

Sexual Orientation and Employment







■ What does the law say?

The Employment Equality (Sexual Orientation) Regulations 2003 outlawed discrimination in employment or training on grounds of sexual orientation. They cover all workers - including heterosexuals - but the 1.7 million lesbian, gay and bisexual people in the UK workplace are most likely to make use of the law.

The 2003 regulations were then extended by the Employment Equality (Sexual Orientation) Regulations 2007 to include discrimination on grounds of sexual orientation in the provision of goods, facilities and services in both the public and private sectors.

The Government also introduced the Civil Partnership Act in December 2005 giving legal recognition to same sex couples. As a result the sexual orientation regulations were amended so that employers have to provide staff in a civil partnership with the same benefits as married couples.

■ Who do the 2003 regulations cover?

The 2003 regulations apply to a wide range of people such as job applicants, permanent employees, casual or bank staff, office holders, the police, members of the armed forces, partners in a business, employment agencies and agency staff. They will also cover discrimination by qualifying bodies and providers of vocational training.

The regulations provide protection for heterosexual people at work as well as lesbian, gay and bisexual workers. The regulations will protect people who are discriminated against on the basis of a perceived sexual orientation as well as their actual orientation. For example, if a worker is bullied because he is thought to be gay (even though he is not) then this will be covered by the regulations.



■ What is the scope of the 2003 regulations?

The 2003 regulations make it unlawful for employers to discriminate against or harass job applicants and workers in a range of circumstances, starting at the recruitment stage.

They apply to the terms and conditions of employment that are offered such as pay, promotions, transfers, dismissals and opportunities for training. They also offer protection after the person has left their job if the discrimination or harassment has something to do with the previous employment relationship, such as saying something detrimental in a reference.

■ Where do the 2003 regulations apply?

They apply to anyone working wholly or partly in the UK. The regulations can also cover people who work outside the UK if they can satisfy some very specific criteria. This is a complicated issue and, if you do work outside the UK, you should seek advice immediately about whether the regulations apply to you.

■ What discrimination do they outlaw?

The 2003 regulations outlaw four types of discrimination – direct, indirect, harassment and victimisation.

Direct discrimination

Direct discrimination means treating people less favourably than others on grounds of sexual orientation (or instructing someone else to directly discriminate). This involves comparing how an employer treats one worker of a particular orientation compared to another of a different orientation. There is no justification defence available to an employer for direct discrimination though there may be certain exemptions that apply to a particular job (see below).

Indirect discrimination

This means applying a provision, criterion or practice which disadvantages people of a particular sexual orientation, unless it can be justified. To make out a justification defence, employers have to show a real business need which is proportionate to what they want to achieve.

Harassment

Harassment is defined as subjecting someone to unwanted conduct that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. It does not matter whether the harassment is intentional or unintentional.

Victimisation

This means treating people less favourably because they made or intend to make allegations of discrimination on the grounds of sexual orientation, or because they have given or intend to give evidence under the regulations.


■ What do the 2003 regulations exclude?

There are four main exceptions allowed under the regulations:

- Genuine occupational requirement
- Benefits dependant on marital status
- Working for an organised religion
- Positive action

Genuine occupational requirement

This exception allows employers, when recruiting for a job, to treat job applicants differently on grounds of sexual orientation if there is a genuine occupational requirement (GOR) for someone of a particular orientation to do that job.



They can also rely on the GOR exception when promoting, transferring or training someone for a post and also when dismissing someone from a job, if a GOR applies to that job. It cannot, however, be used to justify victimisation or harassment.

When considering whether a GOR applies, employers must have regard to the nature of the job or the context in which it will be carried out. Basically, they have to show:

- That being of a particular orientation is a genuine and decisive (or determining) requirement for the job.
- That the requirement is “proportionate” in the particular case. In other words, that it is an appropriate and necessary way to achieve their aim.
- That the person either does not meet the requirement to be of a particular orientation, or the employer is not satisfied and it is reasonable in all the circumstances for them not to be satisfied.

The GOR exemption is only likely to apply to a few jobs and it has been narrowly construed by the courts and tribunals.

Working for an organised religion

There is a further exemption if the job involves working for an “organised religion”. This allows the employer to apply a GOR to comply with the doctrines of the religion or to avoid conflicting with the religious convictions of its followers. This exception would apply to jobs for members of the clergy and other staff working for the religion and has been very narrowly applied by the courts.

There is a slightly different three stage test for this GOR to apply. The employer has to show:

- That the person would be employed by an organised religion.
- That the requirement complies with the doctrines of the religion; or avoids conflicting with the strongly held religious convictions of a significant number of its followers.
- That the person either does not meet the requirement, or the employer is not satisfied, and it is reasonable in all the circumstances for them not to be satisfied.

Benefits dependant on marital status

The regulations say that an employer can still provide certain benefits that are restricted to opposite sex married employees or same sex couples in a civil partnership. It would therefore be lawful for an employer to refuse survivor benefits in their occupational pension scheme to opposite sex unmarried couples and same sex couples who are not in a civil partnership.

Positive action

Positive action is allowed under the regulations where it seems reasonable to assume that it would prevent, or compensate for, past disadvantages. This should not be confused with positive discrimination (which is unlawful) which means treating people more favourably on grounds of sexual orientation.

The regulations allow employers to restrict some vocational training to disadvantaged groups to take up particular work. Trade organisations, such as trade unions, can provide training or “encouragement” for disadvantaged groups to take up posts in their organisations. They can also encourage people of a particular sexual orientation to apply for jobs.



■ How can workers enforce their rights?

Although most issues should be resolved in the workplace, there are times when this is not possible. If a worker decides to pursue a claim to an employment tribunal, they must do so within three months of the incident being complained about.

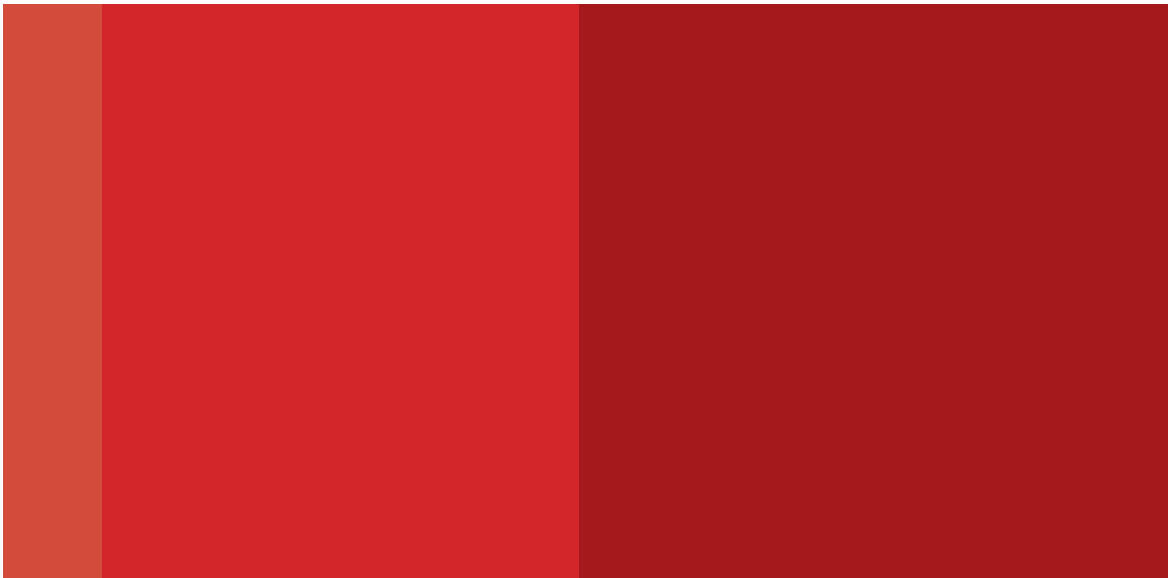
If you want to pursue a claim you should seek advice from your trade union as soon as possible. There may be steps that you will have to take before you can lodge a claim with the Employment Tribunal (for example, you may have to submit a written grievance to your employer first). You should seek advice at the earliest possible stage and certainly well within the three month time limit to ensure any claim is lodged in time. Failure to lodge in time may mean that your claim will not be heard.

For further information please call 0808 100 8050

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