

Identifying Discrimination

Introduction

Discrimination legislation has been introduced over the last 20 years, with the latest (in October 2006) making discrimination in employment on grounds of age an offence.

Discrimination may be an element of many types of enquiry: but the client may not recognise it, or may not want to mention the idea first.

Many people face discrimination in society. Whatever a client's experience of discrimination, we aim to provide a service to meet their needs.

This training pack is designed to help you as an adviser identify possible cases of discrimination in employment, housing, and the provision of goods or services. The pack is designed for generalist or trainee advisers who have had some experience, though not necessarily of discrimination issues.

We have seven objectives for this pack. We hope that by the time you've worked through it, you will:

- realise how easy it is to miss cases of discrimination (we explain why)
- have a general understanding of the key concepts involved in all the antidiscrimination legislation
- have an understanding of the difference between direct and indirect discrimination
- be aware of the key issues and concepts involved in each particular area of discrimination (disability, religion, gender, race, sexual orientation and age)
- recognise the signs that may mean there has been discrimination
- know the right questions to ask if discrimination may be a factor
- have a detailed understanding of what action to take if discrimination does seem to be a factor

That may sound like a lot to achieve. The pack goes through these seven objectives step by step, and gives you plenty of examples to illustrate each point. We hope you'll find it enjoyable and interesting to work through, as well as informative.

Self-assessment quiz

This short quiz is for you to check what you know about discrimination already.

1. Which of these is the best definition of discrimination?
 - a. being prejudiced against a particular social group
 - b. refusing to have anything to do with people from a particular social group
 - c. treating people from a particular social group unfairly compared to other people, whether it is done consciously or not.

2. Which of these groups is covered by anti-discrimination legislation?
 - a. Muslims
 - b. people with schizophrenia
 - c. people over 65
 - d. transsexuals
 - e. Roma
 - f. married people
 - g. asylum-seekers

3. What is indirect discrimination?
 - a. unintended discrimination
 - b. practices that apply to everyone but mainly affect one social group to their detriment
 - c. discrimination by an organisation that's institutionally racist or sexist.

4. What can someone do if they have been discriminated against in these circumstances?
 - a. not short-listed for a job on grounds of sexual orientation
 - b. fired for not coming to work on a religious holiday
 - c. refused entry to a restaurant because they're disabled

5. Does a person have any remedy in law if:
 - a. they're ostracised at work for having a gay son
 - b. they don't get promoted because they stood up for someone who was being sexually harassed
 - c. they went for a drink in a bar and the bar staff made loud jokes about them being an asylum seeker)

6. How long does someone have to be employed before they can make a claim for discrimination to an Employment Tribunal?

The answers are on the next page.

Quiz Answers

1. c — It's only discrimination if there's some action (not just negative feelings), and if the person is disadvantaged by it. For instance, disliking your neighbours because they're Asian is prejudice; but refusing to serve them in your shop is discrimination.

2.
 - a. yes: Employment Equality (Religion or belief) Regulations
 - b. yes: Disability Discrimination Act
 - c. yes, for employment issues - Employment Equality (Age) Regulations
 - d. yes: Sex Discrimination Act
 - e. yes: Race Relations Act
 - f. yes: Sex Discrimination Act
 - g. no

3. b — (Though it may also be unintended and a result of institutional racism).

4.
 - a — apply to an Employment Tribunal under the Sex Discrimination Act
 - b — apply to an Employment Tribunal under the Employment Equality Regulations
 - c — bring a case in the County Court under the Disability Discrimination Act

5.
 - a — yes: Discrimination because of association is also unlawful under the Employment Equality (Sexual orientation) Regulations
 - b — yes: victimisation is unlawful under all the legislation
 - c — no: the legislation does not cover discrimination against asylum seekers.

6. Employees are covered from their first day in employment there is no qualifying period.

Don't worry if you didn't get all the answers: this pack is meant to help remind you.

Objective: realise how easy it is to miss cases of discrimination

Keisha James comes to see you because she's just been fired. She's been working for eighteen months in a call centre. Last week she found out that she's pregnant. She told her supervisor, and today she got a letter saying that the company is unhappy with the standard of her work, and that she has to leave at the end of the month. There's been no mention of her work being below standard until now.

Although most advisers identify cases like Keisha's as unfair dismissal, many people don't realise that it might also be sex discrimination: Keisha may be being treated unfairly for a reason to do with her gender. If she claims discrimination as well as unfair dismissal, she could be entitled to more compensation.

That kind of situation is one reason why it can be hard to identify possible discrimination: we don't automatically define situations in the same way that the law does. Another factor is that clients themselves may not think of what's happened to them as discrimination. For example:

Nabil Mohammed is the buyer for a light engineering company. The firm gets into financial difficulties, and the directors decide to make three posts redundant. Nabil's is one of them. He doesn't think it makes sense for them to get rid of his job; but he doesn't argue, just goes to the bureau to ask about redundancy pay. Later he remembers hearing one of the directors making offensive comments when Nabil stopped for prayers during the day.

Sometimes clients are aware of the possibility of discrimination, but may be reluctant to raise it with an adviser who isn't from the same social group. They may also hide the factor that would trigger discrimination from an employer or service provider, for example not saying that they're gay, or that they've had a mental illness.

Janet McLaren was referred by her local authority for a place in a housing co-op. She had to join the co-op and be interviewed, then wait for a flat to become available. After eight months she heard from a friend that there had been a vacancy, but it was given to someone else. Janet is partially sighted. She didn't mention her impairment in the interview, but she felt that the panel were uncomfortable with her. When she comes to the bureau she just asks if co-ops have to accept people in the order they apply. Again, she doesn't mention her visual impairment.

As well as potential financial implications, there are other more personal consequences if advisers don't recognise potential discrimination. Many people are all too used to being treated without respect because of their disability, race, age or other reason. If trained advisers don't explore the possibility, the message these people get is that discrimination is normal and not important. We want people to feel respected and valued for who they are and that clients feel able to raise with us any issues they need advice for.

There may be clues to look out for when the client is explaining what happened, such as:

Ali: I was told I didn't fit in

Beryl: They said the job needed a full time commitment

Carmen: They reckoned I wasn't strong enough for the job

Why didn't Ali fit in? Was it because of his race, religion, sexual orientation etc?

Does Beryl work part-time perhaps because of childcare or other caring commitments or because of a disability? Was this expectation discriminatory?

Carmen: Was strength a genuine requirement for the job or was it just an excuse not to employ a woman, or a person with a disability?

Exercise 1

Here are some statements you may hear in an interview which could suggest some underlying discrimination.

For each statement suggest in what way the situation might be discriminatory.

1. I was told I would not be right for a position dealing with customers.
2. I was never offered training.
3. We had to eat in the canteen, but there wasn't anything I could eat.
4. They wouldn't let me come back to work part-time.
5. I was told I wasn't determined enough for the job.

Objective: have a general understanding of the key concepts involved in all the anti-discrimination legislation

The difference between discrimination and prejudice

Many people, advisers and clients alike, are unsure of the difference between discrimination and prejudice. The distinction is important, because discrimination in certain circumstances is unlawful, whereas prejudice, however unpleasant, is not.

Prejudice is about how someone feels: they don't like a particular religious group, they don't approve of homosexuality, they believe women can't think clearly, and so on. It's an irrational generalisation: we condemn or despise or patronise everyone in a particular social group, regardless of their individual character or behaviour. Prejudice is an attitude that may or may not result in action.

Discrimination is defined as treating a person less favourably than someone else. It is therefore about more than attitude: it involves an action that has an effect on the other person. To discriminate, you have to have some kind of power: you can give or withhold a job, for instance, or the nicest room in a hotel, or good service in a restaurant.

Institutional discrimination means that the way the whole organisation operates is discriminatory, whether or not individuals within the organisation intend to discriminate. It tends to occur where nobody has reviewed the structures and procedures for a long time.

Unlawful Discrimination — only some forms of discrimination are unlawful. Discrimination on the grounds of **race/gender/marriage/gender reassignment/ sexual orientation/religion or belief/ disability and age** is unlawful. Other discrimination is not unlawful, for example to discriminate against red haired people by excluding them.

Generally it is only where there are legal remedies that bureaux will be able to help clients take action. This pack will concentrate on unlawful discrimination.

Legislation is based not on the intention of the person acting, but the impact of their action. To be guilty of discrimination, you don't need to be prejudiced: indeed, your intentions may be very good. Nevertheless, if the impact is that the other person is treated less favourably, it may be discrimination.

Direct and indirect discrimination

Direct discrimination is the most obvious kind. It involves treating someone less favourably simply because of their race/gender/marital status/disability/sexual orientation/religion or belief/age.

Nancy Bravo is a middle manager in a large telecommunications company. She gets very good results on her appraisals, but she's never been promoted. When she asks about this, her boss says they don't have women under 40 in high profile jobs because the customers won't take them seriously.

The company has discriminated against Nancy specifically because she's a woman and because of her age. (It doesn't matter what excuse they give: it's still discrimination).

Indirect discrimination is when a policy or practice that applies to everyone, can have a worse impact on a particular group because of their race, gender, marital status, disability, sexual orientation, religion or belief or age. For instance:

Lowprice Supermarkets require all staff to be on a rota to work late on Friday night. Nathan Woolf can't take part in this because he's Jewish and needs to be home for the Friday night meal.

Here the supermarket hasn't said that it won't employ Jewish staff who observe the Sabbath, but the effect is just the same as if it had.

There's no distinction between direct and indirect discrimination in disability discrimination.

Victimisation and harassment

Victimisation is also a form of discrimination. It involves being treated less favourably because you stood up for your (or someone else's) rights by complaining about discrimination:

Angharad Jones took out a grievance because she was paid less than her male colleagues. She won her case, but her boss now only gives her the least interesting work to do.

Mike Barlow argued that his landlord shouldn't refuse his friend Jim as a tenant, just because Jim is deaf. Now the landlord has given Mike notice to quit, saying he needs the room.

Sometimes it may not be clear that it is really victimisation: the employer, landlord etc may give a reason that sounds convincing. Advisers will need to explore the background to the client's story.

Harassment is behaviour that a member of a group covered by discrimination legislation finds offensive and unacceptable, their dignity has been violated or they have been subject to a hostile environment. It is a prohibited act in the case of discrimination.

An employer, as well as the harasser, can be liable for taking inadequate action to prevent harassment.

Mairead O'Brien's colleagues are always telling anti-Irish jokes when she's around. When she complains her manager says she's being over-sensitive: but she feels she's not taken seriously as a professional.

Sam Smithers is the only out gay man in his office. The other men are always asking him why he doesn't fancy women and wouldn't a good woman put him right.

Roshan Shah's boss regularly asks her to work late on her own, and tries to touch and kiss her.

As with other types of discrimination, it's the effect on the person being harassed that matters, not the intention of the harasser. If Mairead's colleagues claim it's only a joke that makes no difference to the charge of harassment.

Objective: have an understanding of the difference between direct and indirect discrimination

Because the concepts of direct and indirect discrimination are so important, we are giving you some examples to identify for yourself.

For each case, please decide whether there is:

- direct discrimination
- indirect discrimination
- no discrimination

and in your answers if you do think there's discrimination, say if it's lawful or unlawful.

Exercise 2

1. Kofi has a qualification in heritage tourism, and has been working as a tour guide in Birmingham. He applies for a job leading tours round a small cathedral city, but isn't appointed. The company say that visitors won't think it's appropriate for an African person to show them round an English city.
2. Shahbana books a bed and breakfast for her and her partner Lucy to attend a conference. The owner accepts the booking over the phone, but when they arrive he insists they have separate rooms, doubling the cost.
3. Mark was warned several times by his boss for poor timekeeping, and not producing the necessary monthly reports. He's been offered training but he considered that an insult. Now he's been fired. Mark thinks it is because he's gay.
4. Subinder has been on a housing association waiting list for eight years. When she asks why, she's told that priority is given to people whose parents were also tenants.
5. Marianne has been refused entry to the fast-track management training programme, because she works part-time.
6. Johnny's employer has introduced an outward bound team building scheme for all managers. The Director says that promotion will be based partly on people's performance on the scheme. Johnny has an artificial leg.

Answers at the back of the pack.

Objective: be aware of the key issues and concepts involved in each particular area of discrimination

Religion

It is **unlawful for employers** to discriminate on the grounds of a person's 'religion, religious belief or a similar philosophical belief, or people with no religion.' This includes perceived religion: if you discriminate against someone on the assumption that they are Muslim, the fact that they aren't doesn't make it legal. The regulations also cover **association**: for example discriminating because someone is married to a Catholic, or has Catholic friends.

As with all the areas of discrimination we deal with here, there is one exception. Employers are allowed to discriminate when there is a **genuine occupational qualification**. A Jewish care home, for instance, might be able to insist on having Jewish kitchen staff who would understand residents' religious observances, although the care home would have to justify this. It may be justifiable for some staff but not others, depending on their role.

Sexual orientation

Similarly, the regulations make it **unlawful for employers** to discriminate because someone is **gay, lesbian, heterosexual or bisexual**. (Transsexuals are already covered by sex discrimination legislation). It is not unlawful to discriminate on the grounds of particular sexual practices, like sado-masochism.

Again, perceived sexual orientation is included: not just the person's actual sexual orientation, but what the employer assumes. A firm that refused to hire someone because they thought he was gay would still be breaking the law, even if it turned out that he wasn't. Discrimination on the basis of **association** with people of a particular orientation is also covered: for instance, not promoting a woman because her daughter was known to be lesbian.

The same concept of the **genuine occupational qualification** applies. A lesbian club might argue that to make the environment comfortable for its members, it would need to recruit only lesbian staff.

Age

It is unlawful to discriminate (directly or indirectly) on the basis of age in employment (including recruitment and retirement) and vocational training. It applies both to people considered too young and too old and includes apparent age, where someone might appear younger or older than they are. However, discrimination is allowed if it can be **objectively justified** in law.

Race

The Race Relations Act makes it unlawful to discriminate (in employment, housing and the supply of goods and services) on grounds of **colour, race, ethnic origin, national origin or nationality**. The Act applies not only to employers, but to providers of goods and services.

The term **genuine occupational qualification** was first used in the Race Relations and Sex Discrimination Acts of the 1970s. For example, a Chinese community organisation is allowed to recruit only Chinese people to provide advice and support to its members.

Gender

The Sex Discrimination Act (SDA) makes it unlawful to discriminate (in employment, housing, education and training and the supply of goods and services) on grounds of **gender or marital status**. The SDA also includes transsexuals in relation to employment and training. Discrimination on grounds of pregnancy is covered under this Act.

The exception again is the **genuine occupational qualification**. A women's health club may be able to justify recruiting only women as gym instructors, for reasons of decency or privacy.

The Equal Pay Act makes it unlawful to pay a woman less than a man (or a man less than a woman) for **similar work or work of equal value**. It also covers other terms of employment such as holiday entitlement.

Disability

Disability is defined as **a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities**. It includes serious mental illness and learning disability.

The Disability Discrimination Act is drafted somewhat differently to the other legislation. The other acts make it unlawful to discriminate against either the traditionally disadvantaged group or the traditionally advantaged: for instance, it's as unlawful to discriminate against a white person as a black person. The Disability Discrimination Act makes it only unlawful to discriminate (in employment, housing and the supply of goods and services) against disabled people, not the able-bodied.

There is also no concept of genuine occupational qualification. Employers and service providers can discriminate if they can prove that it's **justified**: for instance, that a particular disabled person couldn't do the job because of their disability. They are required to make **reasonable adjustments** (such as providing ramps, or readers for blind people) before they can claim the discrimination is justified.

Objectives: recognise the signs that may mean there's discrimination and know the right questions to ask if discrimination may be a factor

Exercise 3

The following examples demonstrate the kind of hints you may get that discrimination is happening:

1. Julian Braithwaite is a Rastafarian. He applies for a job in a fast-food outlet. The manager says his dreadlocks would be unhygienic.
2. Adelina Gashi was refused a room in a multi-occupied house because the landlord said she wouldn't get on with the other tenants.
3. Mary-Jo Bentham was turned down for a management job because she was 'not aggressive enough.'
4. Mahmoud Abbas has been refused a performance-related bonus because he 'isn't a team player.'
5. Kamlesh Patel works full-time, but leaves promptly to pick up her daughter. She hasn't been promoted because she's said not to be committed enough.
6. Jim Brown's employer refused to pay for training for Jim to get a professional qualification because the firm sees training as away to develop and retain younger staff.
7. Mervyn Thomas has Down's Syndrome. He wasn't allowed into a music venue with his friends.

As an adviser, it helps to treat statements like these as code to decipher. You need to look behind the **reason** given and consider the **impact**. Remember that it may still be discrimination, even if other people are subject to the same rules, if the impact is greater for one social group.

In order to unpick the code, you'll probably need to explore further exactly what happened. For each of these six cases, write down two questions that you could ask in order to get more relevant information.

The answers are at the back of the pack.

Objectives: have a detailed understanding of what action to take if discrimination does seem to be a factor

Under the NOS competencies for generalist advisers, advisers should be able to identify possible issues of discrimination. This means that advisers should be able to identify possible discrimination claims. Advisers may be able, with supervision or additional support, assist a client taking a discrimination case to an employment tribunal. This would involve using the relevant questionnaire, and completing the ET1 form.

Discrimination cases can be difficult to argue and advisers will usually need to refer clients to a specialist employment adviser.

- you will need to explore the situation with the client, pick up on clues and identify possible discrimination issues, seek support for any areas you are not sure about
- with the client look at and clarify the options available, eg apology, negotiation, legal action, and the consequences of each option, eg possibility of increased compensation at an Employment Tribunal, harassment at work, loss of job etc
- if a client decides on legal action through an Employment Tribunal or the courts, they will need specialist advice/solicitor and there are time limits and procedures that must be followed.

Answers to Exercise 1

1. This excuse is sometimes used when employers assume their customers will be prejudiced against staff if they don't conform to a certain image. Your client might have a visible disability or impairment, or dress according to their own culture, or simply have a different ethnic origin or sexual orientation, or be regarded as the wrong age for the customers.
2. This tends to happen to people who are not considered to be 'real' employees, such as, part-time workers (the majority of whom are women), or simply those who don't fit the pattern in that company of successful, ambitious employees who may be predominantly young, white, full time and able-bodied could be a major source of age discrimination.
3. Works canteens need to cater for the needs of their workforce, especially if staff have no choice but to eat there. Perhaps your client keeps to a halal (Muslim) or kosher (Jewish) diet.
4. This is a common situation for women returning to work after the birth of a child; but it could equally apply to someone who's become disabled, or who is now a full-time carer. Employers should not assume that a job can't be done part-time (perhaps by two people), without considering the practicalities.
5. What counts as determination may be stereotypical male behaviour – aggression, competitiveness, youth - so that women, particularly from certain ethnic groups and older people, are assumed not to be determined. Out gay men could also be affected by this.

It is important not to make assumptions, but you would need to explore with the client, using open questions, whether there are discrimination issues. The client may not have thought about discrimination issues themselves, or may be unsure about raising it as an issue. You can ask the client to explain in their own terms, for instance, 'How exactly does your disability affect you at work?' Or 'there is legal protection for some groups including race/gender/disability/sexual orientation/religion or belief/age'. Do you think this could apply to your situation?

Answers – Exercise 2

1. Direct discrimination; unlawful under the Race Relations Act
2. Yes, this is direct discrimination on the grounds of Shahbana's sexual orientation and it is unlawful discrimination.
3. Not discrimination (unless everyone behaves in the same way without being punished for it and they've just picked on him because he's gay. What evidence does he have?)
4. Possibly indirect discrimination; unless the Housing Association had as many Asian as white tenants a generation ago. Unlawful under the Race Relations Act.
5. Indirect discrimination, as women are more likely than men to work part-time. Unlawful, under the Sex Discrimination Act also part-timers are now protected by the Part-time Workers Regulations 2000. They have a right not to be treated less favourably by their employer.
6. Climbing mountains and fording rivers are not essential to doing the job, and Johnny may not be able to perform the physical tasks as well as his able-bodied colleagues. Basing promotion on this is probably unlawful. The Disability Discrimination Act doesn't distinguish between direct and indirect discrimination.

Answers – Exercise 3

1. Did the manager explain why he thought it would be unhygienic?
Do you know what happens with other staff (men and women) with long hair?
2. Do you know who else lives in the house?
What do you think he meant by fitting in? (This is sometimes used as 'code' for belonging to a different ethnic group, sexual orientation or religion).
3. Did they say why they thought you weren't aggressive enough?
Is there any reason why a manager there needs to be aggressive?
Are all or most of the managers men?
4. What are the criteria for getting a bonus?
What do you think they mean by not being a team player?
5. Is there any reason why they'd think you're not committed?
Does everyone on the higher grade work late?
Have there been any complaints about your work?
6. Is there any objective justification for why they think older staff can't be developed?
Is the implication that they think older staff will find it harder to get jobs so the firm doesn't need to make any effort to retain them?
7. Did the doorman say why you couldn't go in?
Were other people being turned away?

You probably won't have these exact questions: that doesn't matter. Look over the answers you have, to see if they achieve the same effect. The point is to explore further exactly what happened, and how the client sees the situation and the context.

About this pack

This pack is a tailor made version of the Citizens Advice Identifying Discrimination self study pack, amended for the Working Together for Advice project, to be used as pre course work for the following generalist courses:

Identifying More Discrimination Issues

Helping Clients with Discrimination Issues

You should not make any judgments or offer any legal advice based on this pack as the law is simplified. This pack was originally prepared and amended in November 2007, May 2008 & April 2009.

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