



SPECIAL RELEASE

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THE SEX DISCRIMINATION (INDIRECT DISCRIMINATION AND BURDEN OF PROOF REGULATIONS) 2001

On 20th July 2001, the Government laid down Regulations before Parliament. These will come into force on 12th October 2001 some three months later than initially expected. The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 implement the European Directive on the 'Burden of Proof in Cases of Discrimination based on Sex' (Council Directive 97/80/EC). The Regulations will amend the Sex Discrimination Act 1975 and they are expected to significantly assist an individual complaining of sex discrimination.

Previously the onus was on the individual bringing the claim to prove that discrimination had actually taken place. The first hurdle for the employee was to prove that the facts established a prima facie case. The Employment Tribunal would then consider whether (1) the employer had a satisfactory explanation for the conduct; and (2) if there was no such satisfactory explanation whether it could infer that discrimination had taken place on the facts placed before them.

The Regulations change this position radically. An individual bringing a claim will now be required to simply present the facts to the Tribunal rather than prove that discrimination has taken place. The significant change will now see Tribunals automatically inferring that discrimination has taken place unless the employer can show otherwise. In other words, instead of the individual having to prove that the discrimination has occurred, the employer must instead prove that it has not occurred.

The Regulations will only apply to cases heard after 12th October 2001. It would be worthwhile therefore to use the next few months to increase awareness amongst individuals within your organisation and be aware of what the likely practice will be from October onwards.

In addition to this significant change, the Regulations also provide a revised definition of indirect discrimination as follows:

"Indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and it can be justified by objective factors unrelated to sex."

This definition will however only apply to cases of sex discrimination in employment settings. The existing definition as set out in Section 1(1)(b) of the Sex Discrimination Act 1975 will continue to apply in cases concerning the provision of goods, facilities and services. Whilst clarification of the definition of indirect discrimination is to be welcomed, having two different definitions of indirect discrimination in relation to sex discrimination is likely to cause confusion and uncertainty.

A further complication is also likely to arise in the future in relation to a further Council Directive (2000/43/EC) relating to the principle of equal treatment on grounds of race and ethnic origin. This Directive was

adopted by the Council of the European Union on 29th June 2000 and must be implemented into UK legislation by 19th July 2003. This Directive provides yet another definition of indirect discrimination as follows:

“Indirect discrimination shall be taken to occur when an apparently neutral provision criterion or practice would put persons at a racial or ethnic origin at a particular disadvantage compared with other persons unless that provision criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

Until such time as there is a single definition applicable to all discrimination legislation, individuals complaining of discrimination are likely to be subjected to delays and uncertainty caused by a lack of consistency and clarity in this complex area of employment law. It remains to be seen whether a single, all-encompassing definition of indirect discrimination will be introduced.

If you would like to discuss this matter further, please contact Kathy Pavey, Marie van der Zyl, Tony Gould or Julian Fidler of the Employment Department.

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