



## Chapter 1: Discrimination and other prohibited conduct

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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 [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

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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 and intention to discriminate**
- **Causing or pressuring or instructing someone to commit a prohibited act**

See part III and part IV of the Ordinance

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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?

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**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**

## Section 6 of the Ordinance

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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 doesn't share their disability but who can type 50 words per minute using a normal keyboard

## **1.2 What is indirect discrimination?**

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**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

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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 policies.

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. However, 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 the same aim could not be achieved by less discriminatory means, such as providing a beard mask.

## **1.3 What is discrimination by association?**

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**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

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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?**

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**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

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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 didn't 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 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 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?**

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**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

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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
- 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 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?

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**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

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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.