Employment and Equal Opportunities Service

Employment guidance - complete guide

Issued by the Committee *for* Employment & Social Security

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Introduction

The Prevention of Discrimination (Guernsey) Ordinance, 2022 (Ordinance) introduces legislation to make it unlawful to discriminate against a person on the grounds of disability, race, carer status, sexual orientation and religion or belief in Guernsey, Herm and Jethou. These categories are known in the Ordinance as Protected Grounds.

Purpose of this guidance

This guidance is issued by the Committee for Employment & Social Security under Section 67(2) of the Ordinance to provide guidance in respect of people's rights and duties in relation to employment and other arrangements relating to work. In the event that a claim is brought under this Ordinance a court or tribunal may take this guidance into account in determining that claim.

At present this guidance does not extend to deal with discrimination on the grounds of sex, maternity or pregnancy, marital status or gender reassignment, as these are not currently Protected Grounds under the Ordinance. It is still

unlawful in Guernsey to discriminate under these grounds but the legal recourse is governed by the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005. See here Legislation- number 5.

Likewise, this guidance does not deal with age discrimination issues. Age discrimination, at present, is not unlawful in Guernsey, although this may in due course be included as an additional Protected Ground.

All employers will need to review their existing policies and procedures in light of the introduction of these new rights. Most of the concepts introduced by the Ordinance are similar to equivalent legislation in other jurisdictions such as the UK or Jersey. However, there are a number of key differences, such as the inclusion of carer status as a discrete Protected Ground in its own right. The purpose of this guidance is principally to provide practical guidance to employers of all sizes, with a focus on the smaller businesses to help them understand their responsibilities and avoid disputes in the workplace. Many smaller local businesses may have to establish new policies and procedures to deal with the Ordinance. This guidance may also help employees to understand their rights and in turn identify what they can do if they believe they have been discriminated against.

Scope of this Guidance

This guidance applies to anyone who is either employing someone who works in Guernsey, Herm or Jethou or recruiting someone to work for them. It also extends to a number of other work-related arrangements.

There is separate guidance issued in respect of service providers who provide goods or services to the public. The Ordinance has specific responsibilities for education providers, accommodation providers and clubs and associations which are covered in the service providers guidance. It is important to note that many organisations may fall into more than one category and have different responsibilities under the employer and service provision parts of the Ordinance. For example, a school may be both an employer (in respect of its employees), a service provider (when providing services to the public) and an education provider (with respect to students).

The Ordinance itself applies:

- whatever sector you work in;

- whether you are taking on your first worker or your hundred and first; whether or not you use any formal recruitment processes like application forms, short listing or interviewing; and
- whether or not you have established work policies and procedures.

The Ordinance applies to the whole lifecycle of the employment relationship from the recruitment and interview process, through inductions and probationary periods, covering pay and benefits, career development, management and ultimately resignation, dismissal and/or redundancy.

It is recognised that smaller and larger employers may operate with different levels of formality and have different resources. How those duties are put into practice may differ from one employer to another. Even so, no employer is exempt from its duties because of its size. As such the guidance should be read in this light.

How the guidance is structured

The guidance is divided into a series of chapters as follows:

- **Chapter 1** explains the different types of discrimination and how they can arise.
- **Chapter 2** provides a detailed explanation of each of the Protected Grounds of disability, race, carer status, sexual orientation and religion or belief.
- **Chapter 3** explains when the duty to make reasonable adjustments applies.
- **Chapter 4** covers the concept of equal pay and equality of terms and conditions
- **Chapter 5** looks at who is considered an employee and what other work-related arrangements that are covered by the Ordinance
- **Chapter 6** provides practical guidance around how to avoid discrimination in recruitment
- **Chapter 7** provides guidance for managing staff, including dealing with a range of issues that can arise during employment
- **Chapter 8** sets out exceptions set out in the Ordinance
- **Chapter 9** deals with how employers should prepare for the Ordinance
- **Chapter 10** sets out the complaints process

- **Appendix I** Equal Opportunities Policy
- **Appendix II** Accessibility Audit

Please also see table of implementation dates here.

Examples

Within many of the chapters of this guidance examples are included to explain how the Ordinance is likely to work. These are all simple examples purely included for illustrative purposes to demonstrate key principles and concepts, and it should not be considered as definitive statements of the law, as very often whether or not discrimination has occurred will depend upon the wider context and the facts before the Tribunal in any individual case. These examples are all set out in boxes for ease.

Key Concepts

In addition, the guidance also contains a number of areas which set out the key concepts and definitions based on the actual language contained within the Ordinance. However, these should not be considered to be a definitive statement of the legal position as set out within the Ordinance itself which can be found here.

Chapter 1: Discrimination and other prohibited conduct

In this chapter we will cover:

- What is direct discrimination?
- What is indirect discrimination?
- What is discrimination by association?
- What is discrimination arising from a disability?
- What is harassment?
- What is victimisation?

Prohibited conduct

The Ordinance makes it unlawful for employers to discriminate against employees and applicants for employment because of a Protected Ground. It is important to understand that discrimination arises in lots of different contexts, and often it can

be unintentional. However, because of the impact of discrimination on the individual, intent is generally considered irrelevant when considering whether or not there has been discrimination.

Why do we need this legislation?

The Ordinance has been created to help employers:

- eliminate discrimination, harassment, and victimisation and other prohibited conduct;
- advance equality of opportunity for everyone;
- provide reasonable adjustments to ensure that persons with disabilities are not placed at a substantial disadvantage;
- provide equal pay and equal treatment.

The Ordinance has been put in place to ensure that employers can work to remove or minimise disadvantages, so that they take steps to meet different needs and to ensure equality, or a greater degree of equality on any of the Protected Grounds. This guidance has been prepared to assist employers in creating policies that make it clear what type of behaviour is unlawful. This should in turn make it easier to resolve internally issues that occur within this environment as most inappropriate behaviour, whether intentional or not, should be clear to identify. In this respect the Ordinance should assist in the drafting of grievance procedures, to ensure that there is a framework to follow. We cover such policies in Chapter 9.

Tribunal – a place of last resort

Naturally the best outcome for a dispute between an employer and an employee is to be able to resolve matters without ever having to involve the Tribunal. When a party feels that they have been unfairly treated at work and have also exhausted all the internal grievance procedures available to them and there has been no resolution, it is generally at this point that they may consider the option of making a complaint to the Tribunal. For more information on the tribunal process please see the Employment and Discrimination Tribunal.

Intent

It is often unhelpful to focus on intent when trying to address issue of discrimination, because it leads to unhelpful stereotypes and attitudes, such as it is only “racists” that discriminate on the grounds of race, because that misses the point. In most instances indirect discrimination will arise not due to any deliberate intent to discriminate, but from a lack of understanding, sub-conscious biases or even a failure to consider the impact of a particular policy on different groups.

Types of discrimination

There are four main forms of discrimination:

- **Direct discrimination**
- **Indirect discrimination**
- **Discrimination by association**
- **Discrimination arising from a disability**

See part II of the Ordinance

Other types of prohibited conduct

In addition, the Ordinance sets out four main forms of prohibited conduct:

- **Harassment**
- **Victimisation**
- **Advertisements indicating an intention to discriminate**
- **Causing or pressuring or instructing someone to commit a prohibited act**

See part III and part IV of the Ordinance

This chapter of the Guide therefore seeks to explain in what circumstances someone has committed an unlawful act of discrimination.

1.1 What is direct discrimination?

Under the Ordinance direct discrimination happens where:

A person (A) discriminates against another (B), if because of a Protected Ground, A treats B less favourably than A treats or would treat others.

For these purposes the Protected Grounds at the time of the less favourable treatment may:

- **exist**
- **have previously existed but no longer exist**
- **exist in the future or**
- **be imputed to B by A**

See section 6 of the Ordinance

Direct discrimination is the most commonly understood form of discrimination and arises when a person is treated worse compared to someone else because of a Protected Ground. Accordingly, in direct discrimination claims it is necessary to make a comparison with the treatment of someone else who doesn't have the Protected Ground. That person is known as a comparator (see below). If an employer would treat the comparator in the same way then treatment will not be considered to be direct discrimination.

The less favourable treatment must be because of a Protected Ground, for example it would not be unlawful to treat someone less favourably because of their socio-economic background. If a person is treated less favourably because of a Protected Ground, this will constitute direct discrimination, even if the discrimination was unintentional. Employers need to ensure that they have appropriate checks in place to enable the swift resolution of any issues involving direct discrimination without the need for formal resolution. Ultimately, however, if the issue did go to the Tribunal, it would have to consider the reason why the person was treated less favourably.

Example

It would be direct discrimination on the grounds of religion or belief for an employer to refuse to employ a candidate because they are a Muslim. It would also be direct discrimination to refuse to employ a candidate because it is imputed (assumed) a candidate was Muslim (for example they may be of Asian origin), even if they do not have the Protected Ground.

Exceptions

In addition, direct discrimination cannot be objectively justified. However, it is important to remember that there are a number of exceptions under the Ordinance for example where a job has a genuine and determining occupational requirement which allows directly discriminatory treatment that would otherwise be unlawful or that there is no requirement to employ a person who cannot fulfil the essential functions of the role. For further details on the exceptions to the Ordinance see Chapter 8.

Example

It would be a genuine occupational requirement for a Catholic priest to be Catholic.

What is meant by a “comparator”?

As mentioned above if you want to show that you have suffered direct discrimination, you need to compare your treatment with the treatment of a comparator. This is someone who doesn't have the same Protected Ground as you. The term comparator isn’t defined by the Ordinance. It may be a real person or if one does not exist, it is possible to use a hypothetical comparator who has all of the same characteristics apart from the Protected Ground in order to make the assessment.

The comparator is someone who is in the same or similar enough situation to you, but who doesn’t have the same Protected Ground.

Example

An employee who is a carer is placed on a performance improvement plan following a poor appraisal, due to what their employer claims are concerns around performance. Another employee who undertakes the same role and had a similarly poor appraisal was not put on a performance improvement plan. If the first employee brought a claim for direct discrimination, a comparator could be the employee who was not put on a performance improvement plan.

What is meant by someone in a similar situation?

It is not necessary for you to be in an identical situation as the comparator. But there must be sufficient similarities between the two of you to show that the reason for the worse treatment is the Protected Ground and not something else.

Example

The employer of a Muslim employee refuses to allow them time off work for Friday prayers. One of their colleagues is a Christian and attends a bible study group on Wednesdays after work. They asked for permission to leave an hour early to attend these groups and the employer has agreed to this.

The Muslim employee could compare their situation with the Christian colleague as they also need regular time off work for religious reasons in a similar situation, because the religions are different.

What is a “hypothetical comparator”?

When it’s not possible to find a real person who is in the same or similar enough situation to you to make a comparison, perhaps because the situation you're in has never happened before, then in this case you can use a hypothetical comparator. This involves considering how an employer would have treated a hypothetical employee without the Protected Ground in similar circumstances. It

can sometimes be useful to consider how an employer has treated other employees in different circumstances in order to make the comparison.

Example

A bisexual person works in a restaurant and one day they make a mistake on the till which results in a small financial loss to their employer. Because of this mistake, the employer dismisses the employee. This situation has never happened before so there’s no actual person to be compared with. However, six months earlier, the employer gave a written warning to another worker for taking home food without permission.

Because this was a similar situation, the treatment of this worker can be used to argue that the employer would not have dismissed someone who is not bisexual for making a one-off till error.

Finding a comparator in disability discrimination cases

If someone is directly discriminated against because of disability, the comparator is someone who doesn't share their particular disability but who has the same abilities and skills as them. The comparator can be someone who is not disabled or someone with a different disability.

Example

A job applicant with carpal tunnel syndrome can type 50 words per minute using an adapted keyboard, but only 30 words per minute on a normal keyboard. If the person was discriminated against when applying for a job, their comparator would be someone who does not share their disability but who can type 50 words per minute using a normal keyboard.

1.2 What is indirect discrimination?

Under the Ordinance indirect discrimination happens where:

A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which has a discriminatory effect on B in relation to a Protected Ground.

A provision, criterion or practice has a discriminatory effect on B in relation to a Protected Ground if:

- **A applies, or would apply, it to persons with whom B does not share the ground,**
- **it puts, or would put, persons with whom B shares the ground at a particular disadvantage when compared with persons with whom B does not share it,**
- **it puts, or would put, B at that disadvantage, and**
- **A cannot show it to be a proportionate means of achieving a legitimate aim.**

See section 8 of the Ordinance

Indirect discrimination happens when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a Protected Ground, and a person is disadvantaged because they are part of this group. If this happens, the person or organisation applying the policy must show that there is a good reason for it – this is known as objective justification.

To prove that indirect discrimination is happening or has happened there are four distinct steps:

- there must be a policy which an organisation is applying equally to everyone (or to everyone in a group that includes the person claiming the discrimination);
- the policy must disadvantage people with a particular Protected Ground when compared with people without it;
- the individual must be able to show that it has, or will, disadvantage them personally; and
- there is no objective justification for the policy, that is to say that the organisation cannot show that there is a good reason for applying the

policy despite the level of disadvantage to people with the same Protected Ground.

Provision, criterion or practice

A policy for these purposes may include any provision, criterion or practice, such as:

- a dress code;
- hours of work; or
- absence polices.

It is immaterial whether the employer intended the policy to discriminate or not. The issue is whether people have been disadvantaged by the policy. Care needs to be taken when creating or changing policies to ensure that indirect discrimination does not happen.

It should be noted that there does not need to be a formal policy in place in order for an employee to challenge a decision affecting them. Generally, a provision, criterion or practice will not be a one-off action as it is necessary to show some form of continuity in how the employer will deal with similar issues in the future.

Example

An employee with a disability was dismissed, but the employer followed a flawed process due to human error. There was no indication that the procedural error had anything to do with the employee's disability i.e. it was not direct discrimination or discrimination arising from disability, and as there was no reason to think that there would be future repetition of the flaw, in these circumstances the flaw from the erroneous process followed would not amount to a provision, criterion or practice, even if it did place the person with the Protected Ground at a disadvantage.

Objective justification

If a policy causes a disadvantage then the onus is on the employer to objectively justify it. First, they must show their policy is designed to achieve a “legitimate aim”. This must be a non-discriminatory reason such as economic efficiency or health and safety. A legitimate aim shouldn’t solely be about cost, but it could be about cost and something else. An employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

Example

An employer has a policy of banning necklaces in a workplace where they operate heavy machinery. This policy would be considered to be a provision criterion or practice.

This might place workers who wear necklaces to show their faith at a disadvantage. However, if an employer can show there’s a good health and safety reason, this would be considered to be a legitimate aim, and if it is proportionate (i.e. there is no other way to achieve the health and safety objective), then it would still be lawful.

To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were reasonably necessary. The actions will not be considered proportionate if the employer could have achieved the same objective through less discriminatory means.

Example

A food manufacturer has a rule that beards are forbidden for people working on the factory floor. This rule may amount to indirect religion or belief discrimination against the Sikh and Muslim employees unless it could be objectively justified.

If the aim of the rule is to meet food hygiene or health and safety requirements, this would be legitimate. However, the employer would need to show that the ban on beards is a proportionate means of achieving this aim. In this regard the employer would need to be able to demonstrate why same aim could not be achieved by less discriminatory means, such as providing a beard mask.

1.3 What is discrimination by association?

Under the Ordinance discrimination by association happens where:

A person (A) discriminates against another (B) who is associated with another person (C) if:

- **A treats B, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated; and**
- **Similar treatment of C would constitute direct discrimination.**

See section 7 of the Ordinance

Discrimination by association occurs when a person is treated less favourably because they are linked or associated with person with a Protected Ground. There is no actual definition of what an “association” is in the Ordinance. An “association” might include a relationship with a friend, spouse, partner, parent, child, grandchild or another person with whom they are personally connected to.

Example

It would be discrimination by association if an employer chose not to employ a parent because they had a disabled child and the employer was concerned about the amount of time off work they may require.

As with direct discrimination, discrimination by association cannot be justified and it is irrelevant if it is unintentional, but it does require a comparator. That comparator can either be real or hypothetical, but it is necessary to consider how an employer would have treated a person who was associated with someone who did not have the Protected Ground.

Example

An employee takes a period of unpaid leave to care for their disabled sister, during which time they cease accruing holiday entitlement. If the employer can show that another employee (as a comparator), took leave to care for a poorly relative, who wasn't disabled, also did not accrue holiday entitlement, then the claim for direct discrimination by association would fail as the two employees have been treated in a similar way.

1.4 What is discrimination arising from a disability?

Under the Ordinance Discrimination arising from a disability occurs where:

A person (A) discriminates against a disabled person (B) if:
A treats B unfavourably because of something arising in consequence of B's disability; and
A cannot show that the treatment is proportionate means of achieving a legitimate aim.

It is not discrimination if A did not know, and could not reasonably have been expected to know, that B had the disability.

See section 9 of the Ordinance

Discrimination arising from disability occurs when an employer treats an employee unfavourably because of something that arises as a consequence of their disability (and which cannot be objectively justified). However, an employer will not be liable if they did not know the employee was disabled and could not reasonably be expected to have known.

This protection prevents someone from being treated badly because of something connected to their disability, such as needing time off for medical appointments, or side effects from drugs that alter someone's behaviour.

Discrimination arising from disability is unlawful unless the employer is able to show that there is a good reason for the treatment of the person and it is proportionate. This is known as objective justification.

Example

An employee with cancer is prevented from receiving a bonus because of time they have taken off to attend medical appointments. This would constitute unfavourable treatment because of something arising from their disability. It will therefore be necessary for the employer to demonstrate its treatment was objectively justified, perhaps by looking at the individual's performance before or since the condition was diagnosed only, during a period where they were well enough to attend work. It might be reasonable perhaps to pro - rata the bonus.

Objective justification

If the treatment of an employee is because of something arising from their disability, then the onus is on the employer to objectively justify it. First, they must show their treatment is designed to achieve a "legitimate aim". This must be a non-discriminatory reason such as economic efficiency or health and safety. The legitimate aim shouldn't solely be about cost, but it could be about cost and something else. An employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were reasonably necessary. The actions will not be considered proportionate if the employer could have achieved the same objective through less discriminatory means.

This does not mean it is unlawful to performance manage an employee with a disability, only that any steps taken must be objectively justifiable.

Example

Following a prolonged period of stress related absence, a senior care worker is now fit to return to work, but is unable to perform their previous role because of the stressful nature of the position, and is only able to function in a different role.

In these circumstances where an employee is unable to return to their former role, before an employer sought to dismiss the employee, they should first consider the possibility of redeployment to a different role. If there were no redeployment opportunities available, ultimately an employer ought to be able to dismiss the employee in these circumstances, because even though the less favourable treatment of dismissal arose because of a disability it would be likely be objectively justified.

Knowledge of the disability

It is not discrimination arising from disability if an employer shows that they did not know and could not reasonably have been expected to know, that the person had the disability. In this context whilst the Ordinance does not require an employer to be a medical specialist, equally it is not possible for them to ignore obvious signs that there is a potential issue, and they should do all they can reasonably be expected to do to find out information about potential disabilities. It is recommended that when making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

For more information about recruitment and dealing with disabled applicants see Chapter 6.

Example

An employee has a good attendance and performance record, but has recently become emotional and upset at work for no apparent reason, and has started having regular absences. They have also been repeatedly late for work and has made some mistakes in their work. The sudden deterioration in the worker's time-keeping and performance and the change in their behaviour at work should have alerted the employer to the possibility that the employee may have a disability. As such, any action the employer may take in relation to these issues would need to be objectively justified, even though they have never been specifically told the employee has a long-term impairment.

1.5 What is harassment?

Under the Ordinance, a person (A) harasses another (B) if:

- **A engages in unwanted conduct related to a Protected Ground; and**
- **Such conduct has the purpose or effect of violating B's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**

OR

- **A engages in unwanted conduct of a sexual nature;**
- **Such conduct has the purpose or effect of violating B's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**

OR

- **A engages in unwanted conduct of a sexual nature or that is related to a Protected Ground;**
- **Such conduct has the purpose or effect of violating B’s dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for B; and**
- **Because of B's rejection of, or submission to, the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**

See section 11 of the Ordinance

The Ordinance recognises three different forms of harassment, these are:

- Harassment related to a Protected Ground;
- Sexual harassment; and
- Harassment related to the rejection or submission to unwanted conduct

Whilst there are similarities between the three types, including the fact that they all:

- relate to unwanted conduct, and
- require that conduct to have the purpose or effect of violating a person’s dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment,

there are subtle differences around the reason for that conduct.

Unwanted Conduct

There is no definition of what is considered as “unwanted conduct” for the purposes of the Ordinance, but this can range from a one-off incident to a campaign of harassment, it can include actions such as spoken or written words, banter, posts on social media, physical gestures, jokes or pranks. However, for “unwanted conduct” to amount to harassment it must first either be related to a Protected Ground or of a sexual nature.

Examples: Unwanted behaviour could include:

- offensive emails;
- spoken or written abuse;
- tweets or comments on websites and social media;
- images and graffiti;
- physical gestures;
- facial expressions; and/ or
- banter that is offensive to you or others.

Violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

All forms of harassment require that the conduct must have either the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. For these purposes it is irrelevant whether or not the conduct was intentional or that the victim did not make the perpetrator aware that the conduct was unwanted.

Example

A group of staff download and share offensive images amongst themselves that make fun of the Islamic women who wear hijabs. A Muslim colleague then inadvertently observes this taking place. They could make a claim for harassment if the behaviour creates a hostile and humiliating environment for them.

In this situation, it is does not matter that the workers never intended for their colleague to know this was taking place, and it was only intended as "banter".

The perception of the recipient

In making the assessment as to whether the conduct has the effect set out above, consideration must be given to the following:

- the perception of the recipient of the conduct in question;
- the circumstances of the case; and
- whether in the circumstances it is reasonable for the conduct to have that effect.

When considering if conduct would be expected to have the effect it did, an objective test is required. If an offence is caused unintentionally, there may be no harassment if the person is being oversensitive. Care should be taken however, about rejecting a complaint of harassment as what one person finds is acceptable and not offensive may not be the case for a different person.

The need for a comparator or to have the Protected Ground yourself

It should also be noted that there is no need for a comparator for harassment related to a Protected Ground or sexual harassment. This means the individual does not have to show that they were, or would have been, treated less favourably than another person. However, a comparator is a requirement in cases of harassment related to the rejection or submission to unwanted conduct.

In addition, for an individual to be the victim of harassment they do not necessarily have to have the Protected Ground themselves.

Example

If a manager racially abuses a black worker in front of a white colleague, the black worker would have a clear claim for harassment related to race. However, if the white colleague is offended they could also bring a claim of harassment related to race.

Sexual Harassment and Conduct of Sexual Nature

Even though sex is not currently a Protected Ground under the Prevention of Discrimination Ordinance, the Ordinance does specifically make sexual harassment unlawful. As with harassment related to a Protected Ground, there must be conduct of an unwanted nature and it must also have the required

purpose or effect of violating a person’s dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. To constitute sexual harassment the unwanted conduct must be of a sexual nature.

There is no definition of what conduct will be considered to be of a sexual nature, but this is likely to include sexual comments or jokes, displaying sexually graphic pictures, suggestive looks, staring or leering or propositions and sexual advances.

Where there is conduct of a sexual nature which then goes on to violate a person’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment, then that will constitute harassment.

Example

The male supervisor of a female employee starts making sexual comments about her body, getting very close to her and resting his hand on her arm. It makes the female employee feel very uncomfortable and intimidated, so she rejects those advances. This is conduct of a sexual nature and has the effect of creating a degrading, humiliating or offensive environment, and so constitutes harassment.

Harassment due to rejection or submission of unwanted conduct

The final form of harassment occurs, where there has been conduct of a sexual nature or that is related to a Protected Ground which has violated a person’s dignity or created an intimidating, hostile, degrading, humiliating or offensive environment. Because of the rejection of, or submission to the conduct, the recipient is subject to less favourable treatment, compared to if they had not rejected or submitted to the conduct, then that will constitute harassment. As noted above, unlike the other two forms of harassment this requires the use of a comparator to establish if less favourable treatment has taken place.

Example

In the above example if supervisor then treats the female employee less favourably as a result of her rejecting his advances, (e.g. makes a reduced discretionary bonus award) then this will also amount to harassment.

Freedom of Speech

The Ordinance contains an exception relating to freedom of expression of an opinion, political view, religious belief or any other implied or actual view. However, the exception cannot apply where there has been deliberate or intentional harassment, or, where the conduct occurred in circumstances where it would appear to a reasonable person that the conduct would create an intimidating, hostile, degrading, humiliating or offensive environment.

Example

An employee comes to work wearing a T-shirt with an anti-gay marriage slogan. The employee concerned is a devout Christian and strongly believes gay marriage is wrong. Despite the fact that the employee is expressing his religious belief, and even if it was not the purpose of wearing the T-shirt to cause offence, if a reasonable person would consider it would have the effect of causing offence to a colleague this would not fall under the exception, and would therefore constitute discrimination.

Protection of Harassment (Bailiwick of Guernsey) Law, 2005

It should be remembered that in addition to rights under the Ordinance, individuals may have rights created under the Protection of Harassment (Bailiwick of Guernsey) Law, 2005 (Harassment Law). The Harassment Law creates both a criminal offence of harassment and also provides for additional civil remedies. The Harassment Law may therefore be applicable to a case of harassment.

1.6 What is victimisation?

Under the Ordinance, victimisation occurs where:

A person (A) victimises another person (B), if A subjects B to a detriment because B has:

- **made a complaint under the Ordinance;**
- **brought proceedings against A or any other person under the Ordinance;**
- **given evidence or information in connection with proceedings brought by any person against A or any other person under the Ordinance;**
- **otherwise done anything under or by reference to the Ordinance in relation to A or any other person (including, for the avoidance of doubt, opposed acts which contravene the Ordinance);**
- **alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of the Ordinance; or**
- **because A knows that B intends to do any of these things, or suspects that B has done, or intends to do, any of them.**

See section 10 of the Ordinance

Victimisation arises when a person is subjected to a detriment because they complained of discrimination or supported another person's complaint of discrimination. This is sometimes known as a protected act.

In claims of victimisation there is no need for a comparator.

What's meant by detriment?

Detriment means you've suffered a disadvantage of some sort or been put in a worse position than you were before.

Example

A Jewish employee raises a grievance against their line manager claiming they have been discriminated against on the grounds of their religion. The raising of a grievance in these circumstances constitutes a protected act.

If their line manager then excludes the employee from team meetings as a result of them raising the grievance, this would be victimisation because the employee has suffered a detriment as a result of raising a grievance.

Complaint can be against a different person and does not have to be successful

Victimisation is often carried out by the same person that has been the subject of a discrimination complaint, but this does not have to be the case.

It does not matter if the original complaint that is the subject of the protected act is upheld or rejected. Indeed, victimisation can still occur as a result of someone making or stating they intend to make a complaint, even if they ultimately never raise one. However, the Ordinance does state that victimisation cannot be claimed where the victim gives false evidence or information, or makes a false complaint or allegation, or where the evidence or information is given, or the complaint or allegation is made, in bad faith.

Example

A person brings an unsuccessful Tribunal claim against their former employer for discrimination on the grounds of sexual orientation. The case is widely reported in the local media.

A manager then interviews the person for a new job at a different company, but during the recruitment process the manager recalls the previous press coverage and rejects the application because they believe that the person is a troublemaker. This would amount to unlawful victimisation, even though the original complaint was against someone else and it was unsuccessful.

Chapter 2: Protected Grounds

This chapter will cover the following topics:

- What is disability?
- What is race?
- What is carer status?
- What is sexual orientation?
- What is religion or belief?

The Ordinance makes it unlawful to discriminate against someone because of what are known as “Protected Grounds”. When the Ordinance comes into force there will initially be five Protected Grounds which are:

- **Disability;**
- **Race;**
- **Carer status;**
- **Sexual orientation; and**
- **Religion or belief**

See part I of the Ordinance

This chapter of the guide will explain the circumstances when someone is deemed to have a Protected Ground and is covered by the Ordinance.

Discrimination on other grounds

In addition to the five Protected Grounds above, it is already unlawful in Guernsey to discriminate in relation to employment on the grounds of sex, gender reassignment, marital status, pregnancy or maternity under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 (Sex Discrimination Ordinance). See Legislation page- number 6.

Whilst many of the concepts under the Ordinance and the Sex Discrimination Ordinance are very similar, this guidance is solely focussed on the five new Protected Grounds and how they are dealt with in employment situations so will not cover discrimination under the Sex Discrimination Ordinance.

It is intended that a second phase of the discrimination legislation changes will be brought in at some point from 2025 onwards and that this is likely to expand the current protection to include sex, gender reassignment, marital status, pregnancy and maternity as Protected Grounds under the Ordinance and eventually repeal the existing Sex Discrimination Ordinance. At the same time this takes place, it is anticipated that age will also be added as an additional Protected Ground. Until this takes place, it will be possible to bring a combined claim under both the Ordinance and Sex Discrimination Ordinance, for example where someone has suffered both sex and race discrimination.

A comparison between Guernsey, Jersey and the UK

For employers who either have a presence in other jurisdictions, or who may have worked in other countries, it is important to understand that there are legal differences in Guernsey and elsewhere. Set out below is a table which shows how the Protected Grounds (which are sometimes referred to as protected characteristics elsewhere) will compare with the UK and Jersey:

Legal protection from discrimination for different grounds/characteristics in different jurisdictions

E&SP: Currently in force for employment and service provision
E: Currently in force for employment only
** Not yet in force, but planned

Protected ground/ characteristic	Guernsey	Jersey	UK
Disability	E&SP	E&SP	E&SP
Race	E&SP	E&SP	E&SP
Carer Status	E&SP		
Sexual Orientation	E&SP	E&SP	E&SP
Religion or Belief	E&SP		E&SP
Sex	E	E&SP	E&SP
Pregnancy/ Maternity	E	E&SP	E&SP
Gender re-assignment	E	E&SP	E&SP
Marital status	E		E&SP
Age	**	E&SP	E&SP

E: Protection for sex, gender reassignment, pregnancy or maternity and marital status is currently given by the Sex Discrimination Ordinance for employment matters only. Protection from discrimination on these grounds in a non-employment context will be considered in phase 2 which will not come in until at least 2025.

** In Guernsey age will not become a Protected Ground until phase 2.

2.1 Protected Grounds - disability

Disability is one of the Protected Grounds under the Ordinance.

A person has a disability if the person has one or more long term impairments.

A long-term impairment is an impairment which:

- **has lasted, or is expected to last, for not less than six months; or**
- **is expected to last until the end of the person's life.**

For these purposes an impairment means:

- **the total or partial absence of one or more of a person's bodily or mental functions, including the absence of a part of a person's body;**
- **the presence in the body of organisms or entities causing, or likely to cause, chronic disease or illness;**
- **the malfunction, malformation or disfigurement of a part of a person's body;**
- **a condition or malfunction which results in a person learning differently from a person without the condition or malfunction; or**
- **a condition, illness or disease which affects a person's thought processes, perception of reality, social interactions, emotions or judgement or which results in disturbed behaviour.**

See section 1 of the Ordinance

A person has a disability is they have one or more long term impairments. The definition of disability has deliberately been drafted on a wide basis, in order to capture most long-term impairments that individuals may have. In particular, the definition is wider than the respective positions in the UK and Jersey. In the UK it

is necessary to prove the disability has a substantial and long-term negative effect on a person's ability to do normal daily activities and the disability has lasted or is expected to last for twelve months or more. In Jersey there is a broad interpretation of what is an impairment and there is an additional requirement that the impairment could have an adverse effect on the individual's ability to participate or engage in any area of activity that is protected under the Discrimination (Jersey) Law 2013. The time-period in Jersey for an impairment to be considered long-term is the same as in Guernsey, at six months.

Where it is identified that an employee has a disability, then it will trigger certain obligations including the duty to make reasonable adjustments. For further details on this duty follow the link to Chapter 3- reasonable adjustments.

Impairment

The first question that needs to be considered in determining whether or not a person has a disability is do they have an impairment? An impairment can be physical, mental, intellectual or sensory. It can include illnesses or diseases, or disfigurements and is intended to capture almost any condition, illness or disease as can be seen from the definition. Whether or not a person has an impairment will always come down to their individual circumstances, but this is not intended to be a high threshold and in particular, there is no requirement for the impairment to have a particular level of adverse effect on the individual or their day-to-day activities.

Example

A new employee in a bank is struggling with their induction which is a lengthy written document, and they raise a complaint commenting that they prefer to learn complicated concepts through visual means rather than reading about them.

Whether or not the employee in this example has a disability will depend on if they have an underlying condition such as dyslexia. If they do, then this would constitute a disability – even if it has never been diagnosed. However, if this is purely a preference of learning style, then even though they may learn differently from other people this will not constitute a disability.

Long term

In order to qualify as a disability, any impairment must be “long term”. This means it must last, or be expected to last for not less than six months’ or until the end of the person’s life.

When considering if an impairment has lasted, or is expected to last for six months then you should include any period of remission where the impairment has the potential to recur, or any period where the person is receiving medical treatment which controls the symptoms of the impairment to any extent. This is intended to cover conditions such as multiple sclerosis or cancer which can go into a period of remission.

If there is any doubt as to whether an impairment is a long-term impairment, medical evidence may be sought by the person with the impairment from a registered health professional, special educational needs coordinator or occupational health practitioner, as appropriate, as to the expected duration of the impairment.

With respect to reasonable adjustments (see Chapter 3) if there is any doubt about whether the disabled person is placed at a substantial disadvantage, an employer may seek medical evidence and consult with others about how any disadvantage may be removed or reduced.

Example

Whilst on holiday, an employee suffers a fracture of their arm. Such an injury would likely constitute an impairment, as it constitutes a malfunction of part of their body.

If the break was only a minor fracture and it was expected to heal within six months’ then it would not be classed as “long term”, so would not constitute a disability. However, if the injury was a serious break, that would be expected to take more than six months to be treated, then it would be deemed to be long term and so would constitute a disability.

Anxiety, depression, stress or other mental health conditions

Where an individual has anxiety, depression, stress or other mental health conditions on a long-term basis (i.e. has lasted or is expected to last for at least six months), then this will likely amount to a disability. Whilst it is not necessary for someone to receive a specific formal diagnosis in order to be considered to have an impairment, an employee cannot simply self-diagnose that they might have a mental health condition.

In the case of anxiety, depression, stress or other mental health conditions, it can be difficult to anticipate the likely duration of the impairment and, as noted above the Ordinance specifically anticipates medical evidence can be used for these purposes. Furthermore, medical evidence can also be useful in considering the legal duty to make reasonable adjustments, including matters such as a phased return to work.

Even if someone has an impairment which has not lasted, and is not expected to last, six months and as such does not yet classify as a long-term impairment, a good employer should always consider making adjustments. For example, when an employee has anxiety or stress, the employer may have a duty of care to their staff and where possible it is better to keep someone in work, than off sick. In addition, where an employer fails to address issues such as stress in the workplace, a condition may become a long-term impairment and therefore a disability due to the passage of time.

2.2 Protected Grounds – race

Race is one of the Protected Grounds under the Ordinance.

Race can mean any of the following>

- **colour,**
- **nationality,**
- **ethnic origins,**
- **national origins,**
- **descent, which includes caste.**

See section 2 of the Ordinance

In a lot of instances whether someone has been discriminated on the grounds of their "race" will be obvious. For example, it will be unlawful to treat someone less favourably because of their "skin colour" or "nationality". This also extends to treating someone less favourably on the grounds of their "national origins" or “descent” which includes being of Bailiwick of Guernsey origin.

The term “caste” is not defined in the Ordinance. In general terms it relates to a hierarchical system within which membership is determined by birth.

The caste system is sanctioned by Hinduism but is also found in other societies around the world as well. The term "ethnic origin" is much broader, and covers identifiable groups who might share the same language, religion, literature, or geographical origin etc. such as Jews, Romany Gypsies and Sikhs.

Two or more distinct racial groupings

In addition, it is possible that a racial group can comprise of two or more distinct groupings, such as Russian Jews, Gypsies and Irish Travelers and British Sikhs.

Example

An Irish employee claimed that their manager ridiculed their "funny accent", referring to them as an "Irish gipsy" and made frequent derogatory references to them in relation to a reality TV show.

This would be an example of harassment on the grounds of race, using two distinct racial groupings.

2.3 Protected Grounds – carer status

Carer status is one of the Protected Grounds under the Ordinance.

A person (A) has the Protected Ground of carer status if A provides care or support on a continuing, regular or frequent basis for a person with the Protected Ground of disability (B), and

- **B's disability is of a nature which requires continuing, regular or frequent care or support of the kind that A is providing; and**
- **A lives with B or is a close relative of B.**

For these purposes a close relative means any of the following relationships:

- **Spouse**
- **Parent**
- **Partner**
- **Grandchild**
- **Child**
- **Grandparent**
- **Sibling**
- **Parent or child of a spouse or partner**

See section 3 and section 72 of the Ordinance

Carer status refers to someone who has continuing, regular or frequent responsibility for ongoing care or support of another person. The carer must fall within the definition above of a close relative, or otherwise live with the person who receives the care.

Disability

In order to qualify for carer status, the person receiving the care or support must be deemed to have a disability that is covered by the Ordinance, i.e. they must have a long-term impairment. This is when an impairment lasts for at least 6 months or until the end of a person’s life.

Continuing, regular or frequent care or support

The disability must be of a nature which requires “continuing, regular or frequent care or support”, but it could cover things such as annual hospital visits for check-ups, or a series of continuing issues that may occasionally arise.

There is no requirement that the care or support must be permanent. Attendance at a one-off hospital appointment would be unlikely to be considered to be “continuing, regular or frequent care or support” but if the visit was part of a package of support for different appointments relating to the same condition, it may.

Example

An employee submits a flexible working request to reduce their full-time hours, in order to provide care and support for their elderly mother who has dementia and requires increased help during the day, especially at lunch times. The employee in this case would be classified as having carer status as they have a close relative who is disabled and they provide care and support on a regular basis.

Whilst there is no duty to make reasonable adjustments in respect of carers, if the employer intended to refuse the request on the basis that the role could not be part-time working, they would have to be able to objectively justify the provision, criterion or practice to work full-time otherwise the decision could amount to indirect discrimination.

Whether or not such a policy would be objectively justified would depend upon the wider circumstances taking into account matters such as customer demand, the ability of other existing staff to cover, or the ability to recruit other staff.

Professional carers

There is an exception for where the care is support that is provided by a person in a paid, professional capacity. This might be under a contract of employment or in the course of self-employment.

Example

A nurse who is employed as a care worker supporting vulnerable adults and through that role provides care for a close relative, would not be considered as having carer status.

However, if the support given is unpaid and not part of a professional role/job then this status would be protected.

2.4 Protected Grounds – sexual orientation

Sexual orientation is one of the Protected Grounds under the Ordinance.

Sexual orientation can mean a person's sexual orientation towards:

- **persons of the same sex**
- **persons of a different sex**
- **persons of both the same sex and persons of a different sex**

See section 4 of the Ordinance

Sexual orientation describes who a person is attracted to. Discrimination on the grounds of someone's sexual orientation would include treating someone less favourably because of who they are attracted to e.g. that they are gay, lesbian, bisexual or heterosexual. This would be unlawful. The Ordinance would also protect someone who is treated less favourably because they are connected to someone who has a particular sexual orientation. This is known as discrimination by association. The Ordinance would also protect someone who it is believed (imputed) to have a particular sexual orientation even if that is not the case.

Example

Two employees get into an argument over a work issue. During the course of that argument, one of the employee's uses a derogatory term relating to what he believes the other person's sexual orientation to be.

The use of derogatory terminology relating to a person's sexual orientation in these circumstances is likely to amount to harassment, even if the employee does not have that particular orientation.

It is important to remember that a person's sexual orientation is different from their sex, gender identity (i.e. how an individual identifies) and/or whether they have undergone gender reassignment.

2.5 Protected Grounds – religion or belief

Religion or belief is one of the Protected Grounds under the Ordinance.

Religion means any religion and includes any religious background or outlook, and a reference to religion also includes a reference to a lack of religion.

Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

See section 5 of the Ordinance

Religion

Religion can cover any religion, such as Christianity, Judaism, Islam or Buddhism, or a smaller religion like Rastafarianism, as long as it has a clear structure and belief system. The Ordinance will also protect against those individuals who may be discriminated against because they lack either a specific or any religion, as well as manifestations of their faith (i.e. how they believe a religion should be practiced by way of worship, observance, teaching and practice).

Example

An airline operates a strict uniform policy that prevents the wearing of visible jewellery, and so rejects a request from a Christian employee to allow them to wear a plain silver cross as an expression of their faith.

Such a policy would amount to indirect discrimination, and it is unlikely the airline would be able to objectively justify it.

Philosophical beliefs

The Ordinance also extends to philosophical beliefs. The Ordinance does not define what this term means, but based on decisions in the UK which the Guernsey tribunals are likely to follow in order to be protected any belief must:

- be genuinely held;
- not just be an opinion or view point based on the present state of information;
- be weighty and substantial;
- attain a certain level of cogency, seriousness, cohesion and importance; and
- be “worthy of respect in a democratic society”.

Example

A person who considers themselves an ethical vegan and who does not eat or wear animal products or use banknotes thought to be produced with animal products is capable of having a philosophical belief within the meaning of the Ordinance.

So if a colleague deliberately left a piece of raw meat on their desk as a prank, then if this caused offence, then this would likely constitute harassment related to a Protected Ground.

Chapter 3: Duty to make reasonable adjustments

This chapter will cover the following topics:

- What is an adjustment?
- What is considered reasonable?
- The duty to consult
- Who pays for adjustments?
- What are the consequences of a failure to make reasonable adjustments?

The Ordinance recognises that achieving equality for disabled people may mean changing the way that employment is structured in order to create a level playing field for all. This could be amending workplace policies, removing physical barriers or providing extra support for a disabled employee or job applicant.

The Ordinance introduces a duty on all employers to take steps to remove, reduce or prevent the obstacles that a disabled employee or job applicant may face in the workplace, where it is reasonable to do so. This is known as the duty to make reasonable adjustments and where an employer fails to comply with this duty, this will be unlawful under the Ordinance.

A person (A) is under a duty to make reasonable adjustments:

- **where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;**
- **where a physical feature puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, for A to take such steps as it is reasonable to have to take to avoid the disadvantage;**
- **where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with persons who are not disabled, to take such**

steps as it is reasonable to have to take to provide the auxiliary aid.

See section 32 of the Ordinance

For the purposes of the Ordinance the phrase “substantial disadvantage” simply requires there to be a disadvantage that is more than minor or trivial. This is not intended to be a high bar.

This chapter seeks to explain:

- What is an adjustment?
- What is considered reasonably
- The duty to consult
- Who pays for adjustments?
- What are the consequences of a failure to make reasonable adjustments?

In addition, it should be remembered that when dealing with information relating to a disability this constitutes special category data, and particular care should be taken when using and storing this kind of information in order for employers to comply with their duties under the Data Protection (Bailiwick of Guernsey) Law, 2017. For further information please refer to the website of the Office of the Data Protection Authority at https://www.odpa.gg/

3.1 What is an adjustment?

Where it is identified that a disabled person is put at a substantial disadvantage when compared with someone who does not have that disability, then the Ordinance places a duty on an employer to make reasonable adjustments.

The employer may have to change the way things are done, make changes to a physical feature of a building, or provide aids such as special computer software to help that individual do their job. This is a two-stage process, in that the employer must:

- first, consider what adjustments could be made; and
- secondly, whether those adjustments are reasonable.

The purpose of an adjustment is that it must avoid the disadvantage. As such, the employer is not required to make an adjustment if it will have little or no impact on the disadvantage that they are seeking to resolve.

The need for an adjustment may arise where there is substantial disadvantage which is:

- caused by a provision, criterion or practice;
- caused by a physical feature; or
- able to be removed by an auxiliary aid.

Provision, criterion or practice

The term provision, criterion or practice is also used in indirect discrimination, and in broad terms means any form of policy or rule in the workplace that applies to everyone, such as a dress code, hours of work, or absence polices, but places a disabled person at a substantial disadvantage. It is irrelevant whether the employer intended the policy to discriminate against a person with a disability or not.

When considering reasonable adjustments in relation to a provision criterion or practice, it is important to remember they are not always about the physical environment, they may also include providing information in an accessible format, for example providing manuals in bigger typeface or in braille, or may involving changing a process or procedure, or adjustments to hours of work, or how work is organised.

The issue is whether a disabled person has been placed at a substantial disadvantage by the policy, if they have, then the reasonable adjustment duty arises. This may also amount to indirect discrimination. For further information on indirect discrimination please refer to Chapter 1.

Example

A full-time employee has chronic fatigue syndrome (CFS). As a result their productivity reduces in the afternoons, and they are making a large number of errors due to tiredness.

The full-time working hours are a provision, criterion or practice, and this places the employee with CFS at a disadvantage. Adjustments the employer may wish to consider include:

- Alteration to working hours
- Flexible working, such as working from home, part-time working, or job sharing
- Changing tasks or the pace of work to avoid exacerbating the condition
- Allowing for reasonable time off for appointments and treatment
- Changing layout of workspace, such as providing a quiet working station
- More frequent and longer breaks

Adjustment to physical features

The duty to make reasonable adjustments in relation to physical features will not come into force until 1 October 2028 at the earliest, nor will it be possible to bring a claim of indirect discrimination due to a physical feature until this date.

The purpose of this section of the guidance therefore is to allow employers to understand what adjustments they will need to make once this aspect of the Ordinance comes into force.

A physical feature means:

- **a feature arising from the design or construction of a building;**
- **a feature of an approach to, exit from or access to a building; or**
- **a fixture or fitting in or on premises.**

It should be noted that the terms “fixture or fittings” are not defined under the Ordinance, but they would have their normal meanings so a fixture would include items such as light fittings or doors, whereas fittings would cover items such as office furniture.

Where it is identified that a physical feature causes a substantial disadvantage then an employer should consider what adjustments it can make to avoid that disadvantage. In the context of a physical feature this may mean:

- removing the physical feature in question,
- altering it, or
- providing a reasonable means of avoiding it.

Example

An employee had a stroke a number of years ago and as a result, has a number of different impairments, including being partially sighted and reduced mobility. In order to gain access to the building, the employee has to walk up a flight of stairs and through a corridor which is dimly lit, both of which place the employee at a disadvantage to their colleagues, and they struggle to gain access to the building.

Both the stairs and lighting within the building are physical features, and so the employer should consider whether it is possible to remove, alter or provide means to avoid it. For example, is there another way the employee can gain access to the building, such as a rear entrance to avoid both the stairs and corridor. Alternatively, the employer could install a handrail on the stairs and improve the lighting in the corridor*.

* The duty to make reasonable adjustments to physical features does not come into force until 1 October 2028 at the earliest

Auxiliary aids

The Ordinance also places a positive obligation on employers to provide auxiliary aids, which will avoid a disabled person being put at a substantial disadvantage.

For these purposes an auxiliary aid means equipment or a service that:

- **is used by a disabled person, and**
- **provides assistance which compensates for or removes any disadvantage or inequality connected with their disability.**

but does not include any item of personal equipment which the person would reasonably be expected to own.

Auxiliary aids could include the provision of a specialist piece of equipment such as an adapted keyboard, specific chair or text to speech software. Auxiliary services could include the provision of a sign language interpreter or a support worker for a disabled employee. Whether these adjustments are reasonable is a separate question and needs to be assessed. See next part of Chapter 3.

Example

An employer might have to provide special equipment such as an adapted keyboard for an employee who has carpal tunnel syndrome, a large screen for a visually impaired employee, or an adapted telephone for someone with a hearing impairment.

Though the obligation to make adjustments to physical features does not come into force until 1 October 2028 at the earliest, the duties in relation to any provision, criterion or practice, or auxiliary aids are in force from 1 October 2023. The three types of reasonable adjustments are not intended to be mutually exclusive, so if an adjustment relates both to a physical feature and the provision of an auxiliary aid, then the employer would be under a duty from the initial

commencement of the legislation on 1 October 2023 to supply the auxiliary aid.

Example

An employee has seasonal affective disorder (SAD) and is recruited to join a team who currently work at a fixed desk in a dark corner of the office with no natural daylight. Their desk itself is a fixture and so constitutes a physical feature. Accordingly, moving their actual desk (i.e. the physical feature) would strictly not be a requirement until 1 October 2028. However, the employer still needs to consider whether the duty to make reasonable adjustments arises from 1 October 2023 in respect of either a provision, criterion or practice or the provision of an auxiliary aid.

Accordingly, the requirement for the employee to sit with their team would likely be considered a provision, criterion or practice, so allowing the employee to sit a different desk with natural daylight may be considered a reasonable adjustment, if the location of the desk puts the employee at a substantial disadvantage.

Alternatively, the provision of a light box, which replicates natural daylight could be considered an auxiliary aid, and so could also be considered a reasonable adjustment.

The duty to make reasonable adjustments can often overlap to some extent with the concept of indirect discrimination, although it is important it is still considered separately.

Example:

A company has a policy that no headphones are to be allowed in the office but a person with impaired sight, who uses text to speech software, or someone on the autistic spectrum may need headphones to enable them to do their job properly.

The policy of no headphones in the office could be considered to be indirect discrimination because of the provision, criterion or practice or the denial of a reasonable adjustment (auxiliary aid) if requested.

Adjustments to rented property

In practice many employers do not own the premises in which they operate, rather they rent the building or office as tenants from a commercial landlord. In most instances, the employer will have restrictions under the terms of their lease in relation to making adjustments to the property they occupy. The Ordinance creates specific duties for landlords. Landlords are required to make and pay for minor improvements in response to reasonable adjustment requests to replace or provide signage, to replace taps or door handles, to replace, provide or adapt door entry systems, to change the colour of a wall, door or surface. With respect to other changes to physical features, commercial landlords are required to allow reasonable adjustments for the benefit of employees of an employer who occupies a building as tenant.

In granting permission for reasonable adjustments to a physical feature (other than the minor improvements already listed), a landlord may require a tenant to:

- to pay any or all of the costs of any works undertaken under this section;
- to engage an appropriately qualified tradesperson to undertake the work; and
- to restore the property to its original condition at the end of the tenancy.

Where a landlord unreasonably refuses permission to carry out works, then the landlord is considered to have failed to comply with its duty to make reasonable adjustments, and so would be deemed to have discriminated against the disabled person.

The employer is the tenant and would therefore be expected to carry out and pay for the alteration unless it was a disproportionate burden for them to do so.

Example

An employer asks its landlord for permission to widen a doorway to enable an employee in a wheelchair to have access and to put in a disabled toilet. In these circumstances the landlord is not allowed to unreasonably refuse this request but can require the employer (who is also the tenant) to restore the property to its original condition at the end of the tenancy.

The employer would be required to consider this adjustment. The landlord could not refuse permission but would not need to do it or pay for it. It is the employer's responsibility to pay for the change and restore at the end of the tenancy (which the landlord could request) but the employer would not have to do this if to do so would be a disproportionate burden.

An example of where the adjustment may be identified as a disproportionate burden could be where the installation would:

- affect planning or building control;
- affect fire safety;
- stop the building from operating; or
- be disproportionately financially onerous i.e. if the tenancy was a short one or where the building related to a very small business and the costs are disproportionate.

However, what is a disproportionate burden will vary depending on the circumstances of the case.

See the next section of chapter, what is considered reasonable which explains about disproportionate burden.

3.2 What is considered reasonable?

If a substantial disadvantage does exist, and the employer is aware or should be aware the person is disabled, then they must make “reasonable” adjustments.

A person (A) does not discriminate against a disabled person if:

- **A fails to make an adjustment to avoid a disadvantage to a disabled person if to do so would be a disproportionate burden on A; or**
- **A does not know and could not reasonably be expected to know that the person was a disabled person.**

See section 32(6) of the Ordinance

At a practical level there are various factors that determine whether a particular adjustment is considered reasonable. This is ultimately an objective test and not simply a matter of what the employer or the disabled person may personally think is reasonable. These factors can include:

- how effective the adjustment will be to reduce or remove the disadvantage that the disabled employee will otherwise experience. There is a requirement to consult the disabled person to see what would be most effective. If the most effective solution is a disproportionate burden there may still be an alternative adjustment that could be made to partially remove the disadvantage;
- its practicality and/or effect on the business;
- the cost;
- the length of a tenancy in the case of changes to physical features of a building;
- the organisation’s resources and size;
- the availability of financial support; or
- other considerations such as planning, building control or fire safety, where applicable.

When considering how reasonable an adjustment may be, some people may think that disabled people are treated better or 'more favourably' than non-disabled

people in certain respects. Sometimes, this may be what is needed to remove the disadvantage and create equality of opportunity for the disabled person. Making an adjustment in this way is not discrimination against a person who does not have a disability.

The cost of many adjustments will either be nothing, or a minimal amount and so where this is the case, as long as the adjustment is workable and effective, then it would be considered reasonable.

The size and resources of the employer are also another factor. For a small business with limited resources, if the required adjustment costs a significant amount, then it is less likely to be reasonable to make the requested changes. However, costs should never be looked at in isolation, an employer should always consider the other factors too, including the availability of financial and other support.

Example

A newly disabled employee (who now uses a wheelchair) had historically worked at workstation in what would now be in an inaccessible office on the third floor, in an old office building without a lift. If the employer had office space on the ground floor either at that building or another office building with an accessible workstation, then it would likely be considered reasonable to move the employee's workstation or place of work to an accessible location.

If the employer did not have any suitable and accessible office space, and was only located on the third floor of the building, then it would be unlikely that the installation of a lift would be considered reasonable, although the employer should still consider other alternatives such as whether the employee could work from home.

Example

An employer has a written policy which covers all types of leave. The employer provides a reasonable adjustment for a disabled employee who has a visual impairment, by providing an audio file of this policy. As this adjustment would cost the employer nothing, it would be considered reasonable.

Example

An employee who has a learning disability has a contract to work from 9am to 5.30pm but wishes to change these hours to start at 9:15am. This is because the friend who accompanies them to work is no longer available before 9am. They propose to make up the time over their lunch break. Allowing the employee to start slightly later is likely to be a reasonable adjustment for that employer to make.

When can an employer be assumed to know about disability?

Generally, where one member of staff (e.g. such as a HR officer) or an agent (e.g. such as a recruitment agent) knows of an employee's or applicant's disability or potential disability, then the employer will not be able to claim that they do not know of the disability. They will therefore be under a duty to make reasonable adjustments. Employers should ensure that where information about a disabled person may come through different channels, there is a route for the sharing of that information in order to comply with their duties. This should be done with the consent of the disabled person and respecting confidentiality.

Example

A recruitment agent is engaged by an employer to identify suitable candidates for a number of new roles. The recruiter becomes aware of a candidate's disability which might be relevant to their ability to undertake an aptitude test. The candidate consents to this information being disclosed to the employer. However, the recruiter does not draw this to the employer's attention.

As the recruiter is acting as the employer's agent, it is unlikely to be a defence for the employer to claim that they did not know about the disability. This is because the information gained by the recruiter on the employer's behalf is likely to be attributed to them.

3.3 The duty to consult

There is no requirement on a disabled person to either make a request for reasonable adjustments, or when asked to suggest what those adjustment should be. The Ordinance does, however, introduce a specific duty on employers to consult.

Before a person (A) makes a reasonable adjustment, it must consult the disabled person to ask their view as to what steps would avoid the disadvantage and may also consult such other persons as A considers appropriate.

See section 32(3) of the Ordinance

The duty to consult a disabled person over reasonable adjustments is different to the position in the UK and Jersey, where it is only considered good practice. There is no particular specific form or duration of consultation required under the Ordinance, but it is recommended that this should take place in a meeting, with minutes kept and any agreed outcomes recorded.

Whilst many adjustments will be straightforward and can be agreed directly with the individual, from time to time it might be useful to consult with third parties, including medical professionals, as well as charities and other third sector organisations. There is no requirement to do so, but this might be helpful and most advice is either free, or available at minimal cost. Wherever advice is sought, it is recommended this should also form part of the consultation process with the disabled person.

In addition, it should be remembered that when dealing with information relating to a disability that this constitutes special category data, and particular care should be taken when using and storing this kind of information in order for employers to comply with their duties under the Data Protection (Bailiwick of Guernsey) Law, 2017. For further information please refer to the website of the Office of the Data Protection Authority at https://www.odpa.gg.

3.4 Who pays for adjustments?

Whilst many adjustments either have no or minimal cost, the Ordinance makes it clear that it is the employer's responsibility to pay for any adjustments, and these costs cannot be passed on to the disabled person.

A person (A) may not require a disabled person to pay any or all of A's costs of complying with a duty to make reasonable adjustments.

See section 32(7) of the Ordinance

When assessing if an adjustment is reasonable, all factors should be taken into consideration. It might be that the adjustment has a significant cost but when considering the alternative costs, such as the costs involved in recruiting and training a new member of staff to replace the disabled person, the adjustment might be seen as being a more cost-effective option. Note however that it is not just the cost that determines whether the adjustment is reasonable, but considerations such as practicality and resources of the business as well.

There may be financial support available to some employers towards the cost of making an adjustment. As such, it may be unreasonable to decide not to make an

adjustment based on its cost before finding out whether financial assistance for the adjustment is available. See access to work scheme.

3.5 What are the consequences of a failure to make reasonable adjustments?

A failure on the part of an employer to take steps to avoid a disadvantage to a disabled person is a failure to comply with a duty to make reasonable adjustments. The employer is deemed to have committed an act of discrimination. This is why it is important to consult with the disabled person in respect of any reasonable adjustments and where appropriate to seek advice.

It is important to note that the complaints process starts with trying to resolve the issues between the employer and the employee. This is called pre-complaint conciliation.

It may be that the conversation about reasonable adjustments did not take place. It may be that the disadvantage the disabled person was experiencing was not recognised or it may be that the reasonable adjustment to avoid the disadvantage was not identified or not provided when it could have been. In such cases both parties are encouraged to find a resolution to the situation.

For more on the complaints process please see Chapter 10.

Chapter 4: Equal pay and terms and conditions

This chapter covers the following topics:

- Equal pay
- Equal treatment
- Material factor defence
- Discussions about pay

The Ordinance introduces the rights of equal pay and equal treatment. The right of equal pay ensures that two people in the same employment (one with a Protected Ground and the other without the Protected Ground) performing equal work must receive equal pay, unless any difference in pay can be justified. The right of equal treatment covers any other terms and conditions of employment. The right for equal pay and the right of equal treatment, although similar, are two

separate rights. Both are discussed in detail in this chapter of the guidance.

It is important to remember that the Ordinance does not currently cover the situation where the difference in pay is due to the sex of the parties concerned, as sex is not currently one of the Protected Grounds. Any claim for equal pay or equal treatment on the grounds of sex must be dealt with under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 and is therefore not dealt with in this guidance. See Legislation page- number 6.

Other jurisdictions may also have legislation which addresses differences in pay or treatment due to reasons of age. Age is this is not yet a Protected Ground in the Guernsey legislation so again this is not dealt with under this guidance.

4.1 Equal pay

The right to Equal Pay requires that a person with a Protected Ground who is employed to do work which is equal to the work of someone else (who does not share the same Protected Ground) should not be paid differently, unless that difference can be justified through what is known as a material factor defence. This right is implied into everyone’s contract and known as an equal pay clause.

The conditions for an equal pay clause are:

a person (A) with a particular Protected Ground is employed to do work that is equal to work that a comparator (B) who does not have the particular Protected Ground does;

- **B is employed by A's employer or by an associate of A's employer;**
- **both A and B are employed in Guernsey;**
- **B and A were employed to do the work that is equal within three years of each other; and**
- **B must be a real person.**

See section 16 of the Ordinance

At present where the difference in pay is due to sex, any claim for equal pay in relation to sex must be dealt under The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005. See Legislation page number 5.

Is work equal to that of a comparator?

Work is considered as equal to that of a comparator if both people are doing the same job. This may also be the case where they do a broadly similar job.

A's work is equal to that of B's if -

- **A's work and B's work are the same or broadly similar, and**
- **such differences as there are between their work are not of practical importance, having regard to the frequency with which differences between their work occur in practice and the nature and extent of the differences.**

See section 16(5) of the Ordinance

Example

A Catholic employee, who works as a trust administrator for a financial services business, finds out that another employee who is Protestant and was employed at the same time as a fund administrator for a different part of the business, (but also based in Guernsey) is paid £10,000 a year more. Even though they are employed as administrators in different parts of the business, if their work is broadly similar, and the differences are not of practical importance, then their work would be considered equal.

Work of equal value

Neither the Ordinance nor the Sex Discrimination Ordinance at present extend to work of equal value (i.e. two jobs that are different but objectively are considered of equal worth), although it is intended that equal pay for work of equal value will be proposed at some point in the future in relation to any difference in pay due to the Protected Ground of sex only.

Equal pay clause

The right to equal pay covers not just the basic salary or rate of pay of an employee, but also extends to any other financial benefit relating to their employment. This could include bonuses, or rights under a pension scheme, even where previously the employee was not able to participate in the scheme.

An equal pay clause is a provision which relates to pay or any other financial benefit relating to A's employment (including, for the avoidance of doubt, membership of or rights under an occupational pension scheme) that has the following effect:

- **if a term of A's contract of employment is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;**
- **if A does not have a term in A’s contract of employment which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.**

See section 16 (4) of the Ordinance

Where there is a difference in pay, unless it can be justified through a material factor defence (see below) the equal pay clause has the effect to modify the contract of employment of the individual to remove that difference. Not only does that clause give the employee the right to claim back pay for up to six years, it also amends their rate of pay going forwards. However, it should be noted that back pay cannot be awarded in respect of the period prior to 1st October 2023 i.e. the stated six years back pay can only be claimed once the Ordinance has been in force for six years. Claims cannot be made for back pay before the Ordinance came into force.

4.2 Equal treatment

The right to equal treatment requires that a person with a Protected Ground who is employed to do work that is not materially different from someone else (who does not share the same Protected Ground), should not be employed on different terms and conditions because of a Protected Ground, unless that difference can be justified through what is known as a material factor defence. This right is implied into everyone’s contract and known as an equal treatment clause. Pay is dealt with separately by the right to equal pay. See Chapter 4.1.

The conditions for an equal treatment clause are:

- **a person (A) with a particular Protected Ground is employed to do work that is not materially different from work that a comparator who does not have the particular Protected Ground (B) does;**
- **B is employed by A's employer or by an associate of A's employer;**
- **both A and B are employed in Guernsey;**
- **B and A were employed to do the work that is not materially different within three years of each other; and**
- **B need not be a real person.**

See section 17(1) of the Ordinance

At present where the difference in terms and conditions is due to sex, then any claim for equal treatment in relation to sex must be dealt under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005.

Equal treatment Clause

The equal treatment clause covers any terms and conditions of employment other than pay. This could include working hours, holiday entitlement and entitlement to breaks.

An equal treatment clause is a provision which relates to the terms and conditions of employment other than pay (including, for the avoidance of doubt, working hours, holiday entitlement and entitlement to breaks) that has the following effect:

- **if a term of A's contract of employment is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;**
- **if A does not have a term in A's contract of employment which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.**

See section 17(4) of the Ordinance

Where there is a difference in terms and conditions, unless it can be justified through a material factor defence (see below) the equal treatment clause has the effect to modify the contract of employment of the individual to remove that difference. Not only does that clause give the employee the right to claim damages for any loss they might have suffered, it also amends their terms and conditions going forwards, subject to certain conditions and limitations.

Example

In addition to the usual bank holidays, an employer who has a largely Hindu workforce, gives any employees who are Hindu an extra day off each year to celebrate Diwali.

In these circumstances an equal treatment clause, would entitle an employee who was not a practising Hindu to also take the day off work.

Differences between Equal Pay and Equal Treatment

Whilst the rights of equal pay and equal treatment are similar, there are a couple of important differences between the rights:

- The right to equal pay requires people to undertake equal work, whereas for equal treatment the work must not be materially different
- The right to equal pay requires the comparator has to be a real person, whereas for equal treatment the comparator can be hypothetical

4.3 Material factor defence

Even if the conditions for an equal pay or equal treatment clause are otherwise met, an employer will be able to justify a difference in pay or treatment if that is due to a meaningful and genuine reason, which is not either directly or indirectly discriminatory. This is known as the material factor defence.

An equal pay clause or an equal treatment clause in A’s employment contract has no effect if the employer shows that the difference between A's terms and B’s terms is because of a material factor reliance on which:

- **does not involve treating A less favourably than B because of A's particular Protected Ground than the employer treats B; and**
- **if the factor is within the section below, is a proportionate means of achieving a legitimate aim.**

A factor is within this subsection if A shows that, as a result of the factor, A and persons with whom A shares the Protected Ground doing work equal to A's, or, as the case may be, work which is not materially different to A's, are put at a particular disadvantage when compared with persons with whom A does not share the Protected Ground and who do work equal to A's, or work which is not materially different to A's, as the case may be.

For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

See section 18 of the Ordinance

Is there a material difference?

For a difference to be considered material, it must be a significant and relevant difference between the employee and the comparator. Whilst it is no defence to an equal pay claim for an employer to say that the difference is because an employee was willing to work for less or asked to be paid more, market forces are a potentially valid material factor defence. Ultimately, this will come down to a consideration of all of the circumstances of the case. Examples of material factors which might establish a defence depending upon the circumstances include:

- length of service;
- past performance;
- market forces; and/or
- shortage of skills and qualifications.

Is the difference “tainted” by discrimination?

Even where there is a material difference, this will only provide a defence to an employer when the reason is not either directly or indirectly discriminatory due to a Protected Ground. This is sometimes referred to as being “tainted”.

If the reason for the difference was due to a directly discriminatory reason, which cannot be justified then this cannot amount to a material factor defence.

An example might be where Portuguese workers are paid less per hour than local workers and the management cannot justify this difference, as their actions are directly discriminatory.

The question might arise as to whether or not the reason might be indirectly discriminatory, where an employee and others with the Protected Ground are put at a particular disadvantage when compared with persons who do not share the Protected Ground. If a disadvantage is identified, then the employer must objectively justify the reason for the difference, in the same way they would for an indirect discrimination claim. See Chapter 1.2. Where they are unable to do so, then that reason would be considered tainted and so the employer would be unable to rely on the material factor defence.

4.4 Discussions about pay

Some contracts of employment and other agreements contain specific restrictions that are designed to prevent employees from disclosing their pay to another employee, or from asking a colleague about their pay. These terms are sometimes known as pay secrecy clauses.

Restrictions such as this make it very difficult for individuals to be able to pursue a claim for equal pay, when they can’t find out what other individuals receive. The Ordinance makes such pay secrecy clauses unenforceable, where they relate to making enquiries for the purposes of enforcing a person’s right to equal pay. Where pay is disclosed for the purpose of assisting a person to enforce their right to equal pay, this is known as a relevant pay disclosure.

A term of a person's contract of employment that purports to prevent or restrict the person (P) from disclosing or seeking to disclose information about the terms of P's work is unenforceable against P insofar as P makes or seeks to make a relevant pay disclosure.

A term of a person's contract of employment that purports to prevent or restrict the person (P) from seeking disclosure of information from a colleague about the terms of the colleague's work is unenforceable against P insofar as P seeks a relevant pay disclosure from the colleague.

For these purposes the term "colleague" includes a former employee of the same employer or an associated employer in relation to the work in question.

See section 19 of the Ordinance

What is meant by a relevant pay disclosure?

The Ordinance does not outlaw confidentiality around pay completely. It is limited to what is known as a "relevant pay disclosure", which covers the situation of a person seeking to establish if they have a right to equal pay, i.e. if there is a connection between pay and having (or not having) a particular Protected Ground. So, it is not automatically unlawful to tie a payment to a confidentiality obligation, for example where someone is paid a retention bonus in order not to leave their current employer, but care should be taken in the drafting of any such

clause to make it clear it does not prevent a relevant pay disclosure.

Victimisation

Regardless of whether or not there is a contractual restriction, the Ordinance then goes on to ensure that the following are protected against victimisation by their employer:

- Those who seek a relevant pay disclosure;
- Those who make a relevant pay disclosure;
- Those who receive information disclosed in a relevant pay disclosure.

Example

An employer identifies that two employees have been discussing their bonuses, because one of them is concerned that their low bonus is linked to their sexual orientation. The employer then seeks to take disciplinary action against both employees, on the basis their bonuses are supposed to be confidential. This would amount to victimisation on the grounds that the two employees, have sought or made a relevant pay disclosure.

Chapter 5: Employment and other arrangements

In this chapter we will cover the following:

- Discrimination and other prohibited conduct in the workplace
- Who is considered an employee and employer?
- Contract workers
- Employment agencies
- Vocational training providers
- Partnerships
- Personal and public office holders

- Professional or trade organisations
- Professional bodies

The Ordinance makes it unlawful to discriminate based on a Protected Ground against either a job applicant or an employee in relation to work. The protection under the Ordinance applies to employees regardless of their length of service. For further details of what constitutes discrimination and the Protected Grounds please refer to chapter 1 and chapter 2 of this Guidance.

In addition, whilst this Guidance principally focusses on the employer and employee working arrangements, the Ordinance does apply equally to a number of other working arrangements or work-related services which are dealt with in this chapter.

5.1 Discrimination and other prohibited conduct in the workplace

It is unlawful to discriminate against either job applicants or employees in relation to a Protected Ground. This protection is wide ranging and covers all aspects of the employment relationship. It starts when a person is a prospective applicant and continues through the interview and appointment process, such as in relation to offering or not offering someone a job. The protection from discrimination then carries on in respect of the terms and conditions of employment and the opportunities given to employees, all the way through to the eventual termination of someone's contract of employment.

It is also unlawful to either harass a job applicant or employee, or victimise such a person who has, for example, made a complaint about discrimination.

An employer (A) must not discriminate against a person (B):

- **in the arrangements A makes for the purposes of deciding to whom to offer employment or work experience;**
- **as to the terms on which A offers B employment or work experience;**
- **by not offering B employment or work experience.**

An employer (A) must not discriminate against an employee of A's (B): as to B's terms of employment;

- **by denying B access, or limiting B's access, to opportunities for promotion, re-grading;**
- **transfer or training or to any other benefit associated with employment;**
- **by dismissing B;**
- **in the arrangements A makes for the purposes of deciding who to make redundant; or**
- **by subjecting B to any other detriment.**

An employer must not victimise a person or employee, as the case may be, in any of the ways or circumstances set out above.

An employer (A) must not harass a person:

- **who is an employee of A's; or**
- **who has applied to A for employment or work experience.**

See section 14 of the Ordinance

Example: Direct discrimination at interview

An employer does not give an applicant the job, even though they are the best-qualified person, because the employer knows or thinks the applicant is gay. This is direct discrimination on the grounds of sexual orientation against an applicant.

Example: Harassment at an interview

An employer makes a job applicant feel humiliated by telling jokes about their religion during the interview. This would amount to harassment of an applicant on the ground of religion or belief.

5.2 Who is considered to be an employee and employer?

The Ordinance sets out various definitions as to who is considered an employee and employer as follows:

"contract of employment" means a contract of service or apprenticeship, whether express or implied and whether written or oral;

"employee" means an individual who has entered into or who works under (or, where the employment has ceased, worked under) a contract of employment, and includes an individual who has entered into or works under (or worked under, as the case may be) an apprenticeship or internship; and for the avoidance of doubt, does not include an individual who is a volunteer;

"employer", in relation to an employee, means the person by whom the employee is (or where the employment has ceased, was) employed;

"employment" means employment under a contract of employment, and related expressions shall be construed accordingly.

See section 14(6) of the Ordinance

Under the Ordinance the term contract of employment has the same meaning used in the Employment Protection (Guernsey) Law, 1998, and therefore any existing case law will be relevant to determining whether or not someone is an employee. It should be noted that there is a wider definition of an employee in the Sex Discrimination Ordinance that may extend not only to traditional employees, but to a wider category of individuals who have a contract personally

to execute any work or labour, who for other purposes, including tax, may be considered to be self-employed.

Example

A gig economy company establishes itself in Guernsey, which allows customers to book a car and driver through an online app. The drivers will use their own car, and have their own insurance, but the company sets fares, dictates the contract terms and can penalise drivers if they reject too many rides.

As the drivers are all engaged on a self-employed basis by the company, they may not be considered as employees under the Ordinance but are likely to fall into the wider definition of employee under the Sex Discrimination Ordinance. Whilst the driver would be considered an employee under the Sex Discrimination Ordinance (because they provide personal services to the company and not in a customer relationship), they would not be an employee under the terms of the Ordinance. So, if the driver was penalised for taking breaks due to having a long-term impairment that fell within the definition of disability, then they would not be able to make a complaint under the Ordinance.

5.3 Contract workers

A contract worker is someone who is employed by one person and supplied to a third party (known under the Ordinance as the principal) to undertake work. These individuals are sometimes referred to as agency workers or temps.

The Ordinance makes it unlawful for a principal to discriminate against a contract worker:

- **as to the terms on which it allows the contract worker to do the work;**

- **by not allowing the contract worker to do the work, or continue to do it;**
- **by denying the contract worker access, or limiting the contract worker's access, to any benefits, facilities or services in relation to the work (including, without limitation, benefits consisting of the payment of money); or**
- **by subjecting the contract worker to any other detriment.**

Section 20 of the Ordinance

In addition, a principal must not victimise or harass a contract worker and is subject to the reasonable adjustment duty.

5.4 Employment agencies

An employment agency is defined as being a business (whether or not carried on with a view to profit) which provides services for the purposes of finding employment for people, or of supplying employers with people to do work. This includes giving guidance and training on careers to individuals who are seeking employment.

The Ordinance makes it unlawful for an employment agency to discriminate against any person:

- **in the arrangements it makes for selecting persons to whom to provide any of the services of an employment agency;**
- **as to the terms on which it offers to provide any service to a person, or the terms on which it provides any service to a person;**
- **by not offering to provide a service to a person;**
- **by terminating the provision of a service to a person; or**
- **by subjecting a person to any other detriment.**

See section 21 of the Ordinance

An employment agency will not be liable under the Ordinance in the course of providing its services if it reasonably relies on instructions given by an employer to whom the employment agency is providing services.

Example

An employment agency has to recruit in a specific timeframe under its contract with the employer.

The employer confirms to the employment agency that the venue for the interview (the employer's premises) is wheelchair accessible. However, in reality it was not, and it was not until the employment agency had arranged and commenced the interviews that this fact was realised. However, due to the time constraints the employment agency had to continue with the recruitment process. The statement reasonably relied upon was the accessibility of the employer's premises even though the venue was not accessible to all candidates.

In addition, an employment agency must not, in relation to the provision of any of its services, either victimise or harass a person and is also subject to the duty of providing reasonable adjustments.

5.5 Vocational training providers

Vocational training is defined as being training for employment. Where such training takes place in Guernsey by a local educational provider (say for an apprenticeship scheme), the provider also must abide by the Ordinance and be subject to the same responsibilities and duties.

The Ordinance makes it unlawful for a provider or arranger of vocational training to discriminate against any person:

- **in the arrangements it makes for selecting persons to whom to provide training;**
- **as to the terms on which it offers to provide the training or other facilities concerned with such training to a person, or the terms on which it provides the training or other facilities to a person;**
- **by not offering to provide training to a person;**
- **by terminating a person's training; or**
- **by subjecting a person to any other detriment during the course of the training.**

See section 22 of the Ordinance

In addition, a provider or arranger of vocational training must not, in relation to the provision of any of its services, either victimise or harass a person and is subject to the reasonable adjustment duty

5.6 Partnerships

A partnership, which is a business where two or more people share the ownership and the responsibility for managing the business, is also covered by the Ordinance making it unlawful for a partnership to discriminate against any person. Many lawyers and accountants structure their businesses by way of partnerships rather than companies or sole traders and this ensures that the Ordinance covers these types of structures. A partner may not technically be an employee due to the nature of the structure.

A partnership is defined as being a partnership under the Partnership (Guernsey) Law, 1995, a limited partnership under the Limited Partnerships (Guernsey) Law, 1995, a limited liability partnership under the Limited Liability Partnerships (Guernsey) Law, 2013 or any other partnership operating in Guernsey that is established under the law of a country or territory outside Guernsey.

The Ordinance makes it unlawful for a partnership to discriminate against any person (including persons proposing to form themselves into a partnership):

- **in the arrangements it makes for the purposes of determining to whom to offer the position of partner;**
- **as to the terms on which it offers a person that position;**
- **by not offering a person that position; or**
- **in a case where a person already holds that position:**

- **by denying a person access, or limiting a person's access, to any benefit (including, without limitation, benefits consisting of the payment of money);**
- **arising from being a partner in the partnership;**
- **by expelling a person from the partnership; or**
- **by subjecting a person to any other detriment.**

See section 23 of the Ordinance

In addition, a partnership must not either victimise or harass a prospective or current partner and is subject to the reasonable adjustment duty

5.7 Personal and public office holders

A personal office is any office or position to which a person is appointed to perform a function personally under the direction of another person. The appointed person will be entitled to remuneration, which will be additional to expenses incurred or compensation for loss of their income while performing the functions of the position. This might include for example a non-executive director, who does not fall within the definition of an employee.

A public office is a public office or position, appointment to which is either made by, on the recommendation of, or subject to the approval of the States of Deliberation, the States of Election, the States or any Committee thereof, or the Royal Court. For the avoidance of doubt, the position of the office of a People's Deputy has been expressly carved out of the Ordinance and so they are not covered by the legislation in respect of their appointments.

The Ordinance makes it unlawful for a person who has the power to make an appointment to a personal office or a public office to discriminate against any person:

- **in the arrangements it makes for deciding to whom to offer the appointment,**
- **as to the terms on which it offers a person the appointment, or**
- **by not offering a person the appointment.**

The Ordinance also makes it unlawful to discriminate against any person appointed to the office:

- **as to the terms of their appointment;**
- **by denying them access, or limiting their access, to opportunities for promotion, transfer or training, or for receiving any other benefit, facility or service;**
- **by terminating their appointment; or**
- **by subjecting them to any other detriment.**

See section 24 of the Ordinance

In addition, a person who has the necessary power in relation to a personal office or a public office must not either victimise or harass an officeholder and is subject to the reasonable adjustment duty.

5.8 Professional or trade organisations

A professional or trade organisation is defined as being an organisation of employees, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.

Under the Ordinance these organisations have similar duties and responsibilities towards their members (or prospective members), with respect to preventing discrimination, as employers have towards their employees.

The Ordinance makes it unlawful for a professional or trade organisation to discriminate against any person:

- **in the arrangements it makes for deciding to whom to offer membership;**
- **as to the terms on which it is prepared to admit a person as member; or**
- **by not accepting a person's application for membership.**

See section 26(2) of the Ordinance

The Ordinance also makes it unlawful for a professional or trade organisation to discriminate against any member:

- **by denying a member's access, or limiting a member's access, to opportunities for receiving a benefit, facility or service provided by the professional or trade organisation;**
- **by depriving a member of membership or varying the terms of membership; or**
- **by subjecting a member to any other detriment.**

See section 26(3) of the Ordinance

In addition, a professional or trade organisation must not either victimise or harass a member or prospective member and is subject to the reasonable adjustment duty.

5.9 Professional bodies

A professional body is defined as being an authority or body that is empowered to confer, extend, renew or withdraw a qualification or authorisation, that is needed for, or facilitates engagement in, a particular profession, trade or occupation. A local example would be the Guernsey Bar. For these purposes a qualification or authorisation includes recognition, registration, enrolment, approval or certification.

Under the Ordinance these organisations are deemed to have similar duties against discrimination towards their members, or those upon whom they are conferring qualification or authorisation, as employers have towards their employees.

The Ordinance makes it unlawful for a professional body to discriminate against any person:

- **in the arrangements it makes for deciding to whom to confer a qualification or authorisation;**
- **as to the terms no which it is prepared to confer a relevant qualification or authorisation on a person;**
- **by not conferring a qualification or authorisation on a person.**

See section 27(1) of the Ordinance

The Ordinance also makes it unlawful for a professional body to discriminate against any person on whom it has conferred a relevant qualification or authorisation:

- **by withdrawing the qualification or authorisation from the person; or**
- **by varying the terms on which the person holds the qualification or authorisation; or**
- **by subjecting the person to any other detriment.**

See section 27(2) of the Ordinance

In addition a professional body must not, either victimise or harass a member or prospective member and is subject to the reasonable adjustment duty. However, it is not discrimination for the professional body to impose requirements to require the passing of examinations or the possession of relevant skills, experience or professional integrity.

An employer identifies that two employees have been discussing their bonuses, because one of them is concerned that their low bonus is linked to their sexual

orientation. The employer then seeks to take disciplinary action against both employees, on the basis their bonuses are supposed to be confidential. This would amount to victimisation on the grounds that the two employees, have sought or made a relevant pay disclosure.

Chapter 6: Recruitment

In this chapter we will cover the following topics:

- Equality-smart recruitment
- Unconscious bias
- Job descriptions and person specifications
- Advertising
- Positive action
- Questions about health and Protected Grounds
- Reasonable adjustments in recruitment

The Ordinance requires that all employers must not discriminate against job applicants throughout the whole recruitment process. However, having equality smart recruitment isn't just about complying with the Ordinance around recruitment for the sake of it, it is good for businesses too.

Equality smart recruitment is not solely about "tick box" compliance. It is about ensuring you get the best person for the job based on merit alone and free from any bias in relation to any of the Protected Grounds that are not relevant to the person's ability to do the job.

When employers take this approach, their organisation is more likely to be seen as a fair, positive and progressive place to work by the diverse society that they are part of. Ultimately these businesses are likely to be commercially more successful because they are the ones making the best recruitment decisions.

Whilst most people do not deliberately discriminate against good candidates on the basis of protected grounds, the reality is that everyone has unconscious biases, and it is important to be aware of the fact and not let them affect behaviour or decisions.

6.1 Equality smart recruitment

Equality smart recruitment considers all elements of the recruitment process. Before considering the recruitment of a new worker or someone to replace a person who is leaving or has left, the employer will be thinking about what the job involves and the skills, qualities and experience a person will need to do it, which then leads to the need for job descriptions and adverts.

Under the Ordinance any job description and advertisement must:

- Avoid direct discrimination – direct discrimination in recruitment generally cannot be justified unless it falls under a specific exemption such as a genuine and determining occupational requirement.

Example

An employer tells a disabled candidate with one arm that they are unsuitable for a tomato picking role because of their impairment. This would amount to direct discrimination.

- Avoid requirements that may place people with a Protected Ground at a disadvantage that cannot be objectively justified

Most roles will require candidate to have some specific skills, qualifications or other requirements for the job in question and sometimes these requirements by the very nature of the job will exclude some people or make it more difficult for them to satisfy those requirements – provided these can be objectively justified this won’t amount to indirect discrimination.

Example

An employer states in a job advert that the role must be done on a full-time basis. This requirement could put some people at a disadvantage such as a carer who needs flexible hours because of their responsibilities or someone with a disability who needs to rest for a certain amount of time per day. The employer must be able to objectively justify this requirement to work full time, otherwise it might constitute indirect discrimination against a carer or a person with a disability.

An example of where this may be justified is a managerial role where the employee needs to be available to assist their direct reports throughout normal working hours, on a time critical basis, and where it is not possible to appoint another manager to cover the proposed non-working hours. See Indirect discrimination objective justification Chapter 1.2

6.2 What is unconscious bias?

One of the biggest challenges for employers during recruitment is dealing with unconscious bias (which is also known as implicit bias). Unconscious biases are social stereotypes about certain groups of people that individuals form which are based on/from their own background, culture, context and personal experiences and outside their own conscious awareness.

It is important to recognise we all have unconscious biases. We each have an in-built tendency to organise our social worlds by categorizing people into groups. These biases are very often automatically triggered by our brain making quick judgments and assessments.

Overcoming bias in recruitment

Whilst it is easy to say that all decision making in recruitment must be unbiased, what does this actually mean and how can someone overcome their biases? The starting point is to make sure that everyone involved in recruitment decisions is aware of unconscious bias, and wherever possible have received some form of training.

There are however a number of practical steps that can be taken to tackle unconscious bias in recruitment – all of which have no cost:

- advertising job vacancies in more than one location or through different methods to reach a wider range of people from different backgrounds;
- having structured interviews which are primarily focused on the ability of the candidate to do the job;
- having more than one person involved at each stage of the process when reviewing applications, interviewing and making decisions as to who gets the job;
- getting recruiting managers to agree to make each other aware if they notice stereotyping and to do this in a no blame environment; and/or
- keeping a written record of why recruitment decisions were made and avoiding generic answers such as “right fit” that aren’t about ability to do the job.

6.3 Job descriptions and person specifications

In order to ensure you are making equality smart recruitment decisions it is good practice to have:

- A job description for a new or existing role which can be used for reference – this document should state what the job is for and what the person doing it needs to do to meet the needs of the role. It is important to note that any job description should only ask for the necessary requirements of the job otherwise indirect discrimination may occur; and
- A person specification that sits alongside the job description and lists the skills, qualities and experience the ideal candidate should have to perform the role. Care must be taken to ensure that the person specification is clearly linked to requirements for undertaking key criteria of role.

These documents will then help later on in the process, ensuring someone is making good recruitment decisions, based on the ability of candidates and not any unconscious biases they or their colleagues may have.

Larger employers may also consider using an application form as this will help focus on what the role entails and the skills, experience and qualifications that are essential to the job and avoids the provision of additional irrelevant information by a candidate that increases the chance of decisions being influenced by unconscious bias.

Always ensure that any job description or application form is written in simple and plain language.

6.4 Advertisements

Whilst there is no legal requirement to advertise a job, it is often the way in which vacant positions are made known to the general public. It is unlawful to either place or publish a discriminatory advert.

Example:

Even if a role has a specific language requirement it would be unlawful to advertise for a “French sales rep” as this would be discriminatory on the grounds of race. However, it would be permissible to advertise for a “French-speaking sales rep” if speaking French is an essential requirement of the role.

Like the writing of the job description, it is important to ensure that before an advert is published alongside a job description for a particular role, care is taken to work out exactly what is required for that position.

Consider not only stating the organisation's commitment to equality within any job advert, but also make it clear that reasonable adjustments can be made as part of the recruitment process.

Example:

"Please contact us if you need the application form in an alternative format or if you need any adjustments for the interview".

6.5 What is positive action?

Positive action has a strict legal definition within the Ordinance and can apply differently depending upon the context. However, in the case of recruitment it broadly means steps which are taken with the aim of promoting greater equality of opportunity, in relation to a Protected Ground.

Positive action in employment can only be used to encourage people to apply for a job. It cannot be used to restrict the job opportunity only to someone with a particular Protected Ground or result in an applicant being preferentially appointed under the recruitment process because they have a Protected Ground – which is often referred to as positive discrimination and is unlawful. See Chapter 8- Exceptions

Whilst there is no obligation on employers to take positive action, where steps are taken they can be lawful. If an employer wants to take positive action in this way, the advert should clearly state the employer is seeking applications from everyone but wishes to encourage applications from people with a particular Protected Ground on the basis that they are underrepresented or face disadvantage.

6.6 Questions about health and Protected Grounds

An employer (A) shall not request or require information about a Protected Ground from another person (B) during a recruitment process, which indicates, or might reasonably be understood as indicating, an intention by A to do any act which is or might be prohibited by this Ordinance.

The above does not apply to a request for information if:

- **the intended act would not in fact be prohibited by this Ordinance;**
- **the information is used wholly as part of A's diversity monitoring, is kept confidential, and forms no part of the recruitment process; or**
- **if the request is necessary for the purpose of:**

- **establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with the recruitment process, or**
- **establishing whether B will be able to carry out a function that is intrinsic to the work or work experience concerned.**

See section 15 of the Ordinance

It should be noted this is different from the position in Jersey where there is no such restriction, or in the United Kingdom where the restriction only relates to questions about a disability, rather than all Protected Grounds.

The recruitment process

The term recruitment process is widely defined under the law, right from the point of advertising a post, all the way through to making an offer and even negotiating the terms. A recruitment process is usually considered concluded when a job applicant has accepted the job. Whether in any given case the recruitment process is ongoing is a question of fact, but the latest point this will normally be considered concluded is when a job applicant accepts an offer.

"Recruitment Process" means a process which an employer (A) undertakes because A wishes to employ a person or have the person work for A by way of work experience, and includes, without limitation, the process of advertising for a post, sifting applications, selection of candidates for interview, interviewing, job offers and negotiation of an employment contract.

See section 15 (5) of the Ordinance

Pre-employment questions

Employers may not ask questions about an individual's Protected Ground (including in relation to health and disability) during the recruitment process which indicates an intention to potentially discriminate, except in limited circumstances, which broadly fall into four main categories:

- Not prohibited under the Ordinance
- Diversity monitoring
- Reasonable adjustments as part of the recruitment process
- Ability to carry out a function that is intrinsic to the work

The reason why the Ordinance prevents employers asking questions about Protected Grounds is to make sure that all job applicants are considered equally on their ability to carry out the job in question, and not ruled out just because of perceived issues related to, or arising from, a Protected Ground such as disability or carer status.

Where an employer breaches this requirement with respect to requests for information, the Director of the Employment and Equal Opportunities Service may issue a non-discrimination notice and if that notice is not complied with, then a financial penalty may be issued.

Not prohibited under the Ordinance

The Ordinance contains a number of specific exceptions in relation to work, such as where having a Protected Ground is a genuine and determining occupational requirement, or where the employment is for the purposes of an organised religion and there is a requirement for the individual to have that religion. Accordingly, it is permissible to ask questions during a recruitment process that relate to one of these specific exceptions, because this would not constitute discrimination under the Ordinance

Example

A church is seeking to employ a youth worker, to promote Christianity in the community. A requirement of the role is to be a practising Christian, which is permitted under the specific exemption relating to “Employment for the purposes of an organised religion” and so asking a candidate a question to find out whether they are a Christian during the recruitment process is permitted.

Diversity monitoring

Under the Ordinance it remains permissible for employers to carry out diversity monitoring as part of the recruitment process, provided that the information is:

- used solely for that purpose;
- is kept confidential; and
- forms no part of the recruitment process.

Accordingly, where diversity monitoring does take place, (which is encouraged) it is important to try to keep the responses separate from any information which will be seen by the decision makers in the recruitment process.

Reasonable adjustments as part of the recruitment process

As the reasonable adjustments duty covers job applicants as well as employees, the Ordinance recognises that employers will need to ask candidates questions about any reasonable adjustments in order to comply with their obligations. Accordingly, it is recommended that employers should ask all job applicants if they need any adjustments for any part of the recruitment process. Where an applicant indicates adjustments are required an employer is entitled to ask follow-up questions to better understand the requirement for the adjustment, although those questions should be limited only to what is necessary for making reasonable adjustments, and the information should be kept confidential.

Example

As part of a recruitment process an employer requires candidates to undertake a written test. Prior to arranging an interview with a candidate, the employer asks the candidate if they require any reasonable adjustments.

The candidate indicates that they have a visual impairment, and so would require some support through the interview and assessment process. In these circumstances the employer is under a duty to consult with them over any reasonable adjustments, and so should ask questions about what support may be required, such as whether they would be able to conduct the written assessment in a larger font or a spoken or braille format.

Ability to carry out a function that is intrinsic to the work

Certain roles will require an employer to make enquiries of a candidate to confirm that the individual is able to carry out a function that is intrinsic to the work or work experience concerned. This exception is intended to be narrowly interpreted as in most roles, an individual's race, sexual orientation, religion or belief or disability is largely irrelevant to their ability to do a job. Where it is this will often fall under a specific exception for example a genuine and determining occupational requirement. See Chapter 8 Exceptions. Physical ability or disability may be more relevant in some circumstances, such as where a role is particularly physically demanding, and this is intrinsic to that role. However, questions should focus on assessing the ability of the individual to undertake that role and all candidates should be assessed on their ability. In addition, consideration should be given to providing reasonable adjustments for a disabled person in line with the reasonable adjustment duty (see Chapter 3) and that person should only be assessed on their ability to undertake the role once any reasonable adjustments have been made.

Example

As part of the recruitment process for new firefighters, candidates are required to undertake fitness tests and complete a medical questionnaire. Whilst this would involve asking questions about a candidate's ability or any disability, the questions relate only to their ability to carry out an intrinsic part of the role, and therefore would be lawful.

Questions after the conclusion of the recruitment process

Once the recruitment process has concluded then it is open to employers to ask any questions relating to a Protected Ground, such as undertaking health screening and making the job conditional upon passing a medical. However, those questions should only be asked to the extent that they are necessary to understand whether the person may have a lack of ability or a disability that would prevent them from performing certain aspects of the job (even if the aspects of the job are not intrinsic to the role) and/or to understand if there are reasonable adjustments that could be required.

6.7 Reasonable adjustments in recruitment

The duty to make reasonable adjustments where an employer is aware, or ought to be aware, that a candidate has a disability applies throughout the recruitment process. Reasonable adjustments in the recruitment process are ultimately about ensuring there is a level playing field for all candidates, so that you get the best person for the job – that is central to the concept of equality smart recruitment. This might include:

- making certain application forms available in alternative formats;
- giving a candidate more time to undertake an assessment; or
- holding an interview in a different location.

More examples of reasonable adjustments can be found in Chapter 3

Example

When an employer is advertising for a role to work in a building which has two floors which does not have a lift, they must not state that because of this the job would not be suitable “for a disabled person”.

Instead, if they wish to address this issue in the advert, they could point out that the office is on two floors but that they would make reasonable adjustments both at interview and on appointment for applicants with a mobility impairment.

If the interview is with an applicant with a mobility impairment, it would be a reasonable adjustment to hold the interview somewhere with ground floor access. If the successful applicant has a mobility impairment, a reasonable adjustment could potentially be made to allow them to do their role on the ground floor. If necessary, step-free access to the ground floor could be provided through the installation of a ramp (permanent or temporary) if this did not already exist and provided this would be a reasonable adjustment.

Chapter 7: Guidance for managing staff

This chapter will cover the following topics:

- Talking to staff and colleagues about their health or disability
- Performance Issues
- Managing attendance issues and sickness absence
- Managing staff with caring responsibilities
- Redundancy
- Avoiding unlawful discrimination in dismissals

Whilst the Ordinance will introduce a number of specific legal obligations on employers, the basic principles around good people management stay the same. Those employers who already have in place HR policies, and genuinely respect

and value their employees, will find that they may only need to slightly modify how they manage situations such as dealing with performance issues, sickness absence, redundancies or conduct issues.

For smaller employers who might not be so familiar with how to deal with such issues, the aim of this chapter is to give a basic introduction to how discrimination issues can arise in common areas of managing staff. Whilst this guidance principally focuses on the Ordinance, and discrimination legislation, employers should be aware of other employee rights such as unfair dismissal. Simply because a dismissal is not discriminatory does not mean it is fair, although if a dismissal is discriminatory, it will also be found to be unfair – regardless of the length of service of the employee.

Accordingly, small employers are recommended to follow the relevant States of Guernsey Codes of Practice or Guidance when dealing with Disciplinaries (which covers both conduct and capability issues), Raising and handling Grievances or Redundancies. See also the section on the Employment and Equal Opportunities Service website on managing staff.

7.1 Talking to staff and colleagues about their health or disability

It is important to say from the outset that nobody has to tell their employer, or a potential employer that they are disabled. Indeed, there are specific restrictions which prevent employers asking about Protected Grounds such as disability during the recruitment process, apart from in limited circumstances. However, employers should do all they reasonably can to create an environment where people feel safe and comfortable to talk about disability.

Creating the right environment can help to:

- make sure disabled people get support and are not put at a disadvantage or treated less favourably;
- recognise the benefits of an inclusive and diverse workforce where disabled people aren’t excluded;
- recruit and retain staff who often have more resilience and problem-solving skills as they have developed ways of living with a disability;
- avoid situations where an employer does not know someone is disabled and just thinks they cannot do their job or are not putting in any effort;

- improve wellbeing and productivity for everyone; and/or
- reduce sickness absence thereby increasing productivity for the business as a whole.

Where an employer is either aware, or ought to be aware that an employee has a disability, then an employer may have a legal responsibility to support them.

When employees may want to talk about their disability

By creating the right environment, employees will feel more comfortable sharing information with their manager on a voluntary basis, which ultimately benefits the employer as ensuring the right support is in place from the outset can avoid issues which might otherwise arise.
Employees may share information because they:

- feel they need support;
- are struggling with an aspect of their role;
- are aware of a specific health and safety risk to them or others; or
- anticipate difficulties may arise.

Talking with someone about their disability

When a person is talking with their manager about their disability, the manager should take the lead from them. It is up to the individual how much they share, and the manager should be aware it might be a sensitive subject, especially if it is a recent diagnosis. During the conversation the manager should:

- listen carefully to the person;
- try to understand the impact of the disability on them;
- consider their circumstances;
- not make assumptions about what they can and cannot do;
- ask them about any support they might need; and/0r
- ask how they would like their disability to be referred to or talked about, including what (if anything) they want colleagues to know.

Different people can deal with their disabilities in very different ways, some are entirely open about it, others will only provide information on a gradual basis. Either way it is important to reassure the person that they will be supported, and you can discuss how best this should take place.

Identifying a disability

A “disability” has a specific legal meaning, where an impairment is long term, i.e. it must last, or be expected to last for not less than six months or until the end of the person’s life.

Many disabilities will be obvious, for example, when you are dealing with a case of long-term sickness absence, it is highly likely in most instances the individual will have a disability.

It may be more complex when managing intermittent absences and performance issues, especially where an individual has stress or depression, which can be more difficult to identify.

Example

An employee who is absent from work with an “upset stomach” for a couple of days will not be considered to have a disability, on the basis an upset stomach is not a long-term impairment.

Employers should be aware of patterns that may start to emerge in relation to intermittent short-term absences as that could be evidence of an underlying condition. For example, an upset stomach could be a symptom of a long-term condition such as of irritable bowel syndrome, or even it could relate to long-term stress and depression as this commonly leads to an increased number of short-term absences. Equally, both conditions can affect performance in the workplace.

The key is for employers to be aware of what is happening with their staff. Sometimes disabilities are identified through a sick note from a doctor, sometimes an employee may tell you that they have a disability, or alternatively

an employer may be able to identify it before an employee is even aware they have a condition.

Where an employer is either aware, or ought to be aware, that an employee has a disability, then an employer has a legal responsibility to support them. The examples given above are where an employer ought to know or realise even if they haven't been specifically told. The process by which an employer identifies that an employee has a disability is ultimately only the starting point, but it is important to remember that the law does not require a formal medical diagnosis from a doctor to prove a disability. Furthermore, an employer cannot simply ignore facts and circumstances which make them aware that there is a potential issue.

For further guidance please refer to Chapter 2: What is a Disability?

Using appropriate language

It is important when talking with a person about their disability that appropriate language is used, as this can affect how they feel and if inappropriate language is used it may cause distress.

Whilst it might sound obvious, using inappropriate, offensive or negative terminology towards disabled people, including things some might consider as banter or jokes, is likely to amount to unlawful harassment. Ultimately, how we use language is a question of respect towards others, so you should be sensitive in the terms you use. Do not use words that are offensive or negative, for example spastic, wheelchair-bound, retard, cripple etc. The able bodied should also not be used as it implies others are not able bodied which could be upsetting or inappropriate. The correct term to use is non-disabled.

Employers are not expected to be experts, so a good starting point will often be to talk to the individuals themselves about their condition, and what language they use, and how they talk about it. Avoid passive, phrases or words that make someone out to be a victim.

Ultimately use language that respects disabled people as active individuals with control over their own lives. The table below is intended to be helpful guidance around language related to a disabled person.

Avoid	Use
(the) handicapped, (the) disabled	disabled (people)
afflicted by, suffers from, victim of	has [name of condition or impairment] e.g. an individual who is registered blind or who has cerebral palsy
confined to a wheelchair, wheelchair-bound	wheelchair user
mentally handicapped, mentally defective, retarded, subnormal	Someone with a learning disability or people with learning disabilities
cripple, invalid	disabled person
spastic	person with cerebral palsy
able-bodied	non-disabled
mental patient, insane, mad	person with a mental health condition
deaf and dumb; deaf mute	deaf, user of British Sign Language (BSL), person with a hearing impairment
the blind	people with visual impairments; blind people; blind and partially sighted people
an epileptic, diabetic, depressive, and so on	person with epilepsy, diabetes, depression or someone who has epilepsy, diabetes, depression

dwarf; midget	someone with restricted growth or short stature
fits, spells, attacks	seizures
a special needs [child]	a child with special needs or additional learning needs

Where inappropriate or offensive language is used, it should be explained why it is inappropriate, how it makes people feel and why different terms should be used. Often the person who said it might not realise it is offensive, and so it is important to have a culture where this is called out by others, and not just left to the person with the disability.

Example

At the start of a training course, the presenter asks, “does anyone have any special needs”. Whilst the request may have been well-intentioned, it could make a person with a disability feel as though they are being singled out, and that the trainer has drawn unwanted attention to them.

It is recommended that such queries should be dealt with before the beginning of the course at the same time people are invited to attend. This is the time that attendees could be asked about reasonable adjustments. Aside from avoiding the potential embarrassment for the person this action moves the focus to the potential solutions to overcome any barriers so they can fully participate in the course.

Care must also be taken when using the euphemism “special needs”. The phrase may cause offense and should only be used in the context of providing additional targeted education to a particular person with a disability.

Confidentiality

An employer should keep details of anyone’s disability confidential, unless the individual confirms that they are happy for it to be shared with colleagues. Where information is to be shared, then it is recommended this should be agreed in writing with the disabled person, including:

- what information will be shared;
- who it will be shared with;
- who will share the information (e.g. the person themselves or the manager); and
- how the information will be shared.

There are limited circumstances where confidentiality might not be possible, for example when an employee uses a wheelchair or has an assistance dog, but even then, an employer should still agree with the individual what colleagues can be told. In addition, there will be other circumstances where there may be a need to share certain, limited information, particularly where there is a health and safety risk.

Whilst the choice about sharing personal information will ultimately come down to the individual, employers who create an environment where someone is comfortable talking about how their disability and how it affects them. This will increase other people’s understanding of their condition and also creates an open, inclusive and accessible work environment.

Conversations about reasonable adjustments

Where it is identified an employee has, or may have, a disability then employers are under a specific legal obligation to consult with that employee about any potential reasonable adjustments that they may require. There is no legal guidance about how and when employers must consult with employees, but this will often fit into existing procedures or day to day management of staff. It is recommended that an employer should follow up that meeting in writing with that employee, for example with a short email or note to confirm what has been agreed.

7.2 Dealing with performance issues

The key objective of a good performance process is to try to get the best out of an employee and improve the standard of their work – dismissal should only ever be seen as a last resort when all other avenues have been explored. Whilst there are a few additional considerations to take into account when dealing with poor performance in the context of a person with a disability, the fact someone has a disability does not fundamentally change either the process or its purpose.

Identifying a performance issue

The starting point whenever there is an issue with an employee's work performance, is that the manager should talk with the person about:

- how they're currently performing;
- what the employer expects; and
- what support might help.

This is relevant for any member of staff, regardless of whether you believe they have a disability or not. Often it is only by engaging in conversation with the individual that you are able to identify if there is an issue. It is recommended that after any conversation of this nature that an employer should keep a record of what has been discussed and agreed with the person.

Consulting with an employee about reasonable adjustments

Where it is identified an employee has, or may have, a disability and there are potential performance issues, the employer should talk to the employee about their condition, in order to understand whether or not the two are linked. If they are, the employer is under a legal obligation to consult with the employee about potential reasonable adjustments.

It is important to note that this initial conversation should be a private conversation between the staff member and line manager. This conversation should not take place in front of colleagues, although it may in some cases be appropriate to include someone from HR (for larger employers) and/or a colleague of the employee's choosing.

There is no legal guidance about how and when employers must consult with employees, but it would be sensible if this is incorporated into existing

performance management procedures, and it is anticipated that this should take place as early as possible, and certainly before any formal sanction is imposed.

Example

A long serving employee was put on a performance improvement plan (PIP) as a result of a sudden drop in their work performance which included a number of emotional outbursts. Prior to putting the employee on the PIP, the manager did not investigate the circumstances, and so was unaware the employee had been going through a divorce, which had exacerbated an underlying mental health condition.

The employee had tried asking for support but the manager did not listen. The PIP might have been avoided by making reasonable adjustments around their work. This demonstrates the importance of the informal stage of performance management, because had the manager discussed the issues with the employee beforehand, they would likely have identified these issues.

Dealing with employees who do not wish to discuss reasonable adjustments

Whilst there is a specific legal obligation on an employer to consult about reasonable adjustments, it is equally important that employees positively engage with this process. Where an employee is unable to fully participate because of their condition, for example they have stress or depression, an employer should consider what reasonable adjustments might assist with the consultation. It could be appropriate to consult with them in writing to avoid the need to meet in person, or to allow a family member or friend to support the employee in the consultation. It would be wise to ask the employee what might be the best approach might be.

In addition, some people may simply not wish to discuss their condition with their employer or may not accept that there are performance issues. This could make it difficult to effectively consult about reasonable adjustments. Where this is the case and an employer thinks a reasonable adjustment would help with a performance issue they should:

- ensure that the individual understands the performance criteria and how they are not meeting them;
- explain why they believe a reasonable adjustment would help;
- try to talk with the person to see if they can find a way forward together;
- be sensitive and take the person’s lead in how much they want to share about their disability;
- record in writing their efforts to engage; and
- follow a capability or performance procedure if they cannot get a better understanding of the issue by talking with the person.

Carrying out a formal capability or performance procedure

Before the commencement of any formal capability or performance procedure it is recommended that in most instances an employer should have sought to discuss the issues with the employee on an informal basis and, if they were aware that the employee had a disability, consulted with them about any reasonable adjustments. It is important to recognise every situation is different, and the process to be followed will depend on the needs of the employer as well as the employee.

A performance review should be a two-way individual conversation between a manager and an employee. It should give both parties a chance to discuss how the employee is doing. It is best practice to discuss performance on an ongoing basis and not just when a problem has been identified. The performance review should be transparent and both parties should leave with a set of SMART (Specific, Measurable, Achievable, Relevant and Time-Bound) objectives or next steps to take and an agreement to follow up any outstanding issues. If there is a sudden change of performance or other behaviour which is out of character this could be an indicator that there may be an issue which an employer should discuss with the employee.

Before taking any action, the employer must carry out a full and fair capability or performance procedure. This would typically include:

- discussing with the employee their ability to do the job and their performance in the role;
- if it is known that the person has a disability, reviewing whether that will affect their capability to undertake the role;
- consulting with the employee about the reasonable adjustments already in place, how they are working or might need to be changed, and any other adjustments that could be considered; and
- reviewing evidence of the performance issues and the effectiveness of any adjustments that have been put in place.

Sometimes, depending upon the nature of the disability, it might be useful to obtain medical guidance about the impact on the performance of an employee, and any adjustments that are needed or already in place.

Termination of employment due to performance issues

Circumstances may arise where an employer has to consider terminating the employment of a disabled person due to performance issues. Where the disability is the cause of the poor performance, a dismissal in these circumstances will be deemed to be because of something arising as a consequence of that person's disability. Unless the employer is able to objectively justify the dismissal, it will be considered to be discrimination arising from disability. See Chapter 1 Discrimination and other unlawful conduct. Discrimination in these circumstances requires an employer to either be aware of the disability or that they should have been aware of the disability. Where there has been a significant change in behaviour or performance of an employee, then an employer would generally be expected to have made some enquiries to understand if there is an underlying issue.

In order to be in a position to objectively justify any dismissal, an employer would be expected to be able to demonstrate that its treatment was a proportionate means of achieving a legitimate aim. This means that the employer:

- following an investigation, has reasonably concluded that the person cannot carry out the essential functions of their job;

- has tried every option to remove barriers and provide support to the employee;
- has considered whether there are any other suitable roles that could be offered to the employee;
- has checked (including consultation with the employee) that there are no other reasonable adjustments that could be made to their role or the way in which the work is done, e.g. distributing the work differently within a team; and
- has concluded that dismissal is the only appropriate action in the circumstances.

It is important that the employer records the detail of the above actions.

Example

An employee who is known to have dyslexia is recruited to undertake a supervisory role that involves reviewing written documentation prepared by junior staff and makes a number of costly mistakes for the business. Prior to initiating a formal performance process the employer should consult with the employee about potential reasonable adjustments, and particularly consider any technological solutions such as listening aids that might assist the employee. If the employer simply dismissed the employee without first taking this step (notwithstanding the cost of the mistakes), any dismissal would be considered to be discriminatory.

7.3 Managing attendance issues and sickness absence

One common misconception amongst employers is that where an employee has a disability the employer cannot do anything about poor attendance or long-term sickness absence. It is important to state from the outset, that the legislation does not seek to prevent employers dealing with these issues. Provided a fair process has been undertaken and there has been proper consideration around potential reasonable adjustments, it is not unlawful to dismiss an employee with a disability either because they are unable to regularly attend work, or they are absent from work on a long-term basis. However, dismissal should be seen as the

last resort, and is not the overriding purpose of a good attendance management policy, which should focus on getting employees back to work.

Whilst this chapter principally focuses on employees with a disability, it should be noted that similar issues can arise in relation to employees who are either carers (which is of itself a separate Protected Ground) or those who are associated with a disabled person. See Chapter 2 Protected Grounds.

Consulting with an employee about reasonable adjustments

Where it is identified an employee has, or may have, a disability and that is either leading to short-term intermittent absences or a long-term sickness absence, then employers should talk to the employee about their condition, as often this will help an employer to confirm if they do have a disability. In addition, employers are under a specific legal obligation to consult with employees about potential reasonable adjustments.

There are no legal requirements or formalities in relation to how and when employers must consult with employees, but it is assumed this will simply fit into existing sickness absence procedures, taking place as part of either a return-to-work interview, or an absence review meeting. Whilst there is a specific legal obligation on an employer to consult in these circumstances, it is equally important that employees engage positively with this process. Where an employee is unable to fully participate because of their condition, for example they have stress or depression, an employer should consider what reasonable adjustments might be appropriate to enable them to consult with the employee, such as by consulting with them in writing.

Medical guidance

In most instances, it is envisaged that employers and employees should be able to identify and agree between themselves what reasonable adjustments should be made that will either help reduce short-term intermittent absences related to a disability or allow an employee to return from a long-term sickness absence.

Medical evidence can be sought to confirm the duration of an impairment (in order to determine whether or not the impairment constitutes a disability) and can also be useful in order to gain a better understanding of an impairment as part of making reasonable adjustments. Generally, an employer cannot force an employee to agree to undergo a medical assessment, although if an employee

does refuse, an employer is still entitled to take decisions based on the information available to it.

It is important to remember that in obtaining, with the employees' consent, and considering any medical report that an employer must comply with the Data Protection (Bailiwick of Guernsey) Law, 2017. Health related information falls under the category of what is known as "special category data" which places additional obligations and safeguards. The employer can also consult with others (with the employee's permission) about reasonable adjustments.

Reasonable adjustments and return to work

After an extended period of sickness absence, it can be daunting for employees to return to work, regardless of the reason for absence, but particularly when it has involved any mental health issues.

A phased return to work is a very common reasonable adjustment that allows an employee to ease back in to work in a controlled and measured manner. There is no single right way to do a phased return to work, and the key is that it needs to be workable for both employee and employer, although typically this is based on a reduced number of working days and hours.

It is also important to consider the type of duties that an employee should undertake. This is especially important where the role has a physical element to it, and particularly if the reason for the employee's absence was a physical impairment such as a serious injury or chronic condition. Depending on the nature of the impairment, that adjustment may either be temporary or permanent.

Example

A senior employee has been absent from work on a long-term basis due to stress and depression.

Having consulted with the employee, and their doctor, the employer puts in place a 12-week phased return to work, initially doing 4 hours a day for 3 days a week, undertaking straightforward administrative tasks, gradually building up to resume their full duties at the end of the period.

As the employee has exhausted their right to sick pay, the employer pays the employee their salary on a pro rata basis according to the hours worked.

Example

A bricklayer employed by a house building company, sustains a serious back injury, and as a result is unable to lift anything heavy. Following a period of absence to recover, it is agreed that the employee will take on a vacant role of painter and decorator which involves lighter duties.

Termination of employment due to health issues

From time to time circumstances may arise where an employer has to consider terminating the employment of a disabled person, due to either poor attendance or long-term sickness absence. Where the disability is the cause of the poor attendance or long-term sickness absence, a dismissal in these circumstances will be deemed to be because of something arising in consequence of that person's disability. The employer must be able to justify the dismissal, otherwise it will be considered to be discrimination arising from disability. See Chapter 1: Discrimination arising from disability.

Whilst discrimination arising from disability requires an employer to either be aware of the disability, or that they should have been aware, in most instances when an employee has poor attendance over an extended period, it would normally be considered that an employer should be aware that there may be an issue.

Managing the potential conflict between possible disability discrimination and an organisation’s capability (or performance) procedure can be a very difficult area for an employer. Also, it will hinge on all the particular facts and circumstances of an individual case.

For the dismissal to be disability discrimination, the employer must be aware of the disability. If the reason for dismissal was because of poor absence, it could be argued that the employer ought to have been aware of the possibility of a disability because the extended absence acted as an indicator of a problem. It might be helpful to have policies that involve trigger points relating to absences to distinguish disability-related sickness absence from other illness absence.

In order to be in a position to justify any dismissal, an employer would be expected to be able to demonstrate that its treatment was a proportionate means of achieving a legitimate aim. This means that an employer should investigate the issues, and explore the alternatives. Particularly in the case of long-term absences it is often helpful to have obtained a medical opinion, to not only understand the nature of any condition, but in particular the prognosis. This might also be useful to advise when an employee might be in a position to return to work including on a phased back-to-work basis.

In addition, an employer would be required to provide evidence to show that they have considered and consulted with the employee over any potential reasonable adjustments that could be made that would avoid the need to dismiss them. If there were adjustments that could have been made, but that were not made, then that will mean that any subsequent dismissal will be considered to be discriminatory.

Example

A lorry driver has had a stroke and as a consequence has become partially sighted meaning they are unable to drive. The employer would be expected to understand whether or not the partial loss of sight was likely to be permanent or temporary, and if so, how long this may be. In addition, an employer would be expected to give consideration to alternative roles that the employee may be able to undertake, such as within an office. If the driver is dismissed without consideration of the duration of disability, the consideration of reasonable adjustments or a different role, this may be unlawful.

7.4 Managing staff with caring responsibilities

One feature of the Ordinance that is different to the UK and Jersey is that carer status is separately recognised as a Protected Ground. As a result, this will be something new to all employers in Guernsey, both large and small. A carer is someone who provides care or support on a continuing, regular or frequent basis to another person who is considered to be disabled, and they either live with that person or are a close relative.

For further guidance please refer to Chapter 2: What is carer status?, which explains in greater detail including explaining who is considered “a close relative”.

Discrimination and carer status

It will be unlawful to discriminate, victimise or harass a person because of their carer status.

In relation to indirect discrimination, employers may not initially appreciate that there is a provision, criterion or practice in place that puts those with caring responsibilities at a disadvantage. The employer may also not be aware that the employee has caring responsibilities.

Example

An employee is the primary carer for their spouse who has epilepsy. Their spouse regularly has severe seizures, so occasionally the employee has to leave work urgently and return to their nearby home to look after them.

The employer announces that they are transferring the employee's team to another location, at the other end of the island, which will mean the employee is significantly further away from their home. The requirement for the employee to work at another location further away from home could be considered to be a provision, criterion or practice that put carers at a disadvantage, therefore, it would be for the employer to objectively justify the relocation.

This would include looking at whether the employer's aim is legitimate and whether the proposed solution to relocate is a proportionate way of achieving that aim or whether another solution might be possible, such as whether the employee can work from home.

For further guidance please refer to Chapter 1: What is Indirect Discrimination?

Hours of work and flexible working

The most common consideration that will affect an employee with carer status will relate to their hours of work, and the conflict with their caring responsibilities, thereby placing them at a disadvantage when compared to others. This often leads carers to make flexible working requests where they have regular caring commitments during their working hours. This might be to request changes to their working hours, to work from home, or occasional requests for time off, often at short notice, where those caring commitments arise on an ad hoc basis.

It is important to note that even though there is currently no statutory framework around making flexible working requests in Guernsey, and many employers do not even have a policy, carers may still make a request, and if an employer intends to reject any such request, it will need to be able to objectively justify that

refusal. In addition, it should also be noted that similar consideration will also apply to requests for flexible working made by someone with childcare responsibilities, on the basis that if the employer is unable to objectively justify a refusal, then this can also amount to indirect discrimination on the grounds of sex under the Sex Discrimination (Employment) Ordinance, 2005.

The first stage of the process is for an employer to identify that it has a legitimate aim. There is no fixed list of reasons for refusing a request, (unlike the UK or Jersey), although the following points would likely be relevant:

- Inability to reorganise the work among other staff;
- Inability to recruit more staff to cover the hours;
- Negative effect on quality;
- Negative effect on the business' ability to meet customer demand;
- Negative effect on performance;
- Insufficient work for the employee to do during the hours requested; and/or
- Future planned changes to the business.

To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; but it must demonstrate that the measures taken were reasonably necessary. The actions will not be considered reasonably necessary if the employer could have used less discriminatory means to achieve the same objective, therefore it will always be necessary for the employer to consider alternative options. It might be that, even if the request from the employee is not possible, an employer should consult with them to try and to identify a compromise that works for both parties, or if the employer is unsure if it could work, then a trial of this change could be undertaken.

Example

An employee who works at a small estate agency, makes a request to compressed hours over 4 days. This means they would work 9am to 7pm over 4 days so they can have Thursdays off to provide care for their mother who needs to attend hospital once a week for treatment.

The employer is worried the business will lose sales and get complaints if the employee is not available on Thursdays. For these reasons, the employer considers refusing their request. However, the employer agrees to trial the compressed hours for 10 weeks, and to then make a decision.

During the trial, other staff successfully deal with customer enquiries on Thursdays and the employee meets their sales targets. The employer also finds some customers like being able to reach the employee outside normal office hours on the days they work longer hours.

As the trial is a success, the employer agrees to continue with the new working hours.

7.5 Redundancy

Whilst it would clearly amount to direct discrimination to select an employee to be made redundant because they had a Protected Ground, it is also unlawful to discriminate against an employee in the arrangements when deciding who to make redundant. So, when undertaking a redundancy exercise an employer must consider whether or not there is a provision, criterion or practice which might indirectly discriminate against employees who have a Protected Ground, as well as whether there are any reasonable adjustments to consider for any employee who may have a disability.

Adjustments to the redundancy consultation and redeployment process

As part of any fair redundancy process employers will need to consult with employees about a potential redundancy as well as exploring redeployment opportunities. No matter how good the process adopted by employers, nor how sensitive they are to the impact upon their employees, the reality of being placed at risk of redundancy is a stressful process, which is likely to have an impact on the mental health of affected employees. The situation is likely to have a greater impact on any employees who may already have a condition such as depression. The employer should consider what adjustments are made to the process. This might be holding meetings off site or allowing employees to provide written comments.

Consulting with an employee about reasonable adjustments and redundancy

Where it is identified that an employee has, or may have, a disability and there is a potential redundancy situation, an employer is under a specific legal obligation to consult with them about potential reasonable adjustments.

There are no legal requirements or formalities in relation to how and when employers must consult with employees, but this could fit into existing redundancy consultation procedures, and it is usually anticipated this stage would take place at the initial meetings, and certainly before any decision was taken.

Adjustments to scoring

Employers should always be mindful of the duty to make reasonable adjustments when scoring a pool of employees who are at risk of redundancy using redundancy selection criteria. For example, where an employee has had disability-related absences or additional unpaid leave absences related to their carer status, selection for redundancy on the basis of a poor attendance record/score may amount to discrimination and adjustments should be made to disregard these absences.

7.6 Avoiding unlawful discrimination in dismissals

Guernsey already has legislation in place which requires employers to follow a fair procedure when dismissing someone for misconduct. Following a fair process when dismissing any employee with a Protected Ground will also help employers avoid unlawful discrimination.

A fair process

It is recommended that all employers should have a disciplinary procedure to deal with misconduct issues that arise from time to time. This should follow the Code of Practice on Disciplinary Practice and Procedures in Employment, and they should be both fair and consistent in the operation of that process, to avoid unlawful discrimination.

> **Example**
>
> An employer invites an employee to attend a disciplinary hearing with a view to dismissing them for gross misconduct. The date is set for a day which happens to be a religious holiday for the religion that the employee holds. Unless the employer is able to objectively justify that the hearing must be conducted on that specific day (which the worker may well be unable to attend), this is likely to be indirect discrimination due to the Protected Ground of religion or belief.

Consulting with an employee about reasonable adjustments

Where it is identified an employee has, or may have, a disability and there is a potential disciplinary situation, then employers are under a specific legal obligation to consult with employees about potential reasonable adjustments.

There are no legal requirements or formalities in relation to how and when employers must consult with employees, but this may fit into existing disciplinary procedures, and it is usually anticipated this stage would take place at the initial meetings, and certainly before any decision was taken.

Discrimination in dismissals

If the reason for a dismissal is because of something arising in consequence of a person’s disability, then unless the employer is able to objectively justify the dismissal, it will be considered to be discrimination. Discrimination in these circumstances requires an employer to either be aware of a disability, or that they ought to have been aware.

In order to be in a position to objectively justify any dismissal, an employer would be expected to demonstrate that they have investigated the issues and explored the alternatives.

This would then support that the decision to dismiss was a proportionate means of achieving a legitimate aim.

Example

An employee who has Tourette Syndrome, which causes involuntary muscle movements and sounds which are know as tics. This involves a tendency to have involuntary outbursts of swearing and making other obscene remarks. Following one outburst a colleague makes a complaint and the employee is dismissed.

The dismissal in these circumstances would be considered to be arising from a disability, and so the onus would be on the employer to be able to objectively justify the dismissal and to have considered whether a reasonable adjustment could be made. If prior to dismissal, the employer had never consulted with the employee about reasonable adjustments that would help manage their condition, such as working in a quieter environment or regular breaks, the dismissal is likely to be discriminatory.

The discriminatory dismissal will automatically be unfair for the purpose of the Employment Protection (Guernsey) Law, 1998 (as amended).

Chapter 8: Exceptions

In this chapter we will cover the following:

- General Exceptions
- Employment Exceptions

The Ordinance sets out a number of exceptions where it is lawful to discriminate on a Protected Ground, some of which are general and the others specific to the different kinds of employment relationships.

This chapter of the guidance sets out in what circumstances those exceptions will apply.

8.1 General exceptions

The Ordinance provides for 15 general exceptions where it is lawful to discriminate because of a Protected Ground – the titles of which are as follows:

- Positive action: See Chapter 6.5 Positive action
- Act done under legislative or judicial authority
- Compliance with law of another country
- National security
- Freedom of expression: See Chapter 1.5 Harassment
- Immigration
- Population Management
- Crown employment, etc
- Protection from harm
- Race: act done pursuant to States' policy
- Charities and non-profit organisations
- Acts of worship
- Religious organisations
- Tribunal members
- Animals

This chapter of the guidance does not seek to cover all of these exceptions, but it does cover some of the more common ones that are not covered elsewhere. For those that are covered elsewhere within the guidance these can be accessed from the hyperlinks embedded in the list above.

Protection from harm

The Ordinance provides an exception for acts done to protect other people or property from harm in relation to a person who has a disability which gives them an enhanced tendency to commit a criminal offence punishable with

imprisonment, if that act is a proportionate means of achieving that aim.

Example

If an employee, as a result of paranoid schizophrenia, had a known tendency towards violence (as assault is a criminal offence) as a result of their disability, then provided the protective action is considered proportionate, this would not be considered to be discrimination arising from a disability. What those steps would be and whether they would be proportionate will obviously depend upon the circumstances, but that might be suspension and dismissal of the employee following a disciplinary procedure.

Proportionality will be assessed in the same way as for objective justification in claims of indirect discrimination. In the context of the example the employer would need to have considered alternatives to dismissal and reasonable adjustments that would avoid the risk.

Crown employment

This exemption permits statutory restrictions on the employment of foreign nationals in the civil, diplomatic, armed or security and intelligence services and by certain public bodies.

8.2 Employment – exceptions

The Ordinance provides for 8 specific exceptions where it is lawful to discriminate in relation to a Protected Ground regarding employment – the titles of which are as follows:

- Genuine and determining occupational requirement
- Employment for the purposes of an organised religion
- Senior leadership positions: schools with a religious ethos
- Safeguarding (employment)

- Employees and family situations
- Qualifications
- Employment of people with a particular disability
- No requirement to employ person who cannot fulfil essential functions of post

Genuine and determining occupational requirement

The Ordinance provides an exception in relation to employment where an employer is able to demonstrate there is an occupational requirement for a person to have a particular Protected Ground and that requirement is a proportionate means of achieving a legitimate aim. This is known as a “Genuine and determining occupational requirement”. It would not be discrimination to not employ an individual who does not meet that requirement.

Example

The need for authenticity or realism might require someone of a particular race or disability for acting roles or modelling jobs. For example, an actor may be playing the part of a person of a particular skin colour, therefore the requirement to have this Protected Ground could be considered to be an occupational requirement. As such it would not be discriminatory to reject an applicant who had a different skin colour on this basis.

Even if the employer is able to demonstrate that they have an occupational requirement, they must still demonstrate that this requirement is a proportionate means of achieving a legitimate aim. This assessment is carried out in the same way as with claims for indirect discrimination, so the employer must first demonstrate that their occupational requirement is designed to achieve a “legitimate aim”. To show that their actions were proportionate an employer does not need to show that they had no alternative course of action; rather, they must demonstrate that the measures taken were reasonably necessary. The actions will not be considered proportionate if the employer could have achieved the same objective through less discriminatory means.

The exception of genuine occupational requirements also extends to contract work, a position as partner, an appointment to a personal office or an appointment to a public office, and will also apply to employment agencies and providers of vocational training.

Employment for the purposes of an organised religion

The Ordinance provides an exception in relation to work which is for the purposes of an organised religion where either:

- there is a requirement to be of a particular religion or religious denomination; or
- with respect of any conduct on the employee's part, it is incompatible with the Precepts (i.e. behaviours and thoughts), or with the upholding of the tenets, of the religion or religious denomination in question.

Within this exception, work is considered to be for the purposes of an organised religion if it involves representing or promoting the religion, including, but not limited to being a minister, celebrant, leader or youth worker of the religion. This exception is similar to the genuine and determining occupational requirement above, but there is no requirement for this to be objectively justified.

Example

A church wants to recruit a new cleaner. The work that they will be undertaking does not require them to be of a particular religion, therefore the exception does not apply.

Senior leadership positions: schools with a religious ethos

The Ordinance provides an exception in relation to employment within schools which have a religious ethos in relation to the appointment, promotion or remuneration of any teacher in a senior leadership position at the school, to persons:

- whose religious opinions are in accordance with the tenets of the religion or the religious denomination of the school;
- who attend religious worship in accordance with those tenets; or
- who give, or are willing to give, religious education at the school in accordance with those tenets.

The Ordinance also provides a further exception in connection with the termination of the employment of any teacher in a senior leadership position at the schools which have a religious ethos. This is related to any conduct on the teacher's part which is incompatible with the precepts (behaviour and thoughts), or with the upholding of the tenets, of the religion or religious denomination of the school.

For the purposes of this exception the term "senior leadership position" means the position of head teacher, deputy head teacher, assistant head teacher or head of religious education in a school.

Safeguarding (employment)

The Ordinance provides an exception in relation to safeguarding in employment. There is no requirement under the Ordinance to recruit, retain in employment or promote a person where the employer believes reasonably that they have committed, or have a tendency to commit, an act which is or may be a criminal offence punishable with imprisonment. This would include, but not limited to, acts of physical or sexual abuse of other persons and the act of viewing indecent images of persons under 18. Employers should also ensure that they are compliant with the Rehabilitation of Offenders (Bailiwick of Guernsey) Law, 2002. See Legislation Part 13.

There is a requirement within this exception for an employer to have a reasonable belief that someone has committed, or a tendency to commit, criminal offences. Accordingly, for an existing employee, an employer could not merely rely on speculation and gossip, especially for matters that arose outside of work, but would generally be expected to undertake some form of investigation to establish the facts to the extent possible. This is important both from a discrimination perspective and also in the case of a dismissal that this process is fair. In practice, it is recognised if an employee is facing a criminal charge they will often unable or unwilling to respond to questions that an employer may have, therefore it will be

for an employer to determine if they have a reasonable belief.

Example

Following an investigation into an assault a school identifies that one of its members of staff has a condition that amounts to a disability which causes them to have a tendency towards violence, and this condition contributed towards the incident. Normally where an employer takes disciplinary action in relation to a symptom of a disability this could amount to discrimination arising from a disability. However, because the individual has a tendency to commit a criminal offence which can be punishable by imprisonment (i.e. assault) then this would fall within the exception, and as such taking disciplinary action would not amount to discrimination.

Employees and family situations

The Ordinance states that it is not discrimination to:

- Grant an employee's request for flexible working,
- Provide benefits to those employees with care responsibilities for family members, including but not limited to parents of a child and those with the protected ground of carer status, and
- Provide benefits to those employees for family situations, including but not limited to paid leave in the case of the illness of a family member.

Qualifications

The Ordinance provides an exception in relation to claims of race discrimination, where an employer requires a person to hold a certain qualification in relation to a role where:

- The qualification is reasonably necessary for the role, and

- The employer requires, or would require, the same qualification of persons who do not share the same racial group.

This exception might apply in relation to a requirement to have a degree from a particular country such as the UK. Whilst this might amount to indirect discrimination on the grounds of race, provided the qualification is reasonably necessary for the role and it applies to everyone, then it would fall within the exception.

The exception also applies to providers of vocational training who require a person to hold a certain qualification in relation to training which they are undertaking or are applying to undertake. Again, provided that the qualification is reasonably necessary, and it would apply to everyone, it would fall within the exception.

Employment of people with a particular disability

The Ordinance provides an exception in relation to employers who provide supported employment opportunities for persons with a disability, and not to those who do not have that disability. This exception is currently limited to two employers, Grow Ltd and the Guernsey Employment Trust LBG, but can be supplemented by further regulations.

No requirement to employ person who cannot fulfil essential functions of post

The Ordinance provides an exception in relation to employers that there is no requirement to offer employment, promote or retain in employment, or offer training or any other benefit associated with employment to a person in circumstances where they cannot fulfil one or more of the essential functions of the post.

This exception is subject to the reasonable adjustment duty. So, if someone could fulfil the essential functions of the post with reasonable adjustments, then the exception will not apply.

Example

Following an injury at work a crane driver injures his spine and is unable to drive. As they are unable to manoeuvre the crane, they cannot fulfil an essential function of the post. However, before dismissing the employee, the employer would need to consider whether there are any potential reasonable adjustments that could be made such as redeployment to an administrative position.

Chapter 9: Preparing for the Ordinance

- Equal Opportunities policy
- Training
- Monitoring
- Reviewing policies and procedures
- Common reasonable adjustments to think about
- Table of implementation dates for the legislation
- Accessibility

There is no single exhaustive or definitive check list that every single employer must complete before the Ordinance comes into force, although there are a number of points that are going to be common to all employers, regardless of size or complexity.
Probably the single most important thing an employer can do in preparing for the legislation is to raise awareness within the workforce around equality issues – particularly in the context of their business, as the issues and actions a large financial services company might have to consider, will inevitably be quite different from a small building company. This will lead businesses to reflect on how they operate and what barriers are put in place that affect employees or candidates who have a particular Protected Ground. They must ask themselves is that barrier actually needed or could things be done in a different way.

It is hoped that by businesses asking themselves these questions, not only will it make them ready for the implementation of the Ordinance, but it will also cause them to question how they operate, and also find new and better ways of working.

One of the key areas of preparation for an organisation is to think about their current workforce, and identify those employees who might have a disability, and then consult with them in relation to what reasonable adjustments they might need. In most instances, employers will probably find that in many instances they are already making the reasonable adjustments that are required. This might be by providing a specific chair for someone with a bad back, larger screens for those that are visually impaired, or supporting employees who have had a period of time off work with depression through a phased return to work. However, it might lead employers to identify other ways in which they can support those staff.

The duty to make reasonable adjustments to physical features does not come into force until at least 1 October 2028, however, there is nothing to prevent employers from implementing those adjustments in advance of that date. Where the adjustment relates to the provision of an auxiliary aid, an employer will be under a duty to consider that adjustment when the Ordinance comes into force from 1 October 2023.

9.1 Equal Opportunities Policy

An equal opportunities policy is a document which an employer can use to set out its commitment to tackle discrimination and promote equality and diversity in areas such as recruitment, training, management and pay. The Ordinance does not require that you have an equal opportunities policy, or if you do have one, what that policy should contain, but it is highly recommended.

An equal opportunities policy should apply to every aspect of the employment relationship right from the recruitment process, to how you reward staff through pay and benefits, to how you manage disciplinaries and grievances, and ultimately to the end of their contract.

A policy might include:

- Statements outlining an employer’s commitment to equality;

- Identification of the types of discrimination and the Protected Grounds covered by the policy i.e. disability, race, carer status, sexual orientation, and religion or belief;
- Other areas of equality that are not currently Protected Grounds under the Prevention of Discrimination Ordinance, such as sex, age, gender reassignment, and pregnancy and maternity;
- Statements outlining the type of work environment and culture you are aiming to create, including what is not acceptable behaviour in the workplace;
- Information about how the policy will be put into action, including how employees can raise concerns through grievances and how breaches of the policy will be dealt with through disciplinary action; and
- Who is responsible for the policy and how you will monitor and review it.

To make sure an equal opportunities policy has real meaning an employer should:

- Demonstrate a commitment to equal opportunities from the top of the organisation;
- Promote the policy both to existing staff and candidates;
- Provide training to staff on what the policy says and what it means to them; how a willingness to challenge poor behaviour and where necessary, discipline anyone not complying with the policy; and
- Regularly review the effectiveness of the policy.

Equal opportunities policies though are not one size fits all. For example, a larger organisation based in multiple locations with different businesses will likely need something more complex and could wish to include details of equal opportunities monitoring. A smaller business that only employs four or five staff may have a more simplified document.

An example of a equal opportunities policy is found in Appendix I, for use by a small employer. Equal Opportunities Policy

9.2 Training

Equality Training is a key part of any good equal opportunities policy, because if your staff understand what the Ordinance means for them as individuals or as

managers or as an employer then they are more likely to comply with their obligations.

Whilst there is no legal requirement on employers to provide equality training it can be an important part of an employer being able to demonstrate that, in the event a claim is brought, they are taking steps o prevent discrimination, harassment and victimisation and that they are taking these issues seriously. Also, it is more likely to create an inclusive atmosphere where everyone in the organisation can succeed.

When should training take place?

As part of preparing for the introduction of the Ordinance, it is recommended that employers should consider arranging training for their staff around these issues. In order to assist in this process, there will be free training available. For further details please follow the Link to the Consortium training website

In addition, once the Ordinance is in force then employers might choose to provide training:

- During the induction process for new starters; and
- Periodically asking staff to either attend update courses or by completing online training.

What should the training cover?

There is no exhaustive list what equality training should cover, and it should be relevant to the organisation.

However, in most instances training should include:

- An explanation of the Protected Grounds and what behaviour is and is not acceptable;
- The risk of ignoring or seeming to approve inappropriate behaviour;
- The impact that generalisations, stereotypes, unconscious bias, and inappropriate language can have on people's chances of obtaining work, promotion, recognition and respect;
- What the reasonable adjustments duty is and how it works; and
- The organisations equality policy and how it operates in practice, including any monitoring undertaken.

The Consortium training will help with the first four bullet points but it is important for organisations to also consider how their internal policies and procedures will operate, including grievance policies, complaints handling, what to do when requests for reasonable adjustments are received.

9.3 Diversity monitoring

As part of their equal opportunities policy, some employers monitor and report on matters such as recruitment, promotion, training, pay, grievances and disciplinary action by reference to the Protected Grounds of their employees. There is no legal requirement on employers to undertake diversity monitoring, nevertheless, doing so can help them to assess whether, for example, they are:

- Recruiting employees who are disadvantaged or under-represented;
- Promoting people fairly whatever their Protected Grounds;
- Checking that pay is comparable for employees in similar or equivalent jobs; and
- Making progress towards the aims set out in their equal opportunities policy.

Why you may consider monitoring

Monitoring of equality - based issues by an employer (and taking action where the information suggests there may be cause for concern) can also be used as evidence if someone brings a tribunal case against them- although simply collecting the data without analysing it is not enough. It may also help to identify areas where taking positive action may be appropriate, for example, by highlighting parts of the workforce where people with certain Protected Grounds are disproportionately represented.

Diversity monitoring can cover matters such as:

- How many people with a particular Protected Ground apply for each job, are shortlisted and are recruited or promoted;
- How many people in the workforce have a particular Protected Ground and the levels within the organisation at which level they are employed;
- The satisfaction levels of all staff including those with a particular Protected Ground; and

- Whether disciplinary action is disproportionately taken against workers with a particular Protected Ground.

How should monitoring take place?

Employers also need to consider how they wish to collect the information, and whether this should be done on an anonymised basis. As part of this process they also need to communicate the process to reassure people who provide information that it will not be used to discriminate against them and how it will be used.

Example

As part of its recruitment process, an employer requires candidates to complete an application form, which comes with a diversity monitoring form. The application form makes it clear that there is no obligation to complete the diversity monitoring form and that in any event it will be separated from their application forms by someone who is not involved in the decision about who to shortlist and interview.

N.B. where this is not possible because it is a very small organisation, the form might state that you do not look at monitoring forms until after you have decided whether to interview someone or not.

It should be noted in general that employers are not permitted to ask a job applicant questions relating to their Protected Grounds as part of the recruitment process. One of the exceptions to this rule applies to diversity monitoring.

Whenever employers are processing the personal, or special category personal data of their employees, including as part of any diversity monitoring, they must always be aware of their obligations under the Data Protection (Bailiwick of Guernsey) Law, 2017.

9.4 Reviewing policies and procedures

An important aspect of preparing for the introduction of the Ordinance will be a review of the organisation’s policies and procedures to consider what (if any)

changes might be required. What will be expected of each employer will differ according to their size and resources, so a large organisation with a dedicated HR team that already has extensive policies and procedures to review, may need to do more than a small employer who might only employ a handful of staff.

Every employer should spend time thinking about the lifecycle of an employee with different Protected Grounds to understand whether their policies might have a greater impact on those individuals than others. This does not mean that the policy or procedure is necessarily discriminatory, but in the case of indirect discrimination, it would need to be objectively justified, and if the Protected Ground is disability, then the reasonable adjustment duty should be considered.

For most employers that review would normally include:

- Recruitment process;
- Inductions;
- Appraisals;
- Pay, benefits and promotion;
- Work social events;
- Management of sickness absence;
- Conduct and capability procedures; and
- Redundancy.

It is not expected that an employer needs to consider every possible eventuality and come up with a new policy to address an issue that in reality may never happen. However, if an employer has considered its policies and procedures beforehand, hopefully changes can be made before the Ordinance comes into force, and the employer will also be in a better place to explain the justification behind a particular policy if asked to justify it.

Ultimately, employers are not required to be legal experts, and particularly in the case of smaller employers there is no expectation that they need to engage third parties to undertake a review of their policies and procedures. Indeed, the best person to consider whether or not a particular policy is justified is the employer as they will understand their business better than anyone else.

Indirect discrimination

Indirect discrimination can occur where an employer has a policy or procedure in place (referred to in the Ordinance as being a provision, criterion or practice)

which places people with a particular Protected Ground at a disadvantage and cannot be objectively justified. For further details on the concept of indirect discrimination please see Chapter 1.2.

When reviewing policies and procedures, the first aspect is to identify is there any disadvantage to individuals with a Protected Ground. The disadvantage could arise in different ways and some examples are set out below.

Example

Recruitment – Written application forms place people who are visually impaired at a disadvantage as they may have difficulty in reading it

Work social events – An employer hosting end of month drinks each month at which only alcoholic drinks are served, may place people who are Muslim at a disadvantage as they are unable to drink alcohol

Pay, benefits and promotion – Offering benefits such as private medical insurance only to those staff married to someone of the opposite sex, and not to those who are married to someone of the same sex, would place people with a particular sexual orientation at a disadvantage

Once a disadvantage is identified then it is necessary for the employer to be able to objectively justify the policy. This is a two-stage process with the employer first identified a legitimate aim, and secondly consider whether the policy is a proportionate means of achieving that legitimate aim. A policy won't generally be considered to be proportionate if the employer could have used less discriminatory means to achieve the same objective. Using the same examples above, the potential justification is considered below for the policies.

Example

Recruitment – The need to obtain information regarding potential candidates would be considered to be a legitimate aim. However, because the use of written forms place anyone who is visually impaired at a disadvantage, this is unlikely to be considered proportionate, unless the application form is made available in different formats such as using an increased font size or a format that can be read out using reading software.

Work social events – Promoting team culture and spirit would be a legitimate aim, but an employer could make non-alcoholic drinks available so that the Muslim staff could participate.

Pay, benefits and promotion – It would be difficult to demonstrate that not offering a benefit to same sex couples constituted a legitimate aim especially as insurance policies generally are available to same sex couples, therefore such a policy would not be objectively justified.

Reasonable adjustments

Where an employee has a disability, an employer also needs to consider potential reasonable adjustments. For further details on the concept of reasonable adjustments please see Chapter 3.

As part of the duty to make reasonable adjustments, employers have a specific duty to consult. It is recommended that before the Ordinance comes into force employers should arrange to meet with any employees who have a disability to consider what reasonable adjustments should be made. There is no particular form or duration of consultation required, but it is recommended that minutes should be kept and any agreed outcomes recorded.

The reasonable adjustment duty will not apply in respect of physical features until 1 October 2028 at the earliest. It will also not be possible to bring a claim of indirect discrimination due to a physical feature until this date.

Example

A full-time employee has chronic fatigue syndrome (CFS), and as a result struggles to be productive in the afternoons, and is making a number of errors due to their condition and tiredness.

The full-time working hours places employees with CFS at a disadvantage, compared with employees who do not have the disability. Adjustments the employer may wish to consider include:

- Alteration to working hours
- Flexible working, such as working from home, part time working, or job sharing
- Changing tasks or the pace of work to avoid exacerbating the condition
- Allowing for reasonable time off for appointments and treatment
- Changing layout of workspace, such as providing a quiet working station
  More frequent and longer breaks

9.5 Common reasonable adjustments to think about

There is no exhaustive list of reasonable adjustments that employers need to consider but a number of illustrative examples are set out below.

Example: Reallocating duties to another worker

An employee works as a maintenance manager and their role occasionally requires them to go on to the open roof of a building, but this is difficult for the employee as they have severe vertigo. It could be a reasonable adjustment to transfer minor or ancillary duties such as going on to the roof to another member of the maintenance team.

Example: Transfers to existing vacancies

Due to a new disability an employee is unable to continue their existing role even with adjustments. It would, however, be a reasonable adjustment to consider transferring that employee to an existing vacancy provided the employee already has the skills to perform that role or could do so with some retraining or other adjustments.

Example: Phased return to work

An employee has had an extended period of absence due to work-related stress and depression. Allowing the employee to have a phased return to work over a number of weeks, where they gradually build up their hours and duties is likely to be a reasonable adjustment.

Example: Additional breaks

An employer allows a disabled person to work to have additional breaks to overcome fatigue arising from their disability.

Example: Relocating work station

An employee due to their disability needs easy access to the toilets due to their disability. An employer therefore moves their workstation, so that they have the desk nearest to the toilet facilities.

Example: Training for other staff

An employee who is deaf joins a team but their colleagues initially struggle to communicate with them. An employer provides training for the entire team on conducting meetings in a way that enables a deaf staff member to participate effectively.

Example: Auxiliary aids

An employer provides an adapted keyboard for an employee with arthritis.

An employer provides a large screen for an employee with a visual impairment.

An employer provides an adapted telephone for an employee with a hearing impairment.

An employer provides an ergonomically designed chair and standing desk for an employee with a chronic back condition.

Example: Recruitment tests

An employer requires staff to undertake a written test as part of their recruitment process. This places a candidate with restricted manual dexterity at a disadvantage as they would have difficulty completing the exercise in time, so the employer gives that person an oral test instead.

Example: Leave

An employee with cancer needs to undergo treatment and have an extended period of rehabilitation. Their employer allows a period of disability leave and permits them to return to their job at the end of this period.

Example: Modifying disciplinary or grievance procedures

An employee with a learning disability is allowed to take a friend (who does not work with them) to support them at a grievance meeting. Normally the employer only allows staff to be accompanied by colleagues.

Example: Redundancy selection criteria

An employee with a heart condition has increased levels of absence. The employee is one of a number of staff placed at risk of redundancy. When assessing the level of absences as a criterion for selecting people for redundancy, the employer discounts these periods of disability-related absence.

Example: Adjustments for wheelchair users

An employer has a member of staff who is a wheelchair user. Common adjustments would include agreeing to meet in an accessible room, arranging for employee's workstation to be on ground floor, widening a doorway, providing a ramp or moving furniture, relocating light switches, door handles, or shelves if the person has difficulty in reaching them. The installation of a lift is unlikely to be considered a reasonable adjustment for a small employer.

*The duty to make reasonable adjustments to physical features will not come into force until 1 October 2028 at the earliest.

9.6 Implementation dates for the legislation

If you are on a mobile device or would like to print the table below, please download the PDF version here: Implementation dates for the legislation

Provision of Ordinance	Employers	Service providers	Schools and education providers	Clubs and associations	Accom provi

General prohibitions on discrimination	1 Oct 2023	1 Oct 2023	Not before 1 Sept 2025*	1 Oct 2023	1 Oct
General reasonable adjustments duty (Excluding physical features	1 Oct 2023	1 Oct 2023	Not before 1 Sept 2025*	1 Oct 2023	1 Oct
General reasonable adjustments duty to physical features	Not before 1 Oct 2028	Not before 1 Oct 2028	Not before 1 Oct 2028	Not before 1 Oct 2028	Not be 2028
Pro active duty to make reasonable adjustments: Excluding physical features	N/A	Not before 1 Oct 2028	Not before 1 Sept 2025*	N/A	N/A
Pro active duty to make reasonable adjustments to physical features	N/A	N/A	N/A	N/A	N/A
Duty to carry out minor improvements	N/A	N/A	N/A	N/A	Not in 2023. deterr regula

Duty to allow reasonable adjustments to physical features- residential landlords	N/A	N/A	N/A	N/A	not be 2028
Duty to allow reasonable adjustments to physical features- commercial landlords	N/A	N/A	N/A	N/A	Not be 2028
Public sector duty to prepare accessibility action plans	N/A	Public sector only - 1 Oct 2028	Public sector only - 1 Oct 2028	N/A	Not be 2028

* Where a school or education provider is acting as an employer or general service provider, rather than an education providers, duties will come into force from 1 October 2023, in line with the dates in the first two columns.

If an act of discrimination occurs before the implementation date an individual will not be able to bring a claim under the new Ordinance. Claims cannot be brought after the implementation date for acts or omissions that occurred prior to the implementation date.

Those duties which are due to come into force after 1 October 2023 will require a commencement regulation to be made by the Committee *for* Employment & Social Security and shall not have effect until approved by a resolution of the States.

It should also be noted that the intention is that different Protected Grounds will be introduced over the next few years, including age, and that the existing Sex Discrimination Ordinance will be replaced, with sex, pregnancy, marital status and gender reassignment being added as Protected Grounds under the

Ordinance.

9.7 Accessibility

Accessibility Audit An Accessibility Audit (also known as Disabled Access Audit) is an assessment of a building, an environment or a service against best-practice standards to benchmark its accessibility for disabled people.

Please go to the checklist in Appendix II for an example of an Accessibility Audit for an office/ building. This will help you assess getting to your premises, ease of navigating around the building, the environment and the facilities available. The responses to the questions will then help you to develop an accessibility action plan.

You may also wish to undertake an accessibility audit in relation to your online and digital systems and products.

We have not supplied an example for online and digital systems as we recommend that you review these regularly as they may change in relation to digital developments. Please look at the following recommended links to assist you in creating your own audit for these resources.

Recommended Links

Accessible documents

Information for Businesses - Information for Businesses: States of Guernsey

Publishing accessible documents - Publishing accessible documents GOV.UK

Overview of the Accessible Information Standard- Overview of the accessible information standard NHS England

Make it easy- Making information easy for people with a learning disability Making Information easy for people with a learning disability.

Accessible websites and digital accessibility

Information for Businesses - Information for Businesses : States of Guernsey

Guidance and tools for digital accessibility - Guidance and tools for digital accessibility: GOV.UK

Accessible Information Standard - Accessible information standard NHS England

Supporting disabled colleagues

Employment Guide - Employment guide : Guernsey Employment Trust (get.org.gg)

Accessible services

Making your service accessible: an introduction - Service Manual - Making your service accessible: GOV.UK

Chapter 10: Complaints

This chapter will cover the following topics:

- Conciliation
- Tribunal claims

Wherever possible, it is good practice – as well as being in the interests of both employer and employee – to seek to resolve any potential complaints under the Ordinance as they arise and before they become major problems through the employee raising a grievance. Grievances can be raised either on a formal or informal basis and can provide an open and fair way for complainants to make their concerns known, and for their issues to be resolved quickly, without having to bring legal proceedings.

For further details on grievance procedures please refer to the Employment Relations Service Guide - Raising and Handling Grievances.

The Ordinance recognises that it will not always be possible for an employee who considers they have suffered discrimination to resolve those issues through this method. Therefore, they have a right to make a complaint through the Employment & Discrimination Tribunal. This chapter therefore provides an overview of enforcement the Employment & Discrimination Tribunal, although it is not intended to be a procedural guide as to how to go about presenting a claim.

10.1 Conciliation

When parties are unable to resolve the issues between themselves through a grievance, early resolution of any complaint is encouraged through the Employment and Equal Opportunities Service (EEOS) and a pre-complaint

conciliation process, the details of which are set out below.

Pre-complaint conciliation

Before anyone makes a complaint to the Employment & Discrimination Tribunal (Tribunal), they are required to first notify the EEOS of their intended complaint. This process should be started by completing an intent to complain form. Please follow the link to the complaints form page. Upon receiving a notification, the EEOS will ask both the person who wishes to make the complaint and the other party if they wish to engage in pre-complaint conciliation. If they do, the EEOS will then facilitate the conciliation to see if it is possible to reach a settlement. Any settlement agreement concluded by the EEOS will be legally binding and a party will then be unable to bring a claim before the Tribunal.

In order to make it easier to help parties reach an amicable resolution, any settlement discussions between the parties conducted through the EEOS will take place on a without prejudice basis, which means that anything that is said or any offers made are inadmissible as evidence as part of any subsequent Tribunal claim, unless both parties agree.

If either party does not wish to engage in pre-complaint conciliation, or the EEOS believes that it is not possible to settle the matter, then a certificate will be issued to the person who wishes to bring the claim. A person is not entitled to bring a claim until they receive a certificate from the EEOS, and if they attempt to do so, then their claim will be rejected by the Tribunal. It is important to note that the period for bringing a complaint will be extended by pre-complaint conciliation – for further details see below.

Ongoing conciliation

When pre-complaint conciliation is unsuccessful, a person can then decide if they wish to proceed with a formal complaint. The relevant paper work would need to be submitted to the Secretary of the Tribunal. The matter will then be referred to the EEOS and the parties will be given a further period to attempt to settle the matter through conciliation. Normally, six-weeks will be allowed for the parties to settle the complaint before the matter is referred back to the Tribunal. If the complaint is not settled, then the claim may proceed to a hearing. The six-week time period can be extended where negotiations are in progress. The parties can engage in discussion to settle the complaint at any stage up to the conclusion of the final hearing.

Compromise agreements

Alternatively, it is open to the parties to settle complaints between themselves without referring the matter to the EEOS through a compromise agreement. In order for a compromise agreement to be valid:

- The agreement must be in writing;
- It must relate to the particular complaint;
- The person must have received advice from an independent adviser (being a lawyer or a trade union representative) as to the terms and effect of the proposed agreement;
- The agreement must identify the adviser; and
- The agreement has a statement that the above conditions are satisfied.

10.2 Tribunal claims

Following conclusion of the conciliation process, if a person is still dissatisfied then they can bring a claim before the Employment & Discrimination Tribunal (Tribunal).

Responding to a claim

Responses by the employer are also submitted using a prescribed form. The appropriate form is available on the Tribunal website or upon request from the Tribunal.

Claims are started by completing the appropriate form which needs to be submitted to the Tribunal. Responses by employers are also submitted using the appropriate form. The forms will be available here or from the Tribunal upon requests from 1st October 2023.

Time limits

There are strict time limits for bringing claims. The complaint should be raised within a period of three months, beginning on the day when the act complained of was done. However, the period between the person notifying EEOS of the intended complaint in order to initiate pre-complaint conciliation and the date on which they receive a certificate will not count towards the time limit for bringing a claim before the Tribunal. In addition, if the time limit is due to expire within one month of the end of conciliation, it will also be extended so that a person would

always have at least a full month in order to present their claim.

Example:

An employee wishes to bring a claim of discrimination for an event which took place on 10 January, and so the last day on which they could bring a claim would be 9 April.

The employee completed the intent to complain form and submitted it to the EEOS on 1st February. Following a period of pre-complaint conciliation, the parties were unable to resolve the matter, so the EEOS issued a certificate to the employee on 8 February. The period of time from the day after the notification was made to the day on which the certificate was issued was a total of 7 days. So, the final day for bringing a claim would be 16 April.

Alternatively, if the employee contacted the EEOS on 1 April and then received a certificate on 8 April, because even with the extra 7 days the final day for bringing a claim would normally be less than a month* after the end of pre-complaint conciliation, the final day would be extended to be 7 May.

*A month is defined as a calendar month according to the Interpretation and Standards Provision (Bailiwick of Guernsey) Law, 2016

The period of time can sometimes be extended, where the Tribunal is satisfied that it was not reasonably practicable for the complaint to have been made within the 3-month time frame, or that it would be just and equitable in the circumstances of the case to allow the further time.

When does the period for bringing the claim start?

The time for bringing a claim will run from the date on which the act complained of was done. Where the act extends over a period of time, or relates to the term of a contract, then the act is treated as being done either at the end of the conduct or the contract as the case may be.

Example

An employee brings a claim for victimisation which relates to a series of related acts taking place over the last 6 months leading to their eventual dismissal. Even though the first of these acts took place more than three months ago, the period of time for bringing a claim will run from the final act of victimisation, which was their dismissal.

Where the complaint is about a failure to do something, then the Ordinance has specific rules for the purposes of time limits. If the employer explicitly decides not to take the step, such as making a reasonable adjustment, then the time for bringing a claim will run from that point. Where there is not an express decision, then time will begin to run either from the point at which the employer acts inconsistently, or after the passage of what would be considered to be a reasonable period of time.

Example

An employee with carpal tunnel syndrome asks their employer to provide an adapted keyboard as an auxiliary aid. The employer initially agrees to the request, but never actually orders the aid. After a period in which it would have been reasonable for the employer to obtain the keyboard, they will be treated as having failed to do so.

Liability of employers and employees

Claims for discrimination can often be brought against both the employer (who is deemed to be liable for the acts of their employees carried out in the course of their employment), as well as the individuals themselves who commit the act.

An employer will still be liable for the acts of their employees, even if they were done without their knowledge or approval, unless the employer can demonstrate

that they took all such steps as were reasonably practicable to prevent the employee from doing that act. This is sometimes referred to as the “statutory defence”.

As a minimum this would require employers to:

- have an equal opportunities policy;
- provide equality training to staff; and
- seek to address issues when they became aware of them.

Example:

An employee raises a grievance in respect of harassment on the grounds of race by their manager. The manager attended the company’s equality and diversity training and is fully aware of the company’s policy. The company provided adequate equality training to staff and the manager attended all of the sessions. The company has a strong record of dealing with any examples of harassment when they arise, as well as promoting equality and diversity in the workplace, and in this instance takes disciplinary action against the manager and deals fully with the grievance by the employee.

In this scenario the employer may be able to rely on the statutory defence that it did everything it should have, but the manager may be personally liable for their actions.

Burden of proof

Where an employee brings a claim, they must prove that there are facts from which the Tribunal could decide or draw an inference that there has been discrimination. This is sometimes referred to as demonstrating a prima facie case.

If an employee has satisfied the Tribunal that there are facts from which the Tribunal could conclude that there has been discrimination, then the burden of proof shifts to the employer. In order to be able to defend a claim, the employer will have to prove, on the balance of probabilities, that they did not act

unlawfully. If the employer's explanation is inadequate or unsatisfactory, the Tribunal may decide that the act was unlawful.

Awards

Where the Tribunal upholds a complaint of discrimination, it can either make an award of compensation, a non-financial award or both.

A non-financial award means an order that the employer take, within a specified period, such steps that the Tribunal is satisfied are:

- practical;
- will not impose a disproportionate burden;
- relates to the discriminatory act; and
- will reduce the impact of that discrimination on the employee.

Example:

The Tribunal upholds a claim for harassment on the grounds of sexual orientation due to a series of inappropriate comments made by a number of different members of staff. None of the staff have ever received any equality training, therefore the Tribunal makes an order requiring this training to take place.

Compensation

The basic compensation for claims of discrimination relating to employment (other than claims of equal pay) is that a person is entitled to an award of:

- Up to six months' pay, or 26 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

The normal position in calculating either a month or a week's pay for the purpose, is that it is based on the person's average pay during the preceding six-month period. However, the Tribunal does retain a discretion to calculate this on such other basis as it determines is just and equitable, if it determines it would be

inappropriate to calculate the award in the usual way.

Compensation for injury to feelings will be awarded using a series of payment bands depending upon the seriousness of the discrimination and impact on the individual. For further details please see Legislation parts 4 and 5.

In addition, the Tribunal has a further discretion to reduce any award, if it determines the person has unreasonably refused an offer by the employer, which if it had been accepted, would have had the effect of putting the person in the position in which they would have been, had the act of discrimination not occurred.

Joined complaints

Where a person makes more than one complaint against the same employer, or against a number of connected persons, for example an employer and a number of individuals who all work for that employer, then the Tribunal may hear those complaints together (known as joined complaints). In addition, the Tribunal can also join claims brought by the employee for unfair dismissal and sex discrimination to a complaint under the Prevention of Discrimination Ordinance.

Where there are joined complaints against connected respondents then the maximum award the Tribunal can make is:

- Up to nine months' pay, or 39 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

The exception to this is where in addition to other complaints, there is a claim or multiple claims of victimisation, in which case the Tribunal may make a further award of:

- Up to six months' pay, or 26 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

Example

An employee successfully brings a claim for direct discrimination and harassment on the grounds of sex and race, victimisation in relation to a grievance they raised and unfair dismissal. The maximum the Tribunal could award the person would be up to 15 months' pay and an award of injury to feelings of up to £20,000.

Compensation in equal pay cases

Where an employee brings a claim for equal pay, then this is calculated on a different basis, and is not subject to the limits set out above. The employee is entitled to an award of arrears of pay, based on the difference between the pay they actually received compared to the pay they should had received up to a maximum period of six years, but this can only run from the point the Ordinance came into force on 1 October 2023.

Appendix I Example Equal Opportunities Policy

Purpose of the policy

The purpose of this policy is to set out our approach to equal opportunities and avoiding discrimination in the workplace. It applies to all aspects of the employment relationship, before it begins, though to its eventual termination and everything in between including decisions about pay, appraisals, promotion, conduct at work, and grievance matters. However, the policy does not form part of your contract of employment and it may be amended from time to time.

Our commitment

As an organisation we are committed to:

1. Encouraging equality, diversity and inclusion;
2. Creating a working environment free of bullying, harassment, victimisation and unlawful discrimination;

3. Promoting dignity and respect for all, and where individual differences and the contributions of all staff are recognised and valued; and
4. Taking seriously complaints of bullying, harassment, victimisation and unlawful discrimination.

As an employer we are therefore committed to promoting equal opportunities in employment. Our employees and any job applicants will receive equal treatment regardless of carer status, disability, race (including colour, nationality, ethnic or national origin), religion or belief, sexual orientation or sex (including pregnancy or maternity, gender reassignment, marital status) (Protected Grounds). At the time of writing there is no approved legislation requiring employers to ensure that they do not discriminate on the ground of age. However, employers who are thinking ahead to phase two, may also wish to consider whether to include age discrimination as well.

What is discrimination?

No one should unlawfully discriminate against or harass other people including current and former employees, job applicants, clients, customers, suppliers and visitors. This applies both when an individual is at work, but also potentially outside too, for example when dealing with customers, suppliers or other work-related contacts in the course of their employment, or on work-related trips or social events.

There are different types of discrimination and often discrimination can be unintentional or due to sub-conscious biases. The following forms of discrimination are prohibited under this policy:

- **Direct discrimination**: treating someone less favourably because of a Protected Ground. For example, rejecting a job applicant because of the colour of their skin or their sexual orientation.
- **Indirect discrimination**: a provision, criterion or practice (e.g. a policy) that applies to everyone but adversely affects people with a particular protected ground more than others and is not objectively justified. For example, refusing to allow employees to wear religious symbols due to a dress code will adversely affect people of a particular religion. In order to be lawful this would need to be objectively justified, for example by reference to health and safety grounds.

- **Harassment:** this includes sexual harassment and other unwanted conduct related to a protected ground, which has the purpose or effect of violating someone's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. For example, this might include making unwanted sexual advances to another member of staff.
- **Victimisation**: this occurs where there is retaliation against someone who has either complained or has supported someone else's complaint about discrimination or harassment. For example, this might include an employee being disciplined who has raised a grievance against their manager.
- **Disability discrimination**: this includes direct and indirect discrimination, any unjustified less favourable treatment because of the effects of a disability that can’t be objectively justified, and failure to make reasonable adjustments to alleviate disadvantages caused by a disability. For example, this includes including disability-related absences when carrying out a redundancy scoring exercise.

Recruitment and selection

Recruitment, promotion and other selection exercises will be conducted on the basis of merit, against objective criteria that avoid discrimination. Shortlisting should be done by more than one person if possible.

We commit to avoid stereotyping or using wording in advertising that may discourage particular groups from applying, and will target as wide a range of candidates as possible. Everyone working in our organisation should adhere to this and adverts should also include a short policy statement on equal opportunities.

Generally, job applicants will not be asked questions which might suggest an intention to discriminate on grounds of a Protected Ground except in the very limited circumstances: for example, to check that that an applicant could perform an intrinsic part of the job – taking account of any reasonable adjustments.

Where necessary, job offers might be made conditional on a satisfactory medical check. Health or disability questions may be included in equal opportunities monitoring forms. These will not be used for selection or decision-making purposes.

We will endeavour to ask all applicants if any adjustments might be needed at interview because of a disability.

Disabilities and reasonable adjustments

If you are disabled or become disabled, we encourage you to tell us about your condition so that we can support you as appropriate. Disability for these purposes has a wide meaning and includes any long-term impairment, including chronic diseases or illnesses, malfunction or disfigurement of a person's body, a condition which affects a person's ability to learn, or a condition, illness or disease which affects a person's thought processes, social interactions or emotions.

Where it is identified that you have a disability or might have a disability we will contact you to consult with you in relation to any potential reasonable adjustments. In addition, if you experience difficulties at work because of your disability, we would encourage you to raise this with your line manager so we can arrange a time to consult with you to explore any reasonable adjustments that would help overcome or minimise the difficulty. From time-to-time we may also discuss with you whether or not it would be appropriate to seek medical guidance relating to potential reasonable adjustments and their effectiveness.

We will consider the matter carefully and try to accommodate your needs within reason. If we consider a particular adjustment would not be reasonable we will explain our reasons and try to find an alternative solution where possible.

Complaints of discrimination

We take our commitment to equality very seriously and the [Managing Director] is the person who has ultimate responsibility for this policy and any necessary training on equal opportunities.

If breaches of this policy occur, this may result in disciplinary action being taken in accordance with our Disciplinary Procedure. Where this involves serious cases of deliberate discrimination, harassment or victimisation this may be considered gross misconduct and may result in your summary dismissal.

If you believe that you have suffered discrimination you can raise the matter either informally or formally under our Grievance Procedure. Complaints will be treated in confidence and investigated as appropriate. You will not be victimised or retaliated against for complaining about discrimination, even if the complaint is not ultimately upheld. However, making a false allegation deliberately and in bad

faith will be treated as misconduct and dealt with under our Disciplinary Procedure.

Appendix II Accessibility Audit

An Accessibility Audit (also known as Disabled Access Audit) is an assessment of a building, an environment or a service against best-practice standards to benchmark its accessibility to disabled people. The checklist below will help you assess getting to your premises, ease of navigating around the building, the environment and the facilities available. The responses to the questions will then help you to develop an accessibility action plan. You may also wish to undertake an accessibility audit in relation to your online and digital systems and products.

To print a pdf of the audit, first download using the tab on this page, then print.

To access a word document please follow the link. appendix 2 for website.docx

Getting to you		
Criteria	Y/N	Comments
Do you have a section on your website about transport to and parking facilities at your premises?		
Is there car parking which is easy to access and close to the building?		
Is there designated parking for blue badge holders in the nearby car parking?		

Is there adequate space for drop off and pick-up outside the entrance?		
Is the approach to the building in good order and step free?		
Do you have clear signage and directions to the main entrance and the most accessible entrance (if that is not the main entrance)?		

Entering the building		
Criteria	Y/N	Comments
Are there any steps to access the main entrance?		
Is a handrail provided by any level change such as ramp or steps?		
If there are steps, is there an alternative entrance or is there access via ramp or lift to provide step-free access to the building?		
Are there clear instructions on how to access the alternative entrance or how to request assistance?		

Is there a buzzer or speaker entry system? Is this accessible to people who cannot speak or hear?		
Is there someone available to provide assistance if there are difficulties entering the building?		
Is access across the door threshold level or is there a gradient? Can all wheelchairs pass through without difficulty?		
Are entrance doorways easily opened?		
Is there adequate space both sides of the door?		
Is the reception area easy to locate from the entrance? Is it clearly signposted?		

Navigating within the building		
Criteria	Y/N	Comments
Is the reception area clearly signposted and easy to locate from the entrance?		
Is the entrance easily visible to staff so they can see if someone needs assistance?		
Are doorways and access routes wide enough for wheelchairs?		

Are access routes kept clear?		
Are corridor widths at least 120cm wide?		
Is the flooring solid, level and in good condition?		
Is the signage clear and easy to understand?		
Are maps of the building available to help people navigate?		
Is the building well-lit throughout? It is important to realise that people will have different lighting requirements		
Does the floor surface create a glare?		
Is there step-free access to all areas on each floor?		
If rooms/floors are inaccessible, can visitors be hosted in alternative rooms that are accessible?		

A comfortable environment		
Criteria	Y/N	Comments
If there is a reception desk does it have a lowered height section for wheelchair users.		

Is there a range of seating available to accommodate for different needs? This should be different seating heights and some chairs with arms		
Are there induction loop facilities available?		
Do all staff know how to use the induction loop?		
Can any televisions and/or radios be turned off when necessary to reduce background noise? Or is there a quieter area that visitors can use.		
Are staff well trained and informed to assist with visitors' needs?		

Stairs	Y/N	
Criteria		Comments
Are there handrails on both sides of the stairs?		
Are the steps consistent in size and shape?		
Are the edges of the steps clearly visible?		
Are the access routes well maintained and always kept clear?		

Lifts		
Criteria	Y/N	Comments
Do you have lifts available to all floors?		
Are the lifts well signposted?		
Is the lift at least 110cm wide and 140cm deep?		
Are the controls within the lift accessible? (E.g. easy to reach, buttons with braille)		
Is there a mirror to assist with maneuvering?		
Have the lifts been mentioned on your website?		
Do you provide information to visitors to let them know if the lift is not available?		
Is someone responsible for regular maintenance and daily checks?		

Accessible facilities		

Criteria	Y/N	Comments
Is there an accessible toilet on the ground floor?		
If not on the ground floor, are there other accessible facilities elsewhere in the building.		
Are there support bars to help with the transfer between the chair and the toilet?		
Does the toilet have an assistance alarm which drops all the way to the ground level and isn’t tied around anything? Does the cord have two red handles, on 10cm and another 80cm – 100cm above ground level?		
Is the toilet clear of obstacles and wide enough for a wheelchair user to turn their chair around inside? Standard size should be at least 220cm long x 150cm wide.		
Are facilities positioned at an appropriate height for wheelchair users? E.g. sinks, hand dryers, mirrors		
Do you have an accessible showering facility?		
Does the shower have plenty of space for wheelchair users with appropriate seating?		
Are these facilities well maintained and frequently checked?		

Meetings		
Criteria	Y/N	Comments
Do you ask anyone attending a meeting of they have particular requirements?		
Is the equipment and furniture easily accessible?		
Do meeting rooms have adequate space for wheelchairs?		
Can furniture be moved to accommodate different people’s requirements?		
Are the meeting rooms soundproof or free from background noise?		
Are the acoustics in the room good (there is no echo)?		
Do you have policies for inclusive meetings?		
Do you have guidelines for accessible meetings?		

Evacuation procedures		

Criteria	Y/N	Comments
Are there policies and procedures in place for assisting disabled people with evacuation from your building?		
Are first aiders available?		
If any fire drills are expected is this communicated in advance?		
Are the fire alarms audible and visible to all? Do you have flashing lights and sound alarms?		