



# SPECIAL RELEASE

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## STOP PRESS

### SEX DISCRIMINATION 1975 - DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION (RE- VISITED)

As you may recall from a previous "Stop Press", in October 2000, the Employment Appeals Tribunal ("EAT") held in the case of *MacDonald v. Ministry of Defence* that discrimination on grounds of sexual orientation was contrary to the Sex Discrimination Act 1975 ("SDA 1975"). By deciding in this manner the EAT extended the protection afforded by SDA 1975 to gay employees as discrimination on the grounds of sex would include discrimination on grounds of sexual orientation. In coming to this decision, the EAT had held that as the word "sex" in the SDA 1975 was ambiguous, it should be interpreted in line with the European Convention on Human Rights.

Shortly after this decision, the Human Rights Act 1998 came into force. Many commentators at the time pointed to the *MacDonald* case as an example of how the Courts and Tribunals would interpret, insofar as they were able to do so, UK legislation in a way which was compatible with European Convention on Human Rights and thereby extend the interpretation of existing legislation to comply with Convention Rights. In the case of sexual orientation, the European Court of Human Rights had previously ruled that sexual orientation discrimination was contrary to the European Convention on Human Rights.

However, the Court of Session (the Scottish equivalent of the Court of Appeal) has recently upheld an appeal by the Ministry of Defence against the EAT's decision. The Court of Session held by a majority of 2 to 1 that the EAT's decision was flawed and that discrimination on the grounds of sexual orientation should not fall within the ambit of the SDA 1975. As a consequence, the position has reverted to the strict interpretation of the SDA 1975, namely, that this legislation will only protect those men and women who are discriminated against on grounds of sex where such individuals are treated less favourably than members of the opposite sex. Sex will not, therefore, include (at least for the time being) sexual orientation and so complaints of discrimination by gay or by bi-sexual employees in the private sector under SDA 1975 are unlikely to succeed.

As ever, we do not anticipate that this will be the end of the matter. For the time being, the chapter is closed but the story may not be over.

If you would like to discuss this matter further, please contact Kathy Pavey, Tony Gould or Julian Fidler of the Davenport Lyons Employment Group.

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