

2003 No. 520

FAIR EMPLOYMENT

**Fair Employment and Treatment Order (Amendment)
Regulations (Northern Ireland) 2003**

Made - - - - - 9th December 2003

Coming into operation 10th December 2003

The Office of the First Minister and deputy First Minister, being a Department designated for the purposes of section 2(2) of the European Communities Act 1972^(a) in relation to measures relating to discrimination^(b), in exercise of the powers conferred on it by that section and of every other power enabling it in that behalf, hereby makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 and shall come into operation on 10th December 2003.

(2) The Interpretation Act (Northern Ireland) 1954^(c) shall apply to these Regulations as it applies to an Act of the Assembly.

(3) In these Regulations “the Fair Employment and Treatment Order” means the Fair Employment and Treatment (Northern Ireland) Order 1998^(d).

Transitional provisions

2.—(1) Regulations 23 and 26 shall not apply to proceedings instituted before 10th December 2003.

(2) Regulations 24 and 27 apply in relation to proceedings instituted before 10th December 2003, as well as those instituted on or after that date, but do not affect any case in which proceedings were determined before that date.

(3) The amendment made to Article 44(2)(b) of the Fair Employment and Treatment Order by regulation 28 shall not apply in the case of a question served on a respondent before 10th December 2003.

(4) In paragraph (3) “question” and “respondent” shall be construed in accordance with Article 44 of the Fair Employment and Treatment Order.

Definitions

3. In Article 2(2) of the Fair Employment and Treatment Order (general interpretation) –
(a) in the definition of “benefits”, before the words “includes all opportunities”, insert “, except in Article 25A ,” ;

(a) 1972 c. 68

(b) *see* the European Communities (Designation) (No. 3) Order 2002 (S.I. 2002/1819)

(c) 1954 c. 33 (N.I.)

(d) S.I. 1998/3162 (N.I. 21)

- (b) in the definitions of “complainant” and “complaint” after the word “discrimination” in each case insert “or unlawful harassment”; and
- (c) insert the following definitions at the appropriate place in alphabetical order –
 - “ “detriment” does not include conduct of a nature such as to constitute harassment;”
 - “ “harassment” shall be construed in accordance with Article 3A;”
 - “ “provision, criterion or practice” includes requirement or condition;”
 - “ “religious belief” in relation to discrimination or harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) includes any religion or similar philosophical belief;”
 - “ “unlawful harassment” shall be construed in accordance with Article 3A(3);”
 - “ “vocational training” and “vocational guidance” have the same meaning as in Article 3 of Council Directive 2000/78/EC;”.

Definition of “discrimination” and “unlawful discrimination”

- 4.—(1)** In Article 3 of the Fair Employment and Treatment Order (definition of “discrimination” and “unlawful discrimination”) –
- (a) in paragraph (2), for the words “this Order”, substitute “a provision of this Order, other than a provision to which paragraph (2A) applies;” and
 - (b) after paragraph (2) insert –
 - “(2A) A person also discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of any provision referred to in paragraph (2B) if –
 - (a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or
 - (b) he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but –
 - (i) which puts or would put persons of the same religious belief or of the same political opinion as that other at a particular disadvantage when compared with other persons;
 - (ii) which puts that other at that disadvantage; and
 - (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.
 - (2B) The provisions mentioned in paragraph (2A) are –
 - (a) Part III;
 - (b) Article 27, so far as it applies to vocational training or vocational guidance;
 - (c) Article 32; and
 - (d) Part V, in its application to the provisions referred to in sub-paragraphs (a) to (c).”.
 - (2) In paragraph (3) of that Article, after the words “paragraph (2)”, insert “or (2A)”.
 - (3) In paragraph (7)(a) of that Article, after the words “he does an act”, insert “other than an act of harassment”.

Harassment

- 5.** After Article 3 of the Fair Employment and Treatment Order insert –
- “ “Harassment” and “unlawful harassment”**

3A.—(1) A person (“A”) subjects another person (“B”) to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) where, on the ground of religious belief or political opinion, A engages in unwanted conduct which has the purpose or effect of –

- (a) violating B’s dignity, or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in sub-paragraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.

(3) For the purposes of this Order a person subjects another to unlawful harassment if he engages in conduct in relation to that other which is unlawful by virtue of any provision mentioned in Article 3(2B).”.

Meaning of employment in Northern Ireland

6.—(1) In Article 6 of the Fair Employment and Treatment Order (meaning of employment in Northern Ireland and occupation in Northern Ireland), in paragraph (1), for the words from “unless the employee” to the end, substitute –

“if the employee –

- (a) does his work wholly or partly in Northern Ireland; or
- (b) does his work wholly outside Northern Ireland and paragraph (1A) applies.”.

(2) After paragraph (1) of that Article insert –

“(1A) This paragraph applies if –

- (a) the employer has a place of business at an establishment in Northern Ireland;
- (b) the work is for the purposes of the business carried on at that establishment; and
- (c) the employee is ordinarily resident in Northern Ireland –
 - (i) at the time when he applies for or is offered the employment, or
 - (ii) at any time during the course of the employment.”.

(3) For paragraph (3) of that Article substitute –

“(3) In relation to employment concerned with exploration of the sea bed or subsoil or the exploitation of their natural resources, the Department may by order provide that –

- (a) paragraph (1) shall have effect as if the references to Northern Ireland in sub-paragraphs (a) and (b) included any area for the time being designated under section 1(7) of the Continental Shelf Act 1964, or any part of such an area, in which the law of Northern Ireland applies; and
- (b) paragraph (2) shall have effect as if the last reference to Northern Ireland included such an area, or any part of such an area.”.

Functions of the Equality Commission

7. In Article 7 of the Fair Employment and Treatment Order (general duty of Commission), in paragraph (c), after the word “discrimination” insert “and unlawful harassment”.

8. In Article 9 of the Fair Employment and Treatment Order (codes of practice), in paragraphs (1) and (3) after the word “discrimination” in each case, insert “and harassment”.

Harassment by employers

9.—(1) For the heading to Part III of the Fair Employment and Treatment Order there shall be substituted “DISCRIMINATION AND HARASSMENT IN THE EMPLOYMENT FIELD” and for the cross heading immediately thereafter there shall be substituted “*Discrimination and harassment in the employment field*”.

(2) In the heading to Article 19 of the Fair Employment and Treatment Order (discrimination against applicants and employees), omit the words “Discrimination against”.

(3) After paragraph (1) of that Article insert –

“(1A) It is unlawful for an employer, in relation to employment by him in Northern Ireland, to subject to harassment a person whom he employs or who has applied to him for employment.”.

(4) After paragraph (2) of that Article insert –

“(3) In paragraph (1)(b)(iii) reference to the dismissal of a person from employment includes reference –

- (a) to the termination of that person’s employment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment is renewed on the same terms; and
- (b) to the termination of that person’s employment by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer.”.

Contract workers

10.—(1) In the heading to Article 20 of the Fair Employment and Treatment Order (discrimination against contract workers), omit the words “Discrimination against”.

(2) After paragraph (2) of that Article insert –

“(2A) It is unlawful for the principal, in relation to work to which this Article applies, to subject a contract worker to harassment.”.

Office holders etc.

11. After Article 20 of the Fair Employment and Treatment Order insert –

“Office-holders etc.

20A.—(1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this Article applies, to discriminate against a person –

- (a) in the arrangements which he makes for the purpose of determining to whom the appointment should be offered;
- (b) in the terms on which he offers him the appointment; or
- (c) by refusing to offer him the appointment.

(2) It is unlawful, in relation to an appointment to an office or post to which this Article applies and which is an office or post referred to in paragraph (8)(b), for a relevant person on whose recommendation (or subject to whose approval) appointments to the office or post are made, to discriminate against a person –

- (a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment; or
- (b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.

(3) It is unlawful for a relevant person, in relation to a person who has been appointed to an office or post to which this Article applies, to discriminate against him –

- (a) in the terms of the appointment;
- (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit, or by refusing to afford him any such opportunity;
- (c) by terminating the appointment; or
- (d) by subjecting him to any other detriment in relation to the appointment.

(4) It is unlawful for a relevant person, in relation to an office or post to which this Article applies, to subject to harassment a person –

- (a) who has been appointed to the office or post;
- (b) who is seeking or being considered for appointment to the office or post; or

(c) who is seeking or being considered for a recommendation or approval in relation to an appointment to an office or post referred to in paragraph (8)(b).

(5) Paragraphs (1) and (3) do not apply to any act in relation to an office or post where, if the office or post constituted employment, that act would be lawful by virtue of Article 70 and paragraph (2) does not apply to any act in relation to an office or post where, if the office or post constituted employment, it would be lawful by virtue of Article 70 to refuse to offer the person such employment.

(6) Paragraph (3) does not apply to benefits of any description if the relevant person is concerned with the provision (for payment or not) of benefits of that description to the public, or a section of the public to which the person appointed belongs, unless –

- (a) that provision differs in a material respect from the provision of the benefits by the relevant person to persons appointed to offices or posts which are the same as, or not materially different from, that which the person appointed holds; or
- (b) the provision of the benefits to the person appointed is regulated by the terms and conditions of his appointment; or
- (c) the benefits relate to training.

(7) In paragraph (3)(c) the reference to the termination of the appointment includes a reference –

- (a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions; and
- (b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.

(8) This Article applies to –

- (a) any office or post to which persons are appointed to discharge functions personally under the direction of another person, and in respect of which they are entitled to remuneration; and
- (b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a Northern Ireland Minister, the Assembly or a government department,

but not a political office or a case where Article 19, 20, 21, 26 or 32 applies, or would apply but for the operation of any other provision of this Order.

(9) For the purposes of paragraph (8)(a) the holder of an office or post –

- (a) is to be regarded as discharging his functions under the direction of another person if that other person is entitled to direct him as to when and where he discharges those functions;
- (b) is not to be regarded as entitled to remuneration merely because he is entitled to payments –
 - (i) in respect of expenses incurred by him in carrying out the functions of the office or post, or
 - (ii) by way of compensation for the loss of income or benefits he would or might have received from any person had he not been carrying out the functions of the office or post.

(10) In this Article –

- (a) appointment to an office or post does not include election to an office or post;
- (b) “political office” means –
 - (i) any office of the House of Commons held by a member of it,
 - (ii) a life peerage within the meaning of the Life Peerages Act 1958(a), or any office of the House of Lords held by a member of it,

(a) 1958 c. 21

- (iii) any office of the Assembly held by a member of it,
- (iv) any office of a district council held by a member of it, or
- (v) any office of a political party.
- (c) “relevant person”, in relation to an office or post, means –
 - (i) any person with power to make or terminate appointments to the office or post, or to determine the terms of appointment,
 - (ii) any person with power to determine the working conditions of a person appointed to the office or post in relation to opportunities for promotion, a transfer, training or for receiving any other benefit; and
 - (iii) any person or body referred to in paragraph (8)(b) on whose recommendation or subject to whose approval appointments are made to the office or post;
- (d) references to making a recommendation include references to making a negative recommendation; and
- (e) references to refusal include references to deliberate omission.”.

Persons with statutory power to select employees for others

12.—(1) In the heading to Article 21 of the Fair Employment and Treatment Order (discrimination by persons with statutory power to select employees for others) omit the words “Discrimination by”.

(2) The existing provision shall be numbered as paragraph (1) of that Article and the words “in relation to employment in Northern Ireland,” shall be omitted.

(3) After that provision insert –

“(2) It is unlawful for a person who is empowered by virtue of a statutory provision to select or nominate another person for employment by a third person to subject that other to harassment.”.

Employment agencies

13.—(1) In the heading to Article 22 of the Fair Employment and Treatment Order (discrimination by employment agencies) omit the words “Discrimination by”.

(2) In paragraph (1) of that Article omit the words “in relation to employment in Northern Ireland,”.

(3) After paragraph (1) of that Article insert –

“(1A) It is unlawful for an employment agency, in relation to the provision of its services, to subject to harassment a person to whom it provides such services or who requests the provision of such services.”.

(4) In paragraph (2) of that Article for the words “paragraph (1)” substitute “paragraphs (1) and (1A)”.

(5) In paragraph (3) of that Article for the words “This Article” substitute “Paragraph (1)”.

(6) In paragraph (4) of that Article for the words “this Article” substitute “paragraph (1)”.

Vocational organisations

14. For Article 23 of the Fair Employment and Treatment Order (discrimination by vocational organisations) there shall be substituted –

“Vocational organisations

23.—(1) It is unlawful for a vocational organisation to discriminate against a person –

(a) who is not a member of the organisation –

(i) in the terms on which it is prepared to admit him to membership of the organisation; or

- (ii) by refusing to accept, or deliberately not accepting, his application for membership; or
- (b) who is a member of the organisation –
 - (i) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them; or
 - (ii) by depriving him of membership, or varying the terms on which he is a member; or
 - (iii) by subjecting him to any other detriment.

(2) It is unlawful for a vocational organisation, in relation to a person’s membership or application for membership of that organisation, to subject that person to harassment.”.

Persons providing training services

15.—(1) In the heading to Article 24 of the Fair Employment and Treatment Order (discrimination by persons providing training services) omit the words “Discrimination by”.

(2) In paragraph (1) of that Article the words “in Northern Ireland” shall be omitted.

(3) After paragraph (1) of that Article insert –

“(1A) It is unlawful for a person who provides services in connection with training to which paragraph (1) applies, to subject to harassment a person to whom he provides such services or who is seeking to obtain such services.”.

(4) In paragraph (2) of that Article for the words “paragraph (1)” substitute “paragraphs (1) and (1A)”.

(5) For paragraph (3) of that Article substitute –

“(3) Paragraphs (1) and (1A) do not apply to discrimination or, as the case may be, harassment –

- (a) which is rendered unlawful by Article 27; or
- (b) which would be rendered unlawful by Article 27 but for the operation of any other provision of this Order.”.

Assisting persons to obtain employment etc.

16. After Article 24 of the Fair Employment and Treatment Order insert –

“Assisting persons to obtain employment etc.

24A.—(1) It is unlawful for the Department for Employment and Learning to discriminate against any person by subjecting him to a detriment, or to subject a person to harassment, in the provision of facilities or services under section 1 of the Employment and Training Act (Northern Ireland) 1950(a) (general functions of the Department as to employment and training for employment).

(2) This Article does not apply in a case where –

- (a) the Department for Employment and Learning is acting as an employment agency, or
- (b) Article 24 applies, or would apply but for the operation of any other provision of this Order.”.

Persons with power to confer qualifications

17.—(1) In the heading to Article 25 of the Fair Employment and Treatment Order (discrimination by persons with power to confer qualifications) omit the words “Discrimination by”.

(2) In paragraph (1) of that Article the words “in Northern Ireland” shall be omitted.

(a) 1950 c. 29 (N.I.) as amended by S.I. 1988/1087 (N.I. 10) Art. 3; *see also* S.R. 1999 No. 481 Departments (Transfer and Assignment of Functions) Order (Northern Ireland) 1999, Art. 4 and Schedule 2, Part II

(3) After paragraph (1) of that Article insert –

“(1A) It is unlawful for a person who has the power referred to in paragraph (1), in relation to a qualification conferred by him, to subject to harassment another who holds or applies for such a qualification.”.

(4) For paragraph (2) of that Article substitute –

“(2) Paragraphs (1) and (1A) do not apply to discrimination or, as the case may be, harassment which is rendered unlawful by Article 27.”.

Trustees and managers of occupational pension schemes

18.—(1) After Article 25 of the Fair Employment and Treatment Order insert –

“Trustees and managers of occupational pension schemes

25A.—(1) It is unlawful, except in relation to rights accrued or benefits payable in respect of periods of service prior to 10th December 2003, for the trustees or managers of an occupational pension scheme to discriminate against a member or prospective member of the scheme in carrying out any of their functions in relation to it (including in particular their functions relating to the admission of members to the scheme and the treatment of members of it).

(2) It is unlawful for the trustees or managers of an occupational pension scheme, in relation to the scheme, to subject to harassment a member or prospective member of it.

(3) Schedule 2A shall have effect for the purposes of: –

- (a) defining terms used in this Article and in that Schedule;
- (b) treating every occupational pension scheme as including a non-discrimination rule;
- (c) giving trustees or managers of an occupational pension scheme power to alter the scheme so as to secure conformity with the non-discrimination rule;
- (d) making provision in relation to the procedures, and remedies which may be granted, on certain complaints relating to occupational pension schemes presented to the Tribunal under Article 38.”.

(2) In Article 37(2) of the Fair Employment and Treatment Order (restriction on proceedings for breach of the Order), at the end insert “or the investigation or determination of any matter in accordance with Part X (investigations: the Pensions Ombudsman) of the Pension Schemes (Northern Ireland) Act 1993(a) by the Pensions Ombudsman”.

(3) After Article 39(13) of the Fair Employment and Treatment Order insert –

“(14) This Article has effect subject to paragraph 7 of Schedule 2A.”.

(4) After Schedule 2 to the Fair Employment and Treatment Order insert –

“SCHEDULE 2A OCCUPATIONAL PENSION SCHEMES

Interpretation

1.—(1) In this Schedule –

“active member”, “deferred member”, “managers”, “pensioner member” and “trustees or managers”, in relation to an occupational pension scheme, have the meanings given by Article 121(1) of the Pensions (Northern Ireland) Order 1995(b) as at 10th December 2003;

“member” means any active member, deferred member or pensioner member;

“non-discrimination rule” means the rule in paragraph 2;

(a) 1993 c. 49

(b) S.I.1995/3213 (N.I. 22)

“occupational pension scheme” has the same meaning as in the Pension Schemes (Northern Ireland) Act 1993 as at 10th December 2003;

“prospective member”, in relation to an occupational pension scheme, means any person who, under the terms of his employment or the rules of the scheme or both –

- (a) is able, at his own option, to become a member of the scheme;
- (b) shall become so able if he continues in the same employment for a sufficient period of time;
- (c) shall be admitted to it automatically unless he makes an election not to become a member; or
- (d) may be admitted to it subject to the consent of his employer.

(2) In paragraph 6, “employer”, in relation to an occupational pension scheme, has the meaning given by Article 121(1) of the Pensions (Northern Ireland) Order 1995 as at 10th December 2003.

(3) Any term used in Article 25A and in this Schedule shall have the same meaning in that Article as it has in this Schedule.

Non-discrimination rule

2. Every occupational pension scheme shall be treated as including a provision (“the non-discrimination rule”) containing a requirement that the trustees or managers of the scheme refrain from doing any act which is unlawful by virtue of Article 25A.

3. The other provisions of the scheme are to have effect subject to the non-discrimination rule.

4. The trustees or managers of an occupational pension scheme may –

- (a) if they do not (apart from this paragraph) have power to make such alterations to the scheme as may be required to secure conformity with the non-discrimination rule; or
- (b) if they have such power but the procedure for doing so: –
 - (i) is liable to be unduly complex or protracted; or
 - (ii) involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty;

by resolution make such alterations to the scheme.

5. Alterations made by a resolution such as is referred to in paragraph 4 may have effect in relation to a period before the alterations are made (but may not have effect in relation to any time before 10th December 2003).

Procedure in the Tribunal

6. Where under Article 38 a member or prospective member of an occupational pension scheme presents to the Tribunal a complaint that the trustees or managers of the scheme –

- (a) have committed against him an act which is unlawful by virtue of Article 25A or 33A; or
- (b) are by virtue of Article 35 or 36 to be treated as having committed against him such an act;

the employer in relation to the scheme shall, for the purposes of the rules governing procedure, be treated as a party and be entitled to appear and be heard in accordance with those rules.

Remedies in the Tribunal

7.—(1) This paragraph applies where –

- (a) under Article 38 a member or prospective member of an occupational pension scheme (“the complainant”) presents to the Tribunal a complaint against the trustees or managers of the scheme or an employer;
- (b) the complainant is not a pensioner member of the scheme;
- (c) the complaint relates to the terms on which persons become members of the scheme, or the terms on which members of the scheme are treated; and
- (d) the Tribunal finds the complaint to be well-founded.

(2) Where this paragraph applies, the Tribunal may, without prejudice to the generality of its power under Article 39(1)(a), make an order declaring that the complainant has a right –

- (a) where the complaint relates to the terms on which persons become members of the scheme, to be admitted to the scheme;
- (b) where the complaint relates to the terms on which members of the scheme are treated, to membership of the scheme without discrimination.

(3) An order under sub-paragraph (2) –

- (a) may be made in respect of such period as is specified in the order (but may not be made in respect of any time before 10th December 2003);
- (b) may make such provision as the Tribunal considers appropriate as to the terms on which, or the capacity in which, the complainant is to enjoy such admission or membership.

(4) Where this paragraph applies, the Tribunal may not make an order for compensation under Article 39(1)(b), whether in relation to arrears of benefits or otherwise, except –

- (a) for injury to feelings;
- (b) by virtue of Article 39(5).”.

Partnerships

19.—(1) In the heading to Article 26 of the Fair Employment and Treatment Order (discrimination by partnerships) omit the words “Discrimination by”.

(2) In paragraph (1) of that Article omit the words “consisting of 6 or more partners”.

(3) After that paragraph insert –

“(1A) It is unlawful for a firm, in relation to a position as a partner in the firm, to subject to harassment a person who holds or has applied for that position.”.

(4) In paragraph (2) of that Article for the words “Paragraph (1)” substitute “Paragraphs (1) and (1A)”.

(5) After paragraph (4) of that Article insert –

“(5) The reference in paragraph (1)(d)(ii) to the expulsion of a person from a position as partner includes a reference –

- (a) to the termination of that person’s partnership by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the partnership is renewed on the same terms; and
- (b) to the termination of that person’s partnership by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the other partners.”.

Harassment in other fields

20.—(1) For the heading to Part IV of the Fair Employment and Treatment Order there shall be substituted “DISCRIMINATION AND HARASSMENT IN OTHER FIELDS”.

(2) In the heading to Article 27 of the Fair Employment and Treatment Order (discrimination by bodies in charge of further and higher educational establishments), omit the words “Discrimination by”.

(3) After paragraph (1) of that Article insert –

“(1A) It is unlawful for the governing body of an educational establishment falling within paragraph (2) to subject to harassment –

- (a) a person who applies for admission to the establishment as a student; or
- (b) a student of the establishment.”.

Harassment by, or in relation to, barristers

21.—(1) In the heading to Article 32 of the Fair Employment and Treatment Order (discrimination by, or in relation to, barristers), omit the words “Discrimination by, or in relation to,”.

(2) After paragraph (2) of that Article insert –

“(2A) It is unlawful for a barrister to subject to harassment a person who is, or has applied to be, his pupil.”.

(3) In paragraph (3) of that Article after the words “discriminate against any person” insert “or to subject any person to harassment”.

Relationships which have come to an end

22. In Part V of the Fair Employment and Treatment Order, before Article 34, insert –

“Relationships which have come to an end

33A.—(1) In this Article a “relevant relationship” is a relationship during the course of which, by virtue of any provision referred to in Article 3(2B), taken with Article 3(2A), or (as the case may be) by virtue of Article 3A –

- (a) an act of discrimination by one party to the relationship (“the relevant party”) against another party to the relationship, or
- (b) harassment of another party to the relationship by the relevant party,

is unlawful.

(2) Where a relevant relationship has come to an end it is unlawful for the relevant party –

- (a) to discriminate against another party by subjecting him to a detriment, or
- (b) to subject another party to harassment

where the discrimination or harassment arises out of and is closely connected to that relationship.

(3) In paragraph (1) reference to an act of discrimination or harassment which is unlawful includes in the case of a relationship which has come to an end before 10th December 2003, reference to such an act which would, after that date, be unlawful.

(4) For the purposes of any proceedings in respect of an unlawful act under paragraph (2) that act shall be treated as falling within circumstances relevant for the purposes of such of the provisions referred to in paragraph (1) as determine most closely the nature of the relevant relationship.”.

Barristers: Jurisdiction of the Tribunal

23. In Article 38(1) of the Fair Employment and Treatment Order (complaint to Tribunal) –

- (a) after the words “of discrimination” , in both places where they occur, insert “or harassment”; and
- (b) after the words “Part III” insert “or Article 32”.

Burden of proof: Tribunal

24. After Article 38 of the Fair Employment and Treatment Order insert –

“Burden of proof: Tribunal

38A. Where, on the hearing of a complaint under Article 38, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –

- (a) has committed an act of unlawful discrimination or unlawful harassment against the complainant, or
- (b) is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination or harassment against the complainant,

the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.”.

Remedies on complaint under Article 38

25. In Article 39 of the Fair Employment and Treatment Order (remedies on complaint under Article 38) –

- (a) in paragraph (1), after the word “discrimination” in both places where it occurs, insert “or unlawful harassment”; and
- (b) in paragraph (3), for “Article 3(2)(b)” substitute “Article 3(2A)(b)” and for “requirement or condition” substitute “provision, criterion or practice”.

Claims under Part IV of the Order

26. In Article 40 of the Fair Employment and Treatment Order (claims under Part IV) –

- (a) in paragraph (1) omit the words “of discrimination” in both places where they occur and after the words “Part IV” insert “other than Article 32”; and
- (b) in paragraph (4), after the words “unlawful discrimination” insert “or unlawful harassment”.

Burden of proof – county court

27. After Article 40 of the Fair Employment and Treatment Order insert –

“Burden of proof: county court

40A.—(1) This Article applies where a claim is brought under Article 40 and the claim is that the respondent –

- (a) has committed an act of discrimination which is unlawful by virtue of any provision referred to in Article 3(2B)(b), or Part V in its application to that provision, or
- (b) has committed an act of harassment which is unlawful by virtue of Article 27(1A).

(2) Where on the hearing of the claim, the claimant proves facts from which the court could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –

- (a) has committed such an act of discrimination or harassment against the claimant, or
- (b) is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination or harassment against the claimant,

the court shall uphold the claim unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.”.

Period within which respondent must reply

28. In Article 44 of the Fair Employment and Treatment Order (help for aggrieved persons in obtaining information etc) –

- (a) in paragraph (1), after the words “discriminated against him”, insert “or subjected him to unlawful harassment”; and
- (b) in paragraph (2)(b), for the words “reasonable period”, substitute “period of eight weeks beginning with the day on which the question was served on him”.

Exceptions

29. In Article 70 of the Fair Employment and Treatment Order (excepted employments) omit paragraph (1)(b) and the word “or” immediately before it.

School teachers

30.—(1) In Article 71 of the Fair Employment and Treatment Order (school teachers) for paragraph (1) substitute –

“(1) Subject to paragraph (2) –

- (a) Part VII does not apply to or in relation to employment as a teacher in a school; and
- (b) the other provisions of this Order do not apply to or in relation to the recruitment of a person as a teacher in a school.”.

(2) After paragraph (1) of that Article insert –

“(1A) For the purposes of paragraph (1)(b) “recruitment” means any step in the process of engagement of a person for employment up to the commencement of the employment.”.

(3) In paragraphs (2) and (4) of that Article for the word “exception” substitute “exceptions”.

(4) In paragraph (6) of that Article for the words “paragraph (1)” substitute “paragraph (1)(a) or (b) or both”.

Charities

31. In Article 77 of the Fair Employment and Treatment Order (charities) –

- (a) at the beginning of paragraph (1) insert “Subject to paragraph (3)”; and
- (b) after paragraph (2) insert –

“(3) Paragraph (1) does not apply to an act which is unlawful by virtue of a provision referred to in Article 3(2B).”.

Acts done under statutory authority

32. In Article 78 of the Fair Employment and Treatment Order (acts done under statutory authority) –

- (a) at the beginning of paragraph (1) insert “Subject to paragraph (1A)”; and
- (b) after paragraph (1) insert –

“(1A) Paragraph (1) does not apply to an act which is unlawful by virtue of a provision referred to in Article 3(2B).”.

Collective agreements and rules of undertaking

33. After Article 100 of the Fair Employment and Treatment Order insert –

“Collective agreements and rules of undertaking

100A.—(1) This Article applies to –

- (a) any term of a collective agreement, including an agreement which was not intended, or is presumed not to have been intended, to be a legally enforceable contract;
- (b) any rule made by an employer for application to all or any of the persons who are employed by him or who apply to be, or are, considered by him for employment;
- (c) any rule made by an organisation to which Article 23 applies for application to all or any of its members or prospective members; or
- (d) any rule made by a person to whom Article 25 applies for application to all or any of the persons on whom he has conferred qualifications or who are seeking the qualifications which he has power to confer.

(2) Any term or rule to which this Article applies is void where, as the case may be –

- (a) the making of the collective agreement is, by reason of the inclusion of the term, unlawful by virtue of a provision referred to in Article 3(2B);
- (b) the term or rule is included or made in furtherance of an act which is unlawful by virtue of such a provision; or
- (c) the term or rule provides for the doing of such an act.

(3) Paragraph (2) applies whether the agreement was entered into, or the rule made, before, on or after 10th December 2003; but in the case of an agreement entered into, or a rule made, before that date, that paragraph does not apply in relation to any period before that date.

(4) In this Article, and in Article 100B, “collective agreement” means any agreement relating to one or more of the matters mentioned in Article 96(1) of the Industrial Relations (Northern Ireland) Order 1992(a), being an agreement made by or on behalf of one or more employers or one or more organisations of employers or associations of such organisations with one or more organisations of workers or associations of such organisations.

Complaints relating to collective agreements and rules of undertaking

100B.—(1) A person to whom this paragraph applies may present a complaint to the Tribunal that a term or rule is void by virtue of Article 100A if he has reason to believe –

- (a) that the term or rule may at some future time have effect in relation to him; and
- (b) where he alleges that it is void by virtue of Article 100A(2)(c), that –
 - (i) an act for the doing of which it provides may at some such time be done in relation to him, and
 - (ii) the act would be rendered unlawful by a provision referred to in Article 3(2B) if done in relation to him in present circumstances.

(2) In the case of a complaint about –

- (a) a term of a collective agreement made by or on behalf of –
 - (i) an employer;
 - (ii) an organisation of employers of which an employer is a member; or
 - (iii) an association of such organisations of one of which an employer is a member;
 or
- (b) a rule made by an employer referred to in Article 100A(1)(b);

paragraph (1) applies to any person who is, or is genuinely and actively seeking to become, one of his employees.

(3) In the case of a complaint about a rule made by an organisation to which Article 100A(1)(c) applies, paragraph (1) applies to any person who is, or is genuinely and actively seeking to become, a member of the organisation.

(4) In the case of a complaint about a rule made by a person to whom Article 100A(1)(d) applies, paragraph (1) applies to anyone –

- (a) on whom the person has conferred a qualification, or
- (b) who is genuinely and actively seeking a qualification which the person has power to confer.

(5) When the Tribunal finds that a complaint presented to it under paragraph (1) is well-founded the Tribunal shall make an order declaring that the term or rule is void.

(6) An order under paragraph (5) may include provision as respects any period before the making of the order (but after 10th December 2003).

(7) The avoidance by virtue of Article 100A(2) of any term or rule which provides for any person to be discriminated against shall be without prejudice to the following rights (except in so far as they enable any person to require another person to be treated less favourably than himself) namely –

- (a) such of the rights of the person to be discriminated against, and

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(b) such of the rights of any person who will be treated more favourably in direct or indirect consequence of the discrimination,
as are conferred by or in respect of a contract made or modified wholly or partly in pursuance of, or by reference to, that term or rule.”.

Consequential amendments

- 34.** The Fair Employment and Treatment Order shall be amended as follows –
- (a) in Article 14(2)(a) for the words “requirement or condition” substitute “provision, criterion or practice”;
 - (b) in Article 16(6)(a) for the words “requirement or condition” substitute “provision, criterion or practice”;
 - (c) in Article 34(3), after the words “Article 3(2)(b)”, insert “or 3(2A)(b)”;
 - (d) in Article 41(1), after the words “unlawful discrimination”, insert “or unlawful harassment”;
 - (e) in Article 42(3)(a) after the words “Part III” insert “or Article 32”;
 - (f) in Article 71A(3), for the words “Article 3(2)” substitute “Article 3(2A)” and for the words “requirement or condition”, in both instances where they occur, substitute “provision, criterion or practice”;
 - (g) in Article 72(2) , for the words “Article 3(2)” substitute “Article 3(2A)”;
 - (h) in Article 73(2), for the words “Article 3(2)” substitute “Article 3(2A)”;
 - (i) in Article 75 –
 - (i) in paragraph (1) for the words “Article 3(2)” substitute “Article 3(2A)” and for the words “requirement or condition”, in both instances where they occur, substitute “provision, criterion or practice”; and
 - (ii) in paragraphs (2) and (3) for the words “requirement or condition” substitute “provision, criterion or practice”; and
 - (j) in Article 101(1) omit sub-paragraph (b).

Sealed with the Official Seal of the Office of the First Minister and deputy First Minister on 9th December 2003.

(L.S.)

P. McAuley

A Senior Officer of the Office of the First Minister and deputy First Minister

EXPLANATORY NOTE

(This note is not part of the Regulations.)

These Regulations, which are made under section 2(2)(a) and (b) of the European Communities Act 1972, implement Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation (O.J. L303, 2.12.2000, p. 16) so far as it relates to discrimination on grounds of religion or belief.

The Regulations amend the Fair Employment and Treatment (Northern Ireland) Order 1998 (“the Order”) in order to reflect the provisions of the Directive. The amendments come into operation on 10th December 2003, subject to transitional provisions (regulation 2).

Regulation 4 sets out a new definition of indirect discrimination in the areas of employment (and related matters) and vocational training with which the Directive is concerned.

Regulation 5 sets out a new definition of harassment which will apply in the areas with which the Directive is concerned.

Regulation 6 contains an expanded definition of “employment in Northern Ireland”.

Regulation 7 confers a duty on the Equality Commission for Northern Ireland to work towards the elimination of harassment and regulation 8 enables the Commission to issue codes of practice on the elimination of harassment.

Regulation 9 makes it unlawful for an employer to subject to harassment an employee or an applicant for employment.

Regulation 10 makes it unlawful for a principal to subject a contract worker to harassment.

Regulation 11 makes it unlawful to discriminate against, or harass, certain types of office-holder.

Regulations 12 to 15 and 17 make it unlawful for persons with statutory power to select employees for others and for bodies such as employment agencies, employer organisations or trades unions, persons providing training services and persons with power to confer qualifications, to subject a person to harassment.

Regulation 16 makes it unlawful for the Department for Employment and Learning to discriminate against, or harass, a person in the provision of facilities and services relating to its functions under the Employment and Training Act 1950.

Regulation 18 inserts a new Article 25A into the Order. Article 25A makes it unlawful for the trustees or managers of an occupational pension scheme, when carrying out their functions, to discriminate against or harass a member or prospective member of the scheme. Article 25A also inserts a new Schedule 2A into the Order. By virtue of Schedule 2A every occupational pension scheme is treated as including a non-discrimination rule, trustees and managers are given powers to alter schemes so as to ensure conformity with that rule and provision is made relating to the procedures and remedies which may be granted on certain complaints relating to occupational pension schemes presented to the Fair Employment Tribunal.

Regulation 19 removes the lower limit on the size of partnerships which can discriminate lawfully and clarifies the meaning of certain forms of expulsion from a position as a partner.

Regulation 20 makes it unlawful for bodies in the further and higher education field to subject persons to harassment.

Regulation 21 makes it unlawful for barristers to subject to harassment a pupil or a person who has applied to be a pupil.

Regulation 22 provides that, where there has been a relationship in which certain acts of discrimination or harassment would have been unlawful, it is also unlawful to subject a person to a detriment or harassment by reference to that relationship after the relationship has ended.

Regulation 23 provides that complaints of unlawful discrimination or harassment in the employment and training fields by or against barristers are to be heard by the Fair Employment Tribunal.

Regulations 24 and 27 alter the burden of proof in Tribunal or court proceedings regarding employment or training matters.

Regulations 25 and 26 make consequential amendments.

Regulation 28 ensures that respondents must reply to a claimant's preliminary questions within eight weeks of being served with them.

Regulations 29 and 30 make amendments to the exceptions to the Order. The general exception for employment in a private household is removed and the provision excepting the employment of a teacher in a school is amended to apply the exception to the recruitment of a person as such a teacher.

Regulation 31 modifies the exception for charities to discriminate in the provision of benefits by removing that exception so far as it relates to employment or vocational training.

Regulation 32 removes the exception for acts, in the employment field, which are done under statutory authority.

Regulation 33 applies to collective agreements and rules of undertakings the provisions of the Order relating to unlawful contracts.

Regulation 34 makes consequential amendments.

A copy of the Regulatory Impact Assessment relating to these Regulations has been placed in the library of the Northern Ireland Assembly and can be obtained from Anti-discrimination Division, Office of the First Minister and deputy First Minister, Room E3.06, Castle Buildings, Stormont, Belfast BT4 3SR.

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