

Carey Olsen Starting Point Employment Law Guide – The Discrimination (Jersey) Law 2013

Service area / [Employment, Pensions and Incentives](#)

Location / [Jersey](#)

Date / [November 2016](#)

This Starting Point Guide addresses the fundamentals of discrimination law in Jersey.

Introduction

Carey Olsen Starting Point Guides are intended as a general introduction and guide to different aspects of Jersey employment law.

They are a summary of the most important issues that we come across. They are very much edited highlights of those issues. If you would like legal advice in relation to any specific circumstances, please do give us a call.

This Starting Point Guide addresses the fundamentals of discrimination law in Jersey and how the law was extended in September 2015.

Jersey – not just cows

Jersey is the largest of the Channel Islands and is a British Crown dependency.

It has its own financial, legal and judicial systems. It is not part of the UK or of the European Union (although it has close relationships with both). It also has its own breed of instantly recognisable cows.

The Discrimination (Jersey) Law 2013 (The “Discrimination Law”)

The Discrimination Law first came into force on 1 September 2014. It initially applied to race. On 1 September 2015, it was extended to sex and other related characteristics. From 1 September 2016 age was added as a protected characteristic.

What approach to take

There are several areas to consider in preparing for and responding to the Discrimination Law.

In particular, you will need to think about your general approach. Does your organisation want to do what it needs to do in order to comply with the Discrimination Law and no more – or does it wish to consider a more ambitious approach to diversity and inclusion?

The answer to this question is likely to be informed by the size and resources of your organisation. However, it is worth being aware that there is in many organisations a clear business case for engaging more closely with diversity and equality issues – you should be clear about your approach and ensure that you do not lose out on potentially significant benefits.

Areas to consider might include the following:

- **Find a champion** – in most organisations, no initiative will get started without backing at a senior level. Diversity is no different.
- **How diverse are you?** – understanding where you are at the moment is crucial.
- **Look at how and where you recruit** – by going outside the “usual” channels and/or eliminating potential bias, talent may be located in some less obvious places.
- **Think about your employer “brand”** – how are you regarded by your employees, by potential candidates and (often the most difficult one) former employees?
- **Look at your workplace culture** – does your workplace welcome diversity? Is it an inclusive place? Do you reward presenteeism (e.g. long but not necessarily productive hours) over other measures of performance?

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- **Are there problem areas (or problem individuals)?**
- **Can you make work more flexible?** – a growing body of evidence shows a more flexible approach to work is invaluable in attracting and retaining employees and improving company performance.
- **Understand your legal obligations** – irrespective of anything else you do, you must be aware of your legal obligations.

Who has duties under the discrimination law?

All Jersey employers, whatever their size, are covered by the Discrimination Law.

Small employers may have practices that are more informal, have fewer written policies (and HR/management resources), and may be more constrained by financial resources than larger employers, but no employer is exempt from the Discrimination Law because of size.

What the discrimination law means for you as an employer

The Discrimination Law applies to a wide range of individuals who supply services. In fact, it may be better in many cases to think in terms of workers rather than employees – the Discrimination Law is likely to apply to the following categories of workers:

- **employees** (as defined in the Employment (Jersey) Law 2003 (the “Employment Law”). A person is an employee if:
 - a. they work under a contract of service or apprenticeship;
 - b. they are under a contractual obligation to perform work or services personally (save for those who are providing services to clients or customers in the course of a profession trade or business undertaking which is carried on by the individual in question);
- **partners** in partnerships;
- **temporary workers** supplied by an employment agency;
- **apprentices and vocational trainees;**
- **voluntary workers.**

Other areas

The Discrimination Law also applies in a variety of non employment related areas, including:

- Education
- The Provision of goods, facilities and services
- Access to and public premises
- The disposal and management of premises
- Clubs

The above areas are not covered by this note – you should ensure that you are aware of your obligations if you are active in any of the above areas.

Protected characteristics

The Discrimination Law works by prohibiting certain behaviour in relation to those with a certain protected characteristic. The first of the protected characteristics is Race. Discrimination on the grounds of race has been outlawed since the Discrimination Law came into force.

Race is a broadly drafted concept in the Discrimination Law and covers:

- Colour
- Nationality
- National origin (including being of Jersey origin)
- Ethnic origin

With effect from 1 September 2015, further protected characteristics were added as follows:

- Sex which includes a person who:
 - a. is a man
 - b. is a woman or
 - c. has intersex status, defined in the Discrimination Law as physical, chromosomal, hormonal or genetic features that are:
 1. neither wholly male or female
 2. a combination of male or female or
 3. neither male nor female
- Sexual orientation which includes a sexual orientation towards:
 - a. People of the same sex
 - b. People of a different sex
 - c. People of the same sex and a different sex
- Pregnancy and maternity
- Gender Reassignment which covers transgender persons, defined in the Discrimination Law as a person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s gender by changing the person’s physiological or other attributes that are associated with a particular gender.
- Age

Future Protected Characteristics

Disability discrimination is likely to be outlawed from 2018 as legislation is currently being drafted.

Continued

What kinds of behaviour?

The Discrimination Law prohibits certain behaviour in the workplace on the basis of a protected characteristic, e.g. that someone has a protected characteristic, is perceived to have or is associated with somebody who has a protected characteristic.

The Discrimination Law protects people when seeking employment, during employment or when engaged in activities related to their work. It also protects people after they leave employment in some circumstances (see below).

Key concepts

The behaviours which the which the Discrimination Law prohibits in the workplace are as follows:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation

Direct discrimination



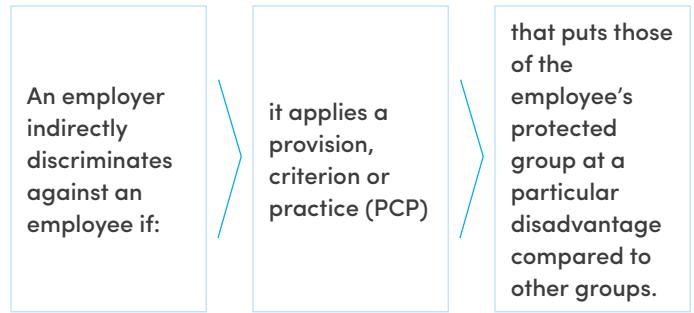
Generally, direct discrimination is not capable of being justified (with certain exceptions such as those connected with Genuine Occupational Requirements – see below). However, employers will be able to justify less favourable treatment in certain circumstances connected with age discrimination and disability discrimination (when the latter comes into force).

Direct discrimination includes:

- Less favourable treatment because of an employee's association with someone with a protected characteristic.
- Less favourable treatment in circumstances where someone is (rightly or wrongly) perceived to have a protected characteristic.

In age discrimination, direct discrimination may be justifiable where it can be show that the discrimination is a proportionate means of achieving a legitimate aim.

Indirect discrimination

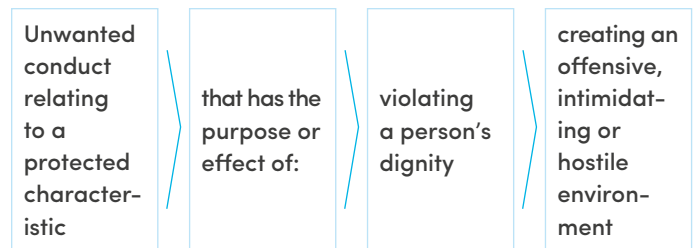


It may be possible for employers to justify indirect discrimination if the employer can show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim. In considering an argument related to justification, the Tribunal would need to take account of:

- The nature and extent of the disadvantage caused to individuals;
- How feasible it would be to overcome or mitigate the effects of that disadvantage; and
- Whether the disadvantage caused is disproportionate in view of the employer's aims.

Harassment

An employee is harassed if they are subjected to unwanted conduct as follows:



Harassment also includes unwanted conduct of a sexual nature on the grounds of sex, sexual orientation or gender reassignment. It also includes being treated less favourably because of the subject's rejection of or submission to the conduct.

Continued

Victimisation

Victimisation is included in the Discrimination Law to protect individuals against retaliation should they make or support a complaint under the law. A person victimises another if they treat them less favourably or otherwise subjects them to a detriment on the grounds that they have:

- 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 against the person or any other 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;
- alleged that the person or any other person has committed an act which is prohibited by the Discrimination Law.

There is an exception for complaints made or other acts done in bad faith – but this is rarely used.

Should someone be victimised, they will essentially have a free standing complaint under the Discrimination Law.

Helping or instructing someone else to discriminate

The Discrimination Law makes it unlawful to knowingly help someone discriminate against, harass or victimise another person.

A person who helps another in this way will be treated as having done the act of discrimination, themselves. It is also unlawful to help a person to discriminate against or harass another person after employment has ended, where the discrimination or harassment arises from and is closely connected to that employment. It is unlawful to instruct or attempt to induce someone to discriminate against, harass or victimise another person because of a protected characteristic or to instruct a person to help another person to do an unlawful act.

An instruction or inducement may amount to no more than persuasion and need not be applied directly – it can be indirect. Nor does any act need to result from the instruction or inducement.

Liability for discrimination

Generally speaking, an employer will be liable for anything done by one of its employees acting in the course of his or her employment. What constitutes “acting in the course of his or her employment” is not defined – but it should be assumed to include anything in the workplace and any situation closely connected to the workplace – such as work related social events.

The only circumstances 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.

The JACS Guide to the Discrimination Law Discrimination in Employment¹ suggests the following steps should be taken:

- 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.

Individual liability

An employee (or agent) may be personally responsible for their own acts of discrimination, harassment or victimisation carried out during their employment or while acting with the authority of their employer. This applies irrespective of whether the employer is also liable.

But there is an exception to this. A worker or agent will not be responsible if their employer or principal has told them that there is nothing wrong with what they are doing and the employee or agent reasonably believes this to be true.

General exceptions

There are some circumstances in which it is not unlawful to treat people less favourably.

These include:

- complying with a legal requirement, another applicable law or court ruling, or for the purposes of safeguarding national security;
- complying with 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:
 - a. promoting employment or other opportunities; or
 - b. providing access to facilities and services.
- Selection for domestic employment – this only applies to the recruitment decision only;
- Genuine Occupational requirements – where someone of a specific race or sex is required because of the specific requirements of the job (for example in a retail environment for reasons of decency and privacy).

Exceptions – sex discrimination

Religion

Religious organisations are permitted to discriminate in recruiting a person to conduct religious services where the employer requires their employees to be of a particular sex, have a particular sexual orientation or to be/not be a transgender person.

¹ <http://www.jacs.org/je/media/94649/discrimination-guide.pdf>

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Health and safety – pregnant women

Where (following a Health and Safety assessment) it is considered that a pregnant employee may be at risk it will not be an act of discrimination to:

- allocate her other duties;
- make changes to her working environment; or
- suspending her without pay.

Short term contracts

An employer is permitted to refuse to recruit a woman where:

- the employer aims to recruit a person on a limited term contract to undertake a project of work that is required to be completed within a particular time frame and the employer has no plans to renew the contract; and
- the person who is not recruited is pregnant and the likely timing of her absence on maternity leave would interfere with completion of the project.

Exceptions – age

Age discrimination comes with a number of exceptions. For instance, age discrimination is not be prohibited in education, premises and the provision of goods, facility and services to those under 18. There are also certain carve outs for the provision of pensions, employment benefits and redundancy payments. In addition, unlike the other protected characteristics, employers are able to objectively justify an act of direct discrimination as a proportionate means of achieving a legitimate aim.

Age – retirement and unfair dismissal

For a period of 2 years until September 2018 (the Transitional Period), employers will be able to require employees to retire at the States pensionable age (currently 65) without having to show any justification. So called “forced” retirement at a retirement age which is less than the States pensionable age will be direct age discrimination unless objectively justified. Following the Transitional Period “forced” retirement at any age will amount to direct discrimination unless the employer can show it is a proportionate means of achieving a legitimate aim. For the purposes of Transitional Period, pensionable age will be 65.

During the Transitional Period, the upper age limit that applies to claims for unfair dismissal will still apply. As a result, employees will be precluded from claiming unfair dismissal in the following circumstances:

- Where the employer has a normal retirement age (“NRA”) for men and women that is higher than 65, when employees have reached the NRA.
- Where the employer has different NRA for men and women and the higher of the NRAs is greater than 65, when employees have reached the higher NRA.
- Otherwise, when employees have reached 65.

Once the Transitional Period has expired, “retirement” will become a potentially fair reason for dismissal.

Positive action

‘Positive action’ means the steps that an employer is permitted to take to encourage people from groups with different needs or with a past track record of disadvantage or low participation to apply for jobs.

An employer can use positive action where they reasonably think (in other words, on the basis of some evidence) that:

- people who share a protected characteristic suffer a disadvantage connected to that characteristic;
- people who share a protected characteristic have needs that are different from the needs of people who do not share it; or
- participation in an activity by people who share a protected characteristic is disproportionately low.

To deal with the three situations, an employer can take proportionate action to:

- enable or encourage people to overcome or minimise disadvantage;
- meet different needs; or
- enable or encourage participation.

However, employers are not permitted to base recruitment or promotion decisions on the basis of positive action – this would be positive discrimination, which is not permitted under the Discrimination Law.

Making a complaint – the tribunal

If an employee (or former employee) considers that they have a complaint under the Discrimination Law, they can make a claim to the Discrimination & Employment Tribunal.

The claim must be made with 8 weeks of the last act occurring. If the Tribunal upholds the claim, it may:

- Make a declaration of the rights of both sides;
- Order a payment of compensation; or

Make a recommendation that the employer take action which will alleviate the adverse effect of the discrimination on the applicant.

Compensation may reflect both financial loss and a sum for hurt and distress up to a maximum of £10,000.

Within that overall limit, the amount awarded for hurt and distress must not exceed £5,000.

Other laws

The Discrimination Law does not exist in a vacuum – it overlaps and interacts with other laws – in particular the Employment (Jersey) Law 2003 provides that a dismissal will be automatically unfair if the reason or principal reason for the dismissal constitutes an act of discrimination against the employee prohibited by the Discrimination Law.

Continued

Amendment No 8 to the Employment Law also adds rights such as maternity/ adoption and leave and pay and the right to ask to work flexibly.

You should ensure that you understand your obligations under the Employment Law as well as the Discrimination Law – looking at either in isolation is not advisable.

Sources of help

The Discrimination Law is undeniably complex. More information is available from the following sources:

- Local information is available from Jersey Arbitration Conciliation Service (“JACS”): www.jacs.org.je
- The Discrimination Law is similar in many respects to the UK Equality Act 2010. This means that much of the UK guidance available from the Equality and Human Rights Commission can be very useful: www.equalityhumanrights.com
- Similarly, ACAS in the UK is an excellent source of guidance: www.acas.org.uk

The UK sources above should be treated with care – the law is similar in some respects but there are differences.



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