

CONTENTS

RACE DIRECTIVE A NOTE ON IMPLEMENTATION IN NORTHERN IRELAND

Race and Employment (Northern Ireland) Regulations

Status of this Note

CHANGES TO THE LAW ON RACIAL DISCRIMINATION

KEY IMPROVEMENTS

New definition of indirect discrimination

Statutory prohibition of harassment

Genuine occupational requirement

Private Housing

RACE REGULATIONS ORDER (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2003

Particular Complaints

RACE RELATIONS ORDER (SEAMEN RECRUITED ABROAD) ORDER (NORTHERN IRELAND) 2003

Office holders

Public Authorities

RACE SPECIFIC ISSUES

Training for those not ordinarily resident in Northern Ireland

Charities as employers

Seafarers recruited overseas

Partnerships

Small dwellings

THE OFFICE OF THE FIRST MINISTER AND DEPUTY FIRST MINISTER

FURTHER HELP

CONTENTS

BACKGROUND

Race and Employment "Framework" Directives

Status of this Note

CHANGES TO THE LAW ON RACIAL DISCRIMINATION

KEY IMPROVEMENTS

New definition of indirect discrimination

Statutory prohibition of harassment

Genuine occupational requirement

Private Households

Discrimination after the relationship has ended

Barristers: complaints

Burden of proof

Questionnaire procedure

Office holders

Public Authorities

RACE SPECIFIC ISSUES

Training for those not ordinarily resident in Northern Ireland

Charities as employers

Seafarers recruited overseas

Partnerships

Small dwellings

FURTHER HELP

BACKGROUND

On 17 June 1997 the governments of the fifteen Member States of the European Union revised the Treaty of the European Community at Amsterdam. Article 13 of the Treaty provides a legal base for Community action to combat discrimination on the grounds of racial or ethnic origin.

On 25 November 1999 the European Commission published a package of draft proposals to combat discrimination under Article 13. Included in the package was a draft Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

The Directive ("the Race Directive") was agreed unanimously at the European Social Affairs Council on 6 June 2000 and published in the official journal of the European Communities on 19 July 2000 as Directive no.2000/43/EC. It was agreed that Member States would implement the Directive within 3 years of its publication: 19 July 2003.

Race and Employment "Framework" Directives

The Race Directive flows from Article 13 of the Treaty of Amsterdam and is similar in many respects to the Race Relations (NI) Order 1997. Both the Race Directive and the Article 13 Employment Directive ("the Employment Framework Directive"), require the introduction new employment legislation dealing with discrimination or harassment on grounds of sexual orientation and age, and the amendment of the employment provisions of the Disability Discrimination Act and the Fair Employment and Treatment (NI) Order 1998.

Both Directives introduce a minimum standard of protection from discrimination on these grounds across Europe. They will be of considerable benefit to UK citizens who wish to travel, live or work in the European Union. They will help to facilitate free movement of persons throughout the EU and limit unfair competition based on discrimination on these grounds.

Status of this Note

This note provides guidance on the changes to existing NI race relations law to implement the EU Race Directive. This guidance does not have any legal status and it is not a substitute for the legislation. It does not constitute a Code of Practice.

CHANGES TO THE LAW ON RACIAL DISCRIMINATION

The regulations which have now been introduced make important changes to the Race Relations (Northern Ireland) Order 1997. They relate to discrimination and harassment on the grounds of race, ethnic or national origins ("the relevant grounds"), and will help to ensure that Northern Ireland meets minimum standards of legal protection from racial discrimination across Europe. The Regulations apply to the Irish Traveller community as defined by the 1997 Order, but they do not amend existing provisions as they relate to colour and nationality.

Key improvements have been made in discrimination law by these regulations. These changes will enhance the lives of individuals in Northern Ireland.

Most of the improvements are also included in the Employment "Framework" Directive. These are in relation to:

- Indirect discrimination
- Harassment
- Genuine occupational requirement
- Private households
- Discrimination or harassment after the relationship has ended
- Barristers: complaints
- Burden of proof
- Questionnaire procedure
- Office holders

Some amendments are specific to race discrimination issues. Equality laws in Northern Ireland have established the principle that everyone should be treated equally. However there are some provisions of the 1997 Order which do allow certain people to be treated differently. The Directive asks us to change or get rid of these laws if they have a harmful discriminatory effect. This is to comply with the Directive's requirement that Member States abolish any provisions contrary to the principle of equal treatment. In order for the Department to comply with this provision, certain exemptions have now been removed in so far as they apply in relation to the relevant grounds.

These race specific issues are:

- Training for those not ordinarily resident in Northern Ireland
- Partnerships
- Small dwellings
- Charities in their role as employers
- Seafarers recruited overseas

KEY IMPROVEMENTS

New definition of indirect discrimination

Previously, indirect discrimination has occurred where a person applied a 'condition or requirement' which was apparently neutral but which did, or could, in fact put people of a particular racial or ethnic origin at a disadvantage, and which could not be justified on other grounds. The new definition replaces "condition or requirement" with the phrase "provision, criterion or practice" so far as discrimination on the relevant grounds is concerned. The new definition will cover formal requirements, conditions and provisions, as well as informal practices, thus widening the circumstances where indirect discrimination could occur. Such discrimination is unlawful unless it can be justified on other grounds.

Previously, the 1997 Order has required the complainant or claimant to show that a considerably smaller proportion of a particular racial group could comply with a requirement or condition. Demonstrating that usually involved a reliance on the use of statistical evidence.

The new definition of indirect discrimination makes it easier to use non-statistical evidence to establish a case, instead of solely statistical evidence, in cases involving the relevant grounds. The Directive enables Member States to allow indirect discrimination to be established without the need to produce statistical evidence.

Statutory prohibition of harassment

Previously racial harassment has not been expressly defined in the 1997 Order. However case law already considers harassment to be a form of unlawful direct discrimination in so far as it applies in situations where unwanted conduct violates someone's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for someone.

In order to avoid reducing existing protection afforded by domestic law, we are introducing the existing case law definition into the 1997 Order, in respect of claims brought on the relevant grounds.

The regulations therefore insert in the 1997 Order a definition of harassment as occurring when unwanted conduct, based on the relevant grounds, has the purpose or effect of violating someone's dignity or creating an environment that is intimidating, hostile, degrading, humiliating or offensive to someone.

When assessing the effect of such conduct on someone the court or tribunal will be able to take into account his/her perception of it, alongside other relevant factors.

Genuine occupational requirement

Article 8 of the 1997 Order lists specific jobs where being of a particular racial group is a genuine occupational qualification for one of those jobs. For example, it might be specified that waiters in a Chinese restaurant be of Chinese origin because the employer wanted to create an authentic atmosphere. Or a theatre might specify that an actor playing Martin Luther King be of Afro-Caribbean origin.

In order to comply with Article 4 of the Race Directive, which introduces the new concept of a genuine occupational requirement, Article 8 of the 1997 Order is repealed in respect of the relevant grounds. In its place the Department has introduced an exception based on genuine occupational requirements.

Employers will be able to recruit staff on the basis of a genuine occupational requirement if it can be shown that it is a genuine and determining requirement of the job to be of a particular race or of particular ethnic or national origins. In cases involving colour or nationality the existing provisions in Article 8 of the 1997 Order will continue to apply.

Private Households

Previously, private households have been exempt from the provisions of the 1997 Order in that they could discriminate when employing persons to work in the home. The regulations remove this exemption in so far as it relates to the relevant grounds.

As a consequence, discrimination in employment in a private household (for example, employment as a nanny, cleaner, or gardener), on the relevant grounds, will no longer be allowed. This will enhance the rights of the people who work in these fields. The changes are being made as a result of the need to abolish any laws contrary to the principle of equal treatment.

Agencies and private employers who recruit someone to work in a private household will no longer be able to discriminate, on the relevant grounds, in whom they select for employment. There is no distinction between employment in private households and other employment in the terms of the Race and Employment Directives.

However, when it is genuinely necessary for a person to be of a particular race or of particular ethnic or national origins in order to carry out particular employment, an employer may be able to rely on the new genuine occupational requirements provisions of the 1997 Order. The private household exemption will remain in respect of discrimination on the grounds of colour or nationality.

Discrimination after the relationship has ended

Previously, the 1997 Order has applied only to acts of discrimination occurring during the relevant relationship (e.g. employer/employee or any other relationship covered by the 1997 Order, during the course of which an act of discrimination or harassment directed by one party against another is unlawful). This has been the case regardless of whether the complaint or claim was brought during the relationship or after it had ended (providing it was within 3 months of the last act complained of).

The new provisions allow a complaint or claim to be brought in respect of an act of discrimination or harassment which occurs after such a relationship has ended. It will be unlawful for employers to discriminate or harass (for example, in the giving of references,) merely because employment has ended.

Barristers: complaints

Previously, claims of discrimination by/or against barristers under the 1997 Order have been heard in the County Court.

The regulations amend the 1997 Order to allow for complaints or claims of unlawful discrimination and harassment by or against barristers to be brought before industrial tribunals. This will only apply in relation to the relevant grounds. This will bring barristers into line with the provisions relating to employment, so far as the bringing of complaints on such grounds is concerned.

Burden of proof

Previously, under the 1997 Order, it has been the responsibility of the complainant or claimant to establish that he or she has been discriminated against or harassed. A tribunal or a court could only draw inferences from a respondent's failure to answer or put forward a defence.

Now, once the complainant or claimant has established a prima facie case, the onus is on the person alleged to have committed the act of unlawful discrimination or harassment to prove that he/she did not commit such an act. The change will apply only in respect of complaints or claims brought on the relevant grounds.

If there is a case to answer and the respondent has not brought forward a satisfactory defence, or fails to respond, the tribunal or court will find against the respondent.

Questionnaire procedure

Article 63 of the 1997 Order provides for a questionnaire procedure whereby an aggrieved person can question the respondent in alleged cases of discrimination. Previously, there has been no time limit within which the respondent had to reply, but merely a 'reasonable period', after which the court or tribunal could draw adverse inferences from the respondent's lack of response.

The new provisions establish a new eight-week limit for respondents to reply to aggrieved persons' questions about alleged acts of discrimination or harassment on the relevant grounds.

The new provision provides clarity by not leaving it to the courts to decide what is a 'reasonable period' within which respondents have to reply. Another benefit is that cases should now progress and be resolved more quickly.

Office holders

Previously, the provisions of the 1997 Order have applied only to appointments of office holders made by a Minister of the Crown or a Government department (where such appointments were not already covered by the employment provisions of the Order). The regulations apply the provisions of the 1997 Order to other appointments of office holders (in so far as the employment provisions of the Order do not already apply) so as to bring the Order into line with the legislation implementing the Employment Directive in this respect.

Public Authorities

The 1997 Order applies to race discrimination by public authorities but not all functions of public authorities are covered. The regulations remedy this by making it unlawful for a public authority to discriminate against or harass a person on the relevant grounds in carrying out any of its functions that fall within the scope of the Directive.

RACE SPECIFIC ISSUES

Article 14 of the Directive requires Member States to "take necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished". In order to comply with this requirement, we have removed, at least partially, some of the exemptions in the 1997 Order.

Training for those not ordinarily resident in Northern Ireland

Northern Ireland employers have been allowed to discriminate on racial grounds when employing people who come to this country to learn new skills and then return to their own country or elsewhere to use those skills. The regulations remove this ability to discriminate in so far as it relates to the relevant grounds. It will still, however, be possible to provide these skills to someone on the basis of their nationality or colour.

Charities as employers

Previously, charities have not been subject to the employment provisions of the 1997 Order. Charities that targeted their benefits at particular racial groups were able to recruit staff from a particular racial group.

As a result of the partial repeal of this exemption, charities will now be subject to the employment provisions in the 1997 Order in the same way as other employers, so far as discrimination or harassment on the relevant grounds is concerned. Charities will be able to rely on genuine occupational requirements when recruiting staff to undertake certain roles where the nature of the employment requires someone of a particular race or of particular ethnic or national origins.

Charities will continue to be able to rely on the existing exemption for the purpose of recruiting staff who need to be of a particular nationality, as the ground of nationality is excluded from the scope of the Directive.

Seafarers recruited overseas

Article 11 of the 1997 Order provided an exemption in respect of the employment of seafarers. There is provision in the 1997 Order (Article 69) for amendment or removal of Article 11 by a separate order.

The Department has amended Article 11 by virtue of such an Order, to ensure that employers will no longer be allowed to discriminate on the grounds of race, ethnic or national origins or colour in relation to the employment of seafarers recruited overseas. This means that the only ground on which

discrimination in employment will not be outlawed is nationality and the only matter not covered by the discrimination provisions is pay.

Partnerships

Article 12 of the 1997 Order (concerning discrimination in or by partnerships) stated that partnerships of fewer than six persons were exempt from its provisions.

The regulations remove this exemption in relation to the relevant grounds. Now, partnerships of any size are subject to the same rules under the 1997 Order in relation to discrimination on those grounds.

Small dwellings

Previously, landlords who dispose of or manage small dwellings have been exempt from the provisions of the 1997 Order. Under the Order "small dwellings" are dwellings in premises which are shared, at least in part (e.g. kitchen or washroom), with the landlord or his family and which accommodate up to two other households or up to six other people, as the case may be. This has meant that landlords who rented out such dwellings were able to discriminate when doing so.

The regulations remove this exemption in so far as it relates to the relevant grounds. A landlord who wishes to rent out a room within a property, in which he or his family live, and share facilities with other tenants, will no longer be able to discriminate on the relevant grounds.

This change will bring the housing provisions of the 1997 Order more in line with the provisions dealing with private household employment.

FURTHER HELP

For further help, the Equality Commission for Northern Ireland offers free advice on race, sex, religion, political and disability discrimination and equality issues generally. Contact details are:

Tel: 028 9050 0600

Web: www.equalityni.org

The Office of the First Minister and deputy First Minister
July 2003