

Employment Update - November 2005

SEX DISCRIMINATION, CIVIL PARTNERSHIPS, GENDER REASSIGNMENT

New Sex Discrimination Legislation

The Employment Equality (Sex Discrimination) Regulations 2005 came into force on 01 October 2005. They make various changes to sex discrimination legislation. The main changes are described below:

1. Indirect Discrimination

Indirect sex discrimination has been redefined in respect of employment and vocational training. Basically, indirect sex discrimination occurs when an employer applies a provision, criterion or practice to men and women equally but it has the effect of putting one sex at a particular disadvantage, without justification. An example of this is changing shift patterns to include an early morning start as women are more likely to be responsible for childcare. Under the new Regulations, there is no longer a requirement for the treatment to be at the detriment of a considerably larger proportion of members of one sex, it merely has to put women at a particular disadvantage when compared to men (or vice versa). To escape such a claim, employers will need to objectively justify that the treatment is a proportionate means to achieving a legitimate aim i.e. they must balance the discriminatory effects of the measure against the importance of the aim pursued (previously they had to show it was justifiable irrespective of the sex of the person). Also, the definition now applies to discriminatory treatment against married people.

2. Harassment

For the first time in sex discrimination legislation, a specific definition of harassment has been included and it has been extended to cover gender reassignment. The change brings the sex discrimination legislation in line with current race, disability, sexual orientation and religion and belief discrimination legislation. A person subjects a woman to harassment if:

(i) on the grounds of her sex, he engages in unwanted conduct that violates her dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for her e.g. a man places vital objects on a high shelf (as females are usually shorter);

(ii) he engages in unwanted verbal, non-verbal or physical conduct of a sexual nature that violates her dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for her e.g. a man makes sexually explicit remarks; or

(iii) on the grounds of her rejection or submission to the unwanted conduct, he treats her less favourably than he would treat her had she not rejected or submitted to the conduct e.g. a woman is refused promotion as she rejected or even accepted, unwanted sexual advances.

The effect of someone's behaviour could be classified as harassment even if this was not their intention. However, such conduct will only be deemed to be harassment if it is reasonable, for example if the complainant is being over-sensitive, it may not constitute harassment and tribunals will have to balance the objective test of what is reasonable with the complainant's subjective perception. As harassment has always been unlawful (as it used to be claimed under the guise of direct discrimination), there should be few practical implications as employers should already be working to prevent inappropriate conduct. However, having 3 specific types of harassment makes the law in this area clearer and employers should think about appropriate amendments to policies and guidelines and further training for managers and staff.

3. Pregnancy and Maternity Leave

Unfavourable treatment in relation to employment and vocational training on the grounds of pregnancy or maternity leave has been made explicitly unlawful and there is no requirement for a male comparator in order for a woman to succeed with a claim. As case law previously recognised this, no new rights or duties have been created. The change merely brings certainty. Furthermore, protection is extended to women who miscarry before 24 weeks and who are, as a result, not entitled to maternity leave. The new law confirms that it will not be discriminatory to withhold remuneration (except for maternity pay) while a woman is on ordinary maternity leave or to withhold contractual terms and conditions (except those relating to maternity pay, the obligation of trust and confidence, notice requirements, redundancy compensation, disciplinary or grievance procedures or pension scheme membership) while a woman is on additional maternity leave. The Regulations further clarify that it is discriminatory to pay a woman less than she would otherwise have been paid had she not been on maternity leave, therefore a woman is entitled to receive any applicable pay rises awarded during her maternity absence.

4. Employees Working Abroad

The scope of the sex discrimination legislation has been extended to cover not only employees who work wholly or partly in Great Britain but also employees who work for British organisations outside Great Britain where (i) the employer has a place of business at an establishment in Great Britain; (ii) the work is for the purpose of the business carried on at that establishment; and (iii) the employee was ordinarily resident in Great Britain at the time he applied for or was offered employment or at any time during the course of his employment. Again, this merely brings the sex discrimination legislation in line with other discrimination legislation.

CIVIL PARTNERSHIPS

On 05 December 2005, the Civil Partnership Act 2004 will come into force. This will allow homosexual couples to have their relationship legally recognised. As a result, homosexual couples who have entered into a civil partnership will be entitled to increased employment rights, including:

- the same employment benefits, including pensions, as married couples;
- protection from discrimination against civil partners (similar to the protection for married couples that currently exists); and
- recognition that a civil partner will be comparable to a spouse.

Employers may need to make amendments to their current benefits and policies in order to accommodate the changes. Employers may also need to train their staff to ensure that they do not inadvertently discriminate against civil partners.

A further point that is worth noting is that information disclosed to an employer about a civil partnership is classified as sensitive personal data for the purposes of the Data Protection Act 1998. It is therefore extremely important that the employer maintains confidentiality.

GENDER REASSIGNMENT

Since 1999 it has been unlawful to discriminate against a person in relation to gender reassignment (unless there is a genuine occupational reason). The Gender Recognition Act 2004, which came into force on 04 April 2005, has extended transsexuals' rights further. Those who satisfy certain requirements are now able to apply for a full gender recognition certificate from the Gender Recognition Panel. This is effectively a replacement birth certificate and has the effect that the transsexual acquires the full legal rights of their acquired sex, including the right to marry or enter into a civil partnership.

Employers who have any employees who may or have undergone gender reassignment should consider carefully the consequences of the legislation including the provision of benefits as well as

pension entitlement, how and when employment records should be amended and any practical implications such as when the use of facilities (e.g. toilets, changing rooms, etc) should be changed and when new business cards should be printed. Further, information held by the employer regarding the gender reassignment should be treated as highly sensitive and therefore the employer should not disclose this information without the express consent of the employee to whom it concerns. There may be criminal sanctions if this duty is breached in addition to a violation of the Data Protection Act 1998.

The amendments to the Sex Discrimination Act, discussed above, also prohibit harassment due to a person's gender reassignment, whether a man or a woman intends to undergo, is undergoing or has undergone gender reassignment.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

Further Information

If you would like more information about any of Goodman Derrick's Employment Law services please telephone and ask to speak to one of the Employment Team.

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