

## STATUTORY INSTRUMENTS

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# 2005 No. 1117

## The Special Educational Needs and Disability (Northern Ireland) Order 2005

### PART III

#### DISABILITY DISCRIMINATION IN EDUCATION

##### CHAPTER III

##### GENERAL QUALIFICATIONS BODIES

#### **General qualifications bodies: discrimination and harassment**

**34.—**(1) It is unlawful for a general qualifications body to discriminate against a disabled person—

- (a) in the arrangements which it makes for the purpose of determining upon whom to confer a relevant qualification;
- (b) in the terms on which it is prepared to confer a relevant qualification on him;
- (c) by refusing or deliberately omitting to grant any application by him for such a qualification; or
- (d) by withdrawing such a qualification from him or varying the terms on which he holds it.

(2) It is also unlawful for a general qualifications body, in relation to a relevant qualification conferred by it, to subject to harassment a disabled person who holds or applies for such a qualification.

(3) In the case of an act which constitutes discrimination by virtue of Article 43, this Article also applies to discrimination against a person who is not disabled.

(4) In this Article and Article 37, “relevant qualification” means an authorisation, qualification, approval or certification of a prescribed description.

(5) But an authorisation, qualification, approval or certification may not be prescribed under paragraph (4) if it is a professional or trade qualification (within the meaning given by section 14A(5) of the 1995 Act).

(6) In this Chapter—

- (a) “general qualifications body” means any authority or body which can confer a relevant qualification, but it does not include—
  - (i) a responsible body (within the meaning of Chapter I or II),
  - (ii) an education and library board, or
  - (iii) an authority or body of a prescribed description or in prescribed circumstances;
- (b) references (however expressed) to the conferment of a qualification on a person include—
  - (i) the renewal or extension of a qualification, and

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(ii) the authentication of a qualification awarded to him by another person.

### **Meaning of “discrimination”**

**35.**—(1) For the purposes of Article 34, a body discriminates against a disabled person if—

- (a) for a reason which relates to the disabled person's disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
- (b) it cannot show that the treatment in question is justified.

(2) For the purposes of Article 34, a body also discriminates against a disabled person if it fails to comply with a duty imposed on it by Article 37 in relation to the disabled person.

(3) Treatment, other than the application of a competence standard, is (subject to paragraphs (5) to (7)) justified for the purposes of paragraph (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

(4) The application by a body of a competence standard to a disabled person is (subject to paragraphs (6) and (7)) justified for the purposes of paragraph (1)(b) if, but only if, the body can show that—

- (a) the standard is, or would be, applied equally to persons who do not have his particular disability; and
- (b) its application is a proportionate means of achieving a legitimate aim.

(5) If, in a case falling within paragraph (1) other than a case where the treatment is the application of a competence standard, a body is under a duty under Article 37 in relation to the disabled person but fails to comply with that duty, its treatment of that person cannot be justified under paragraph (3) unless it would have been justified even if the body had complied with that duty.

(6) Regulations may make provision, for purposes of this Article, as to circumstances in which treatment is, or as to circumstances in which treatment is not, to be taken to be justified (but see paragraph (7)).

(7) Treatment of a disabled person cannot be justified under paragraph (3), (4) or (6) if it amounts to direct discrimination falling within paragraph (8).

(8) A body directly discriminates against a disabled person if, on the ground of the disabled person's disability, it treats the disabled person less favourably than it treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

(9) In this Article, “competence standard” means an academic, medical or other standard applied by or on behalf of a general qualifications body for the purpose of determining whether or not a person has a particular level of competence or ability.

### **Meaning of “harassment”**

**36.**—(1) For the purposes of Article 34, a body subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, the body engages in unwanted conduct which has the purpose or effect of—

- (a) violating the disabled person's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

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

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## **General qualifications bodies: duty to make adjustments**

37.—(1) Where—

- (a) a provision, criterion or practice, other than a competence standard, is applied by or on behalf of a general qualifications body,
- (b) it is a provision, criterion or practice for determining on whom a relevant qualification is to be conferred,
- (c) a disabled person is, or has notified the body that he may be, an applicant for the conferment of that qualification, and
- (d) the provision, criterion or practice places the disabled person at a substantial disadvantage in comparison with persons who are not disabled,

it is the duty of the body to take such steps as it is reasonable, in all the circumstances of the case, for it to have to take in order to prevent the provision, criterion or practice having that effect.

(2) Where—

- (a) a provision, criterion or practice, other than a competence standard, is applied by or on behalf of a general qualifications body,
- (b) it is a provision, criterion or practice other than one for determining on whom a relevant qualification is to be conferred, and
- (c) it places a disabled person who—
  - (i) holds a relevant qualification conferred by the body, or
  - (ii) applies for a relevant qualification which the body confers,at a substantial disadvantage in comparison with persons who are not disabled,

it is the duty of the body to take such steps as it is reasonable, in all the circumstances of the case, for it to have to take in order to prevent the provision, criterion or practice having that effect.

(3) Where any physical feature of premises occupied by a general qualifications body places a disabled person who—

- (a) holds a relevant qualification conferred by the body, or
- (b) applies for a relevant qualification which the body confers,

at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the body to take such steps as it is reasonable, in all the circumstances of the case, for it to have to take in order to prevent the feature having that effect.

(4) Nothing in paragraph (1), (2) or (3) imposes a duty on a general qualifications body in relation to a disabled person if the body does not know, and could not reasonably be expected to know—

- (a) in the case of an applicant or potential applicant for the conferment of a relevant qualification, that the disabled person concerned is, or may be, such an applicant; or
- (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in that paragraph.

(5) In this Article—

- (a) “provision, criterion or practice” includes (subject to any provision under paragraph (6)(e)) any arrangements;
- (b) “competence standard” has the meaning given by Article 35(9).

(6) Regulations may make provision, for purposes of this Article—

- (a) as to circumstances in which a provision, criterion or practice is to be taken to have, or as to circumstances in which a provision, criterion or practice is to be taken not to have, the effect mentioned in paragraph (1)(d) or (2)(c);

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- (b) as to circumstances in which a physical feature is to be taken to have, or as to circumstances in which a physical feature is to be taken not to have, the effect mentioned in paragraph (3);
- (c) as to circumstances in which it is, or as to circumstances in which it is not, reasonable for a body to have to take steps of a prescribed description;
- (d) as to steps which it is always, or as to steps which it is never, reasonable for a body to have to take;
- (e) as to what is, or as to what is not, to be included within the meaning of “provision, criterion or practice”;
- (f) as to things which are, or as to things which are not, to be treated as physical features.

(7) This Article imposes duties only for the purpose of determining whether a body has, for the purposes of Article 34, discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.

VALID FROM 23/04/2008

#### [<sup>F1</sup>Enforcement, remedies and procedures

**37A.**—(1) A claim by a person—

- (a) that a general qualifications body has discriminated against him, or subjected him to harassment, in a way which is unlawful under this Chapter,
- (b) that a general qualifications body is by virtue of Article 44 or 45 to be treated as having done so, or
- (c) that a person is by virtue of Article 44 to be treated as having done so,

may be made the subject of civil proceedings in the same way as any other claim in tort for breach of statutory duty.

(2) Damages in respect of discrimination in a way which is unlawful under this Chapter may include compensation for injury to feelings whether or not they include compensation under any other head.

(3) Proceedings may be brought only in a county court.

(4) The remedies available in such proceedings are those which are available in the High Court.

(5) The fact that a person who brings proceedings under this Chapter against a general qualifications body may also be entitled to bring proceedings against that body under Part II of the 1995 Act is not to affect proceedings under this Chapter.

(6) Part III of Schedule 2 makes further provision about the enforcement of this Part and about procedure and evidence.]

**F1** [Art. 37A inserted \(23.4.2008\) by Special Educational Needs and Disability \(2005 Order\) \(Amendment\) \(General Qualifications Bodies\) \(Alteration of Premises and Enforcement\) Regulations \(Northern Ireland\) 2008 \(S.R. 2008/177\), reg. 3](#)

VALID FROM 23/04/2008

#### [<sup>F2</sup>Alterations to premises occupied under leases

**37B.**—(1) This Article applies where—

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- (a) a general qualifications body occupies premises under a lease;
  - (b) but for this Article, the general qualifications body would not be entitled to make a particular alteration to the premises; and
  - (c) the alteration is one which the general qualifications body proposes to make in order to comply with the duty imposed by Article 37(3).
- (2) Except to the extent to which it expressly so provides, the lease shall have effect by virtue of this paragraph as if it provided—
- (a) for the general qualifications body to be entitled to make the alteration with the written consent of the lessor;
  - (b) for the general qualifications body to have to make a written application to the lessor for consent if it wishes to make the alteration;
  - (c) if such an application is made, for the lessor not to withhold his consent unreasonably; and
  - (d) for the lessor to be entitled to make his consent subject to reasonable conditions.
- (3) In this Article and in Schedule 3A—
- “lease” includes a tenancy, sub-lease or sub-tenancy and an agreement for a lease, tenancy, sub-lease or sub-tenancy;
- “sub-lease” means any sub-term created out of, or deriving from, a leasehold interest; and
- “sub-tenancy” means any tenancy created out of, or deriving from, a superior tenancy.
- (4) For the purposes of paragraph (1), the general qualifications body is to be treated as not being entitled to make the alteration, if the terms and conditions of a lease—
- (a) impose conditions which are to apply if the general qualifications body alters the premises, or
  - (b) entitle the lessor to impose conditions when consenting to the general qualification's body altering the premises.
- (5) Schedule 3A supplements the provisions of this Article.]

**F2** Art. 37B inserted (23.4.2008) by [Special Educational Needs and Disability \(2005 Order\) \(Amendment\) \(General Qualifications Bodies\) \(Alteration of Premises and Enforcement\) Regulations \(Northern Ireland\) 2008 \(S.R. 2008/177\)](#), **reg. 5**

**Modifications etc. (not altering text)**

**C1** Art. 37B modified (23.4.2008) by [Special Educational Needs and Disability \(2005 Order\) \(Amendment\) \(General Qualifications Bodies\) \(Alteration of Premises and Enforcement\) Regulations \(Northern Ireland\) 2008 \(S.R. 2008/177\)](#), **reg. 12(2)**

### Chapter III: claims, leased premises and certain agreements

**38.**—(1) Regulations may make provision for, or in connection with, the making of a claim by a person—

- (a) that a general qualifications body has discriminated against him, or subjected him to harassment, in a way which is unlawful under this Chapter;
- (b) that a general qualifications body is by virtue of Article 44 or 45 to be treated as having done so; or
- (c) that a person is by virtue of Article 44 to be treated as having done so.

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- (2) Regulations may, in relation to a case where premises are occupied by a general qualifications body under a lease—
- (a) make provision modifying the lease, or make provision for its modification, in connection with the making of alterations to the premises in pursuance of a duty imposed on the body by Article 37;
  - (b) make provision in connection with the determination of questions that are about the body's compliance with any such duty and are related to the making of alterations to the premises.
- (3) Any term in a contract or other agreement made by or on behalf of a general qualifications body is void so far as it purports to—
- (a) require a person to do anything which would contravene any provision of, or made under, this Chapter;
  - (b) exclude or limit the operation of any provision of, or made under, this Chapter; or
  - (c) prevent any person making a claim of a kind mentioned in paragraph (1).
- (4) Regulations may—
- (a) make provision for paragraph (3)(b) or (c) not to apply to an agreement settling a claim of a kind mentioned in paragraph (1);
  - (b) make provision modifying an agreement to which paragraph (3) applies, or make provision for the modification of such an agreement, in order to take account of the effect of that paragraph.
- (5) The provision that may be made under paragraph (1), (2) or (4) includes (in particular)—
- (a) provision as to the court or tribunal to which a claim, or an application in connection with a modification, may be made;
  - (b) provision for the determination of claims or matters otherwise than by the bringing of proceedings before a court or tribunal;
  - (c) provision for a person who is a lessor in relation to a lease under which a general qualifications body occupies premises to be made a party to proceedings;
  - (d) provision as to remedies;
  - (e) provision as to procedure;
  - (f) provision as to appeals;
  - (g) provision as to time limits;
  - (h) provision as to evidence;
  - (i) provision as to costs or expenses.
- (6) Provision under paragraph (1), (2) or (4) may take the form of amendments of this Part or the 1995 Act.
- (7) Regulations may make provision as to the meaning of “lease” or “lessor” in this Article.
- (8) Except as provided in regulations under paragraph (1), no civil or criminal proceedings may be brought against any person in respect of an act merely because the act is unlawful under this Chapter.
- (9) Paragraph (8) does not prevent the making of an application for judicial review.

### **Chapter III: regulations**

**39.**—(1) In this Chapter—

“prescribed” means prescribed by regulations;

“regulations” means regulations made by the Department of Education.

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(2) Before making regulations under this Chapter, the Department of Education shall consult such persons as it appears to it to be appropriate to consult, having regard to the substance and effect of the regulations in question.

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