



SEXUAL ORIENTATION

Must' and 'should'

Throughout the guide, a legal requirement is indicated by the word 'must' - for example, an employer must not select a slightly less well-qualified employee in a promotion process because they disapprove of the sexual orientation of the better qualified candidate.

The word 'should' indicates what MIRS considers to be good employment practice.

Understanding the term 'employee'

Regarding discrimination matters, under the Equality Act 2017 the definition of 'employee' is extended to include:

- employees (those with a contract of employment)
- workers and agency workers (those with a contract to do work or provide services)
- some self-employed people (where they have to personally perform the work)
- specific groups such as police officers and partners in a business.

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About this guide

This guide offers employers, senior managers, line managers, HR personnel, employees and employee/trade union representatives an insight into how sexual orientation discrimination can occur in the workplace, how it can be dealt with and how to reduce the chance of future discrimination.

For an overview of how equality legislation applies generally at work, MIRS provides the following guidance:

- Equality and discrimination: understand the basics
- Prevent discrimination: support equality
- Discrimination: what to do if it happens.

The Equality Act 2017 protects employees from discrimination, harassment and victimisation because of sexual orientation, one of nine protected characteristics covered by the Act. Guidance on other protected characteristics and other useful tools and materials can be found at www.mirs.org.im/equality

What is sexual orientation discrimination?

The Equality Act 2017 defines sexual orientation as:

- a person's sexual orientation towards persons of the same-sex (lesbians and gay men)
- a person's sexual orientation towards persons of the opposite sex (heterosexual)
- a person's sexual orientation towards persons of either sex (bisexual).

The law protects and applies equally to people who are discriminated against because they are:

- a lesbian, gay man, heterosexual or bisexual. It does not specifically use these terms, but these are the most commonly used and accepted descriptions in everyday life for each of the protected sexual orientations
- an employee associated with someone who is lesbian, gay, heterosexual or bisexual. For example, a friend or family member

- an employee who is perceived – correctly or incorrectly – to be lesbian, gay, heterosexual or bisexual
- subjected to comments and behaviour regarding sexual orientation which they find offensive. For more on this particular point see the section, Harassment, later in this guide.

Is it necessary to know someone's sexual orientation?

When a heterosexual employee made a complaint of harassment based on sexual orientation because he was subjected to 'endless homophobic banter', it was argued that his claim should be dismissed because his orientation was heterosexual.

However, in the case of *Thomas Sanderson Blinds Ltd v English*, the UK Court of Appeal decided that it was the effect of the conduct that was important in establishing whether it was harassment. The court felt that, in broader terms, an employee should not be forced to reveal their sexual orientation in order to make a complaint of harassment. The court also ruled the employee could find the behaviour offensive even though he was not gay and that his colleagues knew this. Whilst this case is not binding on the Isle of Man it is likely to be influential in assisting a Tribunal's decision – making.

Gender reassignment, Sex and Marriage and civil partnership are other distinct protected characteristics under the Equality Act and each is covered in its own guide in this series. It is not uncommon for a claim of sexual orientation discrimination to also involve complaints under these characteristics.

The Act does not require any minimum length of continuous employment for a discrimination claim to be made and makes discrimination unlawful at all stages of employment - from when a role is advertised and interviewed for through to the last day of employment and beyond, including any references.

Research shows...

Most complaints of sexual orientation discrimination involve homophobic bullying and harassment, such as verbal abuse, exclusion from conversations, name-calling and threats. Situations can also involve unfair dismissal and some an element of sex discrimination, usually sexual harassment.

While bullying can come from anyone, the research adds that often the bully can be more senior than the employee discriminated against, or that the harassment can be started by a popular or influential colleague. Usually, the bullying may have occurred for a significant period rather than being a one-off event.

It also says that where more than one person is involved in carrying out the bullying, there can be a widespread culture of homophobia in the organisation, making it more challenging to raise and resolve.

Source: Acas - Sexual orientation and Religion or belief discrimination in the workplace

How sexual orientation discrimination can happen

There are four main different types of discrimination within the protected characteristic of Sexual orientation under the Equality Act 2010. They are:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation.

Employers should be aware that successfully dealing with a complaint of discrimination is not always the end of the matter. It is useful to think of how any future instances of discrimination or victimisation might be prevented. To find out more, see the companion guide Prevent discrimination: support equality.

Direct discrimination

This breaks down into three different types of direct discrimination where someone is treated less favourably directly because of:

- their own sexual orientation – this is ordinary direct discrimination
- the sexual orientation of someone they are associated with, such as a friend, family member or colleague – this is direct discrimination by association
- how their sexual orientation is perceived – regardless of whether this perception is correct or not – this is direct discrimination by perception.

Direct discrimination in all its forms could involve a decision not to employ someone, to dismiss them, withhold promotion or training, offer poorer terms and conditions or deny contractual benefits because of sexual orientation. In almost all circumstances it cannot be lawfully justified. However, the Act does, in very limited circumstances, allow for what are known as 'occupational requirements' under this protected characteristic. They are explained later in this guide.

For example... ordinary direct discrimination

Simon applies for a promotion in a small business owned by a gay couple as it ideally suits his skills. However, a colleague with less experience and skills is offered the job after they are both interviewed.

Simon is 'unofficially' told that his colleague got the promotion because he fits in better with the management team as he's gay and Simon is not. Simon is upset by this as he has worked hard for the business for three years. He raises a grievance and resigns.

Simon's colleagues are aware of why he left, so morale and performance are damaged. The business loses Simon's skills and waits to hear if he will make a claim to an Employment and Equality Tribunal.

For example... direct discrimination by association

Rhodri applies for a job and as part of the interview is asked what the proudest moment in his life has been. He says it was walking his daughter down the aisle when she married her wife last spring.

After saying this, he feels the tone of the interview changes markedly. He is told later that day that he has been unsuccessful. This makes Rhodri feel he has

been discriminated against because the prospective employer does not like the fact that his daughter is a lesbian. He questions the company about this, but does not receive a satisfactory answer. He decides to make a claim to an Employment and Equality Tribunal.

For example... direct discrimination by perception

Lucy, a heterosexual, has started working at a nursery and is in a probationary period. The line manager who recruited her is very pleased with her performance and feels she has the skills and qualifications to be an asset to the business.

However, the owner, Karen, has taken a dislike to Lucy who always wears trousers and has short hair. Also, Karen has been told that Lucy is a big football fan. Karen's personal prejudices mean she only wants heterosexual women working at the nursery and mistakenly believes Lucy is a lesbian based on her appearance and interests that are not stereotypically feminine.

Karen decides to dismiss Lucy and re-advertise the job. She has heard that an employee needs at least one year's service to make a complaint of unfair dismissal to an Employment and Equality Tribunal. However, Lucy suspects the reason for her dismissal and makes a claim to a tribunal. There is no minimum length of service required to make a complaint of discrimination where the act of discrimination is dismissal.

Indirect discrimination

This type of discrimination is usually less obvious than direct discrimination and can often be unintended. In law, it is where a provision, criterion or practice is applied equally to a group of employees/job applicants, but has (or will have) the effect of putting those who share a certain protected characteristic at a particular disadvantage when compared to others without the characteristic in the group, and the employer is unable to justify it.

So, an employee or job applicant claiming indirect discrimination must show how they have been personally disadvantaged. They must also show how the application of the 'provision, criterion or practice' has or might disproportionately disadvantage other employees or job candidates of that particular sexual orientation compared to other employees who are not of that orientation.

The Equality Act does not define a 'provision, criterion or practice'. However, in the workplace, the term is most likely to include an employer's policies, procedures, rules and requirements, whether written down or not. Examples might include

recruitment selection criteria, contractual benefits, a redundancy scoring matrix or any other work practice.

Indirect discrimination may be objectively justified if the employer can prove the 'provision, criterion or practice' is 'a proportionate means of achieving a legitimate aim'. However, employers should note this can be difficult to prove.

In attempting to demonstrate 'a proportionate means of achieving a legitimate aim', an employer must show:

- there is a legitimate aim such as a good business reason, but employers should note that cost alone is unlikely to be considered sufficient **and**
- the actions are proportionate, appropriate and necessary.

Both points apply in justifying 'a proportionate means of achieving a legitimate aim', not just one of them.

The process of determining whether discrimination is justified involves weighing up the employer's need against the discriminatory effect on the employee and group of employees who are of a particular sexual orientation - the more discriminatory the effect, the more difficult it will be to justify.

Also, the employer should be able to show it has looked for another way of achieving the same aim which would be less discriminatory or not discriminatory, and has been fair and reasonable.

Generally, an employer should scrutinise closely whether any discriminatory act, policy, procedure or rule can really be justified.

And it is important to stress that employers should monitor carefully their policies and practices, otherwise they may inadvertently indirectly discriminate. For example, policies and practices which were not discriminatory when they were first introduced may become discriminatory over time, perhaps because of a change in the composition of the workforce or a change in the law. For more on monitoring, see the companion guide, Prevent discrimination: support equality.

For example... indirect discrimination

Chloe works for a bus company which offers free bus passes for an employee and spouse, but the policy was written a long time ago and only recognises marriage between a man and a woman.

Chloe's partner, Sophia, would really benefit from free transport, but is losing out because of the policy.

Chloe raises the issue with her line manager, saying the policy is discriminatory because it excludes same-sex couples, and also doesn't recognise civil partnership or same-sex marriage. The manager says he will check the policy. He finds out it was written in the 1950s, hasn't been touched since and flags up to senior management that the policy needs reviewing urgently.

The policy is quickly amended to two free bus passes for each employee and the new policy is communicated to all staff. A senior manager apologises to Chloe, thanks her for highlighting the problem, and Chloe and Sophia each get their pass.

Harassment

Harassment is defined as 'unwanted conduct' and must be related to a relevant protected characteristic or be 'of a sexual nature'. It must also have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

This can include bullying, nicknames, threats, jokes, 'banter', gossip, intrusive or inappropriate questions, 'outing' someone, excluding someone (ignoring, not inviting someone to meetings or events etc.) or insults. It can be verbal, written or physical.

For example... harassment

Sunil has recently broken up with his girlfriend and has started a relationship with a man. His new partner is a friend of one of Sunil's colleagues who has told several other staff that Sunil is bisexual.

Some employees have started to make negative comments about Sunil's bisexuality – including lesbian, gay and heterosexual colleagues. One colleague that Sunil isn't particularly close to has also asked some very personal questions, making Sunil feel very uncomfortable.

Sunil, a valued member of staff, talks to his line manager who says he shouldn't take things so seriously. On that basis, the manager doesn't think any action is necessary. However, after the negative comments and inappropriate

questions continue, Sunil feels he has no choice but to leave the firm, and make a claim of harassment and constructive dismissal to an Employment and Equality Tribunal.

Also, it is possible for an employee to make a complaint of harassment where they are not on the receiving end of the conduct, but witness it and it has a negative impact on their dignity at work or the working environment. The employee making a complaint of harassment in this situation would not need to share the sexual orientation of the colleague who is being harassed.

For more general information on harassment, see the companion guide, Equality and discrimination: understand the basics.

Victimisation

Victimisation is when an employee suffers what the law terms a 'detriment' - something that causes disadvantage, damage, harm, or loss – because of:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination, and/or
- giving evidence relating to a complaint about discrimination, and/or
- raising a grievance concerning equality or discrimination, and/or
- doing anything else for the purposes of (or in connection with) the Equality Act 2017, such as bringing an Employment and Equality Tribunal claim of discrimination.

Victimisation can also occur because an employee is suspected of doing one or more of these things, or because it is believed they may do so in the future.

'Victimisation' is a term commonly misused and misunderstood, and only applies when it meets the explanation in this section.

A 'detriment', for example, might include being labelled a 'troublemaker', being left out and ignored, being denied training or promotion, or being given a poor reference.

An employee is protected under the Equality Act from victimisation if they make, or support, an allegation of discrimination in good faith – even if the information or

evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence maliciously.

For example... victimisation

Pavel is invited to a corporate dinner where staff are encouraged to bring their partners. However, one of the company directors approaches Pavel when he hears Pavel would be bringing his boyfriend. The director warns Pavel that the event is to impress clients and a 'political statement' like having a gay couple there would not be welcomed.

Pavel makes a complaint to the HR department and a grievance process upholds his complaint. After this, Pavel notices his place on a forthcoming training course is withdrawn and some senior staff are overheard referring to him as a 'troublemaker'. Pavel feels he has no choice but to raise another grievance and is seriously considering making a claim to an Employment and Equality Tribunal.

Key areas of employment where it can happen

The majority of instances of sexual orientation discrimination happen through bullying and harassment. In addition, there are many areas of work where sexual orientation discrimination can occur, but there are five in particular:

- recruitment
- pay, and terms and conditions of employment
- promotion opportunities
- training opportunities
- when an employee is dismissed.

Recruitment

To avoid discrimination, an **employer when recruiting should** generally:

- be careful when writing an advertisement, job description and person specification for a vacancy. Stay clear of any reference to a particular sexual orientation or any of the other protected characteristics. There can be exceptions – see the 'Occupational requirements' and 'Sexual orientation and Religion or belief' sections further into this guide – but they are rare. Further,

an employer **should not** include anything irrelevant to the job, and should avoid any wording it is unsure about or thinks might be open to legal challenge

- be clear on the skills, experience and qualifications needed for the job so it is objective in assessing and selecting candidates. At the same time, this should reduce the chances of ruling out a candidate because of their sexual orientation
- state the organisation's commitment to equal opportunities
- avoid advertising solely in one kind of place or media - for example, by only advertising in a magazine aimed at bisexuals, or on a notice board in a bar marketed at gay men. Use at least two different channels so as not to end up with candidates from too narrow an audience. However, if, for example, an employer was taking 'positive action' to target potential applicants who were lesbian, gay or bisexual, because they were under-represented in the organisation, it would probably include adverts in gay media. For more on 'positive action', see the companion guide Equality and discrimination: understand the basics
- make sure the job application form asks only for personal information relevant to the job and/or for the administration of the recruitment
- be mindful, if spreading word of vacancies through existing employees and managers, that relying only on 'word of mouth' is likely to perpetuate any imbalance in the make-up of the workforce, particularly where it is predominantly made up of people of a particular sexual orientation. Also, it is likely to yield only a small pool of candidates
- avoid asking the candidate direct or indirect questions of a personal nature unrelated to the job and their application – for example, do not ask if they are gay or heterosexual. Such questions may be perceived as intrusive, not relevant to the job and imply potential discrimination. Where such information is volunteered, interviewers or others in the selection process should take care not to be influenced by that information
- tell a recruitment agency being used that they need to comply with the Equality Act. For example, an employer **must not** suggest to the agency that it would prefer candidates who are heterosexual, and an agency **must not** follow such an unlawful instruction.

Employers should be aware that the laws relating to gay men in particular have changed significantly over time. It is possible that applicants may have acquired a past criminal conviction for a matter which is no longer unlawful.

For example... discrimination in recruitment

A sports club requires two individuals to manage the bar and other facilities. It advertises for a husband and wife team. This is likely to be direct discrimination because of sexual orientation because the sports club is treating people in civil partnerships or same-sex marriages less favourably than married opposite-sex couples.

Pay, and terms and conditions of employment

It is important to ensure terms and conditions of employment (including contractual benefits) do not generally disadvantage or exclude people because of their sexual orientation, perceived sexual orientation or association with someone of a particular sexual orientation. For example, this might include a staff discount policy, death in service benefits, parental leave or shift patterns.

However, an employer may be able to justify different terms and conditions if there is an important factor or factors not related to sexual orientation, or, for example, another protected characteristic such as marriage or civil partnership. For instance, these factors might include job experience, qualifications and where the job is based geographically.

For example... discrimination in terms and conditions

A retailer, with a network of depots working around-the-clock to distribute goods to its stores, has a 'family-friendly' policy that employees with children are expected to work fewer night and very early morning shifts in the warehouses. However, in practice, there is a tendency among some of the depot line managers to assume most gay, lesbian and bisexual employees do not have children.

Warehouseman Stuart, who is gay, has noticed that many of the unsocial hours shifts are staffed by colleagues who he knows are gay, lesbian or bisexual. He has also noticed that they tend to work more than their fair share of bank holidays, too. Stuart decides to raise these issues with his trade union representative.

Promotion

In promotion opportunities, employees should not be discriminated against because of their sexual orientation, perceived sexual orientation or association with someone of a particular sexual orientation. For example, it would be discriminatory to:

- share job adverts only with people of a certain sexual orientation
- not promote an employee with the relevant skills because it is believed they would not fit in because of their sexual orientation
- decide not to promote someone because they have previously made a complaint about discrimination
- have an unwritten rule that preferred candidates above a certain level should be in opposite-sex marriages.

For example... discrimination in promotion

Harpreet applies for promotion. After a competitive selection process, she scores highest. However, when seeing who the successful candidate is, Harpreet's prospective new manager asks the recruitment panel to look at the scores again because she does not want to manage Harpreet, as she raised a grievance six months previously about colleagues who were making homophobic and bi-phobic comments. This is potentially the victimisation type of discrimination because of sexual orientation.

Training

Withholding training from an employee because of their sexual orientation, perceived sexual orientation or association with someone of a particular sexual orientation would be discriminatory. For example, it would be discriminatory to deny an employee training with the intention of making promotion less likely or selection for redundancy more likely, as 'punishment' for complaining about discrimination or as a malicious act.

For example... discrimination in training

Rory has been working in a care home for just over two years and recently let his manager, Sandra, know he is bisexual. It is likely that redundancies will be made in the next financial year to cut costs. Staff with higher levels of qualifications will probably keep their jobs while others with fewer qualifications will go.

Sandra can send four staff on training to get the higher qualification. She makes a decision to not tell Rory about the training because she disapproves of him being bisexual. She knows he would be an excellent choice for the training and is well-liked by residents and colleagues. This is discrimination because of sexual orientation

Dismissal

If someone is dismissed because of their sexual orientation – whether this is their true sexual orientation or their perceived sexual orientation – or the sexual orientation of someone they are associated with, this would usually be seen as unfair dismissal. In the UK, Acas research reported that more than 40% of claims to Employment Tribunals about sexual orientation discrimination also involve a claim of unfair dismissal.

It also reported that many of these unfair dismissal claims were made by employees who felt their employment was terminated after they made a complaint to their employer about being discriminated against at work because of their sexual orientation.

For example... discrimination in dismissal

Katrine worked at a popular lesbian bar in the town where she lives. She was dismissed, but the manager refused to give a reason. When Katrine discovered that she had been replaced by a lesbian, and that the manager is a lesbian, she suspected she had been dismissed because she is heterosexual. She then made a claim to an Employment and Equality Tribunal.

Considerations for everyone

Employers, senior managers, line managers, HR personnel, employees and their employee and trade union representatives should make sure they understand what sexual orientation discrimination is, how it can happen, their rights and

responsibilities, the employer's policy for preventing discrimination, and what behaviour and actions are unacceptable.

Awareness of what behaviour is unacceptable is essential because many people do not consider that their jokes, nicknames, and 'banter' or invasive questions may be unlawful. These can be some of the most common forms of sexual orientation discrimination.

Employers and employees should be very careful regarding questions related to an individual's protected characteristics as these might be or become discriminatory, particularly if they are intrusive or handled insensitively.

An employer should provide training for all employees in constructively developing their awareness and understanding of each other, and building a culture in the organisation of promoting equality and diversity. Find out more in the companion guide, Prevent discrimination: support equality.

Respecting an employee's wish for confidentiality

As with any personal staff information, a person's sexual orientation or any concerns they raise should be kept confidential unless they have made it clear that they are happy for the information to be shared. Some people are uncomfortable with talking about their private lives at work and this can be particularly the case for lesbian, gay and bisexual people who are not 'out' at work.

'Outing' someone – where their sexual orientation is revealed by another person against their wishes or without their permission – may be seen as unlawful harassment. It could also breach the Data Protection Act, if details of their sexual orientation are kept in confidence on file. Also, it might damage staff trust in their workplace.

'Coming out' at work

When someone tells other people about their sexual orientation this is known as 'coming out'. This process is different for everyone. While many lesbian, gay and bisexual people are 'out' in their personal lives, they may not want to 'come out' at work.

Lobby group Stonewall's Coming out guidance says that nobody should feel they are under pressure to 'come out' and only the individual themselves will know when the time is right for them. For example, an employer or colleague should not try to force

the issue or threaten to 'out' someone, because this may be seen as harassment, as outlined earlier in this guide.

If an employee decides to be open about their sexual orientation at work, it is important for them to decide who they want to tell, which may include:

- a point of contact in the organisation such as a diversity champion – for example, a trade union equality representative
- a manager who will react positively
- their organisation's human resources department
- colleagues who are friends
- everyone (by deciding to 'come out' at work).

If the employee is limiting who they tell, they also need to decide whether they want those people to keep the details of their sexual orientation confidential. If someone reveals a person's sexual orientation to others against that person's will, this may be seen as:

- harassment and/or
- a breach of the Data Protection Act (if details are stored as confidential data) and/or
- a breach of any of the employer's relevant regulations or policies.

Someone's decision to 'come out' at work should be a personal one made only by that individual. Stonewall has an Info Line on 08000 50 20 20 offering advice and support about coming out, and their guidance can be found at www.stonewall.org.uk/at_home/coming_out

Marriage and civil partnership equality

The Isle of Man recognises both civil partnerships and marriage for same-sex couples and opposite-sex couples. Employers should ensure their policies are up to date and cover each of these unions as an employee must not be discriminated against because they are in a civil partnership or married.

Employers should also be aware that the protected characteristic of sexual orientation can overlap with other protected characteristics – including marriage and civil partnership, and religion or belief – and laws such as the Human Rights Act 2001 and the European Convention on Human Rights in supporting, for example, rights to a private life and to marry.

Sometimes, discrimination may be linked to a marriage or civil partnership, but the circumstances may have an equal or greater link with some other protected characteristic – for example, sexual orientation. Employees may then rely on these other protected characteristics to bring an Employment and Equality Tribunal claim.

To find out more about Sexual orientation and Religion or belief, see the section of that name later in this guide.

Matching core 'Occupational requirements' of the job

In certain and rare circumstances, it may be lawful for an employer to specify that applicants for a job must have (or not have) a particular protected characteristic under the Equality Act. For example, an employer might specify that job applicants must be lesbian.

In law, this approach is known as an 'occupational requirement' and it can provide the employer with a defence to a discrimination claim. However, it is not enough for an employer to simply decide they would prefer to employ someone who has a particular sexual orientation. Any such requirement must:

- be crucial to the post, and not just one of several important factors **and**
- relate to the nature of the job **and**
- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim an occupational requirement.

All three points apply to an occupational requirement, not just one or two of them. There is more on 'legitimate aims' in this guide's section, Indirect discrimination. An occupational requirement must remain necessary, so should be reassessed each time the job is advertised, even though it may have been valid for the same post in the past. Circumstances may have changed, meaning the occupational requirement may no longer be applicable.

An employer should think carefully, and consider seeking legal advice, before claiming an 'occupational requirement', as it can be **difficult to justify** and will be rare. Also, a job applicant might make an Employment and Equality Tribunal claim where there appears to be an occupational requirement which could be unjustified.

Further, an occupational requirement can only be used in a defence against claims of ordinary direct discrimination (but not for by association or by perception). Also, it cannot be used in a defence against claims of indirect discrimination, harassment or victimisation.

Sexual orientation and Religion or belief

The Equality Act has specific exemptions where employment is for the purpose of organised religion, such as being a Minister or otherwise promoting or representing the religion.

This means that some roles can be restricted to people of a particular sexual orientation. There can also be additional requirements related to sexual orientation, such as a requirement for gay men or lesbians to be celibate. Restrictions concerning religion can also apply to the protected characteristics of sex, gender reassignment, and marriage and civil partnership. To find out more, see the MIRS guide Religion and belief and the workplace.

Such a restriction only applies when:

- appointing a person who meets the requirement/s in question is a proportionate way of complying with the doctrines of the religion, or
- because of the nature or context of the employment, employing a person who does not meet the requirement/s would conflict with a significant number of the religion's followers' strongly-held religious convictions. The requirement/s must be a proportionate way of avoiding such a conflict.

As with all occupational requirements, a requirement must be essential to the post, and not merely one of several important factors. It is also important to note that no one protected characteristic has a higher priority than any other.

Harassment because of Sexual orientation

Harassment because of sexual orientation can take many different forms. It could be a verbal or written comment, what somebody thinks is a 'joke', exclusion from conversations or activities, violence or the threat of violence.

Some employers may feel they would benefit from having a policy setting out how they would deal with a complaint of harassment because of sexual orientation. This kind of complaint can be difficult for an employee to discuss. An employer should take it seriously and listen to the concerns of the individual.

It is important for an employer to deal with this type of issue, not only because of its legal obligations, but also because there could be knock-on effects. The employee being harassed might feel de-motivated and their productivity fall, or it might lead to them being absent from work through stress. A climate of harassment can also damage morale generally in parts or all of the workplace.

Avoid sexual orientation stereotyping

Employers and employees should avoid making assumptions about people because of their sexual orientation, including thinking that all people of a particular sexual orientation are the same. Such guesswork can often be done without realising – what is known as unconscious bias.

Stereotyping can lead to problems, particularly concerning direct discrimination by perception and direct discrimination by association. For instance, see the example under 'direct discrimination by perception' earlier in this guide. Stereotyping can also trigger harassment and victimisation. For instance, see the example under 'victimisation' earlier in this guide.

To find out more about the general origins of stereotyping see the companion guide, Prevent discrimination: support equality at www.mirs.org.im/equality.

Unacceptable terminology

Derogatory terms that refer to somebody's sexual orientation are clearly unacceptable and discriminatory.

It is important to remember that discrimination might not only affect those who are part of a smaller group. It can affect others, too. So, employees and employers should be careful not to overlook potentially offensive comments simply because they are aimed at a large part or majority of the workforce.

An employer should provide equality training explaining to managers and staff that even referring to an employee's sexual orientation at all unnecessarily could be potentially discriminatory.

It is important for everyone to remember that certain words have the potential to cause offence and therefore there is a need to be considerate as to how such words

might be perceived by others. With discrimination, it is generally how the recipient perceives words and actions, rather than the intention of the person delivering them.

The term 'banter' is often used when there is a disparity between what was intended by one person and how it has been perceived by another. Employers should be prepared to manage situations where a 'joke' or 'banter' has caused offence or upset.

Employers should manage these situations with care. Sometimes these situations can be dealt with by a manager having an informal discussion with an employee and explaining that they have caused offence. In other situations, it will be appropriate for the employer to consider a more formal approach such as disciplinary action. There is more information about handling complaints further on in this guide and the companion guide, *Discrimination: what to do if it happens*, at www.mirs.org.im/equality.

Also, employers and employees need to take into account that the acceptability or unacceptability of terms can change over time, and sometimes quite quickly.

How employees should raise discrimination complaints

There are two ways a complaint of alleged discrimination may be handled. Informally or formally.

An employer should be sensitive to the wishes of the employee who has raised a complaint and discuss with them which way they would prefer the matter to be dealt with. They should come to an agreement on this, but it is for an employer to decide whether to pursue disciplinary measures against an employee.

Some complaints may be dealt with **informally**, where the employer has a quiet word with those involved to reach a resolution which has the desired effect and to which they can all agree. Dealing with a complaint this way can prevent it escalating, allow for it to be dealt with sensitively without the formality of a grievance process and possibly avoid the matter ending as an Employment and Equality Tribunal claim.

However, it is not uncommon for complaints of alleged discrimination to evoke strong feelings for both the person who has made the complaint and the person that the complaint has been made against. Such a complaint is very likely to go through the **formal** approach, using the organisation's formal grievance procedure, and possibly its disciplinary procedure, too.

All employers should have discipline and grievance procedures, and each employee's contract of employment should include information on where the details can be easily found.

How employees should raise complaints, including the option of raising the matter with a trade union representative, is covered in more detail in the companion guide, *Discrimination: what to do if it happens*, at www.mirs.org.im/equality. It includes help for employers and employees in deciding whether to handle a matter informally or formally.

When an employee experiences discrimination

When an employee makes a complaint that they have been a target of discrimination, an employer should be mindful that the employee may feel they have been personally attacked. Handling the situation sensitively with the complainant, the person(s) accused of discrimination and any witnesses is essential, whether this is being done informally or formally.

For example... How an informal complaint can work

Farouq works at a restaurant and is good friends with a gay colleague. Two of the chefs start teasing Farouq and insinuate that he is gay, too. Farouq makes it clear to both of them that he considers their behaviour inappropriate, but they carry on teasing him. Farouq decides to talk to the restaurant manager – he was unaware of the situation, but will now investigate. Farouq tells the manager he doesn't want to make his complaint formal, but wants the teasing to stop.

The manager has a quiet word with the chefs about their behaviour and reminds them of the company's equality policy. A written record of the one-to-one conversations between the manager, Farouq and each of the two chefs are kept on file in case there is any repeat of the behaviour. The teasing ends and Farouq is now happy at work.

For example... How a formal approach can work

Shaun works in a large clothing store and applies for a promotion in the children's wear department. An interview with a manager from a sister store seems to be going well until she asks personal questions that lead to Shaun revealing he lives with his partner, Martin. The manager's demeanour changes and she bluntly questions him about why he wants to work on children's wear. Shaun leaves the interview upset.

A few days later Shaun is informed he did not get the job and is surprised to see it re-advertised. A couple of colleagues make comments that confirm Shaun's suspicions that the manager's attitude towards his sexual orientation influenced the outcome of the interview. Shaun submits a formal written grievance to his employer outlining his concerns and attends a hearing with his trade union representative. A week later, he is informed the grievance was not

upheld because the manager denies the allegation.

Shaun appeals and it is heard by a more senior manager who upholds Shaun's complaint because the original grievance hearing ignored evidence from witnesses and that the recruitment process scores had been tampered with. Shaun is subsequently interviewed by a different manager, scores highly and gets the promotion. Also, he is assured the conduct of the first manager who interviewed him will be investigated in line with company procedures.

When an employee observes discrimination

An employee who witnesses discrimination taking place is just as entitled to raise a complaint as the victim. What has been witnessed should be taken seriously by the employee who has seen it and by the employer who receives a complaint about it from the witness. The main issue is that discrimination is allegedly taking place. Also, the employer should be mindful that the witness feels strongly enough to make a complaint. As with a complaint from an employee alleging discrimination aimed at them, a complaint about discrimination which has been observed should be handled just as sensitively.

For example... How an informal approach can work

Maria has heard several of her call centre colleagues use the word 'gay' as slang to mean stupid or unfortunate. She finds this offensive because her son has experienced bullying at school from children using the word in the same way. She has tried to speak to her colleagues about this, but they dismiss her concerns.

Maria decides to speak to her manager about why she finds it offensive. He decides to speak to the colleagues concerned to set expectations about appropriate behaviour at work and a programme of equality training is put in place. Maria is satisfied with the outcome, as long as the manager keeps an eye on how things go.

For example... How a formal approach can work

Lee works for a recruitment company in a 'macho' environment. He noticed a few months ago that a gay member of staff, Sam, was being harassed and bullied in the office. This started as what might be described as fairly low-level teasing, but more recently had become aggressive name-calling. When Lee came into the office today he noticed pictures of naked men stuck to Sam's computer.

Towards the end of the day Lee saw the ring leader of the bullying approach Sam in the staff room and expose himself while threatening him. Lee checked if Sam was all right and asked if he was going to report this.

Sam said he was worried there would be repercussions if he made a complaint, especially as their line manager had already seen some of what was going on and had done nothing to intervene. However, as Lee finds the behaviour of his colleagues towards Sam offensive, he submits a grievance to the HR department.

A grievance hearing is held where Sam and the people carrying out the bullying are called as witnesses. The company upholds Lee's complaint and decides to take disciplinary action against the harassers – the 'ring leader' is dismissed for gross misconduct and the others receive final written warnings.

How employers should handle discrimination complaints

When an employer receives a complaint about sexual orientation discrimination, it should take the matter very seriously, and listen carefully and with empathy to what the employee says.

A complaint – or grievance as it is also known – might be handled in an organisation **informally** or **formally** depending on the nature of the particular complaint, its seriousness, the possible action that may need to be taken and the outcome desired by the person making the complaint, as explained in the previous section, How employees should raise discrimination complaints.

However, if an employer or manager becomes aware that discrimination, harassment or victimisation is taking place because of someone's sexual orientation, it is important that they do not wait until a complaint or grievance is raised. The sooner action is taken the more easily it can be resolved and it is less likely that the employer would be liable for the discriminatory actions of the employee/s involved.

An employer should discuss with the employee raising the concern whether the employee wishes to have the matter dealt with informally or formally. They should come to an agreement on this.

It is for an employer to decide whether to pursue disciplinary measures against an employee. However, it should ensure it investigates complaints thoroughly and follows disciplinary procedures where warranted. Any inaction by the employer could

damage staff morale in general and possibly culminate in the employee who made the complaint submitting a claim to an Employment and Equality Tribunal.

How employers should handle a complaint of alleged discrimination is covered in more detail in the companion guide, *Discrimination: what to do if it happens at www.mirs.org.im/equality* . It includes help for employers and employees in deciding whether to handle a matter informally or formally.

To help give a better understanding of when to use an informal approach or a formal one concerning alleged sexual orientation discrimination, both employers and employees should assess the following examples.

When to consider an informal response

It is likely an employer will use an informal response when it and the parties involved agree that this is likely to be the best way forward. Such an approach will be largely based on having conversations with the parties concerned to investigate the situation in the hope of resolving the matter without using the organisation's formal grievance procedure.

If the matter turns out to be relatively straightforward, the informal approach can have the advantage of resolving the matter sooner, with less stress and at less cost than if the matter went through the formal grievance route. Also, it can make it easier for work relationships to be rebuilt.

When considering whether an informal response is appropriate, an employer should be mindful of the outcome the complainant is seeking and the outcome that might be necessary from the employer's point of view. Also, an employer can explain to an employee that an informal approach still means the complaint is being treated seriously and, in the circumstances, is potentially the best way to try for the most desirable outcome for all concerned.

However, if an informal approach doesn't work or turns out to be inappropriate, the matter could still be dealt with formally.

For example... An informal response to an informal complaint

Zhilan is a lesbian working in a finance firm. She approaches her manager because a colleague used homophobic language to describe the female presenter of a TV programme being discussed in the office.

Zhilan says she has never heard the colleague use language like that before, so doesn't want to make a formal complaint. However, while out of character, she found it shocking and would like it 'nipped in the bud'.

The manager speaks to the colleague, James, in a side room. He asks if James remembers the situation. James freely admits the words he used and explains he used them flippantly in front of Zhilan because he thought it was a 'jokey' rather than a homophobic term.

He is apologetic and understands now that using language like that can be found offensive. The manager feeds this information back to Zhilan, and James apologises to Zhilan who accepts this should be the end of the matter. The manager decides no further action is needed other than keeping an eye on the situation

When to consider a formal response

The formal response, usually using the employer's formal grievance procedure including a hearing, is likely to be the way forward when the allegation of discrimination is serious. It is even more likely if the complaint is particularly serious and could also lead to a disciplinary investigation. However, there can be other circumstances where the need for a formal response can arise, as highlighted in the final example, A formal response to an informal complaint.

For example... A formal grievance

The HR department in a building firm receives a formal written grievance from Paul, a gay employee who believes his manager is withholding pay rises because of Paul's sexual orientation. The firm carries out an investigation which suggests Paul received fewer pay rises than his heterosexual colleagues and when he did they were lower, and also that bonuses had been withheld. Paul is invited to a grievance hearing and is accompanied by a trade union representative. It is chaired by a manager from outside Paul's department. It is decided a more in-depth investigation is needed. The company then arranges investigation meetings with Paul's manager and his head of department, plus more detailed analysis of pay records.

Paul is invited to a second hearing, is given all of the evidence and witness statements, and is again accompanied by the trade union rep.

It is explained that all of the evidence suggests the apparent low level of pay rises Paul received were due to the higher rate of pay he started on and was not because of his sexual orientation. However, failure to provide bonuses did seem to be connected to a poor working relationship stemming from the manager's attitude towards Paul's sexual orientation. Paul's grievance is therefore upheld in part.

The outcome is confirmed in writing and Paul is told of his right to appeal, but he accepts the decision. The firm compensates Paul for loss of bonuses and starts a disciplinary investigation against the manager.

For example... A formal response to an informal complaint

Nina works for an estate agent and has been on sick leave for a month. In conversations with her manager, Hannah, Nina has said she has stress, anxiety and depression due to her personal life.

Hannah arranges to call Nina for an update ahead of her next appointment with her GP. This time, Nina confides that the real reason for her condition is homophobic bullying by colleague Richard. Nina says it sometimes happens when one or two other employees are around, but never when managers are there. Hannah encourages Nina to put her complaint in writing, but Nina says she doesn't feel strong enough to go through a grievance process. Hannah agrees to speak to her own manager in confidence and call Nina back within the next three days.

After speaking to her manager and with Nina's agreement, Hannah starts an investigation into the alleged bullying. Nina isn't required to submit a grievance, but will provide a statement, as will staff who were present when the bullying allegedly happened. The investigation includes evidence from Richard. Hannah explains to Nina that the nature of the alleged bullying could be found to be serious misconduct. It is too serious to be dealt with informally, as the employer has a duty of care towards its staff.

Once the investigation is complete, Richard is invited to a disciplinary hearing and given a final written warning for his conduct. The warning includes that there must be no repeat of the behaviour, and no repercussions or retaliation. Nina feels able to return to work gradually and is grateful for the way her employer handled the situation.



Manx Industrial Relations Service (MIRS)

The Manx Industrial Relations Service (MIRS) is an independent organisation funded by Government and we provide a free, impartial and confidential service on any employment relations matter. We are here to help employers, employees and trade unions work together for the prosperity of the Isle of Man.

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the MIRS website www.mirs.org.im

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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