

2001 No. 2660

SEX DISCRIMINATION

**The Sex Discrimination (Indirect Discrimination
and Burden of Proof) Regulations 2001**

Made - - - - - *20th July 2001*
Laid before Parliament *20th July 2001*
Coming into force - - *12th October 2001*

The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to measures relating to sex discrimination in matters of employment, self-employment and vocational training(b), hereby makes the following regulations in exercise of the powers conferred by that section.

Citation, interpretation and extent

- 1.—(1) These regulations may be cited as the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001.
- (2) In these regulations “the 1975 Act” means the Sex Discrimination Act 1975(c).
- (3) These regulations shall extend to Great Britain only.

Commencement and transitional provisions

- 2.—(1) These regulations shall come into force on 12th October 2001 (in this regulation referred to as “the commencement date”).
- (2) Regulations 5 and 6 apply in relation to proceedings instituted before the commencement date, as well as those instituted on or after that date, but do not affect any case in which proceedings in the employment tribunal, county court or sheriff court were determined before the commencement date.

Sex discrimination

3. For section 1 of the 1975 Act there is substituted—

“Direct and indirect discrimination against women

- 1.—(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if—
- (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or
- (b) he applies to her a requirement or condition which he applies or would apply equally to a man but—

(a) 1972 c. 68.
(b) See the European Communities (Designation) (No. 3) Order 1999 (S.I. 1999/2788).
(c) 1975 c. 65.

- (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
 - (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
 - (iii) which is to her detriment because she cannot comply with it.
- (2) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if—
- (a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or
 - (b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but—
 - (i) which is such that it would be to the detriment of a considerably larger proportion of women than of men, and
 - (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
 - (iii) which is to her detriment.
- (3) Subsection (2) applies to—
- (a) any provision of Part 2,
 - (b) sections 35A and 35B(a), and
 - (c) any other provision of Part 3, so far as it applies to vocational training.
- (4) If a person treats or would treat a man differently according to the man’s marital status, his treatment of a woman is for the purposes of subsection (1)(a) or (2)(a) to be compared to his treatment of a man having the like marital status.”

Discrimination against married persons

4. For section 3 of the 1975 Act there is substituted—

“Direct and indirect discrimination against married persons in employment field

3.—(1) In any circumstances relevant for the purposes of any provision of Part 2, a person discriminates against a married person of either sex if—

- (a) on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex, or
- (b) he applies to that person a provision, criterion or practice which he applies or would apply equally to an unmarried person, but—
 - (i) which is such that it would be to the detriment of a considerably larger proportion of married persons than of unmarried persons of the same sex, and
 - (ii) which he cannot show to be justifiable irrespective of the marital status of the person to whom it is applied, and
 - (iii) which is to that person’s detriment.

(2) For the purposes of subsection (1), a provision of Part 2 framed with reference to discrimination against women shall be treated as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.”

Burden of proof: employment tribunals

5. After section 63 of the 1975 Act there is inserted—

“Burden of proof: employment tribunals

63A.—(1) This section applies to any complaint presented under section 63 to an employment tribunal.

(a) Sections 35A and 35B were inserted by the Courts and Legal Services Act 1990 (c. 41), sections 64 and 65.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—

- (a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2, or
- (b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.”

Burden of proof: county and sheriff courts

6. After section 66 of the 1975 Act there is inserted—

“Burden of proof: county and sheriff courts

66A.—(1) This section applies to any claim brought under section 66(1) in a county court in England and Wales or a sheriff court in Scotland.

(2) Where, on the hearing of the claim, the claimant proves facts from which the court could, apart from this section, conclude in the absence of an adequate explanation that the respondent—

- (a) has committed an act of discrimination against the claimant which is unlawful by virtue of—
 - (i) section 35A or 35B, or
 - (ii) any other provision of Part 3 so far as it applies to vocational training, or
- (b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the claimant,

the court shall uphold the claim unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.”

Claims under Part 3 of the 1975 Act so far as it applies to vocational training

7. After section 66(3) of the 1975 Act there is inserted—

“(3A) Subsection (3) does not affect the award of damages in respect of an unlawful act of discrimination falling within section 1(2)(b).”

Consequential amendments of 1975 Act

8.—(1) In section 5(3)(a) of the 1975 Act, for “section 1(1)” there is substituted “section 1(1) or (2)”.

(2) In section 37 of the 1975 Act, for subsection (1) there is substituted—

“(1) In this section “discriminatory practice” means—

- (a) the application of a provision, criterion or practice which results in an act of discrimination which is unlawful by virtue of any provision of Part 2 or 3 taken with section 1(2)(b) or 3(1)(b) or which would be likely to result in such an act of discrimination if the persons to whom it is applied were not all of one sex, or
- (b) the application of a requirement or condition which results in an act of discrimination which is unlawful by virtue of any provision of Part 3 taken with section 1(1)(b) or which would be likely to result in such an act of discrimination if the persons to whom it is applied were not all of one sex.”

(3) In section 65(1B)(b) of the 1975 Act—

- (a) for “section 1(1)(b)” there is substituted “section 1(2)(b)”, and
- (b) for “requirement or condition” there is substituted “provision, criterion or practice”.

(4) In section 82(1) of the 1975 Act, after the definition of “proprietor” there is inserted—

““provision, criterion or practice” includes “requirement or condition;”.

(a) Section 5(3) was inserted by the Sex Discrimination (Gender Reassignment) Regulations 1999 (S.I. 1999/1102), reg2(2).

(b) Section 65(1B) was inserted by the Sex Discrimination and Equal Pay (Miscellaneous Provisions) Regulations 1996 (S.I. 1996/438), regulation 2(2).

Amendment of Employment Act 1989

9. In section 1 of the Employment Act 1989(a) (overriding of statutory requirements which conflict with certain provisions of the 1975 Act), in subsection (3)—

- (a) for “requirement or condition”, wherever occurring, there is substituted “provision, criterion or practice”,
- (b) for “subsection (1)(b)(i) of section 1 or 3” there is substituted “section 1(2)(b)(i) or 3(1)(b)(i)”,
- (c) in paragraph (a), for “subsection (1)(b)(ii) of that section” there is substituted “section 1(2)(b)(ii) or 3(1)(b)(ii) of that Act”, and
- (d) in paragraph (b), for “subsection (1)(b)(ii)” there is substituted “section 1(2)(b)(ii) or 3(1)(b)(ii)”.

20th July 2001

Patricia Hewitt
Secretary of State,
Department of Trade and Industry

(a) 1989 c. 38.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which are made under section 2(2) of the European Communities Act 1972, implement (in Great Britain) Article 2 and Article 4(1) of Council Directive 97/80/EC of 15th December 1997 (“the Directive”) concerning the burden of proof in cases of discrimination based on sex (OJ L14, 20.1.1998, p.6). The Directive has effect in relation to the United Kingdom by virtue of Council Directive 98/52/EC of 13th July 1998 (OJ L.205, 22.7.1998, p.66).

Article 2(1) of the Directive defines “the principle of equal treatment for men and women” for the purposes of Article 141 (formerly Article 119) of the EC Treaty and other Community legislation relating to sex discrimination, including in particular Directive 76/207/EEC of 9th February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ L39, 14.3.1976, p.40).

Article 2(2) of the Directive sets out the definition of indirect discrimination for the purposes of the principle of equal treatment referred to in Article 2(1).

Article 4 requires every Member State to take such measures as are necessary, in accordance with their national judicial systems, to ensure that in complaints of sex discrimination, before a court or other competent authority, the burden is on the complainant initially to establish facts from which the court or competent authority may presume there has been direct or indirect discrimination. Thereafter, the burden shifts to the person who has allegedly discriminated against the complainant, the respondent, to prove that there has been no such discrimination.

The Directive is only applicable to situations concerning equal treatment of men and women as regards employment and vocational training.

The Regulations amend the Sex Discrimination Act 1975 (“the 1975 Act”) and the Employment Act 1989 (“the 1989 Act”) in order to reflect the provisions of the Directive. The amendments come into force on 12th October 2001, subject to transitional provisions (see regulation 2).

Regulation 3 provides for the substitution of section 1 of the 1975 Act. The sole change made to subsection (1) is that it will now apply only in respect of the provisions of the Act other than—

- Part 2 (discrimination in the employment field),
- sections 35A and 35B (discrimination in relation to barristers and advocates), or
- any other provision of Part 3, so far as it relates to vocational training.

The new subsection (2) (as substituted by regulation 3) sets out what constitutes direct and indirect discrimination for the purposes of the following provisions of the 1975 Act—

- Part 2,
- sections 35A and 35B, and
- any other provision of Part 3, so far as it relates to vocational training.

Under new subsection (2)(a), direct discrimination will occur when a person treats a woman less favourably than he treats or would treat a man on the ground of her sex. This is identical to the new subsection (1)(a) (and to the old subsection (1)(a) which regulation 3 replaces). Subsection (2)(b) provides that in circumstances relevant for the purposes of a provision to which the new subsection applies, indirect discrimination will occur where a person applies an apparently neutral provision, criterion or practice to the disadvantage of a woman and to a substantially higher proportion of women than men, unless that provision, criterion or practice can be justified by objective factors unrelated to sex.

Regulation 4 substitutes a new section 3 in the 1975 Act (discrimination against married persons in the employment field). The only change of substance is in subsection (1)(b) (which relates to indirect discrimination). This reflects the provisions of new section 1(2)(b) (as substituted by regulation 3).

Regulations 5 and 6 insert two new sections into the 1975 Act. These sections provide that the burden of proof will shift from the complainant to the respondent if the complainant can prove facts from which the tribunal could, apart from the section, conclude in the absence of

an adequate explanation that discrimination has occurred. In those circumstances the burden of proof shifts to the respondent to prove that no such discrimination occurred. This only applies to proceedings by virtue of—

- Part 2,
- Sections 35A or 35B,
- any other provision of Part 3, so far as it relates to vocational training.

Regulation 7 inserts a new subsection (3A) into section 66 of the 1975 Act. The amendment makes it clear that a county court or sheriff court has power to award damages in respect of an unlawful act of discrimination which relates to vocational training and falls within the new section 1(2)(b), (as substituted by regulation 3), whether or not the discrimination is intentional.

Regulation 8 makes consequential amendments to other provisions of the 1975 Act.

Regulation 9 makes a consequential amendment to section 1 of the 1989 Act.

A copy of the Regulatory Impact Assessment relating to these Regulations has been placed in the libraries of both Houses of Parliament and can be obtained from the Women and Equality Unit, Cabinet Office, Second Floor, 10 Great George Street, London SW1P 3AE.

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£2.00

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Printed and published in the UK by The Stationery Office Limited
under the authority and superintendence of Carol Tullo, Controller of
Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament.
E1405 7/2001 645939 19585

ISBN 0-11-029769-5



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