

EMPLOYMENT EQUALITY (SEXUAL ORIENTATION)
REGULATIONS 2003

1. EU Council Directive 2000/78/EC of 27 November 2000 required member states to establish a general framework for equal treatment in employment and occupation by 2 December 2003. On 1 December 2003, the Employment Equality (Sexual Orientation) Regulations 2003 ("the Regulations") came into force. Since that date, it has been unlawful to discriminate against employees, prospective employees and certain other groups on the grounds of sexual orientation.

THE REGULATIONS

Sexual Orientation

2. The term is defined as meaning sexual orientation towards persons of the same sex, towards persons of the opposite sex and towards persons of the same sex and of the opposite sex.

3. The discriminator's *own* sexual orientation is not a relevant consideration. Whilst it may explain his or her unlawful behaviour, the test that is to be applied is objective: was the complainant's sexual orientation the cause of the discriminator's conduct? The *motivation* for the discrimination is neither here nor there.

4. Sexual orientation is an entirely separate issue from that of gender reassignment. Questions of discrimination or harassment on the grounds that an individual plans to undergo, is undergoing or has undergone gender reassignment fall to be considered under the Sex Discrimination (Gender Reassignment) Regulations 1999.

Situations Covered

5. In addition to the standard situation of employer and employee (or prospective employee), a number of other relevant working relationships are covered by the Regulations:-

- a. Contract workers (reg 8), with detailed provisions dealing with territorial matters (reg 9);

- b. Trustees and managers of occupational pension schemes (reg 9A);
- c. Office holders (reg 10);
- d. Police (reg 11);
- e. Barristers and advocates (12, 13);
- f. Partners (reg 14);
- g. Trade organisations (reg 15);
- h. Qualifications bodies (reg 16);
- i. Providers of vocational training (reg 17);
- j. Employment agencies, careers guidance (reg 18); and
- k. Institutions of further and higher education (reg 20).

6. In addition the Regulations cover situations in which a '*relevant relationship*' has come to an end (reg 21). It is then unlawful to subject an individual to a detriment or harass him or her in a way that '*arises out of and is closely connected to*' the former relationship.

7. Individuals within organisations can be named as respondents to claims for discrimination on the grounds of sexual orientation and can be ordered to pay compensation to a victim themselves. Principals are liable for their agents and employers are liable for employees acting in the course of their employment. It is a defence if an employer can show that it took such steps as were reasonably practicable to prevent the employee's unlawful act.

8. An organisation would not normally be responsible for the actions of third parties but there may be situation in which discrimination or harassment by third parties would give rise to a claim, for example if the homophobic harassment of a lesbian employee was treated less seriously than unwanted sexual advances towards a straight woman.

Direct Discrimination

9. Direct discrimination occurs – as for race, sex or disability - where one individual is treated less favourably than another on the grounds of his or her actual or perceived sexual orientation (reg 3(1)a).¹ The definition demands a comparison between the treatment afforded to the complainant and that which would be afforded to an individual of different sexual orientation.

¹ See for example, Lewis v. HSBC Bank, EAT 19.12.06 UKEAT/0364/06/RN.

10. It is worth underlining that the discriminator's perception of the victim's sexual orientation need not be accurate. It is enough if the prohibited behaviour takes place on the grounds of what the discriminator *believes* his victim's sexual orientation to be². For that reason, it is not necessary for a complainant to disclose their actual sexual orientation when bringing a complaint.

11. It will be direct discrimination if the less favourable treatment is on the grounds of the sexual orientation of someone with whom the complainant associates³ or on the grounds of a refusal to follow an instruction to discriminate⁴.

Genuine Occupational Requirement ("GOR")

12. It will not be unlawful to discriminate against a person on the grounds of sexual orientation if it can be shown that being of a particular sexual orientation is a "*genuine and determining occupational requirement*" and is proportionate to apply that requirement in the particular case (reg 7(2)). In such circumstances an employer can discriminate against a person who does not meet the requirement or who he has reasonable cause to believe does not meet it (reg 7(2)c).

13. A GOR must be essential for the person to be able to perform the functions of the job ("*requirement*"), it must be crucial to the post, rather than one of a number of factors ("*determining*"), it must relate to the job in question ("*occupational*") and it must not be created by the employer for its own motives ("*genuine*"). Only a court or tribunal can give an authoritative ruling as to what is, or is not, a GOR.

14. In relation to employment for the purposes of an organised religion, it is enough to show that the requirement is necessary to comply with the doctrines of the religion, alternatively, that the nature of the work and the context in which it is carried out demands the requirement so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

² See *Mandla v. Dowell Lee* 1983 IRLR 209.

³ See *MacDonald v Advocate General for Scotland* 2003 UKHL 34.

⁴ See *Weathersfield Ltd v. Sargent* 1999 IRLR 94.

15. This regulation highlights the potential for conflict between the religious convictions of one member of staff and the sexual orientation of another. Both must be protected from harassment and discrimination. It is suggested that the right to be treated with dignity and respect in the workplace irrespective of sex, race, disability, age religion or sexual orientation be included as an over-riding objective of an organisation's equal opportunities policy. It will then be easier for an employer to insist that their employees treat each other professionally despite their differences.

16. It is for an employer to prove a GOR and the tribunal is likely to construe GOR's strictly. Each job for which a GOR may apply must be considered individually and should be reassessed each time the post becomes vacant. It may be possible to redistribute the duties of the position up so as to avoid the need for recruitment to be limited to a particular sexual orientation. The employer will have to show that it is necessary for the relevant duties to be carried out by an individual of a particular sexual orientation. It will not be enough to show that it is merely preferable.

Indirect Discrimination

17. Indirect discrimination has a four-part definition within the Regulations. It arises when: -
"A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B but

- (i) which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared to other persons,*
- (ii) which puts B at that disadvantage, and*
- (iii) which A cannot show to be a proportionate means of achieving a legitimate aim"*

18. The expression "*provision, criterion or practice*" is designed to be wide enough to cover both contractual terms and non-contractual policies, for example, selection criteria or informal workplace practices.

19. As with other forms of indirect discrimination, the complainant need not show that the discriminator intended to discriminate on the grounds of sexual orientation.

20. Unlike the situation under the SDA and RRA, the definition of indirect discrimination within the Regulations does not invite statistical analysis of the percentage of one group as against the percentage of another able to satisfy a particular provision, criterion or practice.

Justification

21. It is open to someone accused of indirect discrimination to attempt to show that the provision, criterion or practice is justified; that is to say it was a proportionate means of achieving a legitimate aim. The burden of proving justification falls squarely upon the alleged discriminator.

22. A real business need must be identified and the measure to achieve it must be more than simply reasonable. Although the regulations do not demand that the measure is the *only* way of achieving the organisation's aim, employers should be ready to argue why other – perhaps more expensive or difficult – measures could not have been employed instead in order to reduce the discriminatory effect.

23. Factors which may come into play in determining whether a measure is justified are likely to include market forces, comparative disadvantage and the costs of compliance. If that is correct, it may be possible to show justification where alternative measures are prohibitively expensive or unworkable for some other reason.

Victimisation

24. Victimisation involves two elements:-

- a. Some form of action, complaint or allegation connected to the Regulations;
and
- b. Less favourable treatment of the person who so acts on the grounds of their action.

25. As with other anti-discrimination legislation, there is no protection for those who make allegations or give evidence in bad faith (reg 4(2)).

Harassment

26. Harassment is defined as "*unwanted conduct which has the purpose or effect of violating [the complainant's] dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for [the complainant]*" having regard to all the circumstances (reg 5(1)).

The different parts of the definition may overlap with one another but a complainant need only show one element to show that harassment has taken place.

27. It is not a variety of discrimination and, as a result, there is no need to show how a comparator would have been treated.

28. Whether or not conduct amounts to harassment is determined by reference to all the circumstances. It is a partly objective and partly subjective test in that the Regulations also specifically require that the perception of the victim to be taken into account.

29. There is no GOR or justification defence available in relation to complaints of harassment.

REMEDIES

30. As with other forms of discrimination, a complaint lies (in the main) to the employment tribunal (reg 28) and must be brought within 3 months (reg 34). A questionnaire (in the form provided in schedule 2) may be served and, in the absence of reasonable excuse, should be answered within 8 weeks (reg 33). Inferences may be drawn from any failure to reply or equivocal or evasive responses (reg 33(2) b)).

31. If the complainant can make out a prima facie case, then it falls to the Respondent to prove that he did not discriminate or harass; the burden of proof is reversed (reg 29). In the context of indirect discrimination, if the complainant proves the first three elements of indirect discrimination, it is for the Respondent to prove justification.

32. If the tribunal finds that the Respondent has discriminated against the complainant, it may make one or more of the following orders:-

- a. A declaration of the parties' rights in relation to the act complained of (reg 30(1a));
- b. Compensation (with no upper limit) (reg 30(1)b); or
- c. A recommendation of action the tribunal considers practicable to reduce or remove the adverse effects of the discrimination (reg 30(1)c).

33. An award of compensation may be increased (or made for the first time) if without reasonable justification, a Respondent fails to comply with any recommendation made by the tribunal (reg 30(3)).

PREVENTATIVE MEASURES

34. There are various steps that organisations can take to prevent discrimination or harassment on the grounds of sexual harassment. If a complaint of unlawful conduct is made, those measures may also assist an employer in arguing that it has done all that was reasonably practicable to prevent an employee's behaviour and so avoid liability.

Existing Employees

35. If an employer has not already done so, it is imperative that it review all contracts, handbooks, policies and procedures to ensure that they do not expose it to discrimination claims. As well as the potential for indirect discrimination, there may be sections of employment documentation that are directly discriminatory, for example where parental leave entitlement is expressed in such a way as to exclude same sex partners.

36. Benefits offered to spouses must be extended to civil partners pursuant to the Civil Partnership Act 2004 (in force since 5th December 2005). Some obvious examples are in relation to pension provision, private medical insurance and leave around marriage. But note that it is permissible to limit benefits to married couples *and* civil partners to the exclusion of those couple who have not undergone a marriage or civil partnership.

37. A recent study commissioned by the Law Society highlighted concerns about "*heterosexual machismo*" and an "*undercurrent of homophobia*" in the corporate culture of some City law firms. All employers must take care that opportunities for social gatherings do not discriminate against members of staff on the grounds of their sexual orientation. Invitations should be worded so as to include civil partners as well as wives and to ensure that same sex partners are not excluded. Thought must be given about the venue and the nature of social events.

38. The Regulations contain no requirement on any organisation to have an equal opportunities policy. That being said, the instigation or review of an equal opportunities policy may be a good way of focussing attention on the issue for both staff and managers.

39. An equality policy will only protect employees and employers if it is publicised and enforced. Training may be required to ensure that staff have a proper understanding of what might constitute unlawful behaviour. Employers will need to ensure that any potentially discriminatory behaviour that is brought to their attention is robustly dealt with. A failure to do so may constitute discrimination or give rise to a constructive dismissal.

40. Many organisations monitor their workforce and may consider including questions about sexual orientation. Such questions should be voluntary and the answers treated in strict confidence.

Positive Action

41. Positive action is permitted where it reasonably appears that the action "*prevents or compensates for disadvantages linked to sexual orientation*" (reg 26(1)). In those circumstances, it is lawful to restrict training opportunities to disadvantaged groups or encourage such groups to apply for certain types of work. Employers are not, however, permitted to discriminate in favour of particular individuals when selecting someone for a job, as that remains unlawful.

Prospective Employees

42. Both the terms of any advertisement and its placement should be given careful consideration so as to avoid discrimination against potential employees. Personal questions asked in interview may well be perceived as intrusive and suggestive of discriminatory attitudes. If personal information is offered, selectors will need to guard against allowing it to influence their decision.

43. Employers should also review any application forms in use. There will be few jobs which demand that an organisation know an employee's marital status. Such questions should be removed or, if they are necessary, should be amended to ask whether a candidate is married or in a civil partnership, without asking the candidate to specify which.

44. If an employer considers a particular sexual orientation to be a GOR of any post that should be made abundantly clear to prospective applicants on advertisements and application forms and during any interviews.

Former Employees

45. As with all forms of discrimination, care must be taken to ensure that the provision of any reference (or the refusal to provide a reference) is not tainted by considerations of sexual orientation.

46. Exit interviews may assist an employer in identifying and eradicating any discrimination or harassment that has taken place. Employees who declined to complain about such behaviour during their employment may be more forthcoming when they are about to leave the organisation.

Catriona MacLaren

Email: cmaclaren@tanfieldchambers.co.uk

Tel: 0207 421 5300