

Focus on Equality & Discrimination

Programme

- Discrimination – overview & high risk areas
- Discrimination – examples
- Liabilities & the reasonable steps defence and the *Allay* case
- SGB responsibilities

Part 1 - Overview

1. Protected Characteristics
2. Prohibited Conduct
3. High risk areas



Protected Characteristics



Prohibited Conduct

- Direct Discrimination
 - ‘because of’ – English v Sanderson Blinds
 - Perception
 - Association
- Indirect Discrimination
- Harassment – even ‘false’ perception
- Victimisation
- Disability only – s15 ‘arising from disability’ and duty to make reasonable adjustments



Direct Discrimination

“A person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat other.”



What is Harassment?

- Equality Act 2010:

“Unwanted conduct related to relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.”

- Motive = irrelevant and no comparator required



Harassment - Effect

- In deciding whether conduct has the effect referred to above, each of the following must be taken into account -
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- The circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

What is Bullying?

- Bullying – ACAS:

Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient



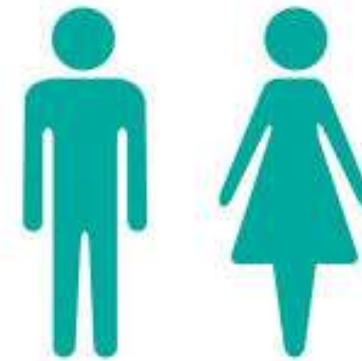
Victimisation

A person victimises another on grounds of any protected characteristic if he subjects that person to a detriment because he:

- a) brings proceedings under the Act
- b) Gives evidence or information in connection with proceedings
- c) Does any other thing for the purpose of or in connection with the Act
- d) Makes an allegation that another person has contravened the Act

Disability Discrimination

- What is a disability under the 2010 Act?
- Direct
- Indirect
- Section 15 'arising out of'
- Reasonable adjustments
- Harassment
- Victimisation
- Mental health issues



Discrimination – high risk areas

- Covid-related issues
- Mental health issues (disability)
- Dealing with flexible working/home working requests (disability & sex)
- Absence Management – warnings and trigger points & other reasonable adjustments (disability)
- Disciplinary & Grievances - *Burdett v Aviva*

Part 2 - Discrimination – some examples

Harassment - when managers get it wrong...

- Mann v BH Publishing Ltd and anor ET Case No.2203272/04 – mimicry of an accent
- Driskel v Peninsula Business Services Ltd and ors 2000 IRLR 151, EAT – comments about attire
- Craddock v Fontoura t/a Countyclean ET Case No.1402999/09 – playing matchmaker
- Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13 – move from a skilled role to a role that ultimately became menial

Discrimination - some less obvious examples.....

- 'outing' a gay employee against his or her wishes *HM Land Registry v Grant*
- Maya Forstater - questioning or rejecting gender theory is permissible and does not conflict with legal rights of trans people
- Ethical veganism – belief?
- *Burdett v Aviva*

Covid-related issues

- Mental health facts and figures
- Misreporting widespread - religion and belief - fear of catching Covid a protected belief?
- S44 and 100 ERA 1996 claims
- Vaccination and testing
- Flexible working v requiring return to office
- Constructive dismissal & unfair dismissal
- D Rodgers v Leeds Laser Cutting Limited
- J O'Harris v D Rambaud
- Kubiilius v Kent Foods

Why you CAN'T refuse to go to work if you are afraid of catching Covid: Staff wary of the virus cannot use it as a reason to stay away from the office, employment tribunal rules

- An tribunal ruled fear of Covid can't be used as reason not to return to the office
- This is because worry of infection is not a legally protected philosophical belief
- The discrimination complaint was brought against an employer this month

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Part 3 – Liabilities & the Reasonable Steps Defence

Liabilities? Loss of Earnings and Injury to Feelings – Vento Bands

Lower Band (applies to less serious cases)	£900 to £8,600
Middle Band	£8,600 to £25,700
Upper Band (applies to the most serious cases)	£25,700 to £42,900
Exception cases	£42,900+

Injury to Feelings - Factors

- The degree of distress/upset caused
- How any grievance is dealt with
- Seriousness
- Any medical condition
- Panic attacks/stress/lack of confidence
- How senior the discriminator was



Personal Liability?

- Employer liable? YES
- Employee liable? YES
- Level of liability? Uncapped
- Joint and several?



Reasonable steps defence - Allay (UK) Limited v Gehlen

- Limits of the 'reasonable steps' defence - s109(4) Equality Act 2010
- Effectiveness can legitimately be considered
- Training had become 'stale' and required refreshing



Other Risks/Impact

- Employee:
 - Disciplinary action up to & including dismissal
 - Bullying enough
- Employer:
 - Detrimental impact on business
 - Talent/morale
 - Reputational damage



Part 4 – SGB responsibilities

Responsibilities of Managers

- Understand what discrimination is
- Understand how to respond to issues
- Understand relevant policies and procedures and seek advice from expert resource where appropriate
- Provide support in defending claims and being able to run, where appropriate, the reasonable steps defence by demonstrating that the policies and procedures (and training) is effective
- If inappropriate behaviour is observed, deal with it promptly
- Treat any informal or formal complaints raised sensitively and seriously
- Speak to expert resource for guidance if unsure
- Lead by example
- Consider if further training is required