EQUALITY AT WORK

A Short Guide To

The Employment (Sex Discrimination) Act 2000

Isle of Man Government

Department of Economic Development

November 2003
INTRODUCTION

This guide has been compiled by the Department of Economic Development to give an understanding of the Employment (Sex Discrimination) Act 2000.

This booklet is not intended to be exhaustive but is intended to give guidance on the main aspects of the legislation. In a work of this size it is impossible to provide definitive statements of the law which is in any case open to constant interpretation by the Employment Tribunal and the courts.

September 2001

CONTENTS

1) The Employment (Sex Discrimination) Act 2000 3
2) Equal Pay 4
3) Sex or Marital Discrimination 5
4) Employers' obligations 6
5) Advertising Job Vacancies 7
6) Sexual Harassment 8
7) Exceptions to the Act 9
8) Who is responsible when discrimination occurs in the workplace? 11
9) Who is covered by the Act? 12
10) Pursuing a claim 13
   • Manx Industrial Relations Service
   • Time Limits
   • Employment Tribunal
   • Compensation

1) Equal Opportunities - the Business Benefits 15

Contacts 16
1) The Employment (Sex Discrimination) Act 2000

The Employment (Sex Discrimination) Act 2000 is designed to eliminate discrimination on grounds of sex or marital status and to promote equal treatment between men and women in the field of employment.

The legislation is drafted in terms of discrimination against women and this booklet follows the drafting of the legislation by referring to discrimination against women. **The legislation, however, applies equally to discrimination against men.**

The legislation covers discrimination in respect of both pay and other areas of employment.

A copy of the Act may be purchased from the Central Reference Library, Government Office, Bucks Road, Douglas, Isle of Man, Tel 01624 685520
2) EQUAL PAY

The Equal Pay section of the Employment (Sex Discrimination) Act 2000 requires employers to treat men and women the same for purposes of pay and other terms of their contracts of employment where the woman is doing:

- the same or broadly similar work to that of a male colleague; or
- a job which has been graded equivalent to that of a male colleague under a job evaluation scheme.

In order to bring a claim an employee must chose as a comparator a person of the opposite sex who is treated more favourably in terms of pay and/or conditions. The comparator must be in the same employment, that is working for the same employer, or an associated employer.

An employer has to be able to prove that any difference in pay between a man and a woman is due to a material factor other than sex, for example that a man is paid more because he has greater relevant experience or specific skills or qualifications related to the job. Such discrimination in pay is unlawful. The law provides a procedure by which an individual can take a claim for equal pay to an Employment Tribunal or the High Court.

Also covered by this section are other contractual benefits, for example:- guaranteed overtime working, commission, contractual bonus payment, privileged access to sport and social facilities, company cars.

In the course of an equal pay claim employers may be called upon to explain and justify their pay practices and arrangements.

Employers are recommended to carry out a thorough review of their pay and benefit system to ensure there are no discriminatory elements. A small business may not need to carry out a full and complex review, but nevertheless should ensure that its pay system is fair and lawful.

The pay system should be:-

- Transparent – it should be clear why bonuses, overtime and extra grades are awarded, so it can be shown that they are not being applied in a discriminatory manner.
- Based on objective criteria – not based on views of what the job was in the past or on skills that are possibly no longer used.
- Free from sex bias – a careful review will ensure the system is fair, or highlight areas where there may be issues.

Although not required by law, an Equal Pay policy, that is regularly monitored and reviewed, shows a commitment by the employer to equality at work and to the employees.
3) SEX OR MARITAL DISCRIMINATION

There are different forms of discrimination covered in the Employment (Sex Discrimination) Act which may constitute discrimination in employment. This behaviour is unlawful.

a) Direct Sex or Marital Discrimination

Treating a woman, less favourably than a man is, or would be, treated in similar circumstances, on the grounds of her sex or because she is married.

b) Indirect Sex or Marital Discrimination

Applying a condition or requirement which, although it is applied equally to both sexes, is such that a considerably smaller proportion of women than men can comply with it and which the person applying it cannot show to be justifiable.

Indirect marital discrimination is where the proportion of married people who can comply is considerably smaller than the proportion of unmarried people of the same sex who can comply.

Indirect sex discrimination in employment might arise, for example, if an employer required candidates for a job to hold a particular technical qualification which was not often acquired by women and which was not relevant to the job in question.

Employers are advised to give careful consideration to the way part-time workers are treated. In many workplaces women make up the majority of part-time workers and consequently any less favourable treatment may constitute indirect sex discrimination.

c) Victimisation

Treating a woman less favourably than another person because she has, for example, asserted rights under the sex discrimination legislation, or has helped another person to assert their rights or because it is suspected that the person might do any of these things.

For example a claim for victimisation might be made if an employee who brought, or was in the process of bringing, a sex discrimination claim, was moved to a different department, or denied promotion.
4) EMPLOYERS' OBLIGATIONS

It is unlawful for an employer to discriminate on grounds of sex or marital status:

- in the arrangements made for determining who will be offered a job (eg interview procedures, selection methods etc.);
- in the terms on which a job is offered;
- by refusing (or deliberately omitting) to offer a person a job;
- in access to opportunities for promotion, transfer or training;
- in respect of any other benefit, facilities or services provided to employees;
- in relation to dismissal and any other unfavourable treatment to which a person may be subjected.

Employers should therefore ensure that their selection procedures for recruitment, training and promotion are non-discriminatory, and offer equal opportunities to all employees or potential employees irrespective of their sex or marital status.

Recruitment and Selection - Employers should ensure that all staff involved in recruitment and selection are aware of discrimination issues, and that the best person is sought for a vacancy rather than assumptions made about whether a man or a woman would fit in better, or be more able to do the job.

Further advice on recruitment and selection is available from the contacts at the end of the booklet.

Part-time Workers - It is important for employers to treat their part-time employees fairly as unfair treatment may result in a case being bought for indirect discrimination under the Act.

Pregnancy and Maternity - It is unlawful to treat women less favourably on grounds of pregnancy and maternity, for example, refusing to recruit a woman because of her pregnancy or by dismissing a woman because of her pregnancy, is likely to constitute direct sex discrimination.

It is legal for employers to discriminate by giving special treatment to women in connection with pregnancy and childbirth (eg time off for pregnant women).

Retirement - All employers must treat male and female employees equally in respect of retirement ages, irrespective of the current differential state pension age.

Requests to work part time – Case law has shown that managers should give serious consideration to a woman’s request to work part-time for childcare reasons and should be able to objectively justify any refusal. Managers may well find that there are benefits in allowing employees to work reduced or flexible hours especially if this leads to greater number of able experienced staff deciding to remain with the organisation.
5) ADVERTISING JOB VACANCIES

It is unlawful to publish, or have published, an advertisement which indicates, or could reasonably be understood as indicating, an intention to discriminate unlawfully. If the discrimination would in fact be lawful - for example, if a job advertisement states that a man is required for a job for which being a man is a Genuine Occupational Qualification, the advertisement is legal (see 'Exceptions to the Act).

The use of job titles such as 'waiter' or 'salesgirl' will be taken to indicate an intention to discriminate, unless the advertisement contains an indication to the contrary. This does not mean that all such job titles may not be used, but where they are used, the advertisement must make it clear that both sexes are entitled to apply - for example, by saying 'waiter/waitress'.

It is good practice for an advert to state that applications are welcome from both men and women, especially if the job is in a field where traditionally there are likely to be more applicants from one sex than the other.

Fines

- An employer who advertises in a discriminatory manner could be fined up to £5,000.

- Employers who state to a publisher that a discriminatory advertisement is lawful because of an exception under the legislation, knowing this is untrue, are committing an offence which is punishable by a fine of up to £5,000.

- If a newspaper, or other publisher, publishes a discriminatory advert and can not show that it relied justifiably on a disclaimer from the employer that the advert was not discriminatory, the newspaper could be liable for a fine of up to £5,000.

For further advice on advertising vacancies, contact the Equality Adviser at the Department of Trade & Industry.
6) SEXUAL HARASSMENT

Sexual harassment may be any conduct of a sexual nature, which creates an intimidating, hostile or humiliating working environment. It may include unwelcome physical, verbal or non-verbal conduct.

The Act makes it unlawful for employers to treat women or men less favourably because of their sex. Sexual harassment constitutes a form of direct sex discrimination.

Employers have a duty to protect employees from sexual harassment. It is recommended that employers:

- draw up and publicise a policy statement on sexual harassment
- train managers to carry out the policy
- have a proper complaints procedure

Sexual Harassment is a particularly difficult area, as behaviour which some staff may find deeply offensive or consider to be unacceptable may be seen by others as 'just a bit of banter'. Employers should be clear on what kind of behaviour is appropriate at work and make this clear to their staff.

Employers have a duty to deal effectively with claims of sexual harassment and an Employment Tribunal is likely to ask for evidence from an employer to show that managers dealt as effectively as possible with any complaint brought to their attention.

Mrs. P was originally one of three female laboratory technicians in a public sector organisation, but in December 1982 the other two were replaced by two men, Mr C and Mr R, who conceived a dislike for Mrs. P and pursued a 'policy of vindictive unpleasantness' to force her to apply for a transfer to another organisation. Their course of conduct included a number of incidents which clearly had a sexual innuendo e.g. continually staring at her, comparing her to nude pinups in the newspaper, making suggestive remarks and standing so that she had to brush against them. Mrs P found life at the school intolerable and in August 1983 she applied for a transfer.

She took the case to an employment tribunal. Mrs. P was held to be the victim of illegal acts. The tribunal decided that this form of harassment was direct sex discrimination and since then it has been regarded as such, although it is not actually written down in the Sex Discrimination Act. The Respondents argued that they would have treated a man, whom they disliked, in exactly the same way as Mrs. P. This was rejected because the tribunal held that there were obvious sexual connotations in their behaviour which they wouldn't have used towards a man.

Strathclyde Regional Council v Porcelli 1986 Ct Sess

Importantly, tribunals have ruled that harassment need not involve touching, and you can be deemed to have harassed somebody by doing an action only once. Employers must take reasonable steps to prevent discrimination. This is not just a matter of judgement there should be evidence to prove the good conduct of the employer.
7) EXCEPTIONS TO THE EMPLOYMENT (SEX DISCRIMINATION) ACT 2000

Where employers seek to employ a person of a particular sex or a married person, if they consider that the employment is covered by one of the exceptions or special cases of the Act, they are advised to contact the Equality Adviser at the Department of Trade & Industry to ascertain exactly what the provisions are in the Act and whether the exception applies to their particular situation.

The following provides a summary of some of the exceptions and special cases contained in the legislation.

A. SPECIFIC EXCEPTIONS

There are some limited exceptions to the Act in relation to the IOM Constabulary, prison officers, ministers of religion, charitable work for the benefit of one sex, professional and competitive sport, insurance, communal accommodation and certain other statutory provisions.

There is also an exception in the case of employment wholly outside of the Isle of Man.

B. GENUINE OCCUPATIONAL QUALIFICATIONS

Employers may confine a job to persons of one sex only (i.e. may recruit, train, transfer or promote persons of one sex only) where being a member of a particular sex can be considered a ‘genuine occupational qualification’ (GOQ) for that particular job. Being a man or woman is a genuine occupational qualification for a job only where:

• the job requires a man for reasons of physiology (eg modelling) or authenticity (eg acting). The Act specifically states that a requirement for strength or stamina is not sufficient reason to limit a job to a man;

• the job requires either a man or a woman for reasons of decency or privacy;

• the job involves living or working in a private household, where there could be reasonable objection to someone of the opposite sex having the degree of physical or social contact with the person living in the home, or the knowledge of intimate details of such a person’s life, which the job is likely to entail;

• because of the nature or location of the establishment, the job holder has to live in premises which are normally occupied by persons of one sex only and which do not have private sleeping or sanitary facilities for both sexes. Employers must show that it is not reasonable to expect alternative facilities to be provided

• the job is in a prison, or some other single-sex establishment (or single-sex part of an establishment) for people requiring special care, supervision or attention, and it is reasonable because of the essential character of the establishment for the job to be confined to persons of one sex only;
• the job involves the provision of personal services, promoting welfare or education, that are most effectively provided by men (or by women) - for example some probation officers or wardens of residential hostels;

• the job is likely to involve duties outside the United Kingdom in a country whose laws and customs are such that those duties could not be done effectively by a woman;

• the job is one of two to be held by a married couple.

A person's sex is a GOQ where only some of the duties qualify for the exemption, BUT NOT if there are already enough employees of the appropriate sex who could reasonably be allocated to those duties without undue inconvenience.

These exceptions can be complex and the Department of Trade & Industry publishes a separate leaflet on GOQs which is available from the contact at the end of this booklet.

C. POSITIVE ACTION

There is a provision in the Act to allow employers or training providers to train women, or men, for work which has previously been wholly or mainly done by the other sex, but they may not discriminate in the selection for recruitment or promotion to such work.
8) WHO IS RESPONSIBLE WHEN DISCRIMINATION OCCURS IN THE WORKPLACE?

1) Where employers commit or allow an act of discrimination to be committed, they will be liable under the legislation. The employer is vicariously liable even if they did not know the discrimination had taken place. Only if employers can show that they did not discriminate and prove that they took all reasonable steps to prevent their employees discriminating may they have a defence to a claim under the Act.

2) An employee may be held personally liable if he or she discriminates in the workplace.

3) If a person acting as an agent for another commits an act of discrimination, then both the principal and agent may be liable under the Act.

4) **Pressure to discriminate** - It is unlawful for a person to pressurise another to discriminate unlawfully, by offering any benefit or threatening any penalty. Such a person will be liable under the legislation. Moreover, employers who discriminate unlawfully as a result of such pressure may remain liable under the Act.

5) **Instructions to discriminate** - It is unlawful for a person in authority, or a person who is regarded as being in authority, to instruct another to do any acts which are unlawful. For example, an employer instructing a personnel officer to only recruit women to a particular post.
9) WHO IS COVERED BY THE ACT?

The requirement not to discriminate unlawfully in the field of employment applies not only to employees but also to:

- partnerships of any size, in the treatment of partners or prospective partners;
- trade unions and other organisations of workers;
- contract workers (where contract workers are employed not by the principal but by another person, who supplies the workers under a contract with the principal, then the principal must not discriminate unlawfully against these workers);
- employers’ organisations;
- professional bodies;
- bodies granting licences or qualifications which affect a person’s employment opportunities;
- services provided by vocational training bodies;
- Employment Agencies - It is also unlawful for an employment agency to discriminate in the provision of its services, except in respect of jobs where it could be lawful for employers to discriminate.
  - Employers who misinform an employment agency that an exception applies are committing an offence punishable by a fine of up to £5000.
10) PURSUING A CLAIM

Manx Industrial Relations Service
Where an employee, potential employee or applicant for employment considers that s/he has been discriminated against on grounds of sex or marital status, s/he may make a complaint to the Employment Tribunal by completing an originating application and lodging it with the Tribunal.

An alternative to starting the formal complaint procedure is to invite the Industrial Relations Officer to try and resolve the issue before the formal approach to the Employment Tribunal is made. This approach often leads to a settlement between the parties without having to go through the Tribunal process.

Tribunal Time limits:
- within 6 months of leaving employment, or at any time if still in employment, for an equal pay claim before a Tribunal
- within 3 months of the act complained of for a Sex Discrimination case

It is important to bear in mind that the time limits start from the time the act complained of was done (or the last act in a series of alleged discriminatory acts) not from the time the Employment Tribunal or Industrial Relations Officer is contacted. In exceptional cases the court or Tribunal may waive or extend the time limits.

Initial guidance may be obtained from the Manx Industrial Relations Service.

Equal Pay claims before the High Court:
Equal Pay claims may also be taken before the High Court in which case there is a 5 year time limit.

Finding out more from the employer:
In a sex discrimination case a pro forma Questionnaire may be sent to the employer by the complainant to help a complainant to assess whether the complaint is in fact one of unlawful discrimination on grounds of sex or marital status.

The aim of the Questionnaire is to obtain information from the employer whose conduct is the subject of the complaint. The employer has an opportunity to reply to the Questionnaire giving his or her explanation for treatment about which the complainant is aggrieved.

The Questionnaire procedure is a formal procedure. Questions and replies are admissible as evidence in any subsequent proceedings before an Employment Tribunal. Employers are not obliged to reply to a Questionnaire. If, however, they do not reply, or if their replies are evasive or ambiguous, a Tribunal may draw adverse conclusions from this. The Tribunal may also order employers, in the course of proceedings, to provide an employee with details of their response to the complaint.
Where the complainant lodges an originating application to an Employment Tribunal, a copy of the complaint made is sent to the employer and/or individual concerned. In addition, the Tribunal will send a copy of the complaint to the Manx Industrial Relations Service and will send copies of the employer’s response to the complainant and the Industrial Relations Officer.

The Industrial Relations Officer will be available at the request of both parties, or on his or her own initiative, to try to promote a settlement. No information given to the Industrial Relations Officer may be divulged to the Tribunal without the consent of the person concerned.

If a complaint is not resolved by conciliation or withdrawn for any other reason it will proceed to a Tribunal hearing.

**If a Tribunal upholds a complaint it may:**

- make a declaration of the rights of both parties;

- award compensation, which may include both special damages (for losses which can be fairly accurately calculated, such as loss of earnings), general damages (for losses which can less easily be quantified, such as injury to feelings); and any interest accruing on the award.

- Make a recommendation that the employer should take a particular course of action within a specified time. If a recommendation is not complied with, the Tribunal may increase the amount of compensation awarded.

**There is an upper limit of £30,000 to the amount of compensation which may be awarded by the Employment Tribunal.**

**Equal Pay Cases**

In an equal pay case the Tribunal or High Court may award up to 2 years’ back pay. But not backdated prior to October 17th 2001.
11) EQUAL OPPORTUNITIES - THE BUSINESS BENEFITS

Organisations who encourage and value diversity, and see the strengths in the differences between individuals have a great advantage in terms of flexibility and staff motivation.

WHY EQUALITY?

- Best use of a limited pool of workers
- Flexibility may improve service to clients and motivate staff
- Workforce representative of local population
- An improved corporate image
- Attract ethical investment
- New business ideas arise from a diverse range of ages, genders, and backgrounds.

COSTS OF INEQUALITY

- Inefficiency in Human Resources
- Inflexible workforce limiting change
- Poor corporate image
- Management time on grievances
- Case going to Tribunal - may be expensive in publicity, time and potential costs.

TEN POINT PLAN FOR EMPLOYERS

1. Develop Equal Opportunities Policy, with clear procedures for complaints
2. Action Plan with targets, eg to review pay policy
3. Equal Opportunities training for all staff involved in recruitment and promotion
4. Monitor appointments and promotion.
5. Review procedures regularly
6. Draw up clear, justifiable job criteria
7. Consider Positive Action in training and development
8. Consider your organisation’s image, does your organisation clearly stand out as an Equal Opportunities employer?
9. Review arrangements for flexible working, eg. parental leave, part-time work for working mothers
CONTACTS

Further information, advice and help on the Employment (Sex Discrimination) Act 2000 is available from:-

Equality Adviser
Hamilton House, Peel Road, Douglas
Isle of Man, British Isles. IM1 5EP

Tel: (01624) 682372
e-mail: equalityadviser@ded.gov.im

Industrial Relations Officer
Manx Industrial Relations Service
5th Floor
Victory House
Prospect Hill
Douglas, IM1 1EQ

Tel: (01624) 672942.
e-mail: iro@industrialrelations.gov.im

Also available from the Equality Adviser:-

“Genuine Occupational Qualifications - A guide for employers"

“Sex Equality and Job Advertisements - Good Practice Guide”

“A Code of Practice on Sex Discrimination in Employment 2001.”

www.gov.im/ded