

2003 No. 2827

EMPLOYMENT AND TRAINING

SEXUAL ORIENTATION DISCRIMINATION

**The Employment Equality (Sexual Orientation) (Amendment)
Regulations 2003**

<i>Made</i> - - - -	<i>6th November 2003</i>
<i>Laid before Parliament</i>	<i>7th November 2003</i>
<i>Coming into force</i> - -	<i>1st December 2003</i>

Whereas the Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972^(a) in relation to discrimination^(b);

Now, therefore, the Secretary of State for Trade and Industry, in exercise of the powers conferred by the said section 2(2), hereby makes the following Regulations:—

Citation and commencement

1. These Regulations may be cited as the Employment Equality (Sexual Orientation) (Amendment) Regulations 2003 and shall come into force on 1st December 2003.

Interpretation

2.—(1) In these Regulations, “the principal Regulations” means the Employment Equality (Sexual Orientation) Regulations 2003^(c).

(2) In regulation 3 (amendments to the principal Regulations) a reference to a numbered regulation or Schedule is a reference to the regulation or, as the case may be, Schedule bearing that number in the principal Regulations.

Amendments to the principal Regulations

3.—(1) The principal Regulations shall be amended in accordance with paragraphs (2) to (6).

(2) In regulation 2(3) (interpretation), for the definition of “benefits” substitute—

““benefits”, except in regulation 9A (trustees and managers of occupational pension schemes), includes facilities and services;”.

(3) After regulation 9 (meaning of employment and contract work at establishment in Great Britain) insert—

^(a) 1972 c.68.

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

^(c) S.I. 2003/1661.

“Trustees and managers of occupational pension schemes

9A.—(1) It is unlawful, except in relation to rights accrued or benefits payable in respect of periods of service prior to the coming into force of these Regulations, 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 1A (occupational pension schemes) shall have effect for the purposes of—

- (a) defining terms used in this regulation 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 an employment tribunal under regulation 28 (jurisdiction of employment tribunals).”.

(4) In regulation 27(2) (restriction of proceedings for breach of Regulations), 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 Act 1993(a) by the Pensions Ombudsman”.

(5) After regulation 30(4) (remedies on complaints in employment tribunals) insert—

“(5) This regulation has effect subject to paragraph 7 of Schedule 1A (occupational pension schemes).”.

(6) After Schedule 1 (Norwegian part of the Frigg Gas Field) insert—

“SCHEDULE 1A

Regulation 9A(3)

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 section 124(1) of the Pensions Act 1995(b) as at the date of the coming into force of these Regulations;

“member”, in relation to an occupational pension scheme, means any active member, deferred member or pensioner member;

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

“occupational pension scheme” has the same meaning as in the Pension Schemes Act 1993 as at the date of the coming into force of these Regulations;

“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,

(a) 1993 c.48.
(b) 1995 c.26.

- (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 (procedure in employment tribunals), “employer”, in relation to an occupational pension scheme, has the meaning given by section 124(1) of the Pensions Act 1995(a) as at the date of the coming into force of these Regulations.

(3) Any term used in regulation 9A (trustees and managers of occupational pension schemes) and in this Schedule shall have the same meaning in that regulation 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 regulation 9A.

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 the coming into force of these Regulations).

Procedure in employment tribunals

6. Where under regulation 28 (jurisdiction of employment tribunals) a member or prospective member of an occupational pension scheme presents to an employment tribunal a complaint that the trustees or managers of the scheme—

- (a) have committed against him an act which is unlawful by virtue of regulation 9A (trustees and managers of occupational pension schemes) or 21 (relationships which have come to an end); or
- (b) are by virtue of regulation 22 (liability of employers and principals) or 23 (aiding unlawful acts) 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.

(a) 1995 c.26.

Remedies in employment tribunals

7. (1) This paragraph applies where—

- (a) under regulation 28 (jurisdiction of employment tribunals) a member or prospective member of an occupational pension scheme (“the complainant”) presents to an employment 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 employment tribunal may, without prejudice to the generality of its power under regulation 30(1)(a) (power to make order declaring rights of complainant and respondent), 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 the coming into force of these Regulations);
- (b) may make such provision as the employment 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 employment tribunal may not make an order for compensation under regulation 30(1)(b), whether in relation to arrears of benefits or otherwise, except—

- (a) for injury to feelings;
- (b) by virtue of regulation 30(3).”

6th November 2003

Jacqui Smith,
Minister of State for Industry and the Regions and
Deputy Minister for Women and Equality,
Department of Trade and Industry

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which are made under section 2(2) of the European Communities Act 1972 (c.68), amend the Employment Equality (Sexual Orientation) Regulations 2003 (“the principal Regulations”). They do so in order to implement (in relation to trustees and managers of occupational pension schemes in Great Britain) Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment (OJ L 303, 2.12.2000, p.16) so far as it relates to discrimination on grounds of sexual orientation. The principal Regulations make it unlawful to discriminate on grounds of sexual orientation in employment and vocational training, and come into force on 1st December 2003.

A new regulation – regulation 9A – is inserted into the principal Regulations by regulation 3(3). Regulation 9A makes it unlawful for the trustees or managers of an occupational pension scheme, when carrying out their functions, to harass or discriminate against a member or prospective member of the scheme.

An additional Schedule – Schedule 1A – is inserted into the principal Regulations by regulation 3(6). By virtue of Schedule 1A, every occupational pension scheme is treated as including a non-discrimination rule i.e. a rule requiring the trustees or managers of the scheme not to act in a way contrary to regulation 9A (see paragraph 2 of Schedule 1A); and trustees and managers are given power to alter schemes so as to secure conformity with that rule (see paragraph 4 of Schedule 1A).

Where a member or prospective member of a scheme has been subjected to harassment or discrimination contrary to regulation 9A, he can make a complaint against the trustees or managers of the scheme to an employment tribunal under regulation 28 of the principal Regulations. In such a case, Schedule 1A provides for the employer in relation to the scheme to be joined as a party to the complaint (see paragraph 6 of Schedule 1A).

Schedule 1A also makes provision regarding the remedies which may be granted by an employment tribunal in certain cases involving occupational pension schemes (see paragraph 7 of Schedule 1A). Where a member or prospective member of a scheme (other than a pensioner) makes a successful complaint against his employer, or the scheme’s trustees or managers, under regulation 28 of the principal Regulations, the tribunal may make a declaration as to his rights under the scheme. However, it cannot make an order for compensation under regulation 30(1)(b) of the principal Regulations unless the compensation is for injury to feelings or the order is made by virtue of regulation 30(3) of those Regulations.

Three further amendments to the principal Regulations are made by these Regulations. First, a modified definition of the term “benefits” is inserted into regulation 2 of the principal Regulations by regulation 3(2). The modified definition ensures that, when the term ‘benefits’ is used in relation to occupational pension schemes, it does not include facilities and services. Secondly, regulation 27 of the principal Regulations, which limits the proceedings which can be brought for a breach of those Regulations, is amended so as to ensure that a complaint that the non-discrimination rule has been breached by the trustees or managers of a scheme can be referred to the Pensions Ombudsman: see regulation 3(4). Thirdly, a new paragraph – paragraph (5) – is inserted into regulation 30 of the principal Regulations by regulation 3(5). This makes it clear that regulation 30 has effect subject to paragraph 7 of Schedule 1A.

A Regulatory Impact Assessment report of the effect that these Regulations will have on business costs, and a Transposition Note showing how the sexual orientation provisions of Council Directive 2000/78/EC have been implemented in Great Britain, are available to the public, free of charge, from the Selected Employment Rights Branch, UG65, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET. Copies of each have also been placed in both Houses of Parliament.

STATUTORY INSTRUMENTS

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