Employment and Equal Opportunities Service

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 duty of reasonable adjustments.

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 has to 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 duty of reasonable adjustments.

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.**

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 duty of reasonable adjustments.

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 duty of reasonable adjustments.

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 duty of reasonable adjustments.

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 duty of reasonable adjustments. 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.