intention behind the action or the perception of the person alleged to be discriminating. Therefore if the employee feels they have been discriminated against then the Tribunal will look at their feelings, rather than looking at whether a 'reasonable employee would feel that they had been discriminated against'.

### **Does the law only apply to employees?**

The Ordinance goes further than that and states that the categories of people that can bring claims are:

- Employees;
- Former employees (in certain circumstances);
- Job applicants;
- Contract workers;
- Agency workers;
- People on work-experience;
- Existing partners; and
- Candidates for partnership.

### **Is there any time limit in which someone can make a claim for sex discrimination?**

A claim must be brought within three months of when the discrimination occurred.

### **What happens when a claim is brought?**

The Department of Commerce and Employment will try and settle the claim using conciliation techniques and will try and do so within a six week time frame. If it cannot be settled within six weeks then the claim will progress to the Tribunal.

### **If the employee succeeds how much will they be awarded?**

The award for a successful complaint is three months' pay (or 13 weeks' pay if paid weekly) calculated on the basis of the complainant's average pay during the three month (or 13 week) period immediately preceding the "relevant date". The "relevant date" is the date of the act which founded the complaint or, if the act extended over a period of time, the latest date falling within that period which is prior to the date on which the complaint was presented.

### **What if the person is not employed, how will the Tribunal calculate their average pay?**

If the pay-related formula is deemed inappropriate by the Tribunal, it will calculate the award on what it considers to be just and equitable in the circumstances of the case. For example, where a complaint is based on pre-employment discrimination, and the complainant is unable to show what his or her remuneration would have been, it is likely that the Tribunal will consider it just and equitable to calculate the award on the basis of the remuneration which the complainant would have received had they been offered the job.

### What is a non-discrimination notice?

The Department of Commerce and Employment issue this to employers informing the employer that it has committed an act of discrimination and requiring the employer to stop committing that act. In addition it means that the employer may have to confirm that it has changed its discriminatory practices and produce information to prove it.

If an employer fails to comply with a non-discrimination notice or deliberately misleads the Department by providing false information or by suppressing or destroying relevant information, the employer will be guilty of an offence and may currently be liable for a fine of up to £5,000 and/or three months' imprisonment.

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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## Contact us

For further information or professional advice please contact our lawyers below.

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