Equalities Issues in Sport

An introductory guide for Governing Bodies

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Harper Macleod LLP

INTRODUCTION

Sport may appear to treat people differently according to their own characteristics, segregating and restricting competition and participation based on factors such as age, sex, nationality, weight and disability. However removing barriers and encouraging participation by all persons in sport is an important responsibility of all sports governing bodies.

Governing bodies need to be aware of the consequences of unfair discrimination and recognise the responsibilities of the Equality Act 2010, particularly given the sensitivities that can occur when these issues arise.

This note sets out the protected characteristics and concepts of the Equality Act 2010. It provides examples of handling equality matters in sport.

Although this guide is comprehensive it is not to be taken in substitution for specific legal advice.

GET IN TOUCH

If you have any questions about the contents of this guide, or would like to find out any more information, please don't hesitate to contact us.

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1. OVERVIEW

Whilst professional sports people have the same rights to equal treatment as other workers, with some limited, specific exceptions, those involved in amateur sports may be protected against discrimination also, whether as consumers of publicly-available facilities and services or as a result of European case law principles. European case law in particular is tending to blur any lines between professional and amateur sports regulation in respect of participation rights.

For governing bodies, the primary legislation is found in the Equality Act 2010. This guide explains the way that the Equality Act should typically be applied in sport in Scotland.

The Equality Act was created in order to bring together all prior legislation dealing with discrimination and to attempt to create equality, to protect certain characteristics and groups in society and provide meaningful redress for those whose rights were infringed.

The Equality Act operates on the basis of "protected characteristics". The protected characteristics are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

Part 2, Chapter 2 of the Equality Act then sets out the "Prohibited Conduct" in respect of these protected characteristics. These are:-

Direct discrimination, namely where "a person A discriminates against another B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"
There are very limited exceptions to direct discrimination:

- Age: "A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim"
- Disability: where "B is not a disabled person A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B".
- Disability: positive action / special measures for disabled people which might otherwise be direct discrimination are permitted

Indirect discrimination: Where a provision, criterion or practice puts or would put person sharing a protected characteristic at a particular disadvantage compared to those who do not share it and puts or would put the claimant at that disadvantage and it cannot be shown to be a "proportionate means of achieving a legitimate aim"

Victimisation: this is where a person victimises another person by subjecting the other to a detriment, because they have done a protected act or that person believes they will do / have done a protected act (even if they have not).

Harassment: this is where a person experiences unwanted conduct related to a protected characteristic, and where the conduct has either the purpose or effect of either violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. This does not include marriage/civil partnership and pregnancy/maternity.

Governing bodies should consider creating inclusion/diversity plans and equalities plans that can capture the governing bodies' efforts to promote sport for all and the eradication of inequality. This can look at the composition of the sport, the current priorities, areas for development and long term goals of the sport. This is not easy because focusing on one minority or category of person can be difficult to balance against the rights and interests of all others.

A particular tension can arise with single gender competitions, leagues, tournaments or cups generating large commercial interest and as a result funds, that leads to a disparity between prize-money or other internal investment to one of the genders. However, it is important to remember that sport can help change societal trends and attitudes, including by having a diverse leadership, providing equal investment to reverse unequal decline in activity amongst young people, through paying equal prize money, or even through responding to instances of inappropriate behaviour by taking appropriate disciplinary action against members and officials who offend equalities principles (however deliberately or inadvertently), together with partnering and promoting only appropriate commercial partners.

2. THE ROLE OF THE SGB

The role of the SGB is multi-faceted, with SGBs required to embrace equality principles, educate members and promote equality, whilst working towards eradicating inequality within their sport and sport in general. Tackling discrimination and promoting equality for all must be central to the role of the SGB.

SGBs must ensure that the regulatory approach taken by each SGB is compliant with equality principles; by working towards the Equality Standard for Sport levels; by campaigning upward for equality (if there are instances of inequality by an SGB's European or International Federations) and by cascading equality downwards by requiring clubs to observe and promote equality principles.

SGBs must also monitor equality compliance by members and if necessary take appropriate disciplinary action against members who fall foul of equality principles and laws.

Critically, SGBs must ensure that equality principles are observed in conducting its own business and when taking decisions affecting others, including membership requirements, staging competitions; setting rules for its members competitions; providing funding; selecting people for representative opportunities; appointing people to office and employing people.

Although SGBs are not, of themselves, public sector bodies for the purposes of the Equality Act 2010 and in particular the public sector equality duties that can apply, receiving and using public funding is though to be capable of engaging the general public sector equality duty to the extent that the SGB is carrying out a "public function" on behalf of a public body. There has been no case law testing whether or to what extent a governing body is carrying out a "public function".

The Equality Act 2010 governs all of these situations and this note provides an introduction to the legal issues to be considered.

PARTICIPATION ISSUES

3. GENDER AFFECTED ACTIVITY

Section 195 of the Equality Act provides sports specific exceptions. To the rule that access to employment, activities or services should not be restricted based on gender.

Gender affected activity can be regulated by male or female only participation, per section 195(1). However, this must be applied strictly in accordance with the detail of the provision, which says that the exception is only available in gender-affected activity.

Gender-affected activity is "a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity". Thus, for example, a refusal to allow female riders to participate in events at a common riding was found to be unlawful discrimination. **See Graham v Hawick Common Riding Committee**

In contrast, in the case of the **Football Association Ltd and Nottinghamshire Football Association v Bennett** no discrimination was established as the average woman would be at a disadvantage to the average man when playing football, therefore it is not unlawful to discriminate against women in excluding them as a professional footballer at a particular team.

Care needs to be taken in how this translates into practice. For example, a gender-affected activity in which e.g. female only players or athletes can compete does not mean that persons of the same sex must coach, or be advisers, or officials, in the sport.

Regard must also be had to the rules of the relevant international federation. For example, if an international federation states that there must be no males participating in female sport, and vice versa, with no mixed-gender participation, those rules must be carefully considered. Ignoring those rules, where they are mandated and must be observed under the terms of membership, could be difficult in practice. Advice should be sought if there is a challenge, or potential challenge, to the adoption and implementation of a practice or set of rules that is followed because of an international federation's requirements.

4. MIXED GENDER FACILITIES

Sports clubs may restrict access to facilities as services, for example to prevent serious embarrassment to male or female users with the presence of women or men in their changing rooms per the Equality Act 2010 sch.3 para 27(6) or where physical contact between users is likely, per the Equality Act 2010, sch.3 para 27(7).

An imbalance in facilities by not providing e.g. changing facilities for one gender and restricting access to the other would not be advisable as this would be contrary to the Equality Act. Differences in facilities (e.g. in the size of a changing room or number of showers, etc) may not amount to a breach of the Equality Act, where, for example, it was demonstrable that the facilities were in proportion to the needs of the gender.

5. GENDER REASSIGNMENT OR TRANSSEXUAL PERSONS

PARTICIPATION ISSUES

For gender reassignment or the participation of transsexual persons as a competitor in a gender-affected activity, participation can be restricted if it is necessary to secure fair competition or the safety of competitors, per section 195(2).

Link to gender-affected activity

As noted above, section 195(3) mandates that a gender affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.
Further more section 195(4) provides that in considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.

SGBs will need to be extremely careful and not restrict participation by making decisions based on nothing more than their own beliefs/opinions as to fair competition or safety. Evidence and third party opinion may be useful.

Testing

It may be thought, for example, in a physical sport such as rugby, it is not necessarily true to say that a male to female transsexual person would either risk unfairness in competition or the safety of other competitors in female rugby. Much would depend on the individual person and their strength, hormone balance and natural genetic position. Therefore, various testing, including fitness, body composition, strength and conditioning, could all be undertaken.

However, regard should be had to the Sports Councils' Equality Group guidance on transsexual people and competitive sport, which recommends that the focus is on blood testing and in particular testosterone levels.
The resource guide - titled Trannsexual People and Competitive Sport, Guidance for National Governing Bodies - can be found at www.equalityinsport.org within the archive section.

Competitive sport and international sport

There are guides published by the Sports Councils' Equality Group dealing with each of these areas.

Age-group sport

Particular care needs to be taken in relation to children and trans- issues where different considerations can arise in practice.

PROVISION OF FACILITIES

The trans-person is entitled to use the facilities

of the club or premises in the gender in which they present. Refusing to permit a trans-person use of either gender facilities would amount to direct discrimination. Requiring the person to use a different location to either of the male or female premises would be inadvisable. Making arrangements at the request of the trans- person for a separate facility (such as a different room) may be practically helpful, but not essential.

ANDROGENISM

Androgenism and hyper-androgenism is a subject that requires care and thought, effort and understanding for sports people and sports governing bodies. Many international federations will have rules on this, to try to help govern the participation of persons, typically in the female category of competition, where their hormones and genetic composition are more aligned to the typical male range. One example is that of Indian sprinter Dutee Chand and the current position of the IAAF and IOC regarding her participation in international sports events.

Whilst governing bodies may be open to challenge based on various legal arguments, arguments under the Equality Act 2010 are not immediately attractive given that androgenism is not a protected characteristic under the Equality Act 2010.

6. RACE

Race includes: (a) colour; (b) nationality; (c) ethnic or national origins.

COMPETITIONS AND EVENTS

The Equality Act 2010 allows the selection arrangements of national sports teams, regional or local clubs or related associations to continue to be based in race. This clause also allows closed competitions – namely where participation is limited to people who meet a requirement relating to nationality, place of birth or residence.

By way of example, it is, therefore, lawful to rule that (for example) a tennis competition is only open to persons who can represent Scotland in the sport. Another example may be if a league was set up for participants who were all from a country or continent, e.g. an Asian boys league, however care would need to be taken that the rules on participation were clear and consistently applied.

However, imposing restrictions that limit participation of sportspeople based on nationality can be unlawful in professional sport (the central point in the celebrated European Court of Justice case of Bosman in football). Thus, nationality based quotas in club competitions have been held to infringe the rights to free movement of workers. This principle may possibly also extend to amateur sports, per the case of **Deliege v Ligue Francophone de judo et disciplines Associees ASBC**.

For further detail on this, see participation issues in leagues (below).

HARASSMENT

A member of the club's youth squad sued his club. He had been informed by his friends that the club's manager used racist language to refer to him. He was awarded £2,500. **See Hemssaney v Chester City Football Club and Ratcliffe**. A professional rugby league player succeeded in similar circumstances when he found out his coach was not prepared to select him for the first team, no matter what. See **Sterling v Leeds Rugby Club.**

It may be that an employer in sport (as with any other employer) may be required to protect an employee who is the victim of racial abuse by e.g. spectators or members of opposing teams (it being clear that protection must always be provided in relation to actions of fellow workers). This could apply if the club became aware of the problem and failed to take steps to mitigate or eradicate it. See **Equal Opportunities Commission v Secretary of State for Trade and Industry.**

DIFFERENTIAL TREATMENT

In **McCammon v Gillingham Football Club** a player in a league two club complained that the club treated him and other black players differently from their white team-mates. He said he was refused private treatment for an injury, was docked wages and fined for not training in heavy snow. The chairman did not investigate the complaint. The player was ultimately dismissed. An employment tribunal found that the individual had been unfairly dismissed and racially victimised by the club.

Where an Asian referee was told he was not to be reappointed in the next season because of his performance, he succeeded with a claim of discrimination and unlawful dismissal because other referees who were white and who had poor records were retained. See **Singh v National Review Board.**

Funding is a very important aspect of the governing bodies' role in sport; both in receiving funding from sportscotland and other sources, and in using and distributing funds to sportspeople, officials and clubs.

In the case of **Stoute v LTA**, an 18-year-old English tennis player sued the LTA alleging that he was the victim of unlawful race discrimination when he was not awarded funding and other players, with lower rankings than him, but of different ethnicity, were awarded funding. He has also sued claiming access to training opportunities and tournament selection (representation) opportunities have been restricted. This, he says, has impacted on his progression and his sponsorship potential. Under s29 of the Equality Act 2010 any body who provides a service to the public or a section of the public (whether for payment or not) must not discriminate in the provision of the service. For Stoute to succeed, he will have to demonstrate not merely differential treatment, but sufficient evidence that race was a cause of the differential treatment.

7. DISABILITY AND DISABILITY RELATED ISSUES

Disability is a protected characteristic, however there is no specific sporting exception since the tests for discrimination, including failure to make reasonable adjustments and justification, do not outlaw the situation where, even with reasonable adjustments, a disabled person is not reasonably able to take part in a sporting event or competition with less-disabled or able-bodied competitors (s.20 EA 2010).

A person discriminates against a disabled person if, for a reason that relates to that person's disability he treats him or her less favourably than he would treat a person to whom that reason does not, or would not apply, and he cannot show that the treatment in question is justified.

Example:- a refusal to permit a rally driver with insulin-controlled diabetes to enter a competition on the grounds of safety would be discriminatory in the absence of proper justification.

Discrimination for a disability-related reason may only be justified where the reason for the treatment is both material to the circumstance of the case and substantial. A test of reasonableness is used but this test is less likely to be met where there is evidence that the same result could be achieved by means less restrictive of an individual sportsperson's rights.

PROSTHETICS & AIDS

Justification for discrimination for a disability-related reason could include where the disabled competitor uses artificial appliances and those appliances may harm an opponent. It is easy to see how Oscar Pistorius can compete in athletics with his prosthetic aids, but it is also conceivable that aids could be dangerous, in other sports, for if he were to attempt a contact sport such as football, rugby or similar, different risks may arise.

Of course, Pistorius was not initially permitted to compete at international level due to a number of reasons cited by the IAAF. In **Pistorius v International Association of Athletics Federations** the Court of Arbitration in Sport overruled an IAAF decision refusing the amputee permission to compete in IAAF events. The decision was that his prosthetic devices did not give him a competitive advantage. This was decided expressly based on the evidence before it and the rules before the CAS.

The Pistorius case is not, therefore, in anyway a binding ruling on any other athlete or any other sport; it is entirely specific to the athlete, his prothestic aids and the rules of the sport in question.

Permission to use prosthetic aids should be handled sensitively; in conjunction the governing bodies rules and any guidance available from international federations.

In **PGA Tour Inc v Martin** the US Supreme Court ordered the PGA to allow a competitor use a golf-cart at its event and in qualifying; an adjustment to the otherwise strict rule that players were required to walk. The PGA had argued that this adjustment would alter an essential aspect of the game, which was rejected, largely on the perception of the court as to conditions that players would play in.

HIV

HIV status is a disability for the purposes of the Equality Act. Restricting a player from participating would be unlawful unless it could be justified on health and safety grounds. Significant care needs to be taken in this regard.

For example, in Australia and the case of **Hull v Victorian Amateur Football Association** an Australian Rules football player was successful in claiming that he had suffered unlawful discrimination when his registration was refused because he was HIV+ and VAFA wished to attempt to prevent the risk of HIV+ spreading. Banning an HIV+ player would inevitably achieve the desired aim of preventing any risk that other participants would be infected. However implementing appropriate risk-reduction procedures would achieve this aim and not lead to the player being restricted from playing.

STADIA AND FACILITIES

Sports stadia and premises have to have reasonable modifications to the premises, to try to ensure that it is not impossible or unreasonably difficult for disabled people to use those facilities.

TICKETING & ACCESS POLICIES

Persons with mobility and access difficulties must be provided for insofar as is reasonably possible in relation to events for which access is controlled by ticket. Typically persons will receive access by way of a concession ticket and should a personal assistant be required, that person should be permitted entry free of charge.

8. AGE

Unlawful age discrimination is prohibited in employment and in the provision of services or facilities or associations.
In sport there continues to be an exception for age-related competitions in the interests of safe and fair competition.

SPORTING PARTICIPATION

Under s.195(7) of the Equality Act 2010, a person does not contravene the Act by doing anything in relation to the participation of another as a competitor in an age-banded

activity if it is necessary to do so (a) to secure in relation to the activity fair competition or the safety of competitors, (b) to comply with the rules of a national or international competition, or (c) to increase participation in that activity.

Under s.195(8) of the Equality Act 2010, for the purposes of subsection (7), an age-banded activity is a sport, game or other activity of a competitive nature in circumstance in which the physical or mental strength, agility, stamina, physique, mobility, maturity, or manual dexterity of average persons of a particular age group would put them at a disadvantage compared to average persons of another age group as competitors in events involving the activity.

This section was amended by the Equality Act 2010 (Age Exceptions) Order 2012 art.9.

The explanatory note states: This clause provides for there to be an exception from age discrimination in respect of things done in relation to the participation of persons in age-banded activities to which access is restricted by reference to age or age groups. These are defined to include sports, games and other activities and include both physical sports such as football and also more mental or intellectual activities such as bridge or chess.

Therefore it remains permissible to segregate and limit participation by reference to age for the above purposes.

REFEREEING/OFFICIALS/COACHES

It is more difficult to restrict and segregate participation or appointment by reference to age when the participation or appointment is ancillary to the playing of the sport itself (for example in coaching or refereeing – for further comment see below at Referees and Coaches).

If any attempt is made by governing bodies to restrict participation or appointment based solely on age within professional sport, this needs to be further to a legitimate aim capable of justifying direct age discrimination and the policy must have some social or public policy objective and go further than simply meeting the needs of a particular organisation. Otherwise difficulties will arise. For example the Rugby Football League's implementation of a rule ("club-trained rule") which imposed an employment condition that all players had to have spent three years registered with a Rugby Football League members club before the age of 21 constituted (indirect) age discrimination.

Similarly restricting the ability of people to coach or officiate may be challenging by imposing a minimum age. Any such restriction is likely to be unlawful unless justified. Whether a restriction could be justified would depend on the individual circumstances of the sport, however assumptions as to performance standards (connected to age) would be inadvisable; objective evidence is necessary and policy considerations such as allowing for career progression may be relevant.

9. SEXUAL ORIENTATION

There is no lawful basis to exclude a person of different sexual orientation from participating in a sport.

There may be grounds for a club to restrict membership to persons of only a specific sexual orientation, if it is a private membership club and it otherwise meets the requirements of the Equality Act 2010 (for further on this point see section 16 below). However, as explained at section 16 below, restricting membership may impact on funding (be it direct or via an SGB). SGBs may need to be very careful if providing public funding to promote restricted membership clubs or to help with their activities. A tension may, of course, arise in relation to positive action (further explained at section 19 below).

Discrimination on the grounds of sexual orientation in employment is unlawful. The scope of protection applies to pre-employment, during employment and post-employment.

Owners, influential persons and committee members / officials all need to be careful and not make any statement that may be discriminatory. This includes stakeholders such as shareholders in a club. This occurred in the case of **ACCEPT v Consiliul National pentru Combaterea Discriminarii** whereby a senior shareholder in the Romanian club of Steaua Bucharest made homophobic comments about a prospective signing target; the club did not distance themselves from these remarks. The European Court of Justice concluded that a prima facie case of discrimination could be made out in such circumstances.

10. RELIGION

The organisation of sporting competition on a Friday, Saturday or Sunday could be likely to have a disproportionate adverse impact on competitors of particular religious faiths, but these would very likely be justified for organisational reasons and therefore not unlawful (see Copesy v WWB Devon Clays Ltd). However, each case would need to be judged on its own facts and circumstances.

It is likely to be important, however, for those organising competitions to be able to demonstrate that consideration was, in fact, receptive to and aware of this type of issue at the stage at which the competition was organized – and that it had weighed up whether alternatives could be found.

Manifestations of religion, such as jewellery

(the cross) or headwear (for example the Sikh turban, or the Muslim Hijab) need to be carefully handled by sports governing bodies. Most international federations will regulate what equipment and clothing may or may not be used or worn in their sports, but permitting relaxations may be necessary. Various international federations have now relaxed their rules on prohibiting headwear, where the headwear is a manifestation of religion, such as in football, or to cover up arms and legs if similarly a manifestation of religion, such as in weightlifting.

A governing body in Scotland would need to consider its obligations under membership of, ultimately, the relevant international federation and balance those obligations against its legal obligations under the Equality Act 2010, if restrictions are said to exist.

11. LEAGUES AND NATIONALITY QUOTAS

OVERVIEW

Some team sports attempt to restrict the number of players playing in a team from outwith Scotland or the UK. For example, a team may only select and include 1 professional player from outwith the EU. These restrictions often give rise to complicated situations with equality principles also meeting other European law principles.

Sports governing bodies are not public bodies or public employers for the purposes of law. They are, however covered by the provisions of the EC Treaty on the functioning of the EU (known as the Treaty of Rome). Various principles of the Treaty of Rome are applicable to these situations. Articles 18 and 20 deal with equality and with anti-discrimination, whilst Article 45 of the Treaty of Rome establishes the rights of EU nationals to work on a non-discriminatory basis in any Member State i.e. to receive equal treatment in relation to employment, remuneration and other conditions of work and employment.

Whilst case law concerning Articles 18, 20 and 45 in the context of sport have focused on professional sport, the European Commission considers that, following a combined reading of Articles 18, 12 and 165 TFEU, the general principle of prohibition of any discrimination on grounds of nationality applies to sport for all EU citizens who have used their right to free movement, including those exercising an amateur sport activity.

The above mentioned provision has also been extended to protect professional sportsmen who are citizens of non-EU countries that

have signed an association or co-operation agreement with the EU and who are legally residing in the territory of Member States.

There are two primary strands of discrimination law that apply in this situation, namely "direct" and "indirect" discrimination. As noted above, "direct" discrimination applies where a person's race (which would include their nationality) is used against them and they are subjected to unlawful treatment, e.g. a restriction on access to employment or some form of detriment. Direct discrimination under European law can only be permitted in very limited circumstances. For a rule to be viewed as direct discrimination it must explicitly distinguish on the basis of nationality. "Indirect" discrimination occurs where a particular rule makes it harder for persons of a certain race (including their nationality) to satisfy.

ARE EU SPORTSPEOPLE DIFFERENT?

Until the mid 1990s, nationality quotas were an established part of the top-class sport system in Europe. However, as early as 1976 the European Court of Justice cast doubt on the admissibility of completely excluding foreign players from league matches. Shortly, thereafter the European football governing body UEFA had adopted a "3+2 rule" permitting each national association to limit to three the number of foreign players whom a club was allowed to field in any first division match in their national championships, plus two players who had played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior.

In 1995, the **Bosman** ruling from the European Court of Justice declared that such nationality clauses within association rules in professional league football were contrary to Community law because they breached the fundamental freedoms of the EC Treaty, in particular the freedom of movement for workers.

The limitations of the "3+2 rule" were therefore largely lifted by all European national football associations. The Bosman ruling not only prohibited domestic football leagues in EU member states, but also UEFA, from imposing quotas on foreign players to the extent that they discriminated against nationals of EU states.

While the ECJ accepted that the maintenance of competitive balance, encouragement of education and training programmes and the protection of national teams were legitimate objectives, the rule failed on the issue of proportionality.

There are a number of other cases decided by the European Court of Justice (ECJ) concerning nationality discrimination in the context of sport. Although there are some indications that certain instances of nationality discrimination being justifiable or exempt, in reality these appear to be relatively restricted. In most cases, general rules prohibiting discrimination on the grounds of nationality apply.

WHAT ABOUT SPORTSPEOPLE WHO ARE FROM NON-EU COUNTRIES?

As mentioned above, there have been a number of cases over the last 10-15 years where the ECJ has ruled that where nationals of non-EU

countries, which have entered into agreements with the EU containing non-discrimination clauses which can be interpreted as taking direct effect, must be treated on an equal basis with nationals of the Member State in which they have secured employment. In such cases, quota restrictions on 'foreign players' do not apply to them as such restrictions constitute "working conditions" for the purposes of non-discrimination clauses in the relevant agreements.

For example, in the Kolpak case a Slovakian handball player, who was legally resident and working in Germany had been playing for a German second division handball side since 1997. The German Handball Association had a rule which prohibited its member clubs from fielding more than two non-EU citizens. At that time, Slovakia was not yet a member of the EU but did, however, have an "Association Agreement" with the European Union.

Mr Kolpak was ejected by his club in 2000 as they had filled their quota of two non-EU players. He challenged the German Handball Association and asserted that it had placed an illegal restriction on his freedom of movement as a worker. The case was referred by the German higher court to the European Court of Justice, for a determination on whether the Association Agreement between Slovakia and the European Union provided equal rights for Slovakian workers who were living and working legally within the EU. The Court ruled in favour of Kolpak.

The **Kolpak** ruling therefore declared that citizens of countries which have applicable Association Agreements with the EU, and who are lawfully working within an EU country, have equal rights to work as EU citizens, and cannot have restrictions such as quotas placed upon them.

Sports governing bodies should be aware that not all agreements between individual countries and the EU will contain such provisions, but in addition to football, these cases and agreements have had most effect on other team sports such as rugby and cricket[1].

In a case called **Lehtonen** in 1997, a Finnish basketball player sought to challenge transfer rules imposed by the Belgian Basketball Federation, which effectively prevented him from playing in particular games. Whilst the ECJ accepted that foreign players could be excluded from games for non-economic reasons, the Court was quick to rule out any argument based on the idea of any general organisational autonomy of sports associations. There was a requirement for governing bodies to identify and argue proportionate and objective justification for rules which otherwise offended EU discrimination law.

Another angle to be considered following the recent decision in **Zambrano**. The ECJ held in that case that parents of a dependent EU national child were to be given full rights to work in the EU state of which those children are nationals as a consequence of the rights of that EU national child. So, the non-EU, non-Kolpak parents of an Irish child could work in Ireland with no restrictions; and following on other decisions, could move to another EU state to work.

DO THESE PRINCIPLES APPLY TO AMATEUR SPORT?

It is not as simple to restrict participation based on National/EU and Non-EU nationality or origination as can be seen from the cases mentioned above.

While Bosman confirmed that sport is subject to EU law insofar as it constitutes an economic activity, what has been less than clear is the application of EU law to amateur sport. **Meca-Medina** (Case C-519/04 P, judgment of 18 July 2006) suggested that pure sports rules, not capable of challenge under EU law, would be hard to find, and a recent opinion of the Commission and a decision from the German Basketball Federation's Legal Committee suggest that amateur sport should not consider itself out with EU law merely by being a predominantly "non-economic" activity.

The "WBV" is the regional basketball federation for Western Germany. In June 2009, new rules were introduced limiting teams to playing two non-national players per game. The rules were challenged as breaching the non-discrimination and freedom of movement provisions in articles 12, 17 and 39 EC (now articles 18, 20 and 45). The WBV's disputes are heard at regional and then national level; at both levels the WBV contention that amateur sports did not constitute an "economic activity" and therefore could not be subject to EU law was rejected. The (independent) national legal committee considered that, since the Treaty of Amsterdam (1999), Community law has provided certain "civil" rights for EU citizens that do not require a link to any economic activity. Article 12 EC, which prohibits discrimination on the ground of nationality, is one of these rights. The committee went on to note that article 12 applies not only to emanations of the state, but also to private federations or organisations to the extent that they are capable of undermining the EU anti-discrimination provisions as a result of their autonomy.

The committee commented that, when sports federations occupy a monopoly position, they have legislative powers in their field which are comparable to those of the state. Accordingly, it was comfortable that article 12 EC is enforceable against both professional and amateur sporting bodies in certain circumstances. The WBV occupied such a monopoly position as, in order to participate, all members were required to comply with its rules. Accordingly, the legal committee took the view that the WBV rules were subject to article 12 EC.

This view relied in particular on the European Commission's recent opinion (1 February 2010) on the applicability of EU law to amateur sports, in which it noted that: "following a combined reading of articles 18, 21 and 165 of the Treaty of the Functioning of the European Union [articles 12, 18 and 149 of the EC Treaty respectively]..., the general EU principle of prohibition of discrimination on grounds of nationality applies to sport for all EU citizens who have used their right to free movement. This principle concerns amateur sport as well as professional sport, which falls more specifically under the provisions related to internal market freedoms, such as Article 45 TFEU on free movement of workers or Article

56 TFEU on freedom to provide services, in so far as the considered sport activities constitute an economic activity"

On the point of amateur sport, the courts have also observed that non-discriminatory access to leisure activities is a corollary of freedom of movement i.e. workers are entitled to equal treatment not only in the context of their employment, but any "social advantages" which may include access to amateur sport.

Any attempt to guard against Non-EU players participating in matches ostensibly as Amateurs but when likely being paid or receiving benefit should not be regulated based on the individual's nationality.

UK LAW

Restrictions in place based on nationality will lead to problems if challenged under the Equality Act 2010. Such restrictions could cause problems for both governing bodies and clubs.

A professional sportsperson could easily pursue a claim against a club or other employer if their employment opportunities were restricted by the existence of a nationality rule; this might be, for example, terminating an EU player's contract (which would include non-renewal) to bring in a new EU player.

Third party pressure to discriminate is not a lawful defence to discrimination under the Equality Act. Therefore it would be no defence to a club to say that they had to discriminate due to the rules of the sport applying in Scotland.

SPORTING REGULATORY FRAMEWORK

A number of sports are organised using the pyramid system whereby the international federation obliges regional governing bodies, and in turn members of the regional body (typically the national associations) are obliged to adopt uniform rules and principles. Football is the most obvious example of this system of regulation. Rugby has a more direct approach to regulation whereby the individual national unions have direct membership of the International Rugby Board and are directly obliged to adopt the IRB regulations.

Generally, in the world of sport it is the organisation at the peak of the pyramid that establishes the key rules of the sport and cascades them down to the national, domestic and club level organisations which are thereafter more often than not bound to adopt those rules as a result of their membership to the head organisation.

It is often the case therefore that when these types of provisions exist in a governing body's policies it is because they are adopted straight from the international organisation's policies.

"HOME-GROWN PLAYER RULE"?

With the European Commission firmly against any attempt to regulate participation by reference to nationality, notwithstanding the aim to retain national identity in sport and promote opportunities for nationals to participate within their state, sports bodies have had to try to promote these ideals through other methods.

One example is UEFA's "home-grown player" rules (which focus on where a player trained as a youth, as opposed to nationality). The Commission has considered any indirectly discriminatory effects of such rules being capable of justification as a proportionate means of achieving a legitimate aim.

The home-grown player rule was introduced by UEFA back in 2005. The rule requires clubs participating in the Champions League and the UEFA cup to have a minimum number of home-grown players, i.e. players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. The rule's operative provisions are focused on player registration and at least in theory, there is no distinction between players on the base of nationality or national origin or any other derivative characteristic typically used in quotas.

Why football has developed this rule is to try to encourage development of younger players, foster a closer identity between teams and their development systems, to some extent to discourage player movement (which is possibly not an acknowledged intention to the system). It also does not directly discriminate.

While the home-grown player rule does not directly discriminate, any policy or rule that is intrinsically liable to affect migrant workers more than national workers and thus impede access to the labour market and freedom of movement constitutes indirect discrimination. It is clear that UEFA's rule falls into this category but, as such, will only be lawful if it can be justified.

Justification of the UEFA rule requires it to be established that the rule does further the objective needs of football and meets the criterion of proportionality. For this to be the case, the objectives secured by the rule must not be outweighed by the discriminatory impact of it, and there must be no other means by which these objectives can be met just as effectively. Basketball would therefore need to give thought to the objectives behind this wording and whether there is any other ways of achieving the same.

It is relevant to note that the "Home-grown Player" rule only applies to games in the Champions League and the UEFA Cup and therefore would only affect a minority of football clubs. It also only affects a maximum of 8 squad members out of 25, compared with the "6+5" rule, which concerned over half of the starting line up. It is therefore expected that there would be a greater chance of arguing that this was a proportionate means of achieving a legitimate aim in comparison to the Bosman case.

In terms of the UEFA plan, it is encouraging that the rule has received positive response from a number of parties including the European Commission and the European Parliament with the latter stating that it "expresses its clear support of the UEFA measures to encourage the education of young players by requiring a minimum number of home-grown players in a professional club's squad and by placing a limit on the size of the squads…[it] believes that such incentive measures are proportionate and calls on professional clubs to strictly implement this rule."

This course of action would not be risk-free. Although the rule has been endorsed by the European Commission the rule still has to be challenged in the courts and found to satisfy the legal requirement of proportionality. Commentators have widely suggested that the rule fails to take into account that there are alternative ways of securing the legitimate interests of professional football.

Although it is difficult at the moment to state with any certainty that the 'home-grown players' rule will lead to indirect discrimination on the basis of nationality, the potential risk of this cannot be discounted, as young players attending a training centre at a club in a Member State tend to be from that Member State rather than from other EU countries.

AN EQUIVALENT TO THE "6+5 RULE"

This concept was introduced by FIFA in 2008. The 6+5 rule provides that at the beginning of each football match, each club must field at least six players eligible to play for the national team of the country of the club. There is no restriction, however, on the number of non-eligible players under contract with the club, nor on substitutes to avoid non-sportive constraints on the coaches (potentially leading to 3+8 at the end of a match).

The objective of the rule is to restore the national identity of football clubs who have increasingly resorted to fielding foreign players in their squad. The declared aims of the 6+5 rule are:

1) To guarantee equality in sporting and financial terms between clubs;
2) The promotion of junior players;
3) To improve the quality of national teams; and
4) To strengthen the regional and national identification of clubs and a corresponding link with the public.

The decisive criterion in applying the 6+5 rule is entitlement to play in the relevant national team. The nationality of players is not necessarily the decisive criterion for deciding whether a player is entitled to play in a national team.

Critics have suggested that this rule is not much better than the Bosman "3+2 rule" and is also potentially directly discriminatory.

1. It is understood that the following countries have Association Agreements or similar: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldavia, Mongolia, Russia, Turkmenistan, Ukraine, Uzbekistan, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d'ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe, Antigua, Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Kitts & Nevis, St Lucia, St Vincent, Suriname, Trinidad & Tobago, Cook Islands, East Timor, Federated State of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

12. REFEREES AND COACHES

REFEREES

Whether or not the appointment of officials can be restricted based on age depends on where the appointing body is based and operates. It also depends partly on whether the person is something other than truly a volunteer. If a person is truly a volunteer there can be an argument to exclude the operation of the Equality Act 2010, however any such exclusion would need to be very carefully considered before argued or put into practice. It is much more likely that the appointment of officials and referees in sport in Scotland will fall within the requirements of the Equality Act 2010.

The creation and imposition of a rule by a Scottish governing body – or the adoption and imposition of a rule by a Scottish governing body – restricting an official or referee from being involved based on their age, would be governed by Scots law and European law.

It is clear that the imposition of an upper age limit on refereeing or officiating is almost certainly unlawful. All commentary and case law to date is clear in this regard. There is only one theory to suggest that an upper age limit could be lawful – but for reasons set out below I will explain why I think it is unattractive and unlikely to work for sports governing bodies.

If you impose an upper age limit and exclude a person as a result, you are discriminating against that person directly on the grounds of their age. As direct discrimination on the grounds of age can potentially be justified – and therefore be made lawful – the key question to have been asked in cases of this nature has always been whether the treatment of the person can be justified in law.

This is an objective test. Whether the test can be met by the body is assessed by looking at the policy being imposed by the body and assessing whether it is appropriate and necessary. This is assessed by looking at the body's needs. There is a proportionality test in that if the policy aims cannot be met by other means, the policy may continue. If there are other means that could be reasonably implemented to achieve the aim then the policy cannot be allowed.

In refereeing in football, a challenge was taken by match officials in England towards the end of the last decade. They succeeded in challenging the lawfulness of their retirement from officiating based on age. The body that made the appointments to officiate claimed that it was necessary to retire based on age because of concerns essentially over fitness and capability and the need to ensure that matches were properly officiated.

The challenge was successful because the tribunal found that fitness and competence/ capability testing was, by far, a more appropriate way to ensure that officials could

carry out their tasks to a properly competent level. In contrast, age-based criteria are necessarily arbitrary and make no allowances for the different competencies between individuals. See **Martin and others v Professional Game Match Officials Ltd (2010), Sheffield Employment Tribunal**.

Can there be an argument to keep an age limit? In a recent case involving a legal partnership and retirement from partnership, the age limit for partnership and the consequent enforced retirement was found to be legitimate and enforceable because on the facts of that case. The organisation had legitimate aims and could not meet those aims by other means. For example, they wished to ensure that people had a pathway to progress and be promoted (thus having a career path). The promotion of employment – by allowing more people to come through and fill spaces created by retirees – was allowed as a legitimate aim and the arrangement of forced retirement was the only way to deal with this particular issue in this particular workplace. General comments regarding the need to deal with poor performance in a sympathetic manner were made in that case, but they are to be taken with a significant pinch of salt.

It may be thought that if it was the case that a particular sport had a plethora of officials (which I suspect is unlikely) then the above principle may be of use to make room at the top, but I expect a court would have significant difficulty with this in the context of sport and officiating. Most officials are graded / assessed and in keeping with most theories of sport (that the competition seeks to identify and display the best) it is doubtful that a sport could use a pathway argument instead of an argument that the best officials should officiate.

WHO CAN RAISE A CLAIM? ONLY EMPLOYEES? NO.

The intention of the Equal Treatment Directive and the Equality Act 2010 is to try to provide cover for people of many different statuses and not restrict cover to only employees (that is people employed under a contract of employment).

The position is that:

(i) employees are covered;
(ii) workers are covered; and
(iii) persons who are self-employed and who are engaged on consulting arrangements are covered too.

For example, a referee who resigned and claimed age discrimination in Scotland was found to be a worker for the purposes of the Equality Act 2010 when appointed as an official for Scottish matches under the control of the SFA. He was not an employee for general purposes. The dispute arose from a decision in relation to his officiating. See **Conroy v Scottish Football Association Limited, UKEATS/0024/13/JW, 12 December 2013**.

Office holders

There are other ways to use the Act. Appointment to a post that constitutes an "office" that is a paid appointment is also protected.

Qualifications, training and services

Access to qualifications, training and services is also regulated and therefore persons seeking access to qualifications, training and services can be covered.

What about volunteers?

In the context of employment the only successful defence by way of exclusion of the operation of the Equality Act 2010 came recently in a case involving the Citizens Advice Bureau. The person challenging the CAB, who had ended her involvement with the CAB, claimed unlawful discrimination and this was resisted by finding that the individual was truly a volunteer for the purposes of the legislation and therefore not covered. The case concerned the allegation that access to training was not provided. There is clearly a strong element of unwritten "policy" choice in the decision (a decision in favour of the individual would have been incredibly problematic for voluntary organisations).

If officials are truly voluntary and do not fall within the ambit of the Act in any other way, an individual would struggle to use the Equality Act 2010 to commence a claim against a governing body. However, this may be a difficult distinction to put into practice as it may be inappropriate to restrict access to unpaid volunteers if the same restriction does not apply – because it is decided that it cannot be applied – to persons who do fall within the ambit of the Act. This is because an SGB may then have a two-tier appointment system and it could be problematic on a number of levels, including perception (how would it look to not refuse access to officiating at a more senior level, but restrict at a more junior/lower leve?); operationally most sports need to encourage more people to become and stay involved at a more junior/lower level, rather than restrict their participation.

Significant care would need to be taken on whether someone is "voluntary" because many persons involved in sport in officiating or having some form of appointment will receive some form of remuneration, fee, benefit, expenses, per diem or retainer and as such will not meet the definition of "voluntary". Indeed, being contracted or having any agreement to undertake duties at particular times will point against having voluntary status and help to bring the individual into the ambit of the Equality Act.

EUROPE

The position in Europe is broadly the same as in Scotland because the laws applied in Scotland regarding this subject are derived from European law (the Equal Treatment Directive).

If a sports federation based in Europe is continuing to impose an upper age restriction on appointment they are open to a successful challenge.

INTERNATIONALLY

Those governing bodies who are based outwith Europe are not entirely immune to challenge but it would be difficult to try to challenge a decision of a body domiciled outwith Europe based on European law or similar principles.

For example, FIFA, the international federation for football, is based in Switzerland. They do not need to adhere to European law. They make appointments based on their rules, which they regard as subject to Swiss law. It is understood that Swiss law does not recognise and impose a law against discrimination on the grounds of age.

WHAT IF OUR IF'S OBLIGE US TO ADOPT UPPER AGE LIMITS FOR OFFICIALS?

This is a more difficult matter in practice than it is a matter of legal theory and law. IF's can tend to place requirements on governing bodies but these tend to be subject to the caveat that governing bodies are required to comply only so far as they can having regard to their own domestic law.

However this approach can differ depending on the particular sport and care needs to be taken to examine the exact extent of the obligation. The rules of the IF have to be individually considered.

If the rules of the IF are imposed but subject to compliance with domestic law where there is a conflict, then there would be no difficulty in observing domestic law (which will prevail in any event). No breach of a membership rule would apply in such circumstances.

An absolute requirement placed on a governing body by an IF to comply with a rule that is fundamentally unlawful under Scots law (and European law) does not provide a defence to a claim of unlawful discrimination; if, for example, any IF were to say that SGBs should only appoint and use referees and officials under a certain age in their sport, a problem would arise for the SGB, caught between their obligations under their membership to the IF and their general obligations in Scots law. The latter would prevail.

If a dispute took place in such circumstances, any imposed requirement would be relevant to explain why a governing body may be imposing such a rule, but it would not be of itself reason to excuse any potentially discriminatory behaviour and conclusion.

This is clear because if the governing body is the correct respondent (and they would be if they were the body applying the rules and making the appointment in Scotland) then the respondent cannot cite third party requirements to justify unlawful discrimination.

It would, of course, be a relevant factor to be considered along with the general circumstances, but no more, insofar as the SGB is concerned.

This is a fast developing area of sport. FIFA are presently facing calls to debate the removal of their age limits for international referees (appointed by FIFA).

It is difficult, in the present day, to conceive of any basis to state that a referee must be of a particular characteristic to officiate in a particular sport.

There have been cases in the past in which successful attempts were made to challenge discriminatory arrangements. For example in British Judo Association –v- Petty, the award of a national refereeing qualification to a woman

was held to be discriminatory and unlawful, because the award was subject to the proviso that the referee did not officiate in men's matches.

In **PV v Koninklijke Belgische Voetbalband** it was held that the dismissal of a football referee once he reached 45 was an act of direct age discrimination. It was considered that age is not a substantial and decisive professional requirement which would justify an exception to the ban on age discrimination. The court rejected the defender's submissions that the dismissal was related to lack of competence and motivation, not age, especially as the defender could submit no evidence to support this. Referees are required to meet standards of physical fitness, but these can be objectively measured by means of specific tests.

COACHES

If a governing body licenses and approves coaches then it is likely to meet the definition of a qualifications body and as such it cannot discriminate based on protected characteristics, in respect of those people who it licenses.

It is difficult, in the present day, to conceive of any basis to state that a coach must be of a particular age or characteristic to coach a particular sport.

In Moore v The Squash Rackets Association (SRA) Ltd an ET found that unlawful discrimination had occurred when the SRA treated men and women differently in relation to pay, conditions and coaching appointments. Only men had been invited to apply for positions as regional coach. Moore won claims of sex discrimination, equal pay and victimisation after complaining about pay and changes to the detriment of girls' training.

Care also needs to be taken to ensure that discrimination does not arise in the course of running of courses. For example, in **Hardwick v Football Association** a woman successfully challenged the FA's refusal of an advanced coaching licence in circumstance in which she had performed better on the required training course than certain men. This case was brought on the basis that the FA was a qualifying body, and on the basis that it was concerned with the provision of vocational training. The refusal of grant of license was found to be discriminatory.

Indirect discrimination can arise in the employment context if the SGB were to impose criteria that was unattainable or more difficult for a particular gender or person with a protected characteristic to attain. However, indirect discrimination is unlawful, unless it is justified. Therefore, imposing high levels of experience as one of the criterion may well prove difficult for a group of people to attain, but the use of such criterion could well prove to be justified.

13. WHERE DOES LIABILITY REST?

This depends.

A person can be directly personally liable for an act of discrimination under the Equality Act 2010, for example in the employment context, if they visit harassment on a fellow employee or worker.
An example may be of the person who makes jokes about another person that are racist and that cause offence.

An employer organization is itself at risk of secondary liability for the actions of its employees, workers, officials or those acting for it, where they have not taken reasonable measures to discourage the primary behaviour complained of.
This could apply to actions of employees, workers, officials (board members, council members, etc), agents, third parties instructed by the employer organisation such as advisers.

It is unlawful for a person to instruct, cause or induce discrimination against another (under s111 of the Equality Act 2010).

Knowingly helping someone to commit an act that is unlawful under the Equality Act 2010 is also unlawful (s112(1)).

A committee member who takes a decision that is contrary to the Equality Act 2010 may be found personally liable.

Some examples in sport may be as follows:

- A committee that sets a discriminatory recruitment policy may be liable for the refusal of applications from a particular category of people.
- A coach who makes a discriminatory statement that amounts to harassment to a team-member may be liable, as well as his employer, the club, on a secondary basis.

SPECIFIC ISSUES

14. BOARD COMPOSITION

Paid appointments or those attracting a form of remuneration will amount to an "office" and appointment to and holding of office is covered by the Equality Act 2010. Accordingly there ought to be no discrimination in the appointment of persons to such office.

Unpaid and purely voluntary appointments to office do not attract cover by the Equality Act 2010; but significant care needs to be exercised in using this as a reason not to apply equalities principles, for a whole variety of reasons:

- The circumstances in which people are truly "volunteers" are becoming less common;
- The moral or ethical dilemma that exists;
- It does nothing to encourage people to participate if an organisation is led in a discriminatory way;
- Boards with balanced composition typically outperform boards that are populated with people from the same background;
- Funding, be it from the public purse or via other initiatives such as lottery, often requires compliance with the equalities principles.

Care needs to be taken if this route is used to manipulate the composition of a board and its membership, because whilst the Act may be said to not apply, equalities principles promote access for all and only positive action to be utilized if there is a need to encourage greater representation and participation.

Positive discrimination, in the form of setting quotas for a certain number of people from one background or gender to be represented, will be unlawful if it restricts paid appointments.

Positive action, on the other hand, might be lawful. Positive action can help organisations to encourage applications from a diverse range of sources and backgrounds. Examples of positive action are outlined at section 19 below.

15. SINGLE-SEX CLUBS

Chapter 7 of the Equality Act 2010 makes specific provision for single-sex clubs to exist.

A single-sex club can exist lawfully if the club is a private members club and an association. There must be a set of rules to control how someone becomes a member, involving a selection process. This is an exception to the general rules prohibiting discrimination and is found under s101 of the Equality Act 2010.

An association is for the purposes of the Equality Act 2010 a club with 25 or more members whose membership is controlled by its own rules and involves a process of selection.

A private member's club is thus an association formed for its members' stated private pursuit such as golf, tennis, ex-forces, alumni, social, working men's and gaming.

An association cannot meet the legislative definition if it is a club which is open to members of the public simply on the payment of an entry fee (e.g. a gym).

For instance, a golf club with 1,000 members has an application process stipulating that a potential member must be nominated by two existing members or, if not already known to two members, by playing a round of golf with the committee members, two of whom become the proposer and seconder. As the club has more than 25 members and a defined application and selection process before membership can be obtained, it is a defined association and can restrict its offer of membership to people who share a single-defined characteristic. Therefore, should this golf club decide to be an all-male golf club, or an all-female golf club, it would not be in breach of the legislation.

There are numerous other clubs and associations that are single sex, including all-female ones, and single-characteristic clubs.

Where a mixed-sex club exists, the club may not discriminate against members on the basis of sex or any other prohibited categories, such as race or religion. If a club welcomed both male and female members, it could not prescribe that e.g. lady members could not play after 4pm and junior female members could not play after noon. If the club is e.g. a single-sex club, the club can only determine membership based on that characteristic, to be within the requirements of the legislation. The club would have to comply with all the other equality requirements. For example, an additional restriction to a membership category with perks open to members who are older than e.g. 35 years would likely be considered to be unlawful age discrimination.

It must be remembered by SGBs that although it is possible for single-sex or single-characteristic clubs to be lawful and to exist within the terms of the Equality Act 2010, there are numerous political issues and points of concern that need to be considered alongside whether or not a club is lawful or not. SGBs must be careful not to view the legality of such clubs in isolation.

16. SINGLE-SEX FUNDRAISING

It is lawful to have single-sex activity as an activity that is directed to promoting or supporting a charity, further to s193(7) of the Equality Act 2010. For example, a ladies only sponsored run or golf day would be permissible. Participation could be lawfully restricted to ladies only.

17. PRE-EMPLOYMENT HEALTH QUESTIONNAIRES

In order to aid disabled people in their search for new employment, and not be restricted by perception and prejudice, the Equality Act 2010 deals with pre-employment health questionnaires in a very robust manner.

The general rule provided by section 60 is not to ask pre-employment health questions, because if an employer does, and if an employer refuses to offer someone employment and they have a condition that qualifies as a disability, the individual will have grounds to bring proceedings. The proceedings will be successful and result in a finding of discrimination against the organization – and therefore will result in compensation having to be paid to the unsuccessful applicant – unless the organization can persuade the tribunal that the applicant's health had no bearing whatsoever on the decision to appoint someone else.

If the person's health had no bearing on the appointment then questions should not be asked regarding health.

If a person's health genuinely had to be explored in order to make an assessment of whether a candidate was suitable or not, very narrow questions should be asked to make sure that the questions being asked are strictly limited to the essential questions that have to be asked.

It is not possible to create a definitive list of questions to ask, or not ask, in relation to a person's employment when they apply for a role with an SGB. This is because the questions must go no further than is necessary to identify any difficulty with participating in the application process and thereafter in performing key parts of the job.

Examples of questions that should not be asked include:

- Do you have a disability?
- How well do you keep?
- Have you had any significant illnesses in the last five years?
- What is your physical health like?
- Have you ever suffered from a mental health problem?

Examples of questions that may be asked for the role of e.g. a ski instructor who must be able to ski and traverse mountain slopes includes:-

- Are you sufficiently physically mobile that you are able to ski [to specified standard]?
- Do you have any medical condition that could stop you from evacuating from the Nevis Mountain range by ski in the event of bad weather (e.g. a snowstorm)?

Being capable of skiing to a specified standard and being able to evacuate from a mountain in the event of inclimate weather would be intrinsic to the work concerned and therefore permissible (s60(6)(B)).

18. POSITIVE ACTION

Section 158 of the Equality Act 2010 permits positive action to encourage activity for persons who are part of a group of persons whose participation in the activity is disproportionally low. The principles can apply beyond training, promotion and employment to participation.

However action taken should be a proportionate means of achieving the aim. This means that the action is directed at addressing the inequality or difficulty and it is a reasonable way of achieving the same. If a less obtrusive or less discriminatory method were available, the action might not be proportionate.

Positive action is distinct from positive discrimination. The former is lawful. The latter is unlawful.

Positive action is typically used in recruitment where a member of a group sharing the same protected characteristic is under-represented or otherwise disadvantaged in obtaining a role or office.

So, if an SGB was recruiting or appointing to their board and two candidates for the role were equally well qualified for the role, one was male and one was female, and the SGB recognized that it had a lack of female representation on their board, the female could be appointed to the board accordingly. The male candidate would not be able to complain.

Other examples of positive action in sport includes:

- Providing separate training sessions or medical treatments for e.g. transsexual persons (following a survey of transsexual people that disclosed that these sessions / treatments were avoided for fear of harassment by others).
- Being positive about promotion opportunities by providing mentoring

opportunities to under-represented groups allowing persons a better opportunity to demonstrate that they are well placed to take on specific appointments or roles.

Charging less for female participation might possibly be capable of justification but extreme care would need to be taken, because discounting female participation could easily offend equalities law and principles because unless the cost of participation was seen as the barrier to more females participating, the lesser rates would be seen as unlawful.

Positive discrimination is generally unlawful, because it involves restricting entrance and/or otherwise appointment to one group of people only. If a group of people with a shared characteristic were under-represented or disadvantaged and a decision was taken to restrict applications for a vacancy to only people from that group, positive discrimination would arise. A person who was not allowed to apply would then be entitled to bring proceedings under the Act.

The so-called "Rooney Rule" in America's National Football League is an example of what would be unlawful positive discrimination under the Equality Act 2010 if adopted in the UK. The "Rooney Rule" mandates that black and ethnic minority senior coaching and operational role applicants have to be interviewed, save in very narrow exceptions. It is enforced by the NFL.

There is a statutory exception to positive discrimination for disabled people which provides that an employer can decide to limit recruitment to a particular role, or roles, based on disability; able-bodied persons have no grounds to bring a complaint if they are not permitted to apply. This also permits employers to follow schemes supporting disabled applicants by providing that they can receive an

19. APPLICATION OF PUBLIC SECTOR EQUALITY DUTY?

Specific duties only apply to named public bodies and general duties apply to those carrying out a public function.

Although SGBs are not, of themselves, public sector bodies for the purposes of the Equality Act 2010 and in particular the public sector equality duties that can apply, receiving and using public funding is though to be capable of engaging the general public sector equality duty to the extent that the SGB is carrying out a "public function" on behalf of a public body. There has been no case law testing whether or to what extent a governing body is carrying out a "public function".

Specific advice should be sought if in doubt about the application of the duty. Equally, care needs to be taken to ensure that the correct duties are observed when they are said to apply (as the duties differ in Scotland to England).

ADDITIONAL INFORMATION

There are various sources of guidance and information available to governing bodies to assist in securing their obligations under the Equality Act 2010.

www.sportscotland.org.uk/equality

www.equalityinsport.org

Care does need to be taken in sourcing information from guidance available online.

It is recommended that legal advice be taken about any specific issue or incident for a variety of reasons:

- This note doesn't, of itself, constitute legal advice about any specific situation.
- This note states the legal position as correct as at February 2015.
- The law, and legal principles, found in guides such as this and in other information available online can become outdated and surpassed with new developments.
- Individual cases and circumstances, particularly in the context of equalities, have to be considered and judged on the basis of their own facts and circumstances to properly consider whether a body has discharged its obligations under the Act.

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