Sex Discrimination and Equal Pay Acts - III

PROVISIONS PARTICULARLY AFFECTING SOLICITORS

THE first two parts of this article (pp 2, 20 *ante*) gave a general outline of the provisions of the Equal Pay Act 1970 and the Sex Discrimination Act 1975, which together came into force on 29 December 1975. We now turn to examine in some detail the provisions of the two Acts which have especial reference to solicitors and the legal profession generally.

As an employer, a solicitor is affected in the same way as anyone else. All his employees will be deemed to have equality clauses in their contracts of employment, so that a woman employed on like work with a man must be treated no less favourably than he. This applies not only to rates of pay but also to any treatment regulated by a term in the contract. It does not however mean that just because they do like work the two must receive the same pay. If, for example, the man is more experienced and his higher pay is genuinely due to that factor it will not contravene the equality clause (Equal Pay Act 1970, s 1 (3)).

So far as concerns employment conditions not regulated by a term (express or implied) in the employment contract, the solicitor employer will be subject to the requirements of the 1975 Act described above. Only small firms, where the number of employees does not exceed five, will escape.

Treatment of partners

Section 11 of the 1975 Act regulates partnerships. Again, it does not apply if the firm consists of not more than five partners. (Thus a firm with, eg three partners and five employees, will escape the 1975 controls.)

Section 11 makes it unlawful for a firm consisting of six or more partners; in relation to a position as partner in the firm, to use sex, marriage or victimising discrimination against an individual in the arrangements the firm make for the purpose of determining who should be offered that position or by refusing or deliberately omitting to offer it. Similarly outlawed is such discrimination in the terms on which the position is offered (except terms relating to death or retirement). As respects an individual who is already a partner in the firm, s 11 makes it unlawful to discriminate in the way benefits, facilities, or services are offered, or by expelling the partner or inflicting other detriment.

It is interesting that s 11 also applies to persons proposing to form themselves into a partnership. This might raise difficulties. If a group of half a dozen solicitors decide to form a partnership it seems that, even before they have set up the practice, they must not display sex discrimination towards another person who wishes to join them. Nor, on grounds based on sex discrimination, must the group exclude one of their number when the partnership deed is executed.

Professional bodies and training

Section 11 of the 1975 Act is followed by a group of sections which affect the Law Society, schools of law, and other organs of the profession.

Section 12 applies to

> ‘an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists’.

This clearly covers the Law Society and the British Legal Association, as well as trade unions, employers’ organisations and professional bodies generally. Such an organisation must not use sex, marriage, or victimising discrimination in relation to admission to membership, the retention of membership or the enjoyment of benefits, facilities or services provided by the organisation to its members.

Section 13 again covers the Law Society because it relates to

> ’an authority or body which can confer an authorisation or qualification which is needed for, or facilities, engagement in a particular profession or trade’.

Again, such a body must not discriminate in the terms on which it is prepared to confer the authorisation or qualification or in the grant or withdrawal of it.

Subsection (2) of s 13 deals with a different point. Many enactments conferring power to grant licences or similar authorisations or qualifications require the licensing body to satisfy itself as to the applicant’s good character. In future such a requirement will be taken to impose a duty to have regard to evidence of unlawful discrimination in connection with the carrying on of any profession or trade. This gives general effect to the provisions of s 25(2)(c) of the Consumer Credit Act 1974, which relate to the licensing of persons carrying on credit or hire businesses. It is interesting to note however that the effect of the two provisions is not precisely the same. Under the Consumer Credit Act the question is whether the applicant practised discrimination on grounds of sex. It does not need to be ***unlawful*** discrimination, but on the other hand marriage or victimising discrimination is not referred to.

Vocational training is covered by several sections of the 1975 Act. In part it is covered by the provisions about discrimination in education described in the first article. To some extent it is also covered by the banning of discrimination in services to the public, also dealt with in that article. Further provision comes in the employment provisions, so far as training is provided by employers for their staff. (This would include solicitors’ articled clerks.) Yet another provision is contained in s 14 of the 1975 Act, which bans discrimination by vocational training bodies. This includes any body providing facilities for training for employment if it is designated for the purpose by an order made by the Secretary of State for Employment and Productivity. The Law Society, and any body providing the facilities of an employment agency, is caught by s 15. This makes it unlawful for an employment agency (defined as any body ‘who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers’) to discriminate in the terms on which it offers to provide services, or the way it provides them, or by refusing to provide them. Advertising plays a large part in recruitment of employees, and the advertising restrictions discussed in the second article need to be borne in mind here.

Treatment of clients

As we saw in the first part of this article (p 2), it will no longer be permissible for a client to be treated differently because she is a woman. A solicitor must provide his female clients with services ‘of the like quality, in the like manner and on the like terms’ as for men. As remarked in the first article, these words derive from the Race Relations Act 1968. The reference to manner is particularly curious. There must be no special deference, no ostentatious holding

open of doors or so it would seem.

As we have seen, it is not only solicitors who must now revise their attitudes to women. Learned judges are required to do the same. No more may we expect an observation such as that of Croom-Johnson J in a rating case: 'You do not specify a ground by giving what may be called the woman's reason and saying "Because I say so" , (cited in *Miscellany-at-Law* by RE Megarry, p 362). Even more serious, the judgment of the mythical Master of the Rolls in *Fardell v Potts* may need to be reversed. The case concerned a woman who carelessly navigated a motor launch on the river Thames, and after analysing the legal concept of the reasonable man the judge said:

> 'To return, as every judge must ultimately return, to the case which is before us - it has been urged for the appellant, and my own researches incline me to agree, that in all that mass of authorities which bears upon the branch of the law *there is no single mention of a reasonable woman.* It was ably insisted before us that such an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence; that among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex; that no such reference is found, for the simple reason that no such being is contemplated by the law; that legally at least there is no reasonable woman, and that therefore in this case the learned judge should have directed the jury that, while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, her conduct was only what was to be expected of a woman, as such. . . I find that at Common Law a reasonable woman does not exist' (*Uncommon Law* by A P Herbert, p 5).

It is perhaps a pity that a subject like man's treatment of woman should be subjected to the tortuous language of a modern Act of Parliament, and a little light relief may be permitted at the end of an account like this. Yet to say that Her Majesty's judges are subject to the new law is no mere jest. A judge is undoubtedly a 'person concerned with the provision of services to the public' within the meaning of s 29 of the 1975 Act as applied by s 85(1) (application to Crown). All we lawyers must learn to forget the old proverb: 'When a woman goes to law the Devil is full of business'.

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