

2001 No. 282

SEX DISCRIMINATION

Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001

Made 20th July 2001

Coming into operation 20th August 2001

The Office of the First Minister and deputy First Minister, being a Department 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), in exercise of the powers conferred on it by that section and of every other power enabling it in that behalf, hereby makes the following Regulations:

Citation, commencement, transitional provisions and interpretation

1.—(1) These Regulations may be cited as the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (Northern Ireland) 2001, and shall come into operation on 20th August 2001.

(2) Regulations 4 and 5 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 industrial tribunal or county court were determined before the date on which they came into operation.

(3) The Interpretation Act (Northern Ireland) 1954(c) shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

Amendment of the Sex Discrimination (Northern Ireland) Order 1976

2. For Article 3 of the Sex Discrimination (Northern Ireland) Order 1976(d) (“the Order”) there is substituted—

“Direct and indirect discrimination against women

3.—(1) In any circumstances relevant for the purposes of any provision of this Order, other than a provision to which paragraph (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

(a) 1972 c. 68
(b) See the European Communities (Designation) (No. 3) Order 1999 (S.I. 1999/2788)
(c) 1954 c. 33 (N.I.)
(d) S.I. 1976/1042 (N.I. 15)

- (b) he applies to her a requirement or condition which he applies or would apply equally to a man but—
 - (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,
 - (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 paragraph 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,
 - (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) Paragraph (2) applies to—
 - (a) any provision of Part III, and
 - (b) any provision of Part IV, 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 paragraph (1)(a) or (2)(a) to be compared to his treatment of a man having the like marital status.”.

Discrimination against married persons

3. For Article 5 of the Order there is substituted—

“Direct and indirect discrimination against married persons in employment field

5.—(1) In any circumstances relevant for the purposes of any provision of Part III, 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,
 - (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 paragraph (1), a provision of Part III 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: industrial tribunals

4. After Article 63 of the Order there is inserted—

“Burden of proof: industrial tribunals

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

(2) Where, on the hearing of the complaint, 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 discrimination against the complainant which is unlawful by virtue of Part III, or
- (b) is by virtue of Article 42 or 43 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 court

5. After Article 66 of the Order there is inserted—

“Burden of proof: county court

66A.—(1) This Article applies to any claim brought under Article 66(1) in a county court.

(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 an act of discrimination against the claimant which is unlawful by virtue of any provision of Part IV, so far as it applies to vocational training, or
- (b) is by virtue of Article 42 and 43 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 IV of the Order so far as it applies to vocational training

6. After Article 66(3) of the Order there is inserted—

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

Consequential amendments of the Order

- 7.—(1) The following amendments to the Order shall also have effect.
- (2) In Article 2(2) after the definition of “proprietor” there is inserted—
“provision, criterion or practice” includes requirement or condition;”.
- (3) In Article 7(a), for “Article 3(1)” there is substituted “Article 3(1) or (2)”.
- (4) In Article 38, for paragraph (1) there is substituted—
“(1) In this Article “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 III or IV taken with Article 3(2)(b) or 5(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 IV taken with Article 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.”.
- (5) In Article 65(1B)(b) of the Order
(a) for “Article 3(1)(b)” there is substituted “Article 3(2)(b)” and
(b) for “requirement or condition” there is substituted “provision, criterion or practice”.

Amendment of the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1990

8. In Article 3 of the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1990(c) (overriding of statutory requirements which conflict with certain provisions of the Order), in paragraph (3)—
- (a) for “requirement or condition”, wherever occurring, there is substituted “provision, criterion or practice”,
- (b) for “paragraph (1)(b)(i) of Article 3 or 5” there is substituted “Article 3(2)(b)(i) or 5(1)(b)(i)”,
- (c) in sub-paragraph (a) for “paragraph (1)(b)(ii) of that Article” there is substituted “Article 3(2)(b)(ii) or 5(1)(b)(ii) of that Order”, and
- (d) in sub-paragraph (b) for “paragraph (1)(b)(ii)” there is substituted “Article 3(2)(b)(ii) or 5(1)(b)(ii)”.

(a) Article 7 was amended by Regulation 2(2) of the Sex Discrimination (Gender Reassignment) Regulations (Northern Ireland) 1999 (S.R. 1999 No. 311)

(b) Article 65(1B) was inserted by Regulation 2(4) of the Sex Discrimination (Amendment) Regulations (Northern Ireland) 1996 (S.R. 1996 No. 418)

(c) S.I. 1990/246 (N.I. 2)

Sealed with the Official Seal of the Office of the First Minister and deputy
First Minister on 20th July 2001.

(L.S.)

Reg Empey

Seamus Mallon

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 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 (O.J. No. 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 (O.J. No. L205, 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 (O.J. No. 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 of the Directive 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 (Northern Ireland) Order 1976 (“the Order”) and the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1990 in order to reflect the provisions of the Directive. The amendments come into operation on 20th August 2001, subject to transitional provisions (regulation 1).

Regulation 2 provides for the substitution of Article 3 of the Order. The sole change made to paragraph (1) of Article 3 is that it will now apply only in respect of the provisions of the Order other than—

- Part III (discrimination in the employment field), or
- any provision of Part IV, so far as it relates to vocational training.

The new paragraph (2) of Article 3 sets out what constitutes direct and indirect discrimination for the purposes of the following provisions of the Order—

- Part III, and
- any provision of Part IV, so far as it relates to vocational training.

Under new paragraph (2)(a) of Article 3, 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 paragraph (1)(a) (and to the old paragraph (1)(a) which regulation 2 replaces). Paragraph (2)(b) provides that in circumstances relevant for the purposes of a provision to which the new paragraph (2) of Article 3 applies indirect discrimination will occur where a person applies an apparently neutral provision, criterion or practice to the detriment of a woman and to a substantially higher proportion of women than men, unless that criterion, provision or practice can be justified by objective factors unrelated to sex.

Regulation 3 substitutes a new Article 5 in the Order (discrimination against married persons in the employment field). The only change of substance is in sub-paragraph (1)(b) (which relates to indirect discrimination). This reflects the provisions of new Article 3(2)(b) (as substituted by regulation 2).

Regulations 4 and 5 insert two new Articles into the Order. These Articles provide that the burden of proof will shift from the complainant to the respondent if the complainant can prove facts from which an industrial tribunal or county court respectively could, apart from the Article in question, 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 III,
- any provision of Part IV, so far as it relates to vocational training.

Regulation 6 inserts a new paragraph (3A) into Article 66 of the Order. The amendment enables a county court to award damages in respect of an unlawful act of discrimination in respect of vocational training, falling within the new Article 3(2)(b) (as substituted by regulation 2) whether or not the discrimination is intentional or unintentional.

Regulation 7 makes consequential amendments to other provisions of the Order.

Regulation 8 makes consequential amendments to Article 3 of the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1990.

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