

# D3 Employee Solutions Factsheet

## No 5 Discrimination in Employment

*D3 Employee Solutions' Factsheets reflect our understanding of the law as at the date in the footer. They are meant to summarise the situation and should not be relied upon as a definitive or complete statement of the legal position. Always seek advice if in doubt.*

### 1. What categories does discrimination legislation cover?

There are broadly six-protected categories, but each category contains various subdivisions

<b>Protected categories (reflecting changes from Equality Act 2010)</b>	
<b>Race</b>	Includes race, colour, nationality, racial origin, national origin and ethnic origin
<b>Sex</b>	Both men and women are protected
<b>Marriage or civil partnership</b>	The Equality Act protects people who are married or in a civil partnership against discrimination.
<b>Gender reassignment</b>	<p>The Equality Act provides protection for transsexual people i.e. those who have made the change successfully, those who are currently undergoing a process to change their gender and those who propose to undergo such a process . The Act no longer requires a person to be under medical supervision to be protected – so a woman who decides to live permanently as a man but does not undergo any medical procedures would be covered.</p> <p>Transgender people such as cross dressers, who are not transsexual because they do not intend to live permanently in the gender opposite to their birth sex, are <b>not</b> protected by the Act.</p> <p>It is discrimination to treat transsexual people less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured. Medical procedures for gender reassignment such as hormone treatment, should not be treated as a 'lifestyle' choice.</p>
<b>Pregnancy and Maternity</b>	A woman (whether single, married or in a civil partnership) is protected against discrimination on the grounds of pregnancy and maternity during the period of her pregnancy and any statutory maternity leave to which she is entitled. During this

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	period, pregnancy and maternity discrimination is not also treated as sex discrimination.
<b>Disability</b>	<p>Covers those who have a physical or mental impairment that has a substantial, and long-term, adverse effect on his/her ability to carry out normal day-to-day activities (walking, talking, listening, communicating, eating etc). Long term will be where the disability has lasted or is expected to last for 12 months or more.</p> <p>A person is disabled even if correction/treatment means that they can function 'normally'. Examples are:</p> <ul style="list-style-type: none"> <li>• A person who has a hearing impairment is still 'disabled' even if their hearing appears to be fully corrected by hearing aids.</li> <li>• A diabetic is disabled even if their illness is fully under control through medication</li> <li>• Someone suffering from clinical depression (not stress!) will be disabled even if their condition is managed effectively via treatment and/or drugs</li> </ul> <p>People whose impaired sight can be corrected to normal with glasses/lenses are an exception in that they are specifically excluded by the legislation. However, where a person remains partially sighted in spite of correction they will be disabled under the Act.</p> <p>Alcoholism and drug addiction are <i>not</i> classed as disabilities.</p> <p>An employer is only liable if they know, or can be reasonably expected to know, of a person's disability.</p>
<b>Age</b>	Includes actual age, age group and apparent age
<b>Sexual orientation</b>	Covers an orientation towards persons of the same sex, the opposite sex or both sexes – NOT to sexual practices
<b>Region or belief</b>	Includes 'religion, religious belief or similar philosophical belief'. What counts as the latter is open to debate, but you may have noticed in the press that the Employment Appeal Tribunal (EAT) has said that belief in so-called 'green' issues can count.

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#### 2. Types of discrimination

<b>Direct</b>	<p>Treating someone less favourably (relative to a real or hypothetical comparator) on the grounds of one of the protected categories. Therefore, you cannot directly discriminate against someone because of, for example, their own race or because of their association with someone of a particular race.</p> <p>It is the employer's treatment that is relevant, not their intention i.e. (s)he may not <i>intend</i> to discriminate, but this is no defence. Indeed once established, there is no defence to direct discrimination! If a claimant can show a Tribunal a prima facie case, then the only defence it is for the employer to prove that the less favourable treatment was on other grounds e.g. the employee's conduct or capability, not his/her race etc.</p> <p>There is an exception in that direct age discrimination can be 'objectively justified' although this will be quite rare. In addition (but also quite rare), there are some jobs which can be reserved for members of a particular protected group.</p>
<b>Indirect</b>	<p>Applying a 'provision, criteria or practice' to everyone, but it is one which puts someone in one of the protected categories at a particular disadvantage. For example, a recruitment criterion that someone must be at least 1.7m tall would exclude a larger proportion of women than men. A woman under 1.7m tall could claim indirect discrimination if excluded from consideration on the basis of her height.</p> <p>Unlike direct discrimination, it is open to an employer to justify indirect discrimination by showing that the 'provision, criteria or practice' is a legitimate and proportionate one – a Tribunal will seek to assess the balance between the benefit to the employer of the requirement and the discriminatory effect.</p> <p>Currently Indirect Discrimination does not apply to Disability or gender reassignment, although it will apply from 1<sup>st</sup> October 2011 when the Equality Act 2010 comes into force.</p>
<b>Disability-Related</b>	<p>To be dropped from 1<sup>st</sup> October 2011 when the Equality Act 2010 passes into law. If direct discrimination occurs due to the <i>fact</i> of disability, disability-related discrimination occurs due to the <i>effect</i> of someone's</p>

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	<p>disability. Its applicability has been severely narrowed by the courts; hence why the Equality Act 2010 is replacing it with indirect Discrimination and 'disability arising from a disability'</p>
<b>Arising from a disability</b>	<p>This is a new provision from 1<sup>st</sup> October 2010 and occurs when the discrimination relates to the effects of a person's disability rather than the fact that they are disabled e.g. a difficulty with reading due to dyslexia.</p>
<b>Perceptive Discrimination</b>	<p>This already applies to age, religious belief, sexual orientation and race so that discrimination occurs due the discriminator's assumptions about the person he/she discriminates against. For example the discrimination may be due to an assumption that someone is gay; the fact that they are not gay does not invalidate the discrimination claim.</p> <p>From 1<sup>st</sup> October 2010, The Equality Act 2010 extends this concept to the grounds of sex, disability and gender reassignment.</p> <p>Note that (for reasons not entirely clear) this form of discrimination will not apply to the protected categories of marriage/civil partnership or pregnancy/maternity.</p>
<b>Associative Discrimination</b>	<p>There have (until the Equality Act 2010) been slightly different definitions of direct discrimination. For example, direct sexual orientation discrimination occurs if the act is 'on the grounds of' sexual orientation. This means that A can discriminate against B because of C's sexual orientation and B's association with C. However direct disability discrimination can only be held if the discrimination is on the grounds of the individual's own disability. This means that, a carer of a disabled person, cannot claim disability discrimination if they suffer detriment due to their association with that disabled person.</p> <p>The Equality Act 2010 harmonises the definition on the broader concept of 'on the grounds of' and therefore so-called 'associative discrimination' is extended to cover discrimination on the grounds of:</p> <ul style="list-style-type: none"> <li>• Race</li> <li>• Religious belief</li> <li>• Sexual Orientation</li> <li>• Sex</li> <li>• Disability</li> </ul>

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	<ul style="list-style-type: none"> <li>• Age</li> <li>• Gender reassignment</li> </ul> <p>Note that (for reasons not entirely clear) this form of discrimination will not apply to the protected categories of marriage/civil partnership or pregnancy/maternity.</p>
<b>Harassment</b>	<p>This is subjecting someone, <i>on the grounds of</i> one of the protected categories (except pregnancy/maternity) , to an intimidating, hostile, degrading, humiliating or offensive environment, or violating their dignity. Under the Equality Act an individual can claim harassment even of the unwanted behaviour is directed at someone else e.g. racist comments directed at a co-worker.</p> <p>As with direct discrimination, it is the impact on the individual that is relevant, not the intention of the 'harasser'.</p>
<b>Victimisation</b>	<p>Subjecting someone to less favourable treatment because they have exercised or propose to exercise their rights (or are suspected of having done so) under the various anti-discrimination legislation; or because they have supported another person in so doing. This would, for example, include raising a grievance that they have been harassed or submitted a Tribunal claim. It would also include not appointing someone to a job because they have made some form of discrimination claim against a former employer, whether or not they succeeded with their claim.</p>
<b>Failure to make reasonable adjustments</b>	<p>Applies to disability discrimination only. An employer is under a duty to make adjustments to help a disabled person overcome the adverse impact of their disability where those adjustments are reasonable (e.g. in relation to cost-benefit) and where the adjustment could reasonably be expected to make a difference.</p> <p>Adjustments should be made in order to assist candidates during the recruitment phase and during employment and can be:</p> <ul style="list-style-type: none"> <li>• The provision or adaptation of equipment</li> <li>• Adjustments to the physical layout of the workplace</li> <li>• Adjustments to terms and conditions (e.g. hours or time-off)</li> </ul>
<b>Discrimination by 3<sup>rd</sup> parties</b>	<p>Already applies to sex and from 1<sup>st</sup> October 2010 extended to cover age, disability, gender reassignment, race, religion or belief and sexual orientation.</p>

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	<p>The Equality Act makes an employer potentially liable for harassment of its employees by third parties such as customers or clients. Liability will only arise when harassment has occurred on at least two previous occasions, the employer is aware that it has taken place, and has not taken reasonable steps to prevent it from happening.</p> <p>Note that (for reasons not entirely clear) this form of discrimination will not apply to the protected categories of marriage/civil partnership or pregnancy/maternity.</p>
<b>Instructions to discriminate</b>	<p>It is unlawful to instruct another person (e.g. an employee or an agency) to directly/indirectly discriminate, harass or victimise others on any of the protected grounds.</p> <p>It is also unlawful to subject any person to any detriment (up to and including dismissal) for refusing to act on any such unlawful instruction.</p>
<b>Multiple discrimination</b>	<p>The Equality Act 2010 will allow a person to present a discrimination claim which combines two or more of the protected categories e.g. 'I was harassed because I am a black women.' Currently that would have to represent two claims ('... because I am black' and '... because I am a woman' i.e. one race discrimination claim and one sex discrimination claim). In practice this new provision is likely to generate three separate claims i.e. a race discrimination claim, a sex discrimination claim and a multiple discrimination claim</p>

### 3. Coverage

#### Pre-employment

**Advertising** – job ads must not contain any conditions which are directly discriminatory on any of the protected grounds. The only exceptions to this would be:

- In rare cases where a job is covered by a genuine occupational requirement (GOR). For example, there may be some jobs where, for the preservation of dignity and privacy, it needs to be performed by a woman.
- When an age restriction can be 'objectively justified' – again rare, but may occur in, for example, film or theatre or where there is a genuinely lengthy training period.

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- It is acceptable to exclude candidates whose age is within 6 months of the organisation's normal retirement age (which itself cannot be lower than 65 currently) – although the concept of a default retirement age is likely to disappear sooner rather than later.
- It would be acceptable to say that applicants must be able to demonstrate their ability to work legally in the UK

Similarly the ad ought not to contain conditions that are indirectly discriminatory, unless such conditions can be justified by reference to a legitimate business goal. The advent of age discrimination has particularly highlighted this aspect – avoid expressions like: 'youthful enthusiasm', 'mature' 'recent graduate'; 'an ideal first job' etc.

**Other recruitment methods** – many organisations encourage their existing employees to introduce suitable candidates for jobs. They need to be careful that these practices are not deemed to be indirectly discriminatory. For example if the current workforce is predominantly young and/or from one particularly nationality/national origin, then it is likely that those introduced will have a similar profile. Even internal recruitment/promotion might in these circumstances be indirectly discriminatory, although might be justified as a 'legitimate aim' (to retain talent, encourage loyalty, reduce recruitment & training costs etc) and 'proportionate' when balanced against the discriminatory effect.

**Use of recruitment agencies/head-hunters** – employers are jointly liable for the acts of their agents if they have directly or indirectly authorised that agent to undertake a discriminatory act, or condoned such acts. But employers can inadvertently discriminate if not careful. For example, they may have a policy of trying to attract older candidates since their workforce is predominantly young and older people tend not to apply – so they decide to use an agency which specialises in recruiting, say, the over-50s. That's fine and such positive action is permitted (even encouraged); however, they probably ought to avoid *only* using that agency since that would indirectly discriminate against younger people. Similar arguments would apply to use of printed or internet media targeted at specific narrow groups – by all means use them but within a mix of advertising media. This would not apply where it can be justified that, say, a job needs to be filled by a person from a particular profession; targeting adverts only at that profession's journal/webpages would be acceptable.

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**Recruitment literature** – this would include paper and electronic documents and images. Employers should beware of content (language, images, requirements) that implies discrimination of some kind and which might deter certain groups from applying. Such 'hidden messages' may not be intended but critically assess your 'literature' for them. For example, many employers actively use their own websites to illustrate the types of jobs they have. We have seen one well-known retailer include images of current staff, all of whom are young and photogenic and who are predominantly, if not exclusively, white. Intended or otherwise, what message does this send?

**Application forms** – asking someone's age/DOB, gender, marital status, nationality, on an application form is not, in itself, discriminatory. And of course it is open for recruiters to 'guess' someone's age from dates when they were at school/college, or (more speculatively) their religion or ethnic origin from their name, or assume various characteristics from where someone lives. So it is the use to which information is put, or the perception of how such information might be used that is important. So recruiters should carefully consider what information is requested via application forms – only include that which is essential in order to make shortlisting decisions. For example, critically assess whether you need *any* dates (of birth, qualifications, jobs). You might want to collect data about ethnic origin, age, gender, religion, disability and sexual orientation for monitoring purposes. However, consider how you can separate this data collection from the essential skill, experience and competence information you need so that those shortlisting do not (or cannot be accused of) using the 'personal' data to directly or indirectly discriminate. In addition we often draw wrong inferences from *how* an application form is completed (presentation, spelling etc). Those with particular learning difficulties, those with dyslexia, or those where English is not their first language might have difficulty in completing an application form and might even be deterred from applying in the first place; yet they may be good candidates for the job in question e.g. written English may not be an important job requirement and/or they may have other skills which are more important.

**Internet search & Social/business networking sites** – recruiters are increasingly consulting search engines (e.g. Google) and/or networking sites (e.g. Facebook, LinkedIn) for information about candidates and surveys in the US reveal (unsurprisingly) that many are rejecting, or accepting, candidates on the basis of what they find. There is nothing wrong in searching for information which is in the public domain, indeed for information that people have *chosen* to

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make public. But it is all too easy to make ill-informed judgements and assumptions from what is said (or not said) on networking sites – so beware how you use the information.

#### **Selection processes**

**Job descriptions and selection criteria (person specifications)** – a failure to have a clear definition of the job requirements and objective selection criteria leads recruiters to rely on 'gut feel' or 'hunches' i.e. subjective assessment.

There is the very real danger of unconscious discrimination and/or the perception of overt discrimination – certainly a lack of objective assessment can be presented in a very bad light by candidates not selected either for the shortlist or for the job itself.

Job descriptions and person specs themselves must not include criteria which themselves are potentially (directly or indirectly) discriminatory. Common ones are the unjustified over-specification of: qualifications; length of experience; language requirements; standards of written English. Even expressions such as 'ability to fit into the team' might be interpreted as 'matching the profile of the current team'. So be careful to include criteria that are specifically relevant to the job and preferably those which can be objectively measured/assessed.

**Testing** – many employers use ability tests, personality assessments and/or incorporate various 'exercises' into their assessment processes. They should ensure that they only use tests which are specifically relevant to the role, those which are supplied by reputable test suppliers (who should have validated their tests against various forms of bias) and should only have the tests carried out by suitably trained and accredited people so as to avoid bias in the interpretation.

**Interviews** – one leading case from Northern Ireland illustrates the potential pitfalls of interview questions from which discrimination might be inferred or perceived. Aer Lingus asked a 50-year old female candidate applying for cabin crew how she would respond to starting 'at the bottom of the ladder' and to being given instruction from younger people. Such a question might not indicate an intention to discriminate directly, but the fact that other candidates were not asked the same question meant that an inference could be drawn and in the resulting claim the burden of proof shifted to Aer Lingus to prove that there was in fact no discrimination and it is often hard to prove a negative! So the best advice is to develop a standard set of questions focussed on the skills and qualities objectively required in the job and only depart from these to probe

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answers or if there is a demonstrably objective reason to depart from the standard set in any particular case. And keep notes of the key points of each candidate's answers to create an 'audit trail' so as to support the ultimate assessment and decision to accept/reject each candidate. A formal scoring matrix with space for examples to support the scoring will also help defend any claims of bias.

#### Pre-employment health questionnaires

The Equality Act 2010 limits the circumstances when an employer can ask health-related questions before offering a person a job. Up to that point employers can only ask health-related questions to help you to:

- decide whether there is a need to make any reasonable adjustments to the selection process, or
- decide whether an applicant can carry out a function that is essential ('intrinsic') to the job

**Offers of employment** – It might be obvious that the selection decision (who is rejected/accepted) must not be tainted by discrimination or victimisation, but it is also unlawful to offer terms of employment (pay, benefits, hours, holidays etc) which discriminate on any of the protected grounds. Note that candidates who reject an offer can complain if they believe the offer to be discriminatory. There are some exceptions to both the selection decision and to the terms offered. The main ones are:

- You can (and should) refuse to make an offer to anyone where their appointment would contravene a statutory requirement. The one which affect all employers that offers should not be made to someone who cannot show that they have the **legal right to work in the UK**. In this regards you should ask either all shortlisted candidates (or at the very minimum the person you select) to provide the approved evidence of their right to work in the UK and keep a copy of that evidence. Do not only ask for evidence from only those who you think *might* not have the right based on, say, their name, their accent, their colour or even their nationality.
- You can reject a disabled person who is not capable of performing the tasks, but **only** if this judgement is made after proper consideration of 'reasonable adjustments' has been made i.e. even after such adjustments they would not be capable.
- You can refuse to offer employment to someone whose age is within 6 months of your normal retirement age (which must be no lower than 65)

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- You may be able to refuse to employ an older person where the training period (plus some reasonable subsequent period during which you can get some return from that training) would take them beyond your normal retirement age; but you may be called upon to 'objectively justify' this decision.
- You can refuse to employ someone of a particular age (or in a particular age group) provided you can objectively justify that refusal – this will be rare, so take advice if you feel that a job can only be done by someone in a particular age
- You can refuse to offer a position to a person who does not meet a 'genuine occupational requirement' (GOR) e.g. reject a male when the GOR is to be a woman. This will be quite rare and you should always seek advice before classifying a job in this way.
- You may have job criteria which are indirectly discriminatory, provided that the criteria can be objectively justified
- The National Minimum Wage explicitly discriminates between 16-17 year olds, 18-21 year old and other adults
- And employers often have benefit structures which reward loyalty (e.g. increasingly holidays with length of service) and/or pay scales which are incremental based on service/experience or acquisition of skill. In these contexts it will be lawful to offer lower pay/benefits to new starters relative to existing employees. Nonetheless, beware of discriminating *between* two or more new starters who are offered the same or similar roles.

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#### During Employment

**Contractual terms & conditions** – with some exceptions it is unlawful to discriminate as regards the terms and conditions of employment. The main exceptions are:

- In relation to the **National Minimum Wage** in respect of different age groups, but it would still be unlawful to discriminate on the basis of age (or any of the other protected categories!), *within* any of the 3 NMW age groups.
- **Service-related benefits** which might be indirectly discriminatory on grounds of age can be justified on the basis of rewarding loyalty. A good rule of thumb is the so-called 5 year rule under which, say holidays increasing for periods of service up to 5 years would be regarded as automatically justified. However long periods might still be 'objectively justified' in relation to business need if challenged. It is considered that the hurdle of showing business need to reward loyalty is not too high so it would be relatively easy to justify things like long-service awards or career breaks/sabbaticals after, say, 10 or 20 years. The reality is that it is unlikely that younger employees would challenge these terms anyway.
- **Pension schemes** – whereas it would be unlawful to restrict access to a scheme on the basis of any of the protected categories, including age, there are a host of permitted age-related rules *within* pension schemes. This is a specialist area and advice might be required from a pensions expert.
- Pay and benefits to agency temps does not need to be the same as for employees. However this is likely to change in 2010/2011, certainly for longer-term 'temps' (12 weeks or more)
- Note that the provision of medical and life insurance benefits on the basis of age is *not* a permitted exception (except in a limited respect as regards life insurance for those retiring early on ill-health grounds) and it will be difficult to objectively justify discriminatory treatment in this regard.

**Training & Promotion** – access to training and opportunities for promotion should not be restricted (either directly or indirectly) based on a person's inclusion within one of the protected categories. Neither must someone be denied training or promotion because they have sought to exercise any of their rights under the anti-discrimination legislation or helped someone else in this regard i.e. they must not be victimised. Not having been considered for training

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is sufficient for an employee to bring a claim – they don't need to have applied for training.

**Other Detriment** – this is a bit of a catch all and covers subjecting a person to less favourable treatment not otherwise specifically outlawed. The Courts have taken a broad approach to the definition of 'detriment'. It may, but does not have to, include adverse physical or economic consequences. It is enough that 'a reasonable worker would or might take the view that he or she had been disadvantaged' by reason of their race, age etc. 'Subjecting to' means causing or allowing the detriment to be suffered in circumstances where the employer has control over whether it occurs or not. From cases going to Tribunal, examples of detriment (other than dismissal, covered below) are:

- Subjecting someone to disciplinary proceedings and/or sanctions short of dismissal *because* they fall within one of the protected categories whereas someone not in the group would not be subject to the same sanctions or proceedings; or imposing most severe sanctions that would be imposed on a comparator (real or hypothetical).
- Failing to investigate and/or resolve an employee's complaints (grievances) when a real or hypothetical comparator's similar complaints would have been investigated/resolved
- Imposition of dress codes, uniforms or 'standards' of appearance – could represent indirect discrimination (usually on grounds of religion or ethnic origin) so can perhaps be justified, but there have been cases where this represented direct discrimination on the basis of detriment.
- Transfer to less interesting/attractive work. An example here is a real case where a black worker was transferred to more monotonous work to separate him from a racist colleague – this was regarded as a detriment.

#### Termination of Employment and Post-Employment

**Dismissal** – dismissing an employee where the reason or primary reason constitutes direct discrimination, unjustified indirect discrimination or victimisation is a form of detriment specifically outlawed. Of course very few employers are going to make direct discrimination or victimisation explicit so, when considering a claim, Employment Tribunals will look behind the reasons given by the employer. For example, one employer dismissed an employee at the end of their so-called probation period, ostensibly due to his capability, but

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the Tribunal found that the real reason was direct discrimination on grounds of his South African nationality.

An example of indirect discrimination might be where an employer dismisses, say, a 55-year old on the basis of capability because they 'failed' a mandatory health and safety medical check-up. This is likely to constitute indirect discrimination on the basis that older workers are more likely to 'fail' the check. It is open to the employer to justify such discrimination, but it would probably need to show: firstly that the health standard applied is valid; secondly that the test is not too stringent; thirdly that all employees were required to undertake the check up (i.e. not only to the over 50s); and finally that they had no other less discriminatory method of addressing the issue (e.g. redeployment to a different job)

**Constructive Dismissal** – employees who believe they have been harassed often leave and make two claims: one for harassment (discrimination); and, if they have at least a year's service, one for constructive unfair dismissal on the basis that the employer had breached the implied contractual term of trust and confidence (by harassing them) and/or the implied duty of care (by failing to prevent harassment by others).

**Selection for redundancy** – when selecting from a 'pool' employers will (or should) define objective criteria against which to select employees for redundancy. Naturally those criteria should not be directly discriminatory e.g. 'we will select first from the over-50s'. However, indirectly discriminatory criteria might creep in and would need to be justified. Interestingly the Courts have confirmed that where it is custom and practice in an industry or when it forms part of a collective agreement, length of service (which is indirectly discriminatory on the basis that younger workers are by definition less likely to have long service) can be justifiably included within a set a of other criteria. It is unlikely that 'last-in-first-out' used alone would be acceptable.

**Redundancy payments** – employers are permitted to discriminate by basing redundancy payments on a mix of age and length of service, by either following the statutory payment structure or by a scheme which, although more generous, follows that structure

**Retirement** – until 1<sup>st</sup> October 2011 it will remain legal (i.e. fair) to dismiss someone by reason of retirement, provided that this is not before an employer's normal retirement age (which itself can be no lower than 65) and provided the

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statutory notice requirements have been met. This therefore legalises an act of direct discrimination. However, this will be removed from 1<sup>st</sup> October 2011 after which a forced retirement will be act of direct discrimination which need to be 'objectively justified'

#### **Post-Employment**

Former employees can bring complaints against their former employer for discrimination, harassment or victimisation that occurs after employment has ended. This is most likely to occur either in relation to the provision of an allegedly discriminatory reference, or in connection with any appeal hearing held post employment.

#### **4. Other forms of discrimination**

**Rehabilitation of Offenders** – those found guilty of criminal offense (and where the sentence is 2.5 years or less) may regard their conviction as spent after a specified period, the length of which varies depending on the severity of the sentence. There is a long list of excepted professions/jobs, but in other sectors ex-offenders are not required to declare any spent convictions. It is unlawful for an employer to deny someone employment, dismiss them or otherwise treat them less favourably because they have a spent conviction or because they did not disclose a spent conviction.

**Part-timers** – it has been long established that treating a part-time worker less favourably constitutes indirect discrimination on the grounds of sex, on the basis that a lower proportion of women can meet a requirement to work full time. It has been open to employers to justify the indirect discrimination so, for example, there is no implied right to insist on part-time work. However, where an employer does employ part-time workers they must not treat those workers less favourably than full-timers as regard terms and conditions of employment than; nor must they subject a part-time worker to detriment (including dismissal) for seeking to exercise their rights to fair treatment.

**Equal pay** – men and women are entitled to equal pay when:

- They do the same or broadly similar jobs

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- They undertake work which has been rated as equivalent in a non-discriminatory job evaluation scheme, or
- They undertake work of equal value i.e. that which would be rated as equivalent in a non-discriminatory job evaluation scheme

**Detriment and Automatic Unfair dismissal** – there is a range of reasons, largely unrelated to the 6 protected categories, why an employer cannot subject someone to detriment or dismissal. These include:

- Making a 'protected disclosure' or otherwise asserting a statutory right
- Making a flexible working request
- For refusing to work in unsafe working conditions, reasonably drawing an employer's attention to a health & safety issue or taking action to protect themselves or others from harm/danger
- In connection with the right to time-off for dependants
- Relating to pregnancy, childbirth or maternity/paternity/adoption leave
- Because they have been summoned for jury service
- Because of exercising their right to refuse to work on a Sunday (shops and betting only)
- Because they are an employee representative, a candidate to be a representative or because they have performed their duties as such– this includes trade union reps, health & safety reps, and reps elected for collective redundancy consultation, TUPE consultation, works councils, and joint employee/employer consultative bodies.

#### 5. Complaints of discrimination

All workers, irrespective their length of service can bring claims of discrimination or detriment/automatic unfair dismissal as described above.

Claims may be made against an employer and/or against named individuals – multiple respondents are quite common in harassment cases. It follows that awards of compensation can be made against individuals as well as organisations.

Claims are heard by Employment Tribunals and generally must be submitted with three months of the act complained of. However, in respect of most claims Tribunals have discretion to extend this time limit when it is 'just and equitable' to do so. Circumstances where such discretion would be used are varied but

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would probably include, for example, a case where an individual waited to present their claim until the outcome of any internal grievance against, say harassment, had been confirmed. This might be more than three months after the act of alleged harassment.

Where discriminatory acts extend over a period of time, they are treated as having happened at the end of that period, so Tribunals often find themselves considering events which occurred many months and even years before.

In discrimination cases it is for the claimant to demonstrate firstly that they suffered less favourable treatment and then a prima facie case that the treatment *could* represent discrimination. This goes a little further than an argument such as: 'I'm a gay person and I was dismissed'. In practice the hurdle is not very high, but they would have to point to other things that might indicate discrimination. Having established a prima facie case, the burden of proof shifts to the employer to show that the reason for less favourable treatment was for some reason *other than* discrimination e.g. conduct or capability. Employers often claim that this effectively makes them 'guilty until proven innocent' and that it is often difficult to prove a negative. In practice this is not the case since the Tribunal will generally hear all the evidence before considering the reasoning. However it does depend on an employer, when they claim that, say, a dismissal was due to misconduct, being able to show evidence that this was the true reason. But this is not much different from the position in an unfair dismissal claim.

**Compensation** is technically unlimited for successful discrimination claims. The heads of compensation are:

- **Financial loss** e.g. loss of past and future earnings
- **Injury to feelings** – assessed in three bands: top band for serious cases (upper limit £30K); middle band (upper limit £18K); and lower band (somewhere between £500 and £6K)
- **Aggravated damages** – in practice included in the injury to feelings award, having the effect of increasing that award from it would otherwise

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be. Awards when the Respondent aggravates the injury to feelings by doing such things as promoting the harasser, attempting to cover up, scapegoats the 'victim' or in effect continues the harassment/discrimination in the way they conduct their defence.

- **Personal Injury** – where it can be established that an act of discrimination has caused or aggravated physical or mental health problems (e.g. clinical depression), then Tribunals can award personal injury compensation. In severe cases this can be very high e.g. where the injury is serious enough to prevent a person working for the rest of their expected career and/or where they will need lifelong care.
- **Exemplary damages** – these are rare and it is arguable that they should not apply. However, there is a possibility that where the compensation from the other heads is thought not sufficient to punish a wrong-doer, then exemplary damages may be awarded

*D3 Employee Solutions' Factsheets reflect our understanding of the law as at the date in the footer. They are meant to summarise the situation and should not be relied upon as a definitive or complete statement of the legal position. Always seek advice if in doubt.*