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STATUTORY INSTRUMENTS

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**1998 No. 3162**

**The Fair Employment and Treatment  
(Northern Ireland) Order 1998**

**PART VI**

**ENFORCEMENT OF PARTS III TO V**

*General*

**Restriction on proceedings for breach of this Order**

**37.**—(1) Except as provided by this Order or regulations thereunder, no proceedings whether civil or criminal shall be brought against any person in respect of a contravention of any provision of this Order or of such regulations.

(2) Nothing in paragraph (1) prevents any application for judicial review<sup>[F1]</sup> or the investigation or determination of any matter in accordance with Part X (investigations: the Pensions Ombudsman) of the Pension Schemes (Northern Ireland) Act 1993 by the Pensions Ombudsman].

**F1** SR 2003/520

*Enforcement of Part III*

**Complaint to Tribunal**

**38.**—(1) A complaint by any person (“the complainant”) that another person (“the respondent”)

- (a) has committed an act of discrimination<sup>[F2]</sup> or harassment] against the complainant which is unlawful by virtue of any provision of Part III<sup>[F2]</sup> or Article 32]; or
- (b) by virtue of Article 35 or 36 is to be treated as having committed such an act of discrimination<sup>[F2]</sup> or harassment] against the complainant,

may be presented to the Tribunal.

[<sup>F3</sup>(1A) Paragraph (1) is subject to Article 20 of the Employment (Northern Ireland) Order 2003.]

(2) The Tribunal shall not consider a complaint relating to an act which is unlawful by virtue of Article 25 if the act is one in respect of which an appeal, or proceedings in the nature of an appeal, may be brought to a court under any statutory provision.

**F2** SR 2003/520

**F3** 2003 NI 15

*Status: Point in time view as at 18/04/2011.*

*Changes to legislation: There are currently no known outstanding effects for the The Fair Employment and Treatment (Northern Ireland) Order 1998, PART VI. (See end of Document for details)*

#### [<sup>F4</sup>Burden of proof: Tribunal

**38A.** Where, on the hearing of a complaint under Article 38, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—

- (a) has committed an act of unlawful discrimination or unlawful harassment against the complainant, or
- (b) is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination or harassment 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.]

F4 SR 2003/520
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#### Remedies on complaint under Article 38

**39.**—(1) Where the Tribunal finds that a complaint presented to it under Article 38 is well-founded, the Tribunal shall make such of the following as it considers just and equitable—

- (a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;
- (b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court to pay to the complainant if the complaint had fallen to be dealt with under Article 40;
- (c) a recommendation that the respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any unlawful discrimination[<sup>F5</sup> or unlawful harassment] to which the complaint relates;
- (d) a recommendation that the respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on a person other than the complainant of any unlawful discrimination[<sup>F5</sup> or unlawful harassment] to which the complaint relates.

(2) In applying Article 40 for the purposes of paragraph (1)(b), no account shall be taken of paragraph (3) of that Article.

(3) As respects an act of unlawful discrimination falling within[<sup>F5</sup> Article 3(2A)(b)], if the respondent proves that the[<sup>F5</sup> provision, criterion or practice] in question was not applied with the intention of treating the complainant unfavourably on the ground of his religious belief or political opinion as the case may be, an order may be made under paragraph (1)(b) only if the Tribunal—

- (a) makes such order under paragraph (1)(a) and such recommendation under paragraph (1)(c) (if any) as it would have made if it had no power to make an order under paragraph (1)(b); and
- (b) (where it makes an order under paragraph (1)(a) or a recommendation under paragraph (1)(c) or both) considers that it is just and equitable to make an order under paragraph (1)(b) as well.

(4) Compensation awarded to a person under paragraph (1)(b) may include compensation for injury to feelings whether or not it includes compensation under any other head.

(5) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by the Tribunal under paragraph (1)(c), then, if it considers it just and equitable to do so—

- (a) the Tribunal may increase the amount of any compensation required to be paid to the complainant in respect of the complaint by an order made under paragraph (1)(b); or
- (b) if an order under paragraph (1)(b) was not made, the Tribunal may make such an order.

(6) Where compensation falls to be awarded in respect of any act both under the provisions of this Article and under any other statutory provision, the Tribunal shall not award compensation under this Article in respect of any loss or other matter which has been taken into account under that other statutory provision by a court or tribunal in awarding compensation in an action or complaint in respect of that act.

(7) The Department may by order make provision—

- (a) for enabling the Tribunal, where an amount of compensation falls to be awarded under paragraph (1)(b) to include in the award interest on that amount; and
- (b) specifying, for cases where the Tribunal decides that an award is to include an amount in respect of interest, the manner in which and the periods and rate by reference to which the interest is to be determined.

(8) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by the Tribunal under paragraph (1)(d), the President or Vice-President may—

- (a) certify the failure to the High Court; or
- (b) require the respondent to pay to the Department a pecuniary penalty of an amount not exceeding £40,000.

(9) Where the President or Vice-President has certified a failure under paragraph (8)(a), the High Court may deal with the respondent as if the recommendation of the Tribunal had been an order of the High Court.

(10) The Judgments Enforcement (Northern Ireland) Order 1981 shall apply with the necessary modifications in relation to a penalty imposed under paragraph (8)(b) as it applies to a sum due to the Crown under a money judgment (within the meaning of that Order).

(11) If it appears to the Department that there has been a change in the value of money since the relevant date, it may by order substitute for the sum for the time being specified in paragraph (8)(b) such other sum as appears to it to be justified by the change.

(12) In paragraph (11) “the relevant date” means—

- (a) in relation to the first order under that paragraph, the coming into operation of this Article; and
- (b) in relation to each subsequent order, the last occasion when the sum specified in paragraph (8)(b) was altered.

(13) The Department shall pay into the Consolidated Fund any sums received in respect of penalties under this Article.

[<sup>F5</sup>(14) This Article has effect subject to paragraph 7 of Schedule 2A.]

*Enforcement of Part IV***Claims under Part IV**

**40.**—(1) A claim by any person (“the claimant”) that another person (“the respondent”)—

- (a) has committed an act<sup>F6</sup> . . . against the claimant which is unlawful by virtue of any provision of Part IV<sup>F6</sup> other than Article 32]; or
- (b) is by virtue of Article 35 or 36 to be treated as having committed such an act<sup>F6</sup> . . . against the claimant,

may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.

(2) Proceedings under paragraph (1) shall be brought only in a county court; but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Article 37, would be obtainable in the High Court.

(3) As respects an act of unlawful discrimination falling within Article 3(2)(b), no award of damages shall be made if the respondent proves that the requirement or condition in question was not applied with the intention of treating the claimant unfavourably on the ground of religious belief or political opinion.

(4) Damages in respect of an act of unlawful discrimination<sup>F6</sup> or unlawful harassment] may include compensation for injury to feelings whether or not they include compensation under any other head.

(5) Civil proceedings in respect of a claim by any person that he has been discriminated against in contravention of Article 27 by a governing body of an establishment falling within paragraph (2) (b) of that Article, shall not be instituted unless the claimant has given notice of the claim to the Department of Education.

(6) Nothing in paragraph (5) applies to a counterclaim.

(7) For the purposes of proceedings under paragraph (1)—

- (a) Article 33(1) (power of judge to appoint assessors) of the County Courts (Northern Ireland) Order 1980 shall apply with the omission of the words “on the application of any party”, and
- (b) the remuneration of assessors appointed under that Article shall be at such rate as may be determined by the Lord Chancellor with the approval of the Treasury and may be defrayed as part of the expenses of the Lord Chancellor.

(8) A county court shall have jurisdiction to entertain proceedings under paragraph (1) with respect to an act done on a ship, aircraft or hovercraft outside its division, including such an act done outside Northern Ireland.

**F6** SR 2003/520

**Modifications etc. (not altering text)**

- C1** [Art. 40\(7\)\(b\)](#): functions of Treasury or Minister for the Civil Service transferred to Department of Finance and Personnel (12.4.2010) by [Northern Ireland Act 1998 \(Devolution of Policing and Justice Functions\) Order 2010 \(S.I. 2010/976\)](#), arts. 1(2), **15(4)(i)** (with arts. 15(6), 28-31); S.I. 2010/977, **art. 1(2)**

[<sup>F7</sup> **Burden of proof: county court**

**40A.**—(1) This Article applies where a claim is brought under Article 40 and the claim is that the respondent—

- (a) has committed an act of discrimination which is unlawful by virtue of any provision referred to in Article 3(2B)(b), or Part V in its application to that provision, or
- (b) has committed an act of harassment which is unlawful by virtue of Article 27(1A).

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

- (a) has committed such an act of discrimination or harassment against the claimant, or
- (b) is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination or harassment 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.]

F7 SR 2003/520

*Other enforcement by Commission*

**Persistent discrimination**

**41.**—(1) If, during the period of 5 years beginning on the date on which a finding by the Tribunal or a court under Article 38 or 40 that he has committed an act of unlawful discrimination[<sup>F8</sup> or unlawful harassment] becomes final in respect of any person, it appears to the Commission that unless restrained that person is likely to commit one or more such acts the Commission may apply to a county court for an injunction restraining him from doing so; and the court, if satisfied that the application is well-founded, may grant the injunction in the terms applied for or in more limited terms.

(2) For the purposes of this Article and Article 42 a finding by a court or the Tribunal becomes final when—

- (a) an appeal against the finding is abandoned or determined; or
- (b) the time for appealing expires without an appeal having been brought.

F8 SR 2003/520

**Enforcement of Article 34**

**42.**—(1) Proceedings in respect of a contravention of Article 34 shall be brought only by the Commission in accordance with the following provisions of this Article.

(2) The proceedings shall be—

- (a) an application for a decision whether the alleged contravention occurred; or
- (b) an application under paragraph (4),

or both.

(3) An application under paragraph (2)(a) shall be made—

- (a) in a case based on any provision of Part III[<sup>F9</sup> or Article 32], to the Tribunal; and
- (b) in any other case, to a county court.

*Status: Point in time view as at 18/04/2011.*

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- (4) If it appears to the Commission—
- (a) that a person has done an act which by virtue of Article 34 was unlawful; and
  - (b) that unless restrained he is likely to do further acts which by virtue of that Article are unlawful,

the Commission may apply to a county court for an injunction restraining him from doing such acts; and the court, if satisfied that the application is well-founded, may grant the injunction in the terms applied for or in more limited terms.

(5) In proceedings under paragraph (4) the Commission shall not allege that the person to whom the proceedings relate has done an act which is unlawful by virtue of Article 34 and within the jurisdiction of the Tribunal unless a finding by the Tribunal under paragraph (3)(a) that he did that act has become final.

(6) In paragraph (5), the acts “within the jurisdiction of the Tribunal” are those in respect of which such jurisdiction is conferred by Article 38.

**F9** SR 2003/520

#### **Undertakings by persons contravening Part IV**

**43.**—(1) This Article applies to an act contravening any provision of Part IV and so applies whether or not proceedings have been brought in respect of the act.

(2) If the Commission is satisfied that a person is committing or has committed any such act the Commission may, for the purpose of preventing the commission by that person of any further such act, seek to obtain from that person an undertaking—

- (a) that he will do, or refrain from doing, certain acts specified in the undertaking;
  - (b) that he will institute certain practices so specified; or
  - (c) that he will change his existing practices in a manner so specified.
- (3) An undertaking given by any person under this Article shall—
- (a) be in writing;
  - (b) be in such terms as may be agreed between that person and the Commission;
  - (c) contain such terms as appear to the Commission to be necessary or appropriate for the purpose mentioned in paragraph (2); and
  - (d) have effect for such period as may be specified therein.

(4) If it appears to the Commission that a person who has given an undertaking under this Article has, at any time within the period specified therein by virtue of paragraph (3)(d), failed to comply with the undertaking, the Commission may apply to the county court for a decision as to whether that person has failed to comply with the undertaking.

*Help for persons suffering discrimination*

#### **Help for aggrieved persons in obtaining information, etc.**

**44.**—(1) With a view to helping a person (“the person aggrieved”) who considers that another person may have unlawfully discriminated against him<sup>F10</sup> or subjected him to unlawful harassment] to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner, the Department shall by regulations prescribe—

- (a) forms by which the person aggrieved may question the respondent on his reasons for doing any relevant act, or on any other matter which is or may be relevant; and
  - (b) forms by which the respondent may if he so wishes reply to any questions.
- (2) Where the person aggrieved questions the respondent (whether in accordance with regulations under paragraph (1) or not)—
- (a) the question, and any reply by the respondent (whether in accordance with the regulations or not) shall, subject to the following provisions of this Article, be admissible as evidence in the proceedings; and
  - (b) if it appears to the court or the Tribunal that the respondent deliberately and without reasonable cause omitted to reply within a<sup>F10</sup> period of eight weeks beginning with the day on which the question was served on him] or that his reply is evasive or equivocal, the court or the Tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act.
- (3) The Department may by regulations—
- (a) prescribe the period within which questions must be duly served in order to be admissible under paragraph (2)(a); and
  - (b) prescribe the manner in which a question, and any reply by the respondent, may be duly served.
- (4) County court rules may enable the court entertaining a claim under Article 40 to determine, before the date fixed for the hearing of the claim, whether a question or reply is admissible under this Article or not.
- (5) This Article is without prejudice to any other statutory provision or rule of law regulating interlocutory and preliminary matters in proceedings before a county court or the Tribunal, and has effect subject to any statutory provision or rule of law regulating the admissibility of evidence in such proceedings.
- (6) In this Article “respondent” includes a prospective respondent.

**F10** SR 2003/520

#### **Advice and assistance from Commission**

**45.**—(1) Where a prospective complainant or claimant requests the Commission in writing for advice in relation to prospective proceedings under this Part, the Commission shall give him such advice unless it considers that the request is frivolous.

(2) Where, in relation to proceedings or prospective proceedings under this Part, an individual who is an actual or prospective complainant or claimant applies to the Commission for assistance under this paragraph, the Commission shall consider the application and may grant it if it thinks fit to do so—

- (a) on the ground that the case raises a question of principle; or
  - (b) on the ground that it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent, or another person involved, or to any other matter to expect the applicant to deal with the case unaided; or
  - (c) by reason of any other special consideration.
- (3) Assistance given by the Commission under paragraph (2) may include—
- (a) giving advice;
  - (b) procuring or attempting to procure the settlement of any matter in dispute;

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- (c) arranging for the giving of advice or assistance by a solicitor or barrister;
  - (d) arranging for representation by any person including all such assistance as is usually given by a solicitor or barrister in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and
  - (e) any other form of assistance which the Commission may consider appropriate,
- but sub-paragraph (d) shall not affect the law and practice regulating the descriptions of persons who may appear in, conduct, defend, and address the court in, any proceedings.

*Period within which proceedings must be brought*

**Period within which proceedings must be brought**

**46.**—(1) Subject to paragraph (5) [<sup>F11</sup>to Article 46A,]<sup>F12</sup> and to any regulations under Article 22 of the Employment (Northern Ireland) Order 2003], the Tribunal shall not consider a complaint under Article 38 unless it is brought before whichever is the earlier of—

- (a) the end of the period of 3 months beginning with the day on which the complainant first had knowledge, or might reasonably be expected first to have had knowledge, of the act complained of; or
- (b) the end of the period of 6 months beginning with the day on which the act was done.

(2) Subject to paragraph (5) [<sup>F13</sup>and to Article 46A], a county court shall not consider a claim under Article 40 unless proceedings in respect of the claim are instituted before the end of the period of 6 months beginning with the day on which the act complained of was done.

(3) Subject to paragraph (5) [<sup>F13</sup>and to Article 46A], the Tribunal or county court shall not consider an application under Article 42(2)(a) unless it is made before the end of the period of 6 months beginning with the day on which the act to which it relates was done; and a county court shall not consider an application under Article 42(4) unless it is made before the end of the period of 5 years so beginning.

(4) Subject to paragraph (5) [<sup>F13</sup>and to Article 46A], a county court shall not consider an application under Article 43(4) in relation to an undertaking under that Article unless it is made before the end of the period specified in the undertaking by virtue of paragraph (3)(d) of that Article.

(5) A court or the Tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of this Article—

- (a) when the inclusion of any term in a contract renders the making of the contract an unlawful act, that act shall be treated as extending throughout the duration of the contract; and
- (b) any act extending over a period shall be treated as done at the end of that period; and
- (c) a deliberate omission shall be treated as done when the person in question does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it were to be done.

**F11** Words in art. 46(1) inserted (18.4.2011) by Cross-Border Mediation Regulations (Northern Ireland) 2011 (S.R. 2011/157), reg. 12(2) (with reg. 1(2))

**F12** 2003 NI 15

**F13** Words in art. 46(2)-(4) inserted (18.4.2011) by Cross-Border Mediation Regulations (Northern Ireland) 2011 (S.R. 2011/157), reg. 12(3) (with reg. 1(2))

[<sup>F14</sup>**Extension of time limits: mediation**

**46A.**—(1) Paragraph (2) applies where—

- (a) there is mediation in relation to a relevant cross border dispute giving rise to proceedings under this Order; and
- (b) the fixed period specified in relation to such proceedings by Article 46(1) to (4) (“the limitation period”) would, apart from this Article, expire—
  - (a) in the period of 8 weeks after the date on which the mediation ends;
  - (b) on the date on which the mediation ends; or
  - (c) after the date on which all of the parties to the dispute agree to participate in the mediation but before the date on which the mediation ends.

(2) Where this paragraph applies, the limitation period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(3) For the purposes of paragraph (1) and (2), a mediation in relation to a relevant cross-border dispute ends on the date of the first of these to occur—

- (a) all of the parties reach an agreement in resolution of the dispute;
- (b) all of the parties agree to end the mediation;
- (c) a party notifies all of the other parties of that party's withdrawal,
- (d) a period of 14 days expires after a request made by one party to another party for confirmation of whether the other party has withdrawn and the other party does not respond in that period, or
- (e) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise) and a replacement mediator has not been appointed in that period.

(4) In this Article—

“the Directive” means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;

“mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

“relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive.]

**F14** Art. 46A inserted (18.4.2011) by Cross-Border Mediation Regulations (Northern Ireland) 2011 (S.R. 2011/157), reg. 12(4) (with reg. 1(2))

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