

Sexual Orientation

How the law protects against discrimination based on sexual orientation

Overview

Police officers are protected from discrimination because of their sexual orientation under the Equality Act 2010 (“the Act”).

The Act prohibits treating someone less favourably because they are gay, lesbian, bisexual or heterosexual. The Act also covers direct discrimination and harassment because of perceived sexual orientation. So for example, treating a police officer less favourably because they are thought to be gay, whether or not they actually are, would also be covered. Further, being directly discriminated against or harassed because of someone else’s sexuality is also covered under the Act.



Who is covered?

The Act includes protection in respect of gay, lesbian, bisexual and heterosexual persons.

The Act outlaws direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the force. The chief officer will usually be liable for any discriminatory acts carried out by police officers against other police officers. The chief officer may also be responsible for the acts of their agents. Importantly, the Act also extends in limited circumstances to discrimination after the working relationship has ended. For instance, if the force provides a discriminatory reference, or refuses to provide a reference at all, because of a person’s sexual orientation, this could amount to unlawful discrimination.

Discrimination

Direct discrimination

It is unlawful to treat a person less favourably because of sexual orientation. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of sexual orientation
- That you can compare your treatment to someone (actual or hypothetical) with similar characteristics to yourself but of a different sexual orientation
- That you were subject to disadvantage or detriment as a result of that treatment.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the sexual orientation of the individual being discriminated against.



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The Act requires that ‘like must be compared with like’, so where, for example, a gay officer has been refused a promotion because of his sexual orientation, his comparator could be a heterosexual person who is in all other respects in the same position as him. An individual can also point to a hypothetical comparator. A useful test is the ‘but for’ test: for example, would I have been treated the same way ‘but for’ the fact that I am gay, or have a gay friend etc? If for example a decision is made to dismiss, or not to recruit you because you are gay, or are perceived to be gay, or have gay friends, then the force may be in breach of the Act.

Protection has also been extended under the Act to cover direct discrimination and harassment (see below) suffered because of the sexual orientation of a person with whom you are associated, even if you do not yourself share that sexual orientation. This would protect, for example, parents of gay people from detrimental treatment or comments made because of their association with the gay person. Further, individuals perceived to be of a particular sexual orientation even if they are not, should also be covered by the Act against acts of direct discrimination and harassment.

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Indirect discrimination

The Act also provides that a force discriminates if an arrangement or feature associated with the workplace (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all officers, but it:

- Puts a sexual orientation group at a particular disadvantage when compared with another group
- Puts you at that disadvantage; and
- Is not a proportionate means of achieving a legitimate aim.
- The PCP must have been applied universally, for example a PCP that all officers must be married.

Whether or not the PCP puts one sexual orientation group at a particular disadvantage as compared with another will often depend upon the 'pool' of people considered. The force must satisfy the tribunal that the PCP can be objectively justified. If this is established, a discrimination claim will fail.

Victimisation

It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under the Act. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under the Act or earlier Regulations; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under the Act or the 2003 Regulations; or
- Doing anything in relation to the discriminator or any other person under or by reference to the Act or the 2003 Regulations; or
- Making allegations that the discriminator or any other person has committed an act which contravenes the Act or the 2003 Regulations. This would include raising a grievance of sexual orientation discrimination.

So for example, if you have made a complaint about sexual orientation discrimination and are later treated unfavourably for doing so, you should be covered by the Act. Victimisation following termination of employment is also unlawful. A protected act must be done in good faith.

Harassment

Harassment related to sexual orientation is a form of discrimination. It is defined as being "unwanted conduct related to sexual orientation that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment."



An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can also be brought if harassment occurs because of an association with someone of a particular sexuality, or if someone is perceived to be of a particular sexuality.

Exceptions

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There is an exception for general occupational requirements. This is available where, having regard to the nature or context of the work, being of a particular sexual orientation is an occupational requirement. The defence will only succeed if the application of the requirement is a proportionate means of achieving a legitimate aim.

There are two positive action provisions:

- The general positive action rule can apply where the Force reasonably thinks that persons with a particular protected characteristic are disadvantaged, have different needs or are disproportionately under-represented. In those circumstances, the Force can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation
- The provision concerning positive action in recruitment and promotion. This applies where a Force reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented. In those circumstances, the Force can treat a person with the relevant characteristic more favourably than others in recruitment or promotion, as long as the person with the relevant characteristic is "as qualified as" those others.

Otherwise positive action is generally outlawed.



Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, the Act provides that the claimant is required to establish clear facts which could enable the tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-sexual orientation based explanation from the force, the tribunal must draw an inference of discrimination.

Where the force has failed to comply with its statutory duties, the tribunal may also draw inferences from this failure. For example, from April 2011 all police forces will have to have due regard to the need to eliminate sexual orientation discrimination and promote the opportunities of officers of different sexual orientation groups under the single equality duty created by Act.

Remedies

If the tribunal finds that you have been unlawfully discriminated against, it may grant whichever of the following remedies it considers just and equitable:

- A declaration on the rights of the parties
- A recommendation that the force take a particular course of action; and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by the force's discrimination as found by the tribunal.



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Time limits

Most claims will need to be brought in the employment tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of treatment by the force, the claim may be brought within three months less one day from the end of the treatment. In some instances, if a claim is lodged out of time, the employment tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on. This time limit applies even if you are going through the force internal grievance procedure.

These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

Mandatory ACAS Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk

Employment Tribunal Fees

You have to pay a fee when you file your claim in the employment tribunal. Fees are payable when you issue your claim and prior to a final hearing. A fee remission scheme is in place- see the employment tribunal website at www.employmenttribunals.service.gov.uk for further details. The booklet on the website "EX160A Court and Tribunal fees – do I have to pay them?" Provides details for claiming a remission of fees.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

W: www.slatergordon.co.uk/policelaw

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