

# Indirect Discrimination

SWU Trade Union Advice and Representation Officer **Julie Long** outlines the legislation and principles



This article is concerned with discrimination relating to redundancy and restructuring in the workplace. However, it will be useful to outline the legislation and principles that define and underpin discrimination in the first instance.

The Equality Act (2010) places a duty on employers not to discriminate against their

employees on the grounds of age, race, religion or belief, disability, sex, sexual orientation, gender re-assignment, marriage or civil partnership, pregnancy and maternity. These grounds are known as protected characteristics and are concerned with the protection from discrimination of employees with any one, or more, of the protected characteristics. Consequently, employer policies and procedures, as they relate to the employment of their workforce, must be framed in the context of the Equality Act (2010) and, therefore, ensure compliance with the principles which underpin the act.

The Act in effect places a duty on employers to make reasonable adjustments, for those of its employees with one or more of the protected characteristics outlined above. This means that the provision, criterion, and/or practices of the employer, including the policies and procedures that relate to employment and the physical characteristics of the workplace, must not significantly disadvantage employees with a protected characteristic. Hence by using reasonable adjustments for employees with one or more protected characteristics an employer can mitigate any potential discriminatory acts and ensure compliance with the legislation.

Within equality legislation there are important distinctions between direct and indirect discrimination. Direct discrimination occurs when an employer treats an employee less favourably due to certain characteristics, or attributes, of an individual employee (or group of employees). Therefore, if an employee, who has one or more of the protected characteristics as outlined above, is dismissed by an employer due to the employees protected characteristic(s) this is likely to constitute direct discrimination under the Equality Act (2010). Similarly if the employer refuses to provide training, promotion or imposes less favourable terms and conditions on an employee with a protected

characteristic(s) direct discrimination is likely to have occurred.

Indirect discrimination, on the other hand, can occur when an employers practice, policy, or rules, which applies to all employees in the organisation, has a worse or detrimental effect on some employees with a protected characteristic(s) when compared to others employed by the organisation. An employer, consequently, should not do something which has (or could have) a worse impact on an individual employee, and others, who share a particular protected characteristic. An example of indirect discrimination might be where an employer requires all staff to work full time rather than part-time. This could put female employees at a significant disadvantage as they are more likely to be primary carers for children and may need to work part-time or more flexibly to accommodate this. However, for indirect discrimination to apply to an individual employee the act by the employer must put the employee personally at a particular disadvantage.

There are two other areas of discrimination worth mentioning here, specifically discrimination by association and discrimination by perception. Associated discrimination occurs when a person is discriminated against because of another person's protected characteristic. Discrimination by perception occurs when a person is believed to have a protected characteristic even though they do not. In both cases the discrimination is usually classed as direct discrimination and both types of discrimination do not apply to all the Acts protected characteristics, specifically marriage and civil partnerships, and pregnancy and maternity.

With regards to redundancy the Equality Act (2010) imposes a duty on employers to make reasonable adjustments in their practices so as not to put, for example, disabled employees at a substantial disadvantage when compared to non-disabled employees. The employer is required to undertake appropriate due diligence regarding their statutory duties and responsibility to all employees. It follows that when a redundancy selection criterion is being consulted upon, or applied, union representatives and affected employees should scrutinise all relevant documentation relating to the proposed redundancy. This is to enable the identification of any issues within the redundancy selection criteria that are likely to disadvantage and/or discriminate against the

employee(s) concerned. Whilst the redundancy selection criterion may appear fair, further scrutiny may highlight, for example, the disestablishment of part-time posts which may indirectly discriminate against disabled employees who, due to their long term condition, are unable to work full-time. The disabled employee is, therefore, likely to suffer detriments under the Equality Act (2010) and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (2000), making it un-lawful for part-time workers to be treated less favourably than full-time employees. Whilst anti-discrimination legislation is there to protect individuals and groups from discrimination, as with all legislation certain caveats apply. Employers are expected to make reasonable adjustments to mitigate and support employees with a protected characteristic. However, adjustments only have to be made if the adjustments are considered reasonable. If the employer can show that they can objectively justify their decision not to implement certain adjustments at the present time the employer does not have to make those

adjustments. Factors such as the financial cost of the adjustment, availability of resources to bring about the required change, the inefficiency of any changes, and Health & Safety concerns can be used by the employer to justify why they, the employer do not consider the adjustment to be reasonable.

It is worthwhile remembering that any discrimination claim by an employee against their employer will be heard in an Employment Tribunal. It is vitally important that the alleged act of discrimination is registered with the Employment Tribunal within three (3) months less one (1) day of the alleged discrimination taking place. Failure to comply with these time scales will mean that the alleged discrimination claim is timed out and will not be heard. So expediency in collecting and collating relevant information and lodging the complaint with the Employment Tribunal is of vital importance if the employee is to have a chance to have suitable redress under the law.