

APPLEBY

GUIDE

DISCRIMINATION LAW IN GUERNSEY



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GUERNSEY

As a British Crown Dependency, Guernsey has a stable and reliable legal system. With a long history of political stability, a highly respected regulatory framework and its accessibility via an established infrastructure make it a desirable international offshore destination for businesses. Guernsey's agile and pro-business government, low tax regime and compliance with international standards of regulation and transparency provide a secure and competitive choice for all entities.

INTRODUCTION

The Prevention of Discrimination (Guernsey) Ordinance, 2022 (**Ordinance**) came into force on 1 October 2023. For the first time, the Ordinance introduces legislation in Guernsey to make it unlawful to discriminate against a person on the grounds of disability, race, carer status, sexual orientation and religion or belief, which are known in the Ordinance as Protected Grounds.

This guide provides information in respect of the impact of the Ordinance on people's rights and duties in relation to employment, with a more limited discussion on the consequences for service providers and other organisations. The guide should not be regarded as legal advice, which should always be taken for individual cases.

Whilst the Ordinance brings in protection for the Protected Grounds, should be noted that Guernsey has existing legislation that makes it unlawful to discriminate on the grounds of sex, maternity or pregnancy, marital status or gender reassignment under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 (**Sex Discrimination Ordinance**). This guide will cover both frameworks.

As noted above, most of Ordinance comes into force on 1 October 2023. This guide has been written on the basis that the Ordinance is already in force.

This guide was last updated in July 2023. It is routinely reviewed by Appleby and updated when changes to the law require it. This guide is for general guidance only and does not constitute definitive advice. Please contact one of our lawyers if you require more detailed information.

Further publications are available from applebyglobal.com

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1. MAIN FORMS OF DISCRIMINATION

OVERVIEW

The Ordinance makes it unlawful for employers to discriminate against employees and applicants for employment because of a Protected Ground. The Ordinance is wide ranging and covers all aspects of the employment relationship. It grants rights when a person is a prospective applicant and continues through the interview and appointment process, such as in relation to offering or not offering someone a job.

There are four main forms of discrimination:

• Direct discrimination	• Discrimination by association
• Indirect discrimination	• Discrimination arising from a disability

In addition, the Ordinance also sets out two main forms of other prohibited conduct:

• Harassment	• Victimisation
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2. WHAT IS DIRECT DISCRIMINATION?

Direct discrimination arises when a person (A) discriminates against another (B), if because of a Protected Ground, A treats B less favourably than A treats or would treat others.

For these purposes the Protected Grounds the less favourable treatment (at the time) may:

- Exist;
- Exist in the future; or
- Have previously existed but no longer exist;
- Be imputed to B by A.

In summary, direct discrimination arises when a person is treated worse compared to someone else because of a Protected Ground. A claim for direct discrimination can therefore only be made with a comparison of the treatment of someone else who doesn't have the Protected Ground. That person is known as a comparator (see below).

The less favourable treatment must be because of a Protected Ground, for example it would not be unlawful to treat someone less favourably because of their socio-economic background. It does not matter for these purposes if the discrimination was unintentional.

EXAMPLE OF DIRECT DISCRIMINATION

It would be direct discrimination on the grounds of religion or belief for an employer to refuse to employ a candidate because they are Jewish. It would also be direct discrimination to refuse to employ a candidate because it is imputed (assumed) a candidate was Jewish (for example, they were born in Israel), even if they do not have the Protected Ground.

EXCEPTIONS

Direct discrimination cannot be objectively justified, although there are a limited number of specific exceptions under the Ordinance. For example, where a job has a genuine and determining occupational requirement which allows directly discriminatory treatment that would otherwise be unlawful. For example, it would be a genuine occupational requirement for an Anglican priest to be an Anglican.

WHAT IS A COMPARATOR?

In order for an individual to show that they have suffered direct discrimination, they would need to compare their treatment with the treatment of a comparator. This would be someone who did not share the same Protected Ground that they had. The term comparator isn't defined by the Ordinance. It may be a real person or, if one does not exist, it is possible to use a hypothetical comparator who has all of the same characteristics apart from the Protected Ground in order to make the assessment.

In disability discrimination cases, the comparator would be someone who did not share the individual's particular disability but who has the same abilities and skills as the individual. The comparator could be someone who is not disabled or someone with a different disability.

EXAMPLE OF A COMPARATOR

An employee who is a carer is placed on a performance improvement plan following a poor appraisal, due to what their employer claims are concerns around performance. Another employee who undertakes the same role (and had a similarly poor appraisal) was not put on a performance improvement plan. If the first employee brought a claim for direct discrimination, a comparator could be the employee who was not put on a performance improvement plan.

WHAT IS A SIMILAR SITUATION?

It is not necessary for the individual to be in an identical situation as the comparator. However, there must be sufficient similarities between the two to show that the reason for the worse treatment is the Protected Ground and not something else.

EXAMPLE OF A SIMILAR SITUATION

The employer of a Muslim employee refuses to allow them time off work for Friday prayers. One of their colleagues is a Christian and attends a bible study group on Wednesdays after work. They asked for permission to leave an hour early to attend these groups and the employer has agreed to this.

The Muslim employee could compare their situation with the Christian colleague, as they also need regular time off work for religious reasons in a similar situation, because the religions are different.

3. WHAT IS INDIRECT DISCRIMINATION?

Indirect discrimination arises where there is a provision, criterion or practice that applies in the same way for everybody but disadvantages a group of people who share a Protected Ground, a person is disadvantaged because they are part of this group and the employer cannot show it to be a proportionate means of achieving a legitimate aim (known as "objective justification").

WHAT IS A PROVISION, CRITERION OR PRACTICE?

This has a wide definition and may include a dress code, hours of work and/or absence policies. It is not required for any formal policy to be in place in order for an employee to challenge a decision affecting them.

It is immaterial whether the employer intended the policy to discriminate or not. The issue is whether people have been disadvantaged by the policy. Care needs to be taken when creating or changing policies to ensure that indirect discrimination does not happen.

EXAMPLE OF INDIRECT DISCRIMINATION

There's a clause in an individual's contract which says they may have to travel internationally at short notice. It's difficult for the individual to do this because they are a carer for an immediate family member. This clause therefore places the individual at a particular disadvantage.

OBJECTIVE JUSTIFICATION

If a policy causes a disadvantage then the onus is on the employer to objectively justify it. First, they must show their policy is designed to achieve a "legitimate aim". This must be a non-discriminatory reason such as economic efficiency (although they cannot simply argue that to discriminate is cheaper than avoiding discrimination) or health and safety.

To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were reasonably necessary.

EXAMPLE OF OBJECTIVE JUSTIFICATION

A food manufacturer has a rule that beards are forbidden for people working on the factory floor. This rule may amount to indirect religion or belief discrimination against a Sikh unless it could be objectively justified.

If the aim of the rule is to meet food hygiene or health and safety requirements, this would be legitimate. However, the employer would need to show that the ban on beards is a proportionate means of achieving this aim. In this regard the employer would need to be able to demonstrate why the same aim could not be achieved by less discriminatory means, such as providing a beard mask.

4. WHAT IS DISCRIMINATION BY ASSOCIATION?

Discrimination by association occurs when a person is treated less favourably because they are linked or associated with person with a Protected Ground.

For these purposes someone is "associated" with a person if they are:

- Friend
- Spouse
- Partner
- Parent
- Child
- Grandchild
- Another person with whom they are personally connected to

As with direct discrimination, discrimination by association cannot be justified and it is irrelevant if it is unintentional, but it does require a comparator. That comparator can either be real or hypothetical, but it is necessary to consider how an employer would have treated a person who was associated with someone who did not have the Protected Ground.

EXAMPLE OF DISCRIMINATION BY ASSOCIATION

It would be discrimination by association if an employer chose not to employ a parent because they had a disabled child and was concerned about the amount of time off work they may require.

5. WHAT IS DISCRIMINATION ARISING FROM A DISABILITY?

Discrimination arising from disability occurs when an employer treats an employee unfavourably because of something that arises as a consequence of their disability and the employer cannot show it to be objectively justified.

Discrimination arising from disability occurs when an employer treats an employee unfavourably because of something that arises as a consequence of their disability (and which cannot be objectively justified). However, an employer will not be liable if they didn't know the employee was disabled and could not reasonably be expected to have known.

Discrimination arising from disability is unlawful unless the employer is able to show that there is a good reason for the treatment of the person, and it is proportionate. This is known as objective justification.

EXAMPLE OF DISCRIMINATION ARISING FROM DISABILITY

An employee with cancer is prevented from receiving a bonus because of time they have taken off to attend medical appointments. This would constitute unfavourable treatment because of something arising from their disability. It will therefore be necessary for the employer to demonstrate its treatment was objectively justified, perhaps by looking at the individual's performance before or since the condition was diagnosed only, during a period where they were well enough to attend work. It might be reasonable, perhaps, to pro rata the bonus.

OBJECTIVE JUSTIFICATION

If the treatment of an employee is because of something arising from their disability, then the onus is on the employer to objectively justify it. First, they must show their policy is designed to achieve a "legitimate aim". This must be a non-discriminatory reason such as economic efficiency (although they cannot simply argue that to discriminate is cheaper than avoiding discrimination) or health and safety.

To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were reasonably necessary.

EXAMPLE OF OBJECTIVE JUSTIFICATION

Following a prolonged period of stress related absence, a senior care worker is now fit to return to work, but is unable to perform their previous role because of the stressful nature of the position, and is only able to function in a different role.

In these circumstances, where an employee is unable to return to their former role, before an employer sought to dismiss the employee, they should first consider the possibility of redeployment to a different role. If there were no redeployment opportunities available, ultimately an employer ought to be able to dismiss the employee in these circumstances, because even though the less favourable treatment of dismissal arose because of a disability it would be likely be objectively justified.

KNOWLEDGE OF THE DISABILITY

It is not discrimination arising from disability if an employer shows that they did not know and could not reasonably have been expected to know, that the person had the disability.

EXAMPLE OF KNOWLEDGE OF THE DISABILITY

An employee has a good attendance and performance record, but has recently become emotional and upset at work for no apparent reason, and has started having regular absences. They have also been repeatedly late for work and has made some mistakes in their work. The sudden deterioration in the worker's time-keeping and performance and the change in their behaviour at work should have alerted the employer to the possibility that the employee may have a disability, such as depression. As such, any action the employer may take in relation to these issues would need to be objectively justified, even though they have never been specifically told that the employee has a long-term impairment.

6. WHAT IS HARASSMENT?

Harassment occurs in any one of the following three circumstances:

A person (A) harasses another (B) if:

- A engages in unwanted conduct related to a Protected Ground; and
- Such conduct has the purpose or effect of violating B's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

OR

- A engages in unwanted conduct of a sexual nature; and
- Such conduct has the purpose or effect of violating B's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

OR

- A engages in unwanted conduct of a sexual nature or that is related to a Protected Ground;
- Such conduct has the purpose or effect of violating B's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for B; and
- Because of B's rejection of, or submission to, the conduct, A treats less favourably than A would treat B if B had not rejected or submitted to the conduct.

WHAT IS UNWANTED CONDUCT?

This is not defined in the Ordinance but it can range from a one-off incident to a campaign of harassment. It can include actions such as spoken or written words, banter, posts on social media, physical gestures, jokes or pranks. However, for "unwanted conduct" to amount to harassment, it must first either be related to a Protected Ground or of a sexual nature.

WHAT IS MEANT BY VIOLATING A PERSON'S DIGNITY OR CREATING AN INTIMIDATING, HOSTILE, DEGRADING, HUMILIATING OR OFFENSIVE ENVIRONMENT?

All forms of harassment require that the conduct must have either the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. For these purposes it is irrelevant whether or not the conduct was intentional or that the victim did not make the perpetrator aware that the conduct was unwanted.

Example of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

EXAMPLE OF UNWANTED CONDUCT

An employee makes racist remarks about the local Gypsy and Traveller site. A colleague from a Traveller background overhears this and feels that the employee's behaviour creates a hostile and humiliating environment for them.

THE PERCEPTION OF THE RECIPIENT

In making the assessment as to whether the conduct has the effect set out above, consideration must be given to the following:

- The perception of the recipient of the conduct in question;
- The circumstances of the case; and
- Whether in the circumstances it is reasonable for the conduct to have that effect.

When considering if conduct would be expected to have the effect it did, an objective test is required. Whilst it is not a defence to say offence was unintentional, there may be no harassment if, viewed objectively, the person is being hypersensitive. Care should be taken however, about rejecting a complaint of harassment as what one person finds acceptable and not offensive may not be the case for a different person.

SEXUAL HARASSMENT AND CONDUCT OF A SEXUAL NATURE

The Ordinance specifically makes sexual harassment unlawful. As with harassment related to a Protected Ground, there must be conduct of an unwanted nature and it must also have the required purpose or effect of violating a person's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

To constitute sexual harassment, the unwanted conduct must be of a sexual nature. "Sexual nature" is not defined but is likely to include sexual comments or jokes, displaying sexually graphic pictures, suggestive looks, staring or leering or propositions and sexual advances.

EXAMPLE OF SEXUAL HARASSMENT AND CONDUCT OF A SEXUAL NATURE

A female employee is the only woman in her team. Her male supervisor starts making sexual comments about her body, getting very close to her and resting his hand on her arm. It makes the female employee feel very uncomfortable and intimidated, so she rejects those advances. This is conduct of a sexual nature and has the effect of creating a degrading, humiliating or offensive environment, and so constitutes harassment.

HARASSMENT DUE TO REJECTION OR SUBMISSION OF UNWANTED CONDUCT

This is the final form of harassment and occurs where there has been conduct of sexual nature or that is related to a Protected Ground which has violated a person's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment. Due to the rejection of, or submission to the conduct, the recipient is subject to less favourable treatment, compared to if they had not rejected or submitted to the conduct, then that will constitute harassment. Unlike the other two forms of harassment, this requires the use of a comparator to establish if less favourable treatment has taken place.

EXAMPLE OF HARASSMENT DUE TO REJECTION OR SUBMISSION OF UNWANTED CONDUCT

Using the previous example, if the male supervisor then treats the female employee less favourably as a result of her rejecting his advances, (e.g. makes a reduced discretionary bonus award) then this will also amount to harassment.

PROTECTION OF HARASSMENT (BAILIWICK OF GUERNSEY) LAW 2005

In addition to rights under the Ordinance, individuals may have rights created under the Protection of Harassment (Bailiwick of Guernsey) Law, 2005 (**Harassment Law**). The Harassment Law creates both a criminal offence of harassment and also provides for additional civil remedies. The Harassment Law may therefore be applicable to a case of harassment.

7. WHAT IS VICTIMISATION?

Victimisation occurs where a person (A) victimises another person (B), if A subjects B to a detriment because B has made a complaint under the Ordinance such as:

- Brought proceedings against A or any other person under the Ordinance;
- Given evidence or information in connection with proceedings brought by any person against A or any other person under the Ordinance;
- Otherwise done anything under or by reference to the Ordinance in relation to A or any other person (including, for the avoidance of doubt, opposed acts which contravene the Ordinance);
- Alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of the Ordinance; or
- Because A knows that B intends to do any of these things, or suspects that B has done, or intends to do, any of them.

There is no requirement for a comparator in victimisation claims.

WHAT IS A DETRIMENT?

A detriment is when an individual suffers a disadvantage of some sort or been put in a worst position than they were before.

EXAMPLE OF A DETRIMENT

A Muslim employee raises a grievance against their line manager claiming they have been discriminated against on the grounds of their religion. If their line manager then excludes the employee from team meetings as a result of them raising the grievance, this would be victimisation because the employee has suffered a detriment as a result of raising a grievance.

8. WHAT ARE THE PROTECTED GROUNDS?

OVERVIEW

There are five Protected Grounds:

• Disability	• Sexual Orientation
• Race	• Religion or belief
• Carer Status	

In addition to the five Protected Grounds above, it is already unlawful in Guernsey to discriminate in relation to employment under the Sex Discrimination Ordinance on the following grounds:

• Sex	• Marital Status
• Gender reassignment	• Pregnancy or Maternity

It is intended that a second phase of discrimination legislation changes will be brought in at some point from 2025 onwards. This is likely to expand the current protections under the Ordinance to include sex, gender reassignment, marital status, pregnancy and maternity as Protected Grounds and eventually repeal the existing Sex Discrimination Ordinance. Protection from discrimination on these grounds in a non-employment context will not come in until at least 2025. At the same time this takes place, it is anticipated that age will also be added as an additional Protected Ground.

Until this takes place, it will be possible to bring a combined claim under both the Ordinance and Sex Discrimination Ordinance, for example where someone has suffered both sex and race discrimination.

WHAT IS A DISABILITY?

A person has a disability if the person has one or more long-term impairments.

A long-term impairment is an impairment which:

- Has lasted, or is expected to last, for not less than six months; or
- Is expected to last until the end of the person's life.

A person has a disability if they have one or more long term impairments. The definition of disability has deliberately been drafted on a wide basis, in order to capture most long-term impairments that individuals may have. In particular, the definition is wider than the respective positions in the UK and Jersey.

In the UK, for example, it is necessary to prove the disability has a substantial and long-term negative effect on a person's ability to do normal daily activities and the disability has lasted or is expected to last for twelve months or more. This is not required under the Ordinance.

An impairment can be physical, mental, intellectual or sensory. It can include illnesses or diseases, or disfigurements and is intended to capture almost any condition, illness or disease.

In order to qualify as a disability, any impairment must be "long term". This means it must last, or be expected to last for not less than six months' or until the end of the person's life.

WHAT IS MEANT BY RACE

Race can mean any of the following:

- Colour;
- Nationality;
- Ethnic origins;
- National origins; and
- Descent, which includes caste.

It will be unlawful to treat someone less favourably because of their "skin colour" or "nationality". This also extends to treating someone less favourably on the grounds of their "national origins" or "descent" which includes being of Bailiwick of Guernsey origin.

The term "caste" is not defined in the Ordinance. In general terms, it relates to a hierarchical system within which membership is determined by birth.

WHAT IS MEANT BY CARER STATUS?

A person (A) has the Protected Ground of carer status if A provides care or support on a continuing, regular, or frequent basis for a person with the Protected Ground of disability (B), and:

- B's disability is of a nature which requires continuing, regular or frequent care or support of the kind that A is providing; and
- A lives with B or is a close relative of B.

For these purposes, a close relative means any of the following relationships:

- Spouse;
- Parent;
- Partner;
- Grandchild;
- Child;
- Grandparent;
- Sibling; and
- Parent or child of a spouse or partner.

Carer status refers to someone who has continuing, regular or frequent responsibility for ongoing care and support of another person. The carer must fall within the definition above of a close relative, or otherwise live with the person who receives the care.

There is an exception for where the care is provided by a person in a paid, professional capacity. This might be under a contract of employment or in the course of self-employment. In these circumstances, the person would not have the Protected Ground of carer status.

Carer status is not a Protected Ground in the relevant discrimination legislation for either Jersey or the UK.

WHAT IS MEANT BY SEXUAL ORIENTATION?

Sexual orientation can mean a person's sexual orientation towards:

- Persons of the same sex;
- Persons of a different sex; and
- Persons of both the same sex and persons of a different sex.

Sexual orientation describes who a person is attracted to. Discrimination on the grounds of someone's sexual orientation would include treating someone less favourably because of who they are attracted to e.g. that they are gay, lesbian, bisexual or heterosexual.

The Ordinance also protects:

- Someone who is treated less favourably because they are connected to someone who has a particular sexual orientation (known as discrimination by association); and
- Someone it is believed (imputed) to have a particular sexual orientation, even if that is not the case.

WHAT IS MEANT BY RELIGION OR BELIEF?

Religion means any religion and includes any religious background or outlook, and a reference to religion also includes a reference to a lack of religion.

Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

Religion can cover any religion, such as Christianity, Judaism, Islam or Buddhism, or a smaller religion as long as it has a clear structure and belief system. The Ordinance protects those individuals who may be discriminated against because they lack either a specific or any religion, as well as manifestations of their faith (i.e. how they believe a religion should be practiced by way of worship, observance, teaching and practice).

The Ordinance also extends to philosophical beliefs. While philosophical beliefs is not defined in the Ordinance, UK employment tribunals have extended this protection to include ethical veganism and gender critical views.

A COMPARISON BETWEEN GUERNSEY, JERSEY, AND THE UK

Legal protection from discrimination for different grounds/characteristics is different in each of the above jurisdictions.

PROTECTED GROUND	GUERNSEY	JERSEY	UK
Disability	•	•	•
Race	•	•	•
Carer Status	•		
Sexual Orientation	•	•	•
Religion or Belief	•		•
Sex	*	•	•
Pregnancy / Maternity	*	•	•
Gender Reassignment	*	•	•
Marital Status	*	N/A	•
Age	**	•	•

KEY

• Currently in force for employment and service provision

* Currently in force for employment only

** Not yet in force, but planned

9. DUTY TO MAKE REASONABLE ADJUSTMENTS

OVERVIEW

The Ordinance introduces a duty on all employers to take steps to remove, reduce, or prevent the obstacles that a disabled employee or job applicant may face in the workplace, where it is reasonable to do so. This is known as the duty to make reasonable adjustments. Where an employer fails to comply with this duty, this will be unlawful under the Ordinance.

DUTY TO MAKE REASONABLE ADJUSTMENTS

A person (A) is under a duty to make reasonable adjustments:

- Where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;
- Where a physical feature puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, for A to take such steps as it is reasonable to have to take to avoid the disadvantage;
- Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

The term “**substantial disadvantage**” simply requires there to be a disadvantage that is more than minor or trivial. This is not intended to be a high bar.

WHAT IS AN ADJUSTMENT?

The employer may have to change the way things are done, make changes to a physical feature of a building, or provide aids such as special computer software to help that individual do their job. This is a two-stage process, in that the employer must:

- First, consider what adjustments could be made; and
- Secondly, whether those adjustments are reasonable.

The need for an adjustment may arise where there is substantial disadvantage which is:

- Caused by a provision, criterion or practice;
- Caused by a physical feature; or
- Able to be removed by an auxiliary aid.

The term provision, criterion or practice is the same as used in indirect discrimination.

The duty to make reasonable adjustments in relation to physical features will not come into force until 1 October 2028 at the earliest, nor will it be possible to bring a claim of indirect discrimination due to a physical feature until this date.

The Ordinance also places a positive obligation on employers to provide auxiliary aids, which will avoid a disabled person being put at a substantial disadvantage. Auxiliary aids could include the provision of a specialist piece of equipment such as an adapted keyboard, specific chair or text to speech software.

WHAT IS CONSIDERED REASONABLE?

If a substantial disadvantage does exist, and the employer is aware or should be aware the person is disabled, then they must make "reasonable" adjustments.

At a practical level, there are various factors that determine whether a particular adjustment is considered reasonable. This is ultimately an objective test and not simply a matter of what the employer or the disabled person may personally think is reasonable. The cost of many adjustments will either be nothing, or a minimal amount and so where this is the case, as long as the adjustment is workable and effective, then it would be considered reasonable.

EXAMPLE OF A REASONABLE ADJUSTMENT

An employee who has a learning disability has a contract to work from 9am to 5.30pm but wishes to change these hours to start at 9:15am. This is because the friend who accompanies them to work is no longer available before 9am. They propose to make up the time over their lunch break. Allowing the employee to start slightly later is likely to be a reasonable adjustment for that employer to make.

THE DUTY TO CONSULT

Before an employee makes a reasonable adjustment, it must consult the disabled employee to ask their view as to what steps would avoid the disadvantage and may also consult such other persons as the employer considers appropriate.

The duty to consult a disabled person over reasonable adjustments is different to the position in the UK and Jersey, where it is only considered good practice. There is no particular specific form or duration of consultation required under the Ordinance, but it is recommended that this should take place in a meeting, with minutes kept and any agreed outcomes recorded.

WHO PAYS FOR ADJUSTMENTS?

Although many adjustments will either have no or minimal cost, it is the employer's responsibility to pay for any adjustments. When assessing if an adjustment is reasonable, all factors should be taken into consideration. It might be that the adjustment has a significant cost but when considering the alternate costs, such as the costs involved in recruiting and training a new member of staff to replace the disabled person, the adjustment might be seen as being a more cost-effective option.

WHAT ARE THE CONSEQUENCES OF A FAILURE TO MAKE REASONABLE ADJUSTMENTS?

A failure on the part of an employer to take steps to avoid a disadvantage to a disabled person is a failure to comply with a duty to make reasonable adjustments. The employer is deemed to have committed an act of discrimination. This is why it is important to consult with the disabled person in respect of any reasonable adjustments and, where appropriate, to seek advice.

10. SEX DISCRIMINATION

THE BASIC RIGHT

As noted above, under the Sex Discrimination Ordinance it is unlawful to discriminate against people within the workplace on the grounds of:

- sex;
- marital status;
- pregnancy, childbirth, adoption or maternity leave; or
- gender reassignment.

Any claim will have to be made under the Sex Discrimination Ordinance.

QUALIFICATION FOR THE RIGHT

The right extends to all employees regardless of length of service, as well as job applicants and temporary agency staff.

EXCLUSIONS

There are a number of exclusions to the Sex Discrimination Ordinance, but the key ones are as follows:

- **Genuine Occupational Qualification (GOQs).** Typical examples of GOQ's include the engagement of a female actor to play a female role in a production, or in cases of decency where the job would involve close physical contact by a member of the opposite sex and there would be a reasonable objection; and
- **Maternity pay.** Although there is no statutory right to maternity pay in Guernsey, it is not unlawful to provide additional benefits to women in connection with pregnancy or childbirth e.g. provision of paid maternity leave.

ENFORCEMENT AND REMEDIES

Any claim must be brought within three months, beginning on the date of the act complained about, or where it was not reasonably practicable for the complaint to have been brought within such further time as the Tribunal shall allow.

Where the Tribunal upholds a complaint by an employee, it shall make an award equal to three months' pay or 13 weeks' pay (where the employee was paid weekly).

11. EQUAL PAY

OVERVIEW

The Ordinance introduces the rights of equal pay and equal treatment. The right of equal pay ensures that two people in the same employment (one with a Protected Ground and the other without the Protected Ground) performing equal work must receive equal pay, unless any difference in pay can be justified. The right of equal treatment covers any other terms and conditions of employment. The right for equal pay and the right of equal treatment, although similar, are two separate rights.

The Ordinance does not currently cover the situation where the difference in pay is due to the sex of the parties concerned, as sex is not currently one of the Protected Grounds. Any claim for equal pay or equal treatment on the grounds of sex must be dealt with under the Sex Discrimination Ordinance. Please see our Employment Guide for further detail.

EQUAL PAY

The right to equal pay requires that people who are employed to do work which is equal to the work of someone else, should not be paid differently because of a Protected Ground, unless that difference can be justified through what is known as a material factor defence. This right is implied into everyone's contract and is known as an equal pay clause.

EQUAL TREATMENT

The right to equal treatment requires that people who are employed to do work that is not materially different from someone else, should not be employed on different terms and conditions because of a Protected Ground, unless that difference can be justified through a material factor defence.

MATERIAL FACTOR DEFENCE

Even if the conditions for an equal pay or equal treatment clause are otherwise met, an employer will be able to justify a difference in pay or treatment if that is due to a meaningful and genuine reason, which is not either directly or indirectly discriminatory.

DISCUSSIONS ABOUT PAY

Some contracts of employment and other agreements contain specific restrictions that are designed to prevent employees from disclosing their pay to another employee, or from asking a colleague about their pay. The Ordinance makes such pay secrecy clauses unenforceable, where they relate to making enquiries for the purposes of enforcing a person's right to equal pay. Where pay is disclosed for the purpose of assisting a person to enforce their right to equal pay, this is known as a relevant pay disclosure. Specific advice on what is and what is not a relevant pay disclosure should be taken if required.

12. SERVICE PROVIDERS

OVERVIEW

The Ordinance requires that anyone who provides, goods, services or facilities to the public is considered a “service provider” and therefore must not discriminate against service users because of a Protected Ground. For example, shops will be caught as they sell “goods”, financial services businesses or healthcare providers will be caught as they provide “services”, and a car hire company or a sporting venue will also be caught as they provide “facilities”. In each instance, the business must not discriminate in the selling of its goods, services or facilities as the case may be.

The Ordinance is not limited to businesses and would extend to charities and not for profit organisations, who provide goods, services or facilities to the public, even if they do not charge.

WHAT IS A SERVICE PROVIDER?

The definition of service provider is very broad as it covers any organisation who provides goods, service or facilities to the public, or a section of the public – the Ordinance covers almost every business that deals with the public in some way.

EXAMPLES OF SERVICE PROVIDERS COMMITTING DISCRIMINATORY ACTS

A coffee shop refuses to serve a disabled person in a wheelchair, because they believe there isn't enough room in the shop for them to sit down and suggests a nearby larger shop would be better for them. This is a refusal of service and therefore direct discrimination, even if the coffee shop had the best interests of the person in mind.

A hotel owner insists that a single sex couple have separate rooms, rather than a double room. The requirement to have separate rooms could amount to direct discrimination because of sexual orientation in respect of the terms of the provision. The refusal to allow them to stay in a double room would also constitute a refusal of service of as well.

A bank has a policy of speaking only to the named account holder and not to a third party. This could amount to indirect discrimination for a deaf person who uses a registered interpreter to call the bank.

EDUCATION

The Ordinance requires that the responsible body of a school or education provider must not discriminate against students or prospective students in relation to their education.

Where schools and education providers are operating in an educational capacity and dealing with students or prospective students, it is important to note that the Ordinance is not due to apply to these relationships before 1 September 2025. Where there is a duty to make a reasonable adjustment that relates to a physical feature, that duty will not come into force before 1 October 2028.

It should, however, be noted that often schools and education providers will also operate in different capacities, such as an employer or as a service provider to the public, and so they will still have obligations under the Ordinance as soon as it comes into force on 1 October 2023.

CLUBS AND ASSOCIATIONS

The Ordinance makes it unlawful for clubs and associations of a certain size to discriminate in relation to membership and against any of its members.

The Ordinance applies to all clubs and associations, regardless or not whether they are incorporated, and whether their activities are carried out for profit. There are only two specific conditions for the club or association to be covered by the Ordinance in relation to its members.

- The club must have at least 25 members; and
- The requirement for a club or association to have rules regulating admission to membership.

This does not mean every club or association must have a formal set of written rules on membership; it will be sufficient if the rules for admission of new members are known to those members involved in the selection. So, an organisation that merely requires the public to pay a fee to join it, without any form of selection (such as a gym or sports facility) is acting as a service provider, not a club or association.

CHARITIES AND NOT FOR PROFIT ORGANISATIONS

The Ordinance provides a specific exception for charities and non-profit organisations in respect of allowing them to restrict the provision of benefits to persons who share a Protected Ground. That action must be done in accordance with the governing instrument of that body and the provision of benefits be either a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to the Protected Ground.

13. IMPLEMENTATION DATES FOR THE ORDINANCE

The various sections of the Ordinance are being introduced at different times. Under the current proposals, the Ordinance’s introduction can be summarised as follows:

PROVISIONS OF THE ORDINANCE	EMPLOYER	SERVICE PROVIDERS	SCHOOLS & EDUCATION PROVIDERS	CLUBS AND ASSOCIATIONS	ACCOMMODATION PROVIDERS
General prohibitions on discrimination	1 October 2023	1 October 2023	Not before 1 September 2025	1 October 2023	1 October 2023
General duty of reasonable adjustments (excluding external features)	1 October 2023	1 October 2023	Not before 1 September 2025	1 October 2023	1 October 2023
General duty of reasonable adjustments to physical features	Not before 1 October 2028	Not before 1 October 2028	Not before 1 October 2028	Not before 1 October 2028	Not before 1 October 2028
Proactive duty to make reasonable adjustments (excluding physical features)	N/A	Not before 1 October 2023	Not before 1 September 2025	N/A	N/A
Proactive duty to make reasonable adjustments to physical features	N/A	Not before 1 October 2028	Not before 1 October 2028	N/A	N/A
Date to carry out minor improvements	N/A	N/A	N/A	N/A	Date to be confirmed but not anticipated until 1 October 2028
Duty to allow reasonable adjustments to physical features: residential landlords	N/A	N/A	N/A	N/A	Not before 1 October 2028
Duty to allow reasonable adjustments to physical features: commercial landlords	N/A	N/A	N/A	N/A	Not before 1 October 2028
Disability: public sector duty to prepare accessibility action plans	N/A	Public sector only – 1 October 2028	Public sector only – 1 October 2028	N/A	N/A

Please note, these implementation dates are in relation to where the organisation is acting in the relevant capacity. For example, whilst the provisions in relation to education do not apply for schools until at least 1 September 2025, the Ordinance will apply to a school where it is acting as an employer or as a service provider from 1 October 2023.

14. COMPENSATION

BASIC COMPENSATION

The basic compensation for claims of discrimination relating to employment (other than claims of equal pay) is that a person is entitled to an award of:

- Up to six months' pay, or 26 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

JOINED COMPLAINTS

Where there are joined complaints against connected respondents, then the maximum award the Tribunal can make is:

- Up to nine months' pay, or 39 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

The exception to this is where in addition to other complaints, there is a claim or multiple claims of victimisation, in which case the Tribunal may make a further award of:

- Up to six months' pay, or 26 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

COMPENSATION IN EQUAL PAY CASES

Where an employee brings a claim for equal pay, this is calculated on a different basis, and is not subject to the limits set out above. The employee is entitled to an award of arrears of pay, based on the difference between the pay they actually received compared to the pay they should have received up to a maximum period of six years, but this can only run from the point the Ordinance will come into force on 1 October 2023.

For more specific advice on discrimination law in Guernsey, we invite you to contact one of the following:



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