

Sex Discrimination and Equal Pay Acts-II

THE GENERAL PROVISIONS (*continued*)

As with the race relations legislation, the Sex Discrimination Act 1975 is likely to have its most immediate impact in the field of advertising. From 29 December 1975 major changes in advertising practice have been required, particularly in relation to advertisements for jobs, so as to avoid any suggestion that the advertiser is practising unlawful sex or marriage discrimination.

The advertising controls are contained in s 38 of the 1975 Act. The first two subsections of this read:

- '(1) It is unlawful to publish or cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do any act which is or might be unlawful by virtue of Part II or III.
- (2) Subsection (1) does not apply to an advertisement if the intended act would not in fact be unlawful'.

The Act defines 'advertisement' very widely indeed. It covers every conceivable way of giving notice of employment vacancies, the disposal of premises, the provision of goods, facilities or services, or anything else where discrimination is outlawed. It is not limited to advertisements to the public, but includes any way of giving notice to other persons.

Although the wording of the prohibition in s 38 is brief, it needs careful study. Subsection (1) covers four situations-

The advertisement indicates an intention to do an unlawful act.

The advertisement indicates an intention to do an act which might be unlawful.

The advertisement might reasonably be understood as indicating an intention to do an unlawful act.

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Suppose an advertisement reads 'Woman wanted for cleaning'. This is a clear indication of intention to exclude male applicants. It is not clear however that the exclusion would necessarily be unlawful since, as we shall see, there is an exception for employment in small households and the advertisement might relate to work in a small household. The advertisement therefore falls within the second of the above categories. If it had read 'Experienced char wanted' it might have been held to fall within the fourth category since the word 'char' might be thought to indicate a restriction to women, as being short for 'charwoman'. Even though either of these advertisements fell within subs (1), the advertiser would escape if he could show that the job was in a small household, so that the intended act would not be unlawful. (Section 82 (1) defines 'act' as including a deliberate omission.)

Many job descriptions reflect the fact that throughout history a job of that description has customarily been held by persons of one sex. Alternatively, there may be different words for males and females holding that job. Accordingly subs (3) of s 38 provides-

‘(3) For the purposes of subsection (1) use of a job description with a sexual connotation (such as “waiter”, “salesgirl”, “postman” or “stewardess”) shall be taken to indicate an intention to discriminate, unless the advertisement contains an indication to the contrary’.

Finally, subs (4) and (5) of s 38 provide a defence to the publisher of an advertisement who proves that the advertisement was published in reliance on a statement made to him by the person who caused it to be published to the effect that, by

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reason of the operation of subs (2), the publication would not be unlawful. In order to escape liability, the publisher must also prove that it was reasonable for him to rely on the statement.

Other unlawful acts

Section 38 is contained in pt IV of the 1975 Act, which also makes various other ancillary acts unlawful. Section 37 renders unlawful the carrying on of a ‘discriminatory practice’. Proceedings can be brought only by the Equal Opportunities Commission, who are thus given a weapon against persistent discriminators.

Section 39 makes it unlawful for a person who has authority over another person, or in accordance with whose wishes that other person is accustomed to act, to instruct him to engage in unlawful discrimination; while s 40 makes it unlawful to put pressure on a person to discriminate, whether by offering a benefit or threatening some detrimental treatment. Part IV ends with provisions of the usual type imposing liability on employers, principals and aiders and abettors.

Exceptions

A great deal of the undoubted complexity of the 1970 Act and the 1975 Act arises from the desire to lay down detailed exceptions. Parliament was very far from being in a position to outlaw sex discrimination across the board. For a variety of reasons, certain discriminatory provisions in the existing law (eg for the safety of women in mines and factories) had to be preserved and new anti-discrimination provisions had to permit exceptions in various circumstances. It is not possible in an article to give a comprehensive explanation of all the exceptions, but we can deal in outline with the principal ones.

In the employment field an important exception applies to provision made in relation to death or retirement (including pensions). The 1975 Act does not apply to employment for the purposes of a private household, or where the number of employees does not exceed five. A controversial provision in the 1975 Act is s 7 which lays down exceptions from the employment provisions in cases where sex is a genuine occupational qualification. Section 7 lists eight cases, and its provisions are very complicated. Section 7 applies where ‘reasons of physiology’ come into play (not including, however, physical strength or stamina). This applies in an area central to the Act, which Parliament in its debates skirted gingerly. Let us say that ‘reasons of physiology’ are relevant for an escort agency providing young ladies to accompany tired businessmen on an evening out, and let us leave it at that. Other s 7 exceptions are where sex is relevant ‘for reasons of authenticity’ in dramatic performances; where there is a need to preserve decency or privacy in jobs involving physical contact; small ships with single-sex

crew accommodation; single-sex hospitals and prisons; probation services and jobs in foreign countries.

It is a striking comment on our social outlook that of two provisions standing side by side in the 1975 Act one (s 19, relating to ministers of religion etc) was scarcely debated at all while the other (s 20, relating to midwives) was the subject of constant and turbulent debate.

Section 19 says that the employment provisions do not apply

‘to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers’.

There is no definition of what constitutes a ‘religion’ or what makes it ‘organised’. No way is suggested of identifying the doctrines of the religion. Nor are we given any indication of what is meant by ‘religious susceptibilities’ .All these are matters too deep, and too confused, for legislative provision.

Section 20 permits discrimination against male applicants for employment as midwives, and allows them to be discriminated against in relation to promotion, transfer or training as midwives. Apart from this, a man holding an appointment as a midwife must receive equal pay and other benefits with women.

In the educational field there are exceptions for schools and other educational establishments which admit pupils of one sex only (including cases where a comparatively small number of pupils of the opposite sex are allowed). To encourage single sex schools to turn coeducational, s 27 allows for the making by the Secretary of State for Education and Science of transitional exemption orders under which preference may be given to the admission of pupils of the opposite sex without infringing the Act.

Part III of the 1975 Act contains a number of exceptions to the provisions relating to goods, facilities, services and premises. There is an exception for small dwellings where the person offering accommodation, or seeking to dispose of the premises, resides in the premises and intends to continue doing so. Section 33 contains a saving for women’s sections of political parties. Section 34 contains an important saving for voluntary bodies. These are permitted to restrict membership to persons of one sex. Where they do so, they are allowed to limit their benefits, facilities or services to members even though membership is open to the public. Where the main object of the body is to benefit persons of one sex only, it is not unlawful to carry out that object. The effect of s 34 is to enable clubs to restrict their membership to men only (or women only) as long as they are genuine clubs not conducted for profit.

We have discussed exceptions limited to particular fields. Part V of the 1975 Act sets out a further list of exceptions which are general. These cover charities, competitive sports, differential insurance premiums based on genuine actuarial data, and acts done under statutory authority. Finally, s 52 provides an exception for any act done for the purpose of safeguarding national security.

Equal Opportunities Commission

Section 53 of the Sex Discrimination Act 1975 sets up the Equal Opportunities Commission with the duty of working towards the elimination of the types of discrimination dealt with by the Act, promoting equality of opportunity between men and women generally, and keeping under review the working of the two Acts. The commission are given power to undertake or assist (financially or otherwise) the undertaking of research and educational activities relevant to their functions. The commission are given a specific duty to keep under review health and

safety provisions laid down by any Act of Parliament so far as they require men and women to be treated differently.

The 1975 Act contemplates that the commission will from time to time conduct formal investigations into discriminatory practices. For this purpose they are given power to compel persons to furnish information and produce documents.

Although the commission have important functions in the field of research and education, their major role is as an enforcement agency. This is a 'strategic' role however: the commission will not handle individual complaints unless a point of principle is involved, or the complaint discloses a serious practice of widespread discrimination, or for other special reasons.

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Enforcement

Enforcement of the new anti-discrimination provisions varies according to whether the discrimination is in the employment field or in other fields. In the employment field, whether the matter concerns breach of an equality clause or contravention of the 1975 Act, the matter will go before an industrial tribunal. In other cases the county court has exclusive jurisdiction.

The enforcement of equality clauses is dealt with by s 2 of the Equal Pay Act 1970. This provides that any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration or damages in respect of the contravention, may be presented by way of a complaint to an industrial tribunal. If it appears to the Secretary of State for Employment and Productivity that an employer may have contravened a term modified or included by virtue of an equality clause, but that it is not reasonable to expect the worker to take steps to rectify the matter, the Secretary of State may refer it to the industrial tribunal himself, and it is then dealt with as if it were a claim by the worker. Although the Act does not prevent breaches of equality clauses from being dealt with in other legal proceedings (eg proceedings for breach of contract in the county court), s 2 empowers any such court to strike out the claim where it considers that it could be more conveniently disposed of by an industrial tribunal.

Section 2 contains some provisions for the benefit of employers. A worker cannot bring a claim before an industrial tribunal if he or she has not been employed in the employment within the six months preceding the date of the reference. Nor can an industrial tribunal award any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings before the tribunal were instituted. Where a dispute arises in relation to the effect of an equality clause, the employer may apply to an industrial tribunal for an order declaring the rights of the employer and the worker in relation to the matter in question. Section 64 of the 1975 Act requires an attempt to settle a dispute to be made by a conciliation officer before it proceeds to a hearing before the industrial tribunal. On a complaint of discrimination under the 1975 Act the tribunal may make one or more of the following :

an order declaring the rights of the complainant and the respondent;

an order requiring the respondent to pay compensation of an amount corresponding to any damages he could have been ordered by a county court to pay if the case had been dealt with as a claim for damages in tort for breach of statutory duty;

a recommendation that the respondent take action to obviate or reduce the adverse effect on the complainant of the discrimination complained of.

If the respondent fails without reasonable justification to comply with such a recommendation the tribunal has power to award increased compensation (section 65).

A claim in respect of unlawful discrimination outside the employment field may be brought before a county court in the same way as any other claim in tort for breach of statutory duty, and the county court can award any such remedy as could be awarded in proceedings before the High Court if the High Court were not precluded from entertaining such claims. (It should be noted however that damages are not obtainable for indirect discrimination.) The 1975 Act specifically provides that damages may include compensation for injury to feelings (s 66 (4)).

Enforcement role of Equal Opportunities Commission

Section 75 of the 1975 Act requires the Equal Opportunities Commission to consider any application from an actual or prospective complainant in proceedings under the Act for assistance in handling his claim. However the commission are only allowed to grant the application for assistance if the case raises a question of principle, or 'it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided; or by reason of any other special consideration'. The assistance may take any of the forms which can be provided under the legal aid and advice schemes.

An important weapon in the hands of the commission is the power to issue non-discrimination notices following the holding of a formal investigation. If the non-discrimination notice is not complied with the commission can apply to a county court for an injunction.

The advertising controls in s 38 of the 1975 Act can be enforced only by the commission. This will ensure that a multiplicity of claims is not brought in respect of the same advertisement.

Extent of the Acts

Neither the 1970 Act nor the 1975 Act apply to Northern Ireland. In their application to Scotland references to the county court are to be construed as referring to the sheriff court.

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