



Equal Opportunity and Diversity

Learning Outcomes

By the end of this unit the learner will be able to:

- ✓ Understand 'what is discrimination'?
- ✓ Explain the difference between direct and indirect discrimination.
- ✓ Explore Policies and procedures for managing Equal Opportunities and Diversity.

Equal Opportunity and Diversity

'Discrimination' is the process of judging people according to particular criteria. For example, in the selection process for a teaching post, the appointment panel might discriminate in favour of a candidate who answers their questions clearly and concisely, and discriminate against a candidate who mutters and digresses from the point. However, when most people use the term discrimination they tend to mean *unfair* discrimination. The word is mainly used to denote that the criteria on which the discrimination has occurred are unjust. It is likely that most people would not describe the example above as 'discrimination' because they would not consider the criteria the panel used (clarity, conciseness) as unfair. However, if the criterion the appointment panel used to choose between candidates was gender or race, then most people would recognise it as discrimination.

Discrimination, in itself, is not always wholly negative. To be 'discriminating' is, according to the dictionary, an adjective 'showing good taste and judgement'. We all discriminate, for example, in the food we eat, our clothes, our interests, the furniture and decorations in our houses. It is where we discriminate against people, however, that this process becomes damaging. Where this discrimination is on the grounds of race, it can lead all too easily to violence and crime. Discrimination by one religious or ethnic group against another can tear nations apart as we are reminded by the horrific events in Palestine, Northern Ireland, Yugoslavia and Ruanda. Sex, age and disability discrimination is less overt but still has an insidious and restricting effect upon society, and serves to waste precious skills and abilities. Discrimination was defined in both the Sex discrimination Act and in the Race Relations Act and can take three forms:

Direct discrimination. An instance here would be to advertise for a 'Girl Friday' or to use different criteria for selection for promotion. In the case of race discrimination, it may relate to an employer indicating to a recruitment agency that they do not want black casual workers; or an employer may turn down a deaf or a partially sighted applicant specifically because of this disability. In each case, an individual or group is treated less favourably than another on the grounds of sex, race or disability. The employer has no defence even if they genuinely believe what they are doing is right. The motives are irrelevant.

Indirect discrimination. This occurs where the employer treats all applicants or employees the same but a practice, condition or policy adversely affects one sex, or race more than another, or if it affects the disabled more than the able-bodied. At present there are specific statutes making it unlawful to discriminate on the following grounds:

- sex;
- marital status;
- race;

- national origin;
- ethnicity;
- disability;
- sexual orientation;
- religion or belief;
- age;
- union membership or non-membership;
- that individuals are part-time workers;
- that individuals are fixed-term workers;
- that individuals are ex-offenders whose convictions are spent.

Discrimination law operates rather differently in the case of each of the above grounds, providing a greater degree of protection, for example, to those discriminated against on the grounds of sex or race than to union members or ex-offenders. In some cases the law allows employers to discriminate on certain grounds provided their action can be objectively justified, while in others the grounds for defence are very limited. In recent years the UK has had to amend and extend its discrimination laws in order to comply with new European directives which establish a common framework across all member states in respect of discrimination on grounds of sex, race, sexual orientation, religion or belief, disability and age. This process was completed in December 2006 with the introduction of the final statutes relating to age discrimination. Most of UK discrimination law thus now falls within the boundaries of European competence, the European Court of Justice being the final court of appeal.

Discrimination On Grounds Of Sex or Marital Status

The Equal Pay Act 1970

The Equal Pay Act 1970 was the first legislation promoting equality at work between men and women. Although passed in 1970, it only came into force in December 1975. It was subsequently amended, and its scope extended, by the Equal Pay (Amendment) Regulations 1983 and by the Sex Discrimination Act 1986. The Act is solely concerned with eliminating unjustifiable differences between the treatment of men and women in terms of their rates of pay and other conditions of employment.

The Act, as amended in 1983, specifies three types of claim that can be brought. These effectively define the circumstances in which pay and other conditions between men and women should be equal:

- **Like work:** where a woman and a man are doing work which is the same or broadly similar – for example where a woman assembly worker sits next to a male assembly worker, carrying out the same range of duties.

- **Work rated as equivalent:** where a man and a woman are carrying out work which, while of a different nature, has been rated as equivalent under a job evaluation scheme.
- **Work of equal value:** where a man and a woman are performing different tasks but where it can be shown that the two jobs are equal in terms of their demands, for example in terms of skill, effort and type of decision making.

In order to bring a case the applicant must be able to point to a comparator of the opposite gender with whom he or she wishes to be compared. The comparator must be employed by the same employer and at an establishment covered by the same terms and conditions. When an equal value claim is brought which an employment tribunal considers to be well founded, an 'independent expert' may be appointed to carry out a job evaluation exercise in order to establish whether or not the two jobs being compared are equal in terms of the demands they make.

Employers can employ two defences when faced with a claim under the Equal Pay Act. First, they can seek to show that a job evaluation exercise has been carried out which indicates that the two jobs are not like, rated as equivalent or of equal value. To succeed the job evaluation scheme in use must be both analytical and free of sex bias. Second, the employer can claim that the difference in pay is justified by 'a genuine material factor not of sex'. For this to succeed, the employer has to convince the court that there is a good business reason for the unequal treatment and that there has thus been no sex discrimination. Examples of genuine material factors that have proved acceptable to the courts are as follows:

- different qualifications (e.g. where a man has a degree and a woman does not);
- performance (e.g. where a man is paid a higher rate than a woman because he works faster or has received a higher appraisal rating);
- seniority (where the man is paid more because he has been employed for several years longer than the woman);
- regional allowances (where a man is paid a London weighting, taking his pay to a higher rate than that of a woman performing the same job in the Manchester branch).

The Sex Discrimination Act 1975

The Sex Discrimination Act also came into force in December 1975 and was designed to complement the Equal Pay Act 1970 by dealing primarily with non-contractual forms of sex discrimination such as employee selection, the provision of training opportunities, promotion, access to benefits and facilities and dismissal. The Act covers all workers whether or not they serve under contracts of employment or are employed and all job applicants. The only groups excluded are ministers of religion, soldiers who may serve in front-line duties and people employed to work abroad. It thus remains permissible for firms

recruiting employees to work in Saudi Arabia exclusively to select men. The Act applies equally to men and women, and also protects people from unfair discrimination on the grounds that they are married.

Direct Discrimination

Direct discrimination is straightforward. It occurs simply when an employer treats someone unfavourably and when sex or marital status is an important factor in this decision. In judging claims the courts use the 'but for' test, asking whether the woman would have received the same treatment as a man (or vice versa) but for her sex. Examples of direct sex discrimination include advertising for a man to do a job which could equally well be done by a woman, failing to promote a woman because she is pregnant or dismissing a married woman rather than her single colleague because she is known to have a working husband.

If an employer is found to have discriminated *directly* on grounds of sex or marital status, except in one type of situation, there is no defence. Once it has been established that direct discrimination has occurred, proceedings end with a victory for the applicant.

The one exception operates in the area of recruitment, where it is possible to argue that certain jobs have to be reserved for either women or men. For this to be acceptable the employer must convince a court that it is a job for which there is a 'genuine occupational qualification'. The main headings under which such claims are made are as follows:

- **authenticity** (e.g. acting or modelling jobs);
- **decency** (e.g. lavatory or changing room attendants);
- **personal services** (e.g. a counsellor engaged to work in a rape crisis centre).

Direct discrimination on grounds of pregnancy or maternity is assumed automatically to constitute unlawful sex discrimination. This means that there is no defence of reasonableness whatever the individual circumstances. It is thus unlawful to turn down a job application from a well-qualified woman who is eight months pregnant, irrespective of her intentions as regards the taking of maternity leave.

Indirect Discrimination

It occurs when a 'provision, criterion or practice' is set or operated which has the effect, in practice, of disadvantaging a significantly larger proportion of one sex than the other. A straightforward example is a job advertisement which specifies that applicants should be taller than 5 feet 10 inches. This is indirectly discriminatory because a substantially smaller proportion of women are able to comply than men. Indirect discrimination differs from direct discrimination in that there is a defence that an employer can

deploy. An employer can objectively justify the condition or requirement they have set 'on grounds other than sex', in which case it may be lawful.

An example might be a job for which a key requirement is the ability to lift heavy loads. It is reasonable in such circumstances for the employer to restrict recruitment to people who are physically able to comply, for example by including a test of strength in selection procedures. The fact that more men than women will be able to do so does not make the practice unlawful, provided the lifting requirement is wholly genuine.

Sex or Sexual Harassment

Sex or sexual harassment is defined as unwanted conduct of a sexual nature or based on sex, which affects the dignity of men and women at work. It can be physical or verbal in nature, leading *either* to material detriment (i.e. it affects promotion, pay, access to training, etc.) *or* to the creation of an intimidating or humiliating work environment. Although the law applies equally to men and women, the vast majority of cases are brought by women.

Victimisation

In the field of sex discrimination the term 'victimisation' means the same as it does in other areas of employment law. An employer victimises workers if it disadvantages them in any way simply because they have sought to exercise their legal rights or have assisted others in doing so. An employee would thus bring a claim of victimisation to a tribunal if he or she had been overlooked for promotion having recently successfully settled an equal pay claim. Importantly victimisation covers situations in which someone threatens to bring an action or plans to do so even if no case is ultimately brought.

Race Discrimination

UK race discrimination law is governed by the Race Relations Act 1976 and subsequent amendments. This area of law became one of European competence in 2003, but the principles established in the 1976 Act have not changed, and they remain very similar to those set out in the Sex Discrimination Act described above. The law applies to all workers except those recruited to work overseas or in private households. The 'direct' and 'indirect' forms of discrimination are defined in the same way as in sex discrimination law, as are the terms 'victimisation', 'positive discrimination' and 'harassment'. Importantly the Act extends beyond discrimination on grounds of race to embrace the notions of nationality and ethnic and national origin. It is thus as unlawful for an employer to discriminate against someone because they are French or American as it is to treat someone less favourably because of their racial origins.

Disability Discrimination

The Disability Discrimination Act (1995) came into force in December 1996, since when several thousand cases have been lodged with employment tribunals. It replaced the Disabled Persons (Employment) Act 1944, which was widely criticised for being ineffective, only eight successful prosecutions having been brought during its fifty-year existence. In 2007 the role played by the Disability Rights Commission, like those of the other statutory commissions, was taken over by the Commission for Equality and Human Rights which now has the task of promoting the interests of disabled people and policing the actions of employers. The Act is thus concerned with preventing an employer from discriminating directly against an individual worker or job applicant who suffers from a disability. It is thus lawful to list 'good record of health' as a desirable characteristic in a person specification – that alone cannot constitute discrimination under the terms of the Act. Employers only invite tribunal claims at the point that they actually discriminate against an individual.

Discrimination On Grounds Of Sexual Orientation

The Equality (Sexual Orientation) Regulations 2003 gave effect to EU law which seeks to protect people from discrimination on grounds of their sexual orientation. All workers and job applicants are covered by the regulations. Former employees are also explicitly covered and could bring a claim, for example, were a discriminatory job reference to be written. Four types of claim can be brought, reflecting the standard approach to discrimination law which is now being developed in the statutes. The meanings of these terms are the same as for sex discrimination law :

- direct discrimination;
- indirect discrimination;
- harassment;
- victimisation.

Harassment claims are relatively common under the 2003 regulations, as this is the major form of discrimination suffered by gay and lesbian people. It is thus important for employers to put relevant policies in place and to take a very firm line with staff who perpetrate harassment of this kind if they wish to avoid a day in court defending their actions.

Discrimination On Grounds Of Religion or Belief

The Employment Equality (Religion and Belief) Regulations also came into force in December 2003 and derive directly from the European Union's Equal Treatment Framework Directive. Their structure and content is the same as for sexual orientation, although the practical issues that they throw up are

different. Religious groups who do not share a common ethnicity are thus now protected from unfair discrimination

Age Discrimination Law

The final element of the EU's Equal Treatment Framework Directive to be implemented in the UK was the outlawing of age discrimination. The relevant legislation was introduced in two tranches in October and December 2006. In terms of its basic structure and scope, age discrimination law follows the same approach as has been established for the other types of discrimination law that fall within the area of European competence (i.e. sex, race, disability, sexual orientation and religion or belief). It also extends beyond the world of employment to the activities of trade unions, professional bodies and institutions of further and higher education.

Trade Union Discrimination

The freedom to join a trade union and take part in its lawful activities is generally regarded as a fundamental human right. It is included in both the European Convention on Human Rights and the founding conventions of the International Labour Organisation. Although this freedom is not couched in the language of positive rights, it is in practice difficult for a UK employer lawfully to discriminate against people simply because they have joined a union or have taken part in union activities. These rights are long established, but are now found in the Trade Union and Labour Relations (Consolidation) Act 1992. In 1990, equivalent rights were extended to people who do not wish to join a union or become involved in its activities. There are three basic rights:

- the right not to be dismissed for a trade union reason;
- the right not to suffer action short of dismissal for a trade union reason;
- the right not to be refused a job on trade union grounds.

Part-Time Workers

Discriminating against a female part-time worker has long been taken by the courts to constitute indirect sex discrimination because the vast majority of part-time workers are female. Since 2000, however, it has not been necessary for part-time workers (of either gender) to use sex discrimination law to protect themselves. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 were introduced to ensure that the UK complied with the EU's Part-Time Workers Directive. They now seek to ensure that part-time workers (not just employees) are treated equally with full-time workers in all aspects of work, the key features being as follows:

- Part-time workers who believe that they are being treated less favourably than a comparable full-time colleague can write to their employer asking for an explanation.
- This must be given in writing within 14 days.
- Where the explanation given by the employer is considered unsatisfactory, the part time worker may ask an employment tribunal to require the employer to affirm the right to equal treatment.
- Employers are required under the regulations to review their terms and conditions and to give part-timers pro rata rights with those of comparable full-timers.
- There is a right not to be victimised on account of enforcing rights under the Part time Workers Regulations.
- Any term or condition of employment is covered by the regulations, as is any detriment caused as a result of failure to be promoted or given access to training. It is also now unlawful to select someone for redundancy simply because he or she works part-time.

Fixed-Term Workers

The EU's Fixed-term Work Directive (brought into UK law via the Employment Act 2002) includes a range of important provisions designed to improve the position of the many employees who are employed on temporary contracts. The general requirement is that a fixed-term employee should not be treated less favourably than a comparable permanent employee unless less favourable treatment can be objectively justified. The law gives fixed-term employees the right to ask for a written statement of reasons from their employer if they are being treated unfavourably as well as a statement that their contract has become permanent after four years. Where employers fail to honour these rights or to give satisfactory explanations, complaints can be taken to an employment tribunal.

Managing Diversity

The CIPD (2005b) states that:

Diversity is an inclusive term based on recognizing all kinds of difference. It is about 'valuing everyone as an individual'. It recognizes that people from different backgrounds can bring fresh ideas and perceptions... which can make the work done more efficient and products and services better... Diversity is an inclusive concept that covers all kinds of difference that go beyond the traditional understanding of what equal opportunity is about.

Managing diversity is about ensuring that all people maximize their potential and their contribution to the organization. It means valuing diversity, that is, valuing the differences between people and the different qualities they bring to their jobs which can lead to the development of a more rewarding and productive environment. Kandola and Fullerton quote the following 10 most successful initiatives adopted by organizations who are pursuing diversity policies:

1. introducing equal rights and benefits for part-time workers (compared with fulltime workers);
2. They use the acronym MOSAIC to describe the characteristics of a diversity oriented organization:

Mission and values that are strong and positive and where effective successful diversity management is a necessary long-term goal.

Objective and fair processes exist within the organization and these are audited regularly to ensure that power does not sit within informal networks, and no one group of employees dominates at any level.

Skilled workforces aware of the effects of biases and prejudices on their decision making, and managers who manage the diversity effectively while stressing excellence in individual and team performance.

Active flexibility means that the diversity-oriented organization will display increasing flexibility, not only in its working patterns but also in its practices, policies and procedures.

Individual focus – organizations must guard against averaging out group differences or similarities by creating segregated groups.

Culture that empowers achieved through openness, engendering trust between all individuals through an absence of prejudice and discrimination.

Generating and Communicating EO Strategy and Policies

The policy statement should include the following features:

- Commitment to equal treatment throughout the organisation.
- Justification of why it is important for the organisation and its employees.
- Assignment of organisational responsibility. (Somebody with authority and ability to achieve results.)
- Incorporation of EO objectives into the competency framework (if one exists) or individual performance objectives.
- Outline of the nature of training initiatives to assist the achievement of the objectives.
- Outline of recruitment, promotion and other key EO initiatives and practices.
- How grievances will be dealt with quickly and effectively.
- How monitoring is going to take place.

Disability Requirements

The DDA lays down the need for 'reasonable adjustments' to be made to employment arrangements to compensate for practical problems faced by a disabled person. Apart from wheelchair access, this can include altering the working times, accepting additional time off for treatment (disabled employees generally have excellent attendance records so this is a small burden on the employer), providing a reader or special Braille equipment and paying for specialised training where transfers to other occupations are required. The 'reasonable' nature of the adjustments relate to the cost of the adjustments in relation to the organisation's resources, the current situation in relation to the employment of disabled persons in the organisation and the ease or difficulty and ultimate benefits or making those adjustments. The emphasis is on two situations.

Firstly, for existing employees faced with a developing disability or one arisen from a serious accident. Secondly, where an employer receives an application from a disabled person. In general, there is a greater onus on the employer in the case of an existing employee but where the organisation has a very low proportion of disabled persons, then the onus on making reasonable provisions grows larger.

Health and Safety

The issues here include the need for multi-language safety signs, documents, training and testing, and necessary adjustments for disabled employees. Care should also be taken in relation to the Manual Handling Operations Regulations 1992 to ensure warehousing and other operations can be manageable by both sexes.

Handling Harassment and Bullying

The main aim of policy in this area is complete prevention. It should start with a policy statement which explains the different forms of harassment and bullying, and the damage they cause to the organisation and its employees. It should stress the need for mutual respect at all levels and the need for all employees to feel valued. The way that allegations will be treated should be set out, that they will be speedy, fair and confidential, and promise protection from victimisation for the complainant. It should be made clear that individuals are liable to pay compensation to the victims as well as lose their jobs. This statement should be communicated to all employees in a clear and unambiguous way, giving opportunities for discussion and for questions to be asked.

Procedure for Handling Harassment

It is becoming more common for the organisation to provide independent counsellors to whom victims can turn for advice in the strictest confidence and without pressure. They will help the victim decide whether or not to take their complaint forward although they will be encouraged not to ignore

behaviour, which makes them, and probably other members of the department, uncomfortable. They will also be encouraged to be able to produce evidence, in the form of diary entries or notes of witnesses present. Without any action, it is not likely to stop.

Equal Pay Issues

The EOC Code of Practice on Equal pay suggests that there are opportunities for discrimination on all aspects of pay:

- On the basic rate, women can be on lower grades because the jobs in which they predominate have not been evaluated fairly.
- Women may not have been represented properly on the job evaluation committee or the factors chosen in the scheme may favour men (supervision, strength required and technical skills).
- They may also be appointed at lower starting points on the pay scale.
- They may also move more slowly to the top of the scale if movement depends on achieving competencies or performance. This may be because of the unfair rating system which is skewed against women.
- On performance pay, women may have targets which are too demanding compared to men or the assessments made by managers (still mainly men) may be unfair towards women.
- Women may have reduced access to benefits, such as allowances and company cars because of the way their jobs are graded or because decisions are taken in a discriminatory way by management.

When an organisation sets up pay systems or evaluates existing ones, it is important that these potential problems are open to investigation and rectification. A transparent and accessible appeal system is also essential to help women put their case before having to turn to legal redress.

Age Discrimination

By 2021, 46% of the workforce will be over 45 and, taking Europe as a whole, the number of people aged 50–64 will have increased by 20% in two decades. Despite the growing importance of this section of the workforce, ageism remains entrenched in society and the workplace. Discrimination is displayed principally at recruitment when age limits are often overtly or covertly used by describing the ideal candidate in an advertisement as ‘between 25 and 35’ or using more indirect descriptions as ‘a recent graduate’ or ‘with 1–3 years experience’. Currently, age discrimination is enshrined in law in areas of redundancy and unfair dismissal where no claims can be successful if the employee is over 65 and all employees have a fixed retirement age. These elements may need to change to meet the requirements of the EU Directive. Direct discrimination in job adverts will be outlawed as will age-related promotion decisions. It is likely that interview questions, such as ‘When do you intend to retire’ will be held to be

discriminatory as will expressions like 'we went for the younger person – they have more enthusiasm and are less of a health risk'. Having said all this, Article 6 of the Directive allows different treatment on the ground of age if objectively and reasonably justified, setting out the following examples:

- Maximum age limits for recruitment based on training needs of the job or the need for a reasonable period before retirement. This will apply, presumably, for jobs such as airline pilots.
- Protection of young workers, such as restricting their employment on night work or on dangerous machinery.
- Encouraging or rewarding loyalty by paying long service awards.
- Allowing employment planning to ensure a workforce that is age-balanced to a reasonable degree.

Further Reading:

- ✓ *Michael Armstrong, (2006), A Handbook of Human Resource Management Practice*
- ✓ *John Stredwick, (2005), An Introduction to Human Resource Management*
- ✓ *Arbara Bagilhole, (2009), Understanding Equal Opportunities and Diversity*