

EXPLANATORY MEMORANDUM TO
THE EQUALITY ACT 2010 (WORK ON SHIPS AND HOVERCRAFT) REGULATIONS
2011

2011 No. XXXX

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of these Regulations is to apply Part 5 (Work) of the Equality Act 2010 (“the Act”) to work on ships (including hovercraft), and seafarers. These Regulations specify to which seafarers, working on which ships, working in which waters, Part 5 of the Act applies.

2.2 The Regulations also make provision for different rates of pay for seafarers because of nationality if the seafarer applied for work or was recruited outside Great Britain and is not a British Citizen (as defined in the British Nationality Act 1981 (c. 61) or national of another EEA state or a designated state (as defined in paragraph 4.3 below).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Regulation 6 requires the Secretary of State to review regulations 3 to 5 and to set out the conclusions of that review in a published report. The power relied on to include such a provision is section 207(4)(b) of the Act which provides that regulations made under the Act may include incidental and supplementary provisions. The review is regarded as an incidental and supplementary provision as it will directly address whether the purposes of Part 5 of the Act in relation to work on ships and hovercraft and seafarers have been achieved and whether they could be achieved in a better way. It is not of a significant nature (the requirement is imposed on the Secretary of State and not anyone else) and is expedient.

4. Legislative Context

4.1 The Regulations are being made to specify to which seafarers, working on which ships, operating in which waters, Part 5 of the Act applies

4.2 The Regulations also amend the law on the payment of different rates of pay to seafarers because of nationality if the seafarer applied for work or was recruited outside Great Britain. Although Part 5 of the Act was commenced by [S.I. 2010/2317](#) (C. 112), that Order also saved the legislation listed within it as regards work on ships and hovercraft, and seafarers (see article 11 and Schedule 3) until regulations are made under

section 81. If Regulations are not made under section 81, then Part 5 of the Act will not apply to work on ships and hovercraft, and seafarers.

4.3 Section 9 of Race Relations Act 1976 (“RRA”) is one of the provisions that has been saved insofar as it affects seafarers, until such time as these Regulations come into force. That section permits employers to pay seafarers different rates of pay according to the nationality of the seafarer if the seafarer was recruited outside Great Britain. Section 9 of the RRA is contrary to EU law in so far as seafarers from EEA or designated states are concerned. (Designated states are states outside the EEA whose citizens are entitled to protection under EU law by virtue of association agreements with the EU. Those states are listed in regulation 2). The European Commission has begun the infraction process against the UK on this issue

4.4 Differential pay was debated during the passage of the Equality Bill:

- House of Commons Committee Stage, 12th sitting - Hansard, 23 June 2009, col 438;
- House of Commons Report Stage - Hansard, 2 December 2009, cols 1137-1144; 1153-1156 and 1170-1173; and
- House of Lords Report Stage - Hansard, 2nd March 2010 cols 1378-1385]

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 Mike Penning MP, Parliamentary Under-Secretary of State for Transport has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Equality Act 2010 (Application of Part 5 to Seafarers) Regulations 2011 are compatible with the Convention rights.

7. Policy background

7.1 The Act provides a new cross-cutting legislative framework to protect the rights of individuals and advance equality of opportunity for all; to update, simplify and strengthen the previous legislation; and to deliver a simple, modern and accessible framework of discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society.

7.2 Part 5 of the Act specifically deals with work and offers protection in respect of protected characteristics from discrimination, harassment, victimisation and other unlawful conduct. Protected characteristics included in the Act are age, disability, gender

reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

7.3 Specifically applying Part 5 to work on ships and hovercraft, and seafarers, will ensure that, as far as possible, seafarers receive the same level of protection from discrimination, harassment and victimisation as individuals working in other sectors on land. It will also clarify how equality legislation applies to work on ships and hovercraft, and seafarers.

7.4 The application of Part 5 of the Act as provided for in these Regulations maintains the status quo as far as possible, while complying with European law, and provides clarity to both employers and employees. It also achieves the intended effect of applying Part 5 of the Act to as broad a range of ships and hovercraft, and seafarers, as possible, without going so far as to be in breach of the United Nations Convention on the Law of the Sea “UNCLOS” or European law and without placing additional burdens on UK registered vessels alone.

7.5 UNCLOS restricts the ability of states to apply legislation to foreign flagged ships, but where a seafarer is working wholly or partly in Great Britain these Regulations apply Part 5 of the Act to seafarers on ships registered in an EEA state, other than the United Kingdom, provided other criteria are met. Most of the obligations within the Act are underpinned by EU law and therefore EEA states are also bound by those obligations. As the protected characteristic of marriage and civil partnership is a domestic provision, not required by EU law, that protected characteristic is excluded as regards ships registered in EEA states other than the United Kingdom.

7.6 The Regulations apply Part 5 of the Act to:

- all seafarers, irrespective of nationality, who work onboard a UK registered ship which operates wholly or partly in GB or adjacent waters; and
- EEA/designated state seafarers where the legal relationship of their employment is located in (or closely linked to) GB, working onboard an EEA registered ship/hovercraft operating wholly or partly in GB or adjacent waters (except in relation to the protected characteristic of marriage and civil partnership); and
- EEA/designated state seafarers where the legal relationship of their employment is located in (or closely linked to) GB, working onboard a UK registered ship/hovercraft operating wholly outside of GB and/or adjacent waters.

7.7 European case law provides that where professional activities are pursued partially or temporarily outside the territory of the European Union such persons have the status of workers employed in the territory of a Member State if the legal relationship of employment could be located within the territory of the European Union or retained a sufficiently close link with that territory. That connection criteria also applies in the case of a worker who is permanently employed on board a ship flying the flag of another Member State. (*Mario Lopes da Veiga v Staatssecretaris van Justitie* (Case 9/88)).

7.8 The Regulations provide that it is not unlawful to offer to pay or pay different rates of pay to seafarers (applicants, employees and contract workers), other than those from EEA or designated states, if a person applied for work as a seafarer or was recruited as a seafarer outside Great Britain. If the seafarer later becomes a British citizen or a national of another EEA or designated state then the exception will no longer apply.

7.9 Under section 19 of the Act (indirect discrimination), where an apparently neutral provision, criterion or practice has an effect which particularly disadvantages seafarers from EEA or designated states in terms of a difference in pay, this will nevertheless be lawful if the employer can show that the provision, criterion or practice is objectively justified. If differential pay were challenged by a seafarer from an EEA or designated State, it would be for the employer to satisfy an employment tribunal that the provision, criterion or practice was a provision, criterion or practice that could be objectively justified as a proportionate means of achieving a legitimate aim in the particular circumstances of the case.

7.10 To help ensure the continued competitiveness of the UK shipping industry, it will remain lawful under regulation 5 for employers to pay different rates of pay to seafarers from countries that are not within the EEA and are not designated states.

7.11 The issue of differential pay has received a high level of interest from all sides of the industry who have been actively involved in discussions with the Government throughout the policy decision-making process.

8. Consultation outcome

8.1 In March 2007 the Department for Transport ran a 6 month consultation on the issue of differential pay for seafarers. The consultation paper can be found at <http://webarchive.nationalarchives.gov.uk/+http://www.dft.gov.uk/consultations/archive/2007/changesracerelations/>. A summary of the consultation responses can be found at: <http://webarchive.nationalarchives.gov.uk/+http://www.dft.gov.uk/consultations/archive/2007/changesracerelations/racerelationssummary>.

8.2 In November 2009 the then Parliamentary Under-Secretary of State, Department for Transport, published draft affirmative Regulations which demonstrated the then Government's thinking on how Part 5 of the Act (then Bill) might apply to seafarers. The Written Ministerial Statement can be found at House of Commons:

<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091130/wmstext/9110m0003.htm#09113018000002>;

and House of Lords:

<http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/91130-wms0001.htm#0911303000257>.

The text of the draft affirmative Regulations that accompanied those statements can be found at: <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-2965.doc>.

8.3 Those draft Regulations were silent on the issue of differential pay, meaning that if they had been made in the form that they were published, the practice of nationality-based

pay differentials would have become unlawful in relation to those seafarers protected by Part 5. However, on the day of publication the then Minister wrote to a number of stakeholders seeking evidence-based financial estimates of the likely impact of either:

- “a) outlawing the practice altogether; or
- (b) continuing to allow the payment of differential rates to seafarers but only where such differentiation would not operate to the disadvantage of nationals of any EC or EEA state (or any other state whose nationals are entitled to corresponding rights under EC law) nor that of seafarers recruited in Great Britain, and the difference in rates would correspond to a difference in the costs of living in the places where the seafarers respectively habitually reside.”

8.4 A summary of the evidence submitted can be found at:
<http://www.dft.gov.uk/pgr/shippingports/shipping/diffpay/pdf/report.pdf>.

9. Guidance

9.1 No guidance has been produced to accompany the SI.

10. Impact

10.1 The impact on business is discussed in full in the impact assessment.

10.2 The additional costs for employers of seafarers working on UK registered internationally trading vessels as a result of prohibiting differential pay with regards seafarers from EEA and designated states are estimated at around £0 to £57 million per year, with a Best estimate of around £29 million. There may also be additional costs for some other employers of seafarers.

10.3 Employers of seafarers will also be required to familiarise themselves with the regulations. The total one-off familiarisation costs for UK enterprises with employees are estimated at around £0.2 million.

10.4 Part 5 of the Act, and the regulations, simplify equality legislation relating to work on ships and hovercraft, and seafarers. The simplification benefits for UK enterprises with employees have been estimated at around £9,600 per year. The simplification benefits for UK seafarers have been estimated at around £2,700 per year.

10.5 There are also a number of other potential costs and benefits which have not been monetised, but are discussed in the impact assessment

10.6 The impact on charities or voluntary bodies is nil.

10.7 The impact on the public sector is nil.

10.8 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum at www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on small firms employing up to 20 people, the approach taken to date has been regular dialogue with companies direct; trade associations and maritime trades unions. In 2007, the Department ran a 6 month consultation on the issue of differential pay for seafarers, whilst in November 2009 draft affirmative regulations were published after which a targeted, short consultation was held.

11.3 There continues to be regular dialogue with the three industry bodies referred to above both at Ministerial and official level. Ministers have committed to continuing that dialogue.

12. Monitoring & review

12.1 The Regulations provide that the Secretary of State must carry out a review of regulations 3 to 5 of these Regulations within 5 years, and every 5 years thereafter, and set out his conclusions in a published report. In carrying out that review, the Secretary of State must have regard to how Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework of equal treatment in employment and occupation and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation are implemented in other member States.

13. Contact

13.1 Nick Court at the Department for Transport Tel: 0207 944 3650 or email: nick.court@dft.gsi.gov.uk can answer any queries regarding the instrument.