



A-Z OF EMPLOYING

## **Discrimination in Employment**

*Our guide for Employers and Managers*

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# Discrimination in Employment

*Our guide for Employers and Managers*

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## Overview

1. Discrimination in employment is prohibited by the Human Rights Act 1993 and the Employment Relations Act 2000.
2. The anti-discrimination provisions of the Employment Relations Act 2000 apply only to the employment relationships recognised in section 4; prospective employees cannot complain of discrimination under the Employment Relations Act 2000.
3. An employee cannot pursue discrimination allegations under both Acts over the same matter. Therefore the person needs to make a choice as to which law the claim will be heard under.
4. Exceptions may apply which make discrimination acceptable, however if the employer can make adjustments to its activities without unreasonable disruption to have another employee carry out the duties in issue, then the exception cannot apply.
5. Complaints of discrimination can be heard in the Human Rights Review Tribunal, or in the Employment Relations Authority. The potential liability of employers is similar in these forums. Both forums require that the parties attempt to settle the matter in mediation before progressing to the Human Rights Review Tribunal or Employment Relations Authority.

## Introduction

The Human Rights Act 1993 makes it unlawful to discriminate against people on 13 grounds in situations that arise in everyday life, and particularly in employment. However, there are exceptions permitted by the Human Rights Act 1993 in certain circumstances. Those grounds of unlawful discrimination are the same under the Employment Relations Act 2000, with one exception. The Employment Relations Act 2000 makes it unlawful for employers to discriminate on the additional ground of involvement in the activities of a union.

Discrimination can occur at all stages of an employment relationship; it may occur before an applicant is considered for a position, it may occur sometime during employment and it may occur as the last event before an employment relationship is terminated.

Discrimination is not unlawful unless the law says it is. That statement may appear patently obvious, but it is permissible to discriminate against people on grounds other than the prohibited grounds of discrimination under these Acts. Just because the idea of some form of discrimination may seem abhorrent or immoral does not mean that an employer (or employees) cannot legally do it.

Discrimination may be direct or indirect, deliberate or inadvertent. Often without the intent to discriminate, your policies, procedures or rules may discriminate against a group of employees. Further, policies that treat all employees in the same way may indirectly discriminate against a subset of employees; so you need to have valid reasons for all of your policies, procedures, and rules in order to justify them if they potentially discriminate against a group of employees.

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## Procedural Issues

If an employee wishes to complain of discrimination they must make a choice whether to bring proceedings under the Human Rights Act 1993 or the Employment Relations Act 2000. It should be noted that these two Acts define “employee” and “employer” differently; the definition provided by the Human Rights Act 1993 encompasses a wider group of people than the definition provided by the Employment Relations Act 2000.

Section 4 of the Employment Relations Act 2000 recognises eight employment relationships; the definition of employment relationship does not include employers and prospective employees. A person who is a prospective employee, and who wishes to complain of unlawful discrimination, must make that complaint to the Human Rights Commission under the Human Rights Act 1993.

All complaints under the Human Rights Act 1993 are made to the Human Rights Commission and may be heard in the Human Rights Review Tribunal if it is not settled at dispute resolution.

An employment relationship problem under the Employment Relations Act 2000 may be raised with the employer and may progress to the Employment Relations Authority as a personal grievance where a determination may be sought if not settled at mediation.

## Choice of procedures - complaint or personal grievance

There is considerable overlap between the Human Rights Act 1993 and the Employment Relations Act 2000 in employment, but the dispute resolution processes under each regime are substantially different. An employee must choose one of the two regimes in which to advance a complaint of discrimination; an employer is protected from potential double jeopardy where circumstances could give rise to a complaint of unlawful discrimination under the Human Rights Act 1993 and a personal grievance under the Employment Relations Act 2000.

The Human Rights Act 1993 choice of procedures provision only applies to sexual harassment and racial harassment, which are specific types of discrimination under the Human Rights Act 1993.

The Employment Relations Act 2000 choice of procedures provision applies to any of the circumstances that may give rise to a personal grievance that could also give rise to a complaint under the Human Rights Act 1993; this includes:

- ▶ Discrimination on any of the 13 prohibited grounds; and
- ▶ Sexual harassment; and
- ▶ Racial harassment.

Precisely when that choice of procedures must be made by an employee is the subject of some debate. The two Acts do not apply their respective choice of procedures provisions to the same types of discrimination (the Employment Relations Act 2000 has a considerably wider overlapping provision than that of the Human Rights Act 1993), and they do not mirror each other as to how (and therefore when) the choice is made.

The Human Rights Act 1993 indicates that the choice is made when an employee either:

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- ▶ Makes a complaint under the Human Rights Act 1993 [this refers to section 92B when civil proceedings may be brought either by the person aggrieved or the Human Rights Commission]; or
- ▶ Invokes, in relation to those circumstances, the procedures applicable under the Employment Relations Act 2000 in relation to personal grievances under the relevant employment agreement [this refers to an employee's action of raising a personal grievance with an employer].

The Employment Relations Act 2000 indicates that the choice is made when the employee either:

- ▶ Applies to the Employment Relations Authority for the resolution of the grievance [this refers to the action of filing a Statement of Problem]; or
- ▶ Makes, in relation to those circumstances, a complaint under the Human Rights Act 1993 [an employee makes a complaint when proceedings in relation to that complaint are commenced by the complainant to the Human Rights Commission].

The key difference between the two choice of procedures provisions is in respect of the personal grievance option; the Human Rights Act 1993 indicates that the choice is made when an employee raises the grievance (earlier) rather than when the employee applies to the Employment Relations Authority (later) for it to investigate and determine the problem.

## Proof

If a claim of discrimination is made before either the Human Rights Commission or the Employment Relations Authority, the presumption is that the discrimination complained of actually occurred. There is no onus of proof on the complainant; rather the accused (the employer or person against whom a complaint has been made) must prove that the discrimination complained of did not occur.

The standard of proof is the balance of probabilities; therefore the accused must convince the Employment Relations Authority or Human Rights Review Tribunal that the discrimination complained of more likely did not happen than did happen.

Refer to the **A-Z Guide on Human Rights** for more information about the processes prescribed by the Human Rights Act 1993.

## Human Rights Act 1993

### Prohibited grounds

The 13 prohibited grounds of discrimination (section 21) in employment are:

- ▶ Sex
- ▶ Marital status - which means being single, married, in a civil union, in a de facto relationship or the surviving partner of one of these relationships.

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- ▶ Religious belief
- ▶ Ethical belief
- ▶ Colour
- ▶ Race
- ▶ Ethnic or national origins
- ▶ Disability
- ▶ Age
- ▶ Political opinion
- ▶ Employment status
- ▶ Family status
- ▶ Sexual orientation

The Human Rights Act 1993 may be viewed [here](#).

## Application

Under the Human Rights Act 1993, discrimination is prohibited in employment (section 22), which includes application for employment forms (section 23) and, advertisements for employment (section 67).

## Exceptions

You may not discriminate against people on any of the prohibited grounds, subject to certain exceptions. However, the exceptions themselves are subject to the qualification (section 35) that if you discriminate on the basis of one of the exceptions, but the person(s) discriminated against could have been reasonably accommodated without unreasonable disruption to your organisation, then you may be liable for unlawful discrimination.

The specific exceptions are in relation to:

- ▶ Crews of foreign ships and aircraft that may engage New Zealanders as employees outside New Zealand (section 24);
- ▶ National Security (section 25);
- ▶ Work to be wholly or mainly performed outside New Zealand and in countries where there are different laws, customs and practices (section 26);
- ▶ Authenticity - where being of a certain age or sex is a genuine occupational qualification (section 27);
- ▶ Accommodation - where the employment is of a domestic nature in a private household - where in a live-in employment situation providing unisex or separate accommodation for males and females is unreasonable - where the employee must live with the employer and the employer prefers a particular sex or marital status (section 27);
- ▶ Counselling - where the employee is to provide counselling services to a particular group of people on highly personal matters (section 27);
- ▶ Schools and workplaces - where an organised religion requires the employment to comply with its doctrines or rules or established customs - private religious schools or schools where the sole or principle duties of the position require adherence to the doctrines or rules or established customs of the organised religion (section 28);

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- ▶ Workplaces generally - where it would be unreasonable to provide special services or facilities for a disabled employee or the risks to others of employing a disabled person are unreasonable (section 29);
- ▶ Workplaces generally - where being of a certain age (and physical capability) is a genuine occupational qualification (section 30);
- ▶ Politics - where the work is in a political advisory role (section 31);
- ▶ Reporting roles - where there is a risk of collusion to the detriment of the employer between family members (section 32).

## Harassment

Harassment is a form of discrimination under the Human Rights Act 1993 if it is on the basis of sex or race. Harassment that is not sexual, racial or victimisation is not covered by the Human Rights Act 1993. The Human Rights Act 1993 stipulates that if an employee is victimised for asserting their rights (or the rights of an associate or relative) either under the Human Rights Act 1993, or the Protected Disclosures Act 2000, that their victimisation is a prohibited form of discrimination (section 66).

Refer to the **A-Z Guides** on:

- ▶ Harassment
- ▶ Protected Disclosures Act 2000
- ▶ Sexual Harassment
- ▶ Racial Harassment

## Liability

Under the Human Rights Act 1993, you are potentially liable for discrimination (and harassment) that you have no knowledge of, because both the discriminator (the employee or another person), and the employer may be liable (section 68). You may avoid liability if you can demonstrate either that you took such steps as were reasonably practicable, to prevent the discrimination from occurring, or, that the discrimination occurred without your express or implied authority.

## Enforcement

If an employee (or person) makes a complaint of discrimination under the Human Rights Act 1993, it is made to the Human Rights Commission. If that complaint is not settled by dispute resolution then it may progress to the Human Rights Review Tribunal as a civil case. The Human Rights Review Tribunal has powers to award a range of remedies where it upholds a complaint. The total amount of monetary damages awarded in the Human Rights Review Tribunal cannot exceed \$200,000.

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## Employment Relations Act 2000

### Prohibited grounds

The Employment Relations Act 2000 prohibits discrimination in employment on the 13 prohibited grounds of discrimination covered by the Human Rights Act (section 105) and on the additional ground of involvement in the activities of a union (section 107). The provisions relevant to discrimination in the Employment Relations Act are sections 103 (1)(c), 104, 105, 106 and 107.

### Application

Under the Employment Relations Act 2000, discrimination is prohibited in employment which is defined by section 104 (see copied below). If the requirements of this section are met in conjunction with either section 105 or 107, then the employee has a personal grievance (section 103).

### 104 Discrimination

- 1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's refusal to do work under section 28A of the Health and Safety in Employment Act 1992, or involvement in the activities of a union in terms of section 107,
  - (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
  - (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
  - (c) retires that employee, or requires or causes that employee to retire or resign.
- 2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
- 3) This section is subject to the exceptions set out in section 106.

### Exceptions

The exceptions that the Human Rights Act 1993 provides apply to the Employment Relations Act 2000, as provided for in section 106 of the Employment Relations Act 2000.

### Harassment

Under this Act, harassment is not a form of discrimination.

Refer to the **A-Z Guide on Harassment and Bullying** for further information.



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## Liability

Discrimination is a distinct ground for a personal grievance under the Employment Relations Act 2000; you are liable for discrimination that meets the requirements of section 104 and either section 105 or 107, and the employee is determined to have a personal grievance because of that discrimination.

## Enforcement

Where an employee complains of discrimination under the Employment Relations Act 2000 and it is not settled by mediation, it may progress to the Employment Relations Authority as a personal grievance. The Employment Relations Authority has powers to award a range of remedies where it upholds a personal grievance. There is no limit on the total amount of monetary damages that may be awarded in the Employment Relations Authority for a personal grievance.

Refer to the **A-Z Guides on Personal Grievances**, and the **Employment Relations Authority**, for more information.

## Conclusion

Not every claim of discrimination in employment is in fact discrimination under the law. The law prohibits discrimination in employment on 14 grounds in total, 13 of which are common to the Human Rights Act 1993 and the Employment Relations Act 2000. The law also recognises sexual harassment, racial harassment, and victimisation, as additional distinct kinds of discrimination.

Understanding what conduct may or may not be unlawful is an important aspect of employing; it has an impact on your policies and procedures, from recruitment through to employee benefit schemes. If you require assistance on drafting policies or understanding your rights and obligations under the law, contact the Business Central AdviceLine Team and/or your local Employment Relations Consultant.

### Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website [www.businesscentral.org.nz](http://www.businesscentral.org.nz) regularly.
- ▶ Attend our Member Briefings to keep up to date with all changes.
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