

Recruitment and Selection and the Law

Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA)

The Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA) are designed to prevent unlawful discrimination on grounds of sex, marriage and race in employment, education and training, in the provision of goods and services and in the disposal of premises. In addition the Sex Discrimination (Gender Reassignment) Regulations 1999, which became effective on 1 May 1999, make it unlawful to discriminate on grounds of gender reassignment in employment and vocational training. The Acts apply in the whole of Great Britain with the exception of Northern Ireland. Those who feel they have suffered unlawful discrimination in recruitment or employment can complain to an employment tribunal.

Each act contains a part headed 'Discrimination in the employment field', which covers both discrimination against applicants for employment and against existing employees. As far as prospective job applicants are concerned, it is unlawful to discriminate on grounds of race, sex (including undergoing or having undergone gender reassignment) or marriage:

- (i) in the arrangements made for the purpose of determining who should be offered employment; or
- (ii) in the terms on which employment is offered; or
- (iii) in refusing or deliberately omitting to offer employment (including deliberate omission from a short-list on grounds of sex or race).

Unlawful discrimination covers:

- (i) direct discrimination - where people are treated less favourably than others on grounds of sex or marriage, or on racial grounds. 'Racial grounds' include colour, race, nationality/citizenship and ethnic or national origins. Direct discrimination can include
 - (a) action taken as a result of stereotyping (whether or not the stereotype is a negative one) - for example, refusal to employ a married woman in a post which would require travelling because married women are thought to be less mobile than single women or married men. This is discrimination on grounds of sex and marriage;
 - (b) inconsistency, for example refusal to shortlist an ethnic minority candidate because of a lack of certain qualifications, while white candidates without those qualifications are short listed. This is discrimination on racial grounds;
 - (c) action taken out of worries as to acceptability - for example, refusal to employ a woman as a senior technician because it is felt other technicians would not take orders from her. This is discrimination on grounds of sex;
 - (d) action taken because of pregnancy - for example, refusal to appoint a woman because she is or may become pregnant. This is discrimination on grounds of sex.
- (ii) indirect discrimination - where, although everyone is treated the same, there are requirements which put members of one sex, or married people, or members of a particular racial group at a disadvantage compared with other people, and which

cannot be justified on grounds other than of sex, marriage or race. Indirect discrimination has four essential components:

(a) there is a requirement or condition which is applied equally to all - for example, a selection criterion requiring candidates to be aged 30 or less;

(b) the requirement has a disproportionate effect on members of a group covered by the legislation - for example, women who are more likely to have spent time out of paid work to bring up children;

(c) there is a detrimental effect on members of the group in question - for example, that they are barred from being appointed to the job;

(d) and the requirement is not justifiable on grounds other than race, sex or marriage - for example, that there was no good reason why candidates had to be under 30.

Only if an employer's action meets all four of the above criteria does it classify as indirect discrimination.

(iii) victimisation - of anyone who, in good faith, makes a complaint about discrimination, or assists someone in making a complaint by providing information.

Where an employment tribunal is satisfied that a complaint is well-founded, it can:

(i) make an order declaring the party's rights;

(ii) award compensation;

(iii) recommend action to be taken within a specified period by the discriminator to put matters right.

Positive action

Section 38 of the RRA, and sections 47 and 48 of the SDA, establish important exceptions to the provisions against discrimination. Under these exceptions, commonly known as 'positive action', employers are permitted to take action to encourage members of a particular racial group or sex to enter their employment where it can be shown that this group or sex has been markedly under-represented over the preceding twelve months. Action may take the form of special training facilities, opportunities for work experience or encouragement via job advertisements. Discrimination at the point of selection remains unlawful.

Genuine occupational qualifications

It is not unlawful to discriminate on racial grounds or on grounds of sex for jobs which can best be performed by people of one race or sex, rather than another, in circumstances where authenticity is required (e.g. a waiter in a Chinese restaurant or an actress to play a female character), or where personal services are performed (e.g. an Asian woman social worker). It is, however, highly unlikely that jobs in a university setting would fall into these categories. It should be noted that the SDA excludes physical strength or stamina as possible grounds for a genuine occupational qualification.

The role of the Commissions

The Equal Opportunities Commission (EOC) and the Commission for Racial Equality (CRE) were set up by the SDA and RRA respectively. The commissions have the responsibilities of:

- (a) working towards the elimination of discrimination,
- (b) promoting equality of opportunity and (in the case of the CRE) good relations between persons of different racial groups generally, and
- (c) keeping under review the working of their respective acts of parliament.

They have the power to investigate employers who they have good reason to believe are discriminating unlawfully. If discrimination is found to be taking place, the commissions can require the employer to take specified steps to end the discrimination. They can also help individuals to bring complaints under the acts.

Race Relations Amendment Act 2000

The Race Relations (Amendment) Act 2000 extended the coverage of the 1976 Race Relations Act to the functions of public authorities not previously subject to the Act, giving them a general duty to have due regard, when carrying out their functions, to the need to eliminate unlawful racial discrimination, promote equality of opportunity, and promote good relations between people of different racial groups. This included not only the police and other law enforcement bodies, but also a wide variety of public corporations and nationalised industries, health, education, arts, research and regulatory, audit and inspection bodies.

All public authority bodies to whom the specific duty applies – including universities – were required to prepare and publish a Race Equality Scheme by 31 May 2002, setting out how the organisation intends to meet its general and specific duties under the Act. They are required to:

- Evaluate how relevant their functions and policies are to race equality
- Examine their policies to see their effect on race equality
- Assess and consult on any proposed policies
- Publish consultations, monitoring and assessments so that they are publicly available
- Train staff on new duties under the Act.

Equal Pay Act 1970

The Equal Pay Act 1970 makes it unlawful for employers to discriminate between men and women in terms of their pay and conditions where they are doing the same or similar work; work rated as equivalent; or work of equal value.

Equal Pay (Amendment) Regulations 1983

This gives a woman a right to claim equal pay for work of 'equal value' to that of a man in the same employment (or vice versa), where there is no existing job evaluation scheme, and where there is no person of the opposite sex engaged on 'like work'.

Disability Discrimination Act 1995

This Act repeals the provisions of the Disabled Persons (Employment) Acts 1944 and 1958, which established a register of disabled people and obliged certain employers to employ a quota of disabled people.

The Disability Discrimination Act (which has subsequently been amended by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 which came into force on 1 October 2004) makes it unlawful to discriminate against disabled persons in employment, including in recruitment, training and other benefits. The Act defines a disabled person as someone who 'has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'.

The effect of an impairment is a long-term effect if it has lasted at least 12 months, or if it is likely to last that long, or if it is likely to last for the rest of the affected person's life, or if it is likely to recur if in remission. An impairment is to be taken to affect the ability to carry out normal day-to-day activities if it affects one of the following:

- mobility;
- manual dexterity;
- physical co-ordination;
- continence;
- the ability to lift, carry or otherwise move every day objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn or understand; or
- perception of the risk of physical changes;

Unlawful discrimination covers:

(i) direct discrimination – where an employer directly discriminates against a disabled person if, on the ground of the disabled person's disability, an employer treats the disabled person less favourably than he treats, or would treat a person not having that particular disability whose relevant circumstances, including his or her abilities, are the same as, or not materially different from, those of the disabled person. Direct discrimination cannot be justified.

(ii) discrimination where, for a reason relating to their disability, an employer treats a disabled person less favourably than a non-disabled person is, or would, be treated, and the employer cannot show that the different treatment is justified.

(iii) failure to make a reasonable adjustment - employers have a duty to take reasonable steps to prevent physical features of premises, or any provision, criterion or practice, from placing a disabled applicant (or potential applicant), employee, or disabled person whose employment has ended at a substantial disadvantage.

To comply with this duty, the Act specifies that an employer may have to:

- make adjustments to premises;
- allocate some duties to another person;
- transfer a disabled person to an existing vacancy;
- alter working hours;
- assign a different place of work;
- permit absence during working hours for rehabilitation, assessment or treatment;
- give, or arrange, training;
- acquire or modifying equipment;
- modify instructions or reference manuals;
- modify procedures for assessment or testing;
- promote a reader or interpreter; or
- provide supervision.

The 2003 Regulations also introduce protection against harassment, which is defined as follows:

“a person subjects a disabled person to harassment where, for a reason which relates to the disabled person’s disability, he engages in unwanted conduct which has the purpose or effect of –

(a) violating the disabled person’s dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.”

The concept of harassment is not limited to employees and extends to applicants and former employees as well as other categories of worker.

Disability Equality Scheme

The Disability Discrimination Act 2005 introduced the requirement for a number of public authorities, including universities, to produce a Disability Equality Scheme (DES) by 4 December 2006.

The Act established a ‘general duty’ to make disability equality a key element of how the institution works. In all activities the University must give appropriate weight to the need to:

- promote equality of opportunity between disabled people and others;
- prevent unlawful discrimination;
- prevent harassment of disabled people;

- take steps to take account of disabled people's disabilities, even where that involves treating disabled people more favourably than others;
- promote positive attitudes towards disabled people; and
- encourage participation of disabled people in University life.

Sex Discrimination (Gender Reassignment) Regulations 1999

This extends the Sex Discrimination Act 1975 to cover discrimination on grounds of gender reassignment in cases where an individual is treated less favourably by another person on grounds that the individual intends to undergo, is undergoing or has undergone, gender reassignment.

Definition of gender reassignment

Gender reassignment is defined within the Regulations as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process'.

A note to the Regulations explains that they cover direct discrimination, when a person receives less favourable treatment on the grounds that the individual intends to undergo, is undergoing or has undergone gender reassignment. Thus, for example, a member of staff requiring sick leave for corrective surgery in connection with gender reassignment should be treated the same as any other employee requiring sick leave to undergo surgery.

Employment Equality Regulations (Religion or Belief) 2003

The Employment Equality (Religion or Belief) Regulations came into force in the UK on 2 December 2003. The legislation covers students as well as staff and contract workers. The Regulations cover direct and indirect discrimination, harassment, and victimisation of someone who has made a complaint or who has helped another person to do so.

Religion or belief is defined as being any religion, religious belief or similar philosophical belief. The belief must be similar to a religious belief and some unusual cases may need to be decided in court.

Further information on the Regulations is available from the ACAS (<http://www.acas.org.uk/index.aspx?articleid=337>) website.

Employment Equality Regulations (Sexual Orientation) 2003

The Employment Equality (Sexual Orientation) Regulations 2003 came into force from 1 December 2003 making it unlawful to directly or indirectly discriminate against workers on grounds of their sexual orientation. The Regulations cover direct and indirect discrimination, harassment, and victimisation of someone who has made a complaint or who has helped another person to do so. Sexual orientation is defined in the regulations as orientation towards persons of the same sex (lesbians and gay

men), towards persons of the opposite sex (heterosexual), or towards persons of the same sex and the opposite sex (bisexual).

Further information on the Regulations is available from the ACAS (<http://www.acas.org.uk/index.aspx?articleid=337>) website.

Employment Equality Regulations (Age) 2006

The Employment (Equality) Age Regulations 2006 are effective from 1 October 2006. They make it unlawful, on the grounds of age, to discriminate directly or indirectly (for example, in recruitment, promotion, training, the terms on which employment is offered, and dismissal), unless

- such discrimination can be objectively justified as a proportionate means of achieving a legitimate aim,
- there is a genuine occupational requirement for employing a person of a certain age for a particular post, or
- because such different treatment is covered by a specific exemption within the regulations.

In common with existing legislation, the Employment (Equality) Age Regulations 2006 render unlawful both harassment on the basis of age and victimisation for having made a complaint about treatment of oneself or another on grounds of age. The legislation also allows for employers to be held vicariously liable for acts of employees who discriminate on the grounds of age.

The Rehabilitation of Offenders Act 1974

Under the Rehabilitation of Offenders Act 1974 criminal convictions can become spent or ignored after a rehabilitation period, although they remain on the Police National Computer. The rehabilitation period varies depending on the sentence or order imposed by the court - not the offence. Custodial sentences of more than two and half years can never become spent. The following sentences become spent after fixed periods from the date of conviction:

Sentence	Rehabilitation period	Rehabilitation period
	Age 18 or over when convicted	Age 17 or under when convicted
Prison sentences of 6 months or less, including suspended sentences, youth custody (abolished in 1988) and detention in a young offender institution	7 years	3 and half years
Prison sentences of more than 6 months to 2 and half years, including suspended sentences, youth custody (abolished in 1988) and detention in a young offender institution	10 years	5 years
Borstal (abolished in 1983)	7 years	7 years
Detention Centres (abolished in 1988)	3 years	3 years

Fines (even if subsequently imprisoned for fine default), compensation, probation (for convictions on or after 3 February 1995), community service, combination, action plan, curfew, drug treatment and testing and reparation orders	5 years	2 and half years
Absolute discharge	6 months	6 months

With some sentences, the rehabilitation period varies:

Sentence	Rehabilitation Period
Conditional discharge or bind-over, probation (for convictions before 3 February 1995), supervision, care-orders	1 year or until the order expires (whichever is longer)
Attendance centre orders	1 year after the order expires
Hospital orders)with or without a restriction order)	5 years or 2 years after the order expires (whichever is longer)
Referral Order	Once the order expires

The Police Act 1997 and the Criminal Records Bureau (CRB)

The CRB was established under Part V of the Police Act 1997 and was launched in March 2002. The service enables organisations in the public, private and voluntary sectors to make safer recruitment decisions by identifying candidates who may be unsuitable for certain work, especially that involve children or vulnerable adults.

Organisations wishing to use the service can ask successful job applicants to apply for one of two types of check. The type of check required will depend upon the nature of the position. These are called Enhanced and Standard Disclosures.

Standard Disclosures are primarily for posts that involve working with children or vulnerable adults. Standard Disclosures may also be issued for people entering certain professions, such as members of the legal and accountancy professions.

Enhanced Disclosures are for posts involving a far greater degree of contact with children or vulnerable adults. In general, the type of work will involve regularly caring for, supervising, training or being in sole charge of such people. Examples include a Teacher, Scout or Guide leader. Enhanced Disclosures are also issued for certain statutory purposes such as gaming and lottery licences.

Human Rights Act 1998

The Act gives further effect to rights and freedoms guaranteed under the European Convention of Human Rights. Article 14 affirms the prohibition of discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Data protection Act 1998

Applies to both manual and computerised personal files and requires transparency of the use of information and emphasises the need for privacy and access by individuals. Those who decide how and why personal data are processed (= data controllers) must comply with certain data principles. Those about whom data are processed (= subjects) are provided with a number of rights.

Freedom of Information Act 2000

FOI Act gives anybody the right to access information held by public authorities including central government.

From January 2005 everybody became entitled to ask a public authority in England, Wales and Northern Ireland for any recorded information that they keep.