



In what circumstances is race a GOQ for a job?

- The job involves participation in a dramatic performance or other entertainment in a capacity for which a person of a particular racial group is required for reason of authenticity.
- The job involves participation as an artist's or photographic model in the production of a work of art, visual images or sequences of visual images for which a person of a particular racial group is required for reason of authenticity.
- The job involves working in a place where food or drink is provided to and consumed by the public in a particular setting for which in that job, a person of that racial group is required for reasons of authenticity.
- The holder of the job provides persons of a particular racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group.
- The job involves providing persons of a particular racial group with personal services of such nature or in such circumstances as to require familiarity with the language, culture and customs of and sensitivity to the needs of that racial group, and those services can most effectively be provided by a person of that racial group.

Is GOQ an automatic exception?

NO, GOQ is not an automatic exception for race discrimination. In each case it will be necessary for the employer who claims GOQ to show that GOQ does apply to the particular job in question and the court will then examine the claim strictly.

For example, the situation in point no. 4 above was held by the Court of Appeal in England as not to apply to managerial and administrative jobs because the job holders did not provide personal services and did not have direct contact with service recipients of particular racial group.

(12) Absence of Disability as a Genuine Occupational Qualification

Discrimination on the ground of disability is unlawful

People are entitled to equal consideration for jobs regardless of whether or not they have a disability. The Disability Discrimination Ordinance (DDO) provides that discrimination on the ground of disability is unlawful. Under the DDO, employers are not allowed to discriminate against persons with a disability, in respect of a particular job, except in the following circumstances:

- (a) where absence of a disability is a Genuine Occupational Qualification (GOQ) of the job;
- (b) where the person with the disability would be unable to carry out the inherent requirements of the job.

Exception where absence of a disability is a GOQ

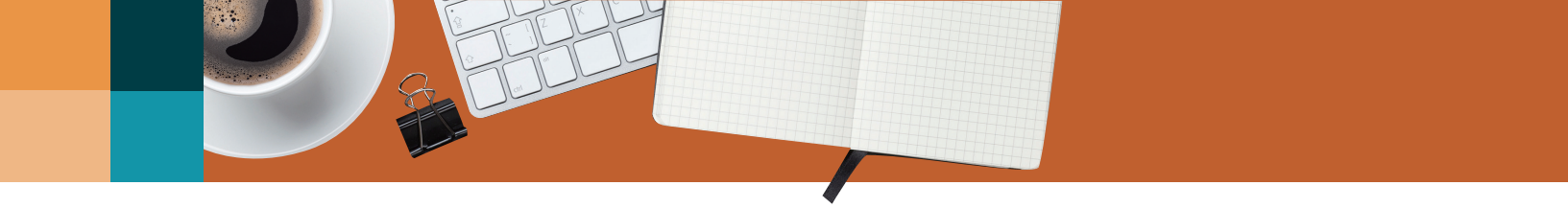
Given the general rule that discrimination on the ground of disability in employment is not allowed, the DDO recognises that, for certain jobs, absence of a disability is a GOQ. In respect of such jobs it is not unlawful for the employer to discriminate against persons with the disability as regards to whom they offer employment, promotion, transfer or training.

In what circumstances is absence of a disability a GOQ?

The DDO prescribes two situations where being a person without a disability is a GOQ for a job:

- (a) The essential nature of the job requires a person without a disability for reasons of physiology or authenticity in dramatic performances. For example, the requirement of a person who is not a wheelchair user may usually constitute a GOQ for a job as a fashion model. Similarly, a woman with severe visual impairment may be refused a job as an actress to play the role of someone who has no visual impairment.
- (b) The nature or location of the establishment is such that the employee has to live in premises provided by the employer but the available premises do not have facilities for persons with the disability in question. However, before the

¹² Please also read "The Use of Consistent Selection Criteria" in this publication for further information on the subject.



employer could claim this as a defence for not offering the job to a person with the disability, he or she should first consider whether alterations to the premises could be made to render them suitable for that person. He or she should carry out such alterations and offer the job to that person unless the alterations would impose an unjustifiable hardship¹³ on the employer. On the other hand, the prospective employee may offer to make the alterations and undertake to restore the premises to the original condition on leaving the premises. In such circumstances, the employer cannot claim absence of the disability as a GOQ on the ground of no suitable premises being available.

Exception where a person is unable to carry out the inherent requirements of jobs

An employer is not obliged to employ or continue to employ a person with a disability who cannot do the job. The DDO provides that discrimination against a person with a disability in recruitment or dismissal would not be unlawful if the person, because of his or her disability,

- would not be able to carry out the inherent requirements of a job, or
- would, in order to carry out the inherent requirements of the job, require some adjustments at work which would cause unjustifiable hardship.

Before concluding that a person with a disability would be unable to carry out the inherent requirements of a particular job, the employer should consider whether the conclusion would be different if some reasonable accommodation was provided to the person. If so, the employer should provide such accommodation, unless this would result in an unjustifiable hardship¹⁴. In the latter case the employer would not be required to employ or retain the person.

What needs to be considered in determining if a person can carry out the inherent requirements of a job?

In determining whether or not a person with a disability can carry out the inherent requirements of a job, an employer is required to take into

account:

- (a) the person's past training, qualifications and experience relevant to the particular employment;
- (b) in the case of a serving employee, his/her work performance; and
- (c) other relevant factors.

Hence, an employer should not assume that persons with a particular disability will not be able to do a certain type of jobs. In other words, the exception of inability to carry out the inherent requirements of a job is not automatic in respect of a particular disability. In each case it will be necessary for the employer who claims this exception to show that, having considered all the factors mentioned above, the person with the disability would not be able to carry out the inherent requirements of the job. Alternatively, the employer has to show that, in order to carry out the inherent requirements of the job, the person would require accommodation which would result in unjustifiable hardship.

¹³ Please also read "Reasonable Accommodation and Unjustifiable Hardship" in this publication.

¹⁴ Ditto.