

Sexual Orientation Regulations 2003

by Simon Trigger

**THE EMPLOYMENT EQUALITY (SEXUAL ORIENTATION)  
REGULATIONS 2003**

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**INTRODUCTION**

1. The Employment Equality (Sexual Orientation) Regulations (“the Regulations”) came into force on 1<sup>st</sup> December 2003. They are intended to implement the Council Framework Directive 2000/78/EC though it is perhaps questionable the degree to which they have achieved this aim.
2. There have of course been previous attempts to create protection against discrimination on the grounds of Sexual Orientation out of existing legislation. However the House of Lords in the case of Pearce v Governing Body of Mayfield School [2003] IRLR 512 effectively ceased this as a line of argument.

**THE SEXUAL ORIENTATION REGULATIONS**

3. The Regulations unlike the sex, race and disability discrimination legislation only apply to discrimination in the employment field. The Regulations extend to Agency Workers, Trade Unions, Police, Barristers, Civil Servants, Self Employed working under a contract to another, Members of the Armed Forces, Partnerships, Training and Qualification Bodies and Educational Establishments (Pt II of the Regulations).
4. By regulation 6 discrimination is prohibited in relation to:
  - a) Recruitment
  - b) Terms on which employment is offered.
  - c) Refusal to offer employment
  - d) Opportunities for Promotion, Transfer, Training, or any other Benefit.

- e) Dismissal (including expiry of a fixed term contract and constructive dismissal)
- f) Any other detriment.

### **SEXUAL ORIENTATION**

5. Sexual Orientation is defined in Regulation 2(1) as a sexual orientation towards persons of the same sex, persons of the opposite sex and persons of the same sex and of the opposite sex. As such the definition is intended to exclude certain sexual orientations, such as bestiality. It therefore intended to cover gay, straight and bi sexual people.

### **DISCRIMINATION**

6. The following forms of discrimination are prohibited:
- a) Direct Discrimination: Reg 3(1)(a).
  - b) Indirect Discrimination: Reg 3(1)(b)
  - c) Victimisation: Reg 4
  - d) Harassment. Defined separately from direct discrimination: Reg 5.
  - e) Post Employment Discrimination: Reg 21.

### **DIRECT DISCRIMINATION: Reg 3(1)(a)**

7. The definition of Direct Discrimination is similar to existing discrimination legislation. It is defined as when **“on grounds of sexual orientation A [the discriminator] treats B [the complainant] less favourably than he treats or would treat other persons”**
8. Of note is the fact that the formulation applies to “grounds of sexual orientation” and not “on grounds of his/her sexual orientation”. This formulation arguably may catch a wider range of discriminatory acts. In any event there is therefore no requirement for a Complainant to establish their own sexual orientation in order to succeed. It is the grounds of the discrimination and not the actual sexual orientation of the complainant that is the test.
9. A Complainant will require a comparator: **Reg 3(2)**. The wording of Regulation 3(2) is the familiar wording: **“a comparison of B’s [the complainants] case with that of another person.... must be such that the relevant circumstances in the one case are the same, or not materially different in the other”**.

### **INDIRECT DISCRIMINATION: Reg 3(1)(b)**

10. The test for Indirect Discrimination is defined in similar but wider terms to the test for such Discrimination in other discrimination legislation. Indirect Discrimination is defined as 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 with 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”***.

11. As such the Regulation applies to a provision, criterion or practice. As such unlike some previous legislation there is no need to show that a condition or requirement has been applied. There is also no need for proof that the complainant cannot comply with the provision etc. It appears to be the case therefore that even informal work practices can be challenged.
12. There is of course also a justification defence. This will apply if the employer can show that the measure was a proportionate means of achieving a legitimate aim.
13. Following the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 there is unlikely to be any practical distinction between the familiar “detriment” as contained within the SDA and “disadvantage” as contained within the Regulations.
14. Of note is the fact that the Framework Directive does not contain a requirement that the specific complainant is actually put at a disadvantage. The Framework Directive (Article 2(b)) defines indirect discrimination as: *“where an apparently neutral provision, criterion or practice would put persons having particular sexual orientation at a particular disadvantage compared with other persons”*.
15. As such the Framework Directive clearly envisaged Anticipatory actions. An anticipatory action does not appear to be sustainable under the implementing Regulation.

#### **VICTIMISATION: Reg 4.**

16. The provisions for Victimisation are taken from the existing legislation. A person discriminates against another if he treats that other less favourably by reason of one of the protected acts. Regulation 4 sets out the usual protected acts, namely **“bringing proceedings under the regulation, giving evidence or information in proceedings brought under the regulations, doing anything under or by reference to the Regulations, or by alleging that an act which would amount to a contravention of the Regulations has been committed by the other”**.
17. There is a good faith defence to such a claim.

## **HARASSMENT: Reg 5.**

18. Harassment has never before been defined as a separate cause of action.

Instead Harassment has been seen as unlawful only where it could be viewed as Direct Discrimination.

19. Harassment is defined as:

*“where on grounds of sexual orientation A engages in unwanted conduct which has the purpose or effect of:*

*(a) violating B’s dignity: or*

*(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”.*

20. Of note is the fact that the definition is on the grounds of sexual orientation and not on the grounds of his or her sexual orientation. The definition applies whether the unwanted conduct was intended or simply has that effect.

21. The above definition suggests a largely subjective test. This is of course in line with the case law on other grounds of discrimination. Regulation 5(2) however states that conduct will only be regarded as harassment if it “**should reasonably be considered as having that effect having regard to all the circumstances**”. This of course places the onus squarely upon the Tribunal to decide what is reasonable in all the circumstances. It remains to be seen whether Tribunals will be suitably sensitive to what reasonably causes harassment.

## **POST EMPLOYMENT DISCRIMINATION: Reg 21.**

22. Pursuant to Regulation 21 discrimination, including harassment, which occurs after the end of a relevant relationship is unlawful if it arises out of or is closely connected to the relevant relationship.

23. A relevant relationship is a relationship between the parties during the course of which an act of discrimination by one party to the other is unlawful by the provisions of the Sexual Orientation Regulations.

## **LIABILITY OF EMPLOYERS OR PRINCIPALS**

24. Regulations 22 and 23 contain familiar provisions in respect of the liability of employers.
25. Employers are liable for acts of discrimination by their employees regardless of the knowledge or approval of the employer. An employer can however attempt to raise the defence open to them that they had taken such steps as were reasonably practicable to prevent the employee from doing that act or acts of that description in their employment: Reg 22(3).
26. Principals are liable for the acts or omissions of discrimination carried out by their agents.
27. A person who knowingly aids another person to do an unlawful act of discrimination is liable for that act. There is the usual defence of reasonable reliance on a statement Reg 23(3).
28. An employee or agent for whose act an employer is liable or would be liable but for the reasonable steps defence is taken to be knowingly aiding their employer or principal in their own act of discrimination.

**BURDEN OF PROOF: Reg 29.**

29. Pursuant to regulation 29 it is for the Complainant to prove facts from which the tribunal could conclude in the absence of a reasonable explanation that an act of discrimination has occurred. Once the Complainant has established this then the Tribunal **SHALL** uphold the complaint unless the Respondent can prove that he did not commit (or is not to be treated as having committed) that act.
30. This is a different test as the traditional test as set out in King v Great Britain China Centre [1992] ICR 516. The traditional test under discrimination law is that if the Complaint makes out a prima facie case then the Tribunal **MAY** uphold the complaint in the absence of a satisfactory explanation. However the new test that is to be applied is that in those circumstances the Tribunal **SHALL** uphold the complaint.
31. This test is now effectively identical to the provisions in the amended SDA and RRA (SDA section .63A and RRA section 54A). A useful guide can be found in the case of Barton v Investec Henderson Crosthwaite Securities [2003] IRLR 332 which was decided under the Sexual Discrimination Act as

amended as to the Courts interpretation of these provisions and the effect of the change in the burden of proof.

### **DEFENCE: GENUINE OCCUPATION REASONS**

32. There are essentially two Genuine Occupation Requirement exceptions to the Regulations. However both of these Genuine Occupation Requirements only apply to Recruitment, the Terms upon which employment is offered, promotion, transfer, training and Benefits, and Dismissal. The Genuine Occupation Requirement does not therefore apply to “the terms upon which the employment is offered”, “harassment” or “any other detriment”.
33. The two Genuine Occupational Requirement Exceptions are the General Exception and the Organised Religion Exception.

#### General Exception

34. In order to rely on the Genuine Occupational Requirement being of a particular sexual orientation must be a genuine and determining occupational requirement. The test appears to be narrower than the traditional exception in discrimination legislation. Furthermore the Requirement must be proportional in order to be relied upon.
35. Finally the employer must not be satisfied and it is reasonable for him not to be satisfied that the person meets the genuine occupational requirement as to sexual orientation. This may appear strange as without actual knowledge of a persons sexual orientation an employer can only determine a persons sexual orientation by reference to appearance and stereotype.

#### Organised Religion Exception

36. This limb of the Genuine Occupational Requirement applies where the employment is for an organised religion and the employer applies a requirement related to sexual orientation in order either to **comply with the doctrines of that religion** or **because of the nature of the employment and the context in which it is carried out so as to avoid conflicting with the strongly held religious views of a significant number of the religions followers**. Again the requirement is only made out if the person to whom the requirement is applied does not meet it and the employer was satisfied and it

was reasonable for him to be satisfied that the employee did not meet the requirement.

37. This exception appears to be wide. There are a number of potential difficulties with this exception:

- a) There is at present no definition of organised religion.
- b) There is no definition of doctrines
- c) There is no definition or assistance as to what constitutes a significant number of the religions followers
- d) There is no definition of strongly held religious convictions.
- e) This may well be ultra vires as the Framework Directive which does not allow this wide exception for Organised Religions.

### **BENEFITS EXCEPTION**

38. Regulation 25 contains a wide exception for benefits that are payable in relation to marital status. Thus a refusal to extend travel concessions to partners of gay employees would not be unlawful discrimination neither would a discriminatory pension scheme that was not extended to partners of gay relationships.

### **ENFORCEMENT**

39. There is a three month time limit for the bringing of an action (Reg 34). However the Tribunal will have the power to extend this time where it is just and equitable to do so (Reg 34(3)).
40. A questionnaire procedure in the familiar form is also included in the Regulations (Reg 33).

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