Does sex discrimination apply to both sexes?

Discrimination on the ground of sex, was outlawed by the Sex Discrimination Act 1975 ("the 1975 Act"). It is important to remember that it makes direct and indirect discrimination unlawful against both men and women.

What is Direct Discrimination?

A Under section 1 of the Sex Discrimination Act 1975 (the 1975 Act):

A person discriminates if he treats or would treat a man or woman, on the ground of his or her sex, less favourably than a person of the opposite sex.

It is unlawful for a recruitment consultancy to accept and act upon a directly discriminatory instruction from an employer. For example, an employer who states that an individual must have certain qualifications and experience, but must also be of a certain sex or marital status, i.e.: -
'Male graduate required, with honours degree in Chemistry, for teaching post beginning September'
'Must be free to travel, no married applicants'.

Merely treating men and women differently does not indicate sex discrimination. The treatment has to be less favourable on the grounds of sex or marital status. For example, Employment Tribunals have taken the view that restrictions on hair length and the wearing of earrings for male employees are not discriminatory even though different rules apply to women.

This is illustrated by the Court of Appeal decision in Smith v Safeway PLC (1996). They held that the prohibition of ponytails for male employees did not constitute less favourable treatment because the same standard of conventional appearance at work was rigorously applied to both male and female employees. The Court ruled that a code that applies a conventional standard of appearance is not of itself discriminatory. While one of the aims of the Sex Discrimination legislation is to prevent unequal treatment of the sexes arising from conventional attitudes, this does not render discriminatory an appearance code that applies a common standard as to what is conventional.

What is Indirect Discrimination?

Section 1 of the 1975 Act also defines indirect discrimination as follows:

where a person applies to a woman a provision, criterion or practice which he applies or would apply equally to a man, but (i) which is such that it would be to the detriment of a considerably

larger proportion of woman than of men; and, (i) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and (iii) which is to her detriment.

This definition also applies to indirect discrimination against men, with the obvious modifications applied to it.

Indirect discrimination for example on grounds of marital status arises where a requirement or condition, applied equally to married and unmarried people of the same sex, has, in practice, a disproportionately adverse effect on married as compared to unmarried people and cannot be shown to be justified in terms of the job to be done, irrespective of marital status. For example, 'This is a demanding job, unsuitable for applicants with family responsibilities'.

Other examples of indirect discrimination include requiring a person to be willing to work evenings when this is not operationally necessary; automatically refusing training or promotion to part-timers if most part-time jobs are done by women but most full-timers are men; unjustifiable mobility requirements; imposition of unnecessary restrictions to hours of work; and exclusion of candidates with the main responsibility for care of dependants.

In certain circumstances, the use of age as criteria for selection may amount to unlawful discrimination on grounds of sex. In Price v Civil Service Commission Society of Civil and Public Servants (1977), the Employment Appeals Tribunal established that the setting of age requirements was indirectly discriminatory. In the case of Mrs. Price the tribunal ruled that an age limit of 28 was a requirement which a considerably smaller proportion of women than men could comply for reasons of child care and family responsibility.

It is also unlawful for a recruitment consultancy to accept and act upon an instruction which would amount to indirect discrimination from an employer.

Can indirect discrimination ever be justified?

AThe employer has a defence to an indirect discrimination claim if it can be shown that the requirement is justifiable irrespective of the sex of the person to whom it applies. There is no definition of “justification” and therefore the employer must prove on the balance of probabilities the reasons for the “justifiable” requirement.

This balancing exercise was established in the case of Steel v Union of Post Office Workers & Another (1978) where the Employment Appeal Tribunal decided that an employer must demonstrate that a practice was necessary, rather than just convenient.

An employer claiming the defence of justification must therefore prove that he or she has imposed a discriminatory provision, criterion or practice because of his or her needs as an employer, and that the provision, criterion or practice must relate to the job.

What amounted to sexual harassment before the recent amendments?

ASexual harassment has only recently been enacted in statutory form although up to now sexual harassment may constitute sex discrimination. However, the 1975 Act was amended on 1 October 2005, and the amending Regulations define sexual harassment and related forms (below). However, as the law has stood up until the amendments were made, in order to prove sexual harassment a person had to establish that they have been treated less favourably on the grounds of their sex. They had to show that a person of the opposite sex would not have been subject to this treatment and that it has resulted in their suffering some detriment such as disciplinary action being taken against them, dismissal (actual or constructive), transfer or failure to promote or train.

It is still worth looking at the law before the statutory amendments, as the case law below is useful for the purposes of illustration.

Up until the statutory amendment, sexual harassment was generally taken to mean behaviour by one sex which is intended to embarrass, humiliate or threaten a member of the opposite sex. It can include unwanted physical advances, verbal abuse and even non-verbal gestures or looks.

Employers must treat complaints of sexual harassment very seriously and thoroughly investigate the matter in order to show that they took reasonable steps to prevent the harassment occurring or recurring. This is because employers may be liable for harassment which employees suffer from fellow employees, customers or clients.

In Chrysanthou and Pinto v Hankyu International Transport and Coker (1995) two female employees complained about offensive remarks that their line manager had made to them. The employers carried out a thorough investigation and gave the manager a formal written warning. The Tribunal was satisfied that the employers had taken such steps as were reasonably practicable to prevent the manager from repeating the offensive behaviour.

The case of Chief Constable of the Lincolnshire Police v Stubbs (1999) considered whether an employer could be liable for the harassment of an employee outside the work place. S and W were police officers with the Lincolnshire Police who had both been seconded to the Regional Crime Squad (RCS). While they were working with the RCS, two incidents occurred which led S to complain that she was being sexually harassed by W. One of these incidents occurred when S went for a drink at a pub after work with several fellow officers. The subsequent incident which also took place in the pub occurred at the leaving party of another officer. It was argued on behalf

of the Chief Constable that as the incidents of sexual harassment had taken place in pubs and both were social occasions at which everyone was off duty they had not occurred in the course of W's employment. The Employment Appeal Tribunal (EAT) rejected this argument. The EAT stated that the Employment Tribunal had to consider whether what had occurred between S and W occurred in circumstances that were "an extension of their employment". This was a question of the exercise of good judgment by the Employment Tribunal. The EAT thought that the borderline between cases where an employer is liable and those for which there was no liability may be difficult to find. Two of the factors which the Employment Tribunal would need to consider were whether or not the person was on duty and whether or not the conduct occurred on the employers' premises. In the instant case although the two incidents did not occur at the Police Station, the EAT thought that "they were social gatherings involving officers from work, either immediately after work or for an organised leaving party".

Accordingly the EAT decided that the incidents should be regarded as part of the employment relationship.

Members must therefore ensure that they apply good employment practices to control any potential sexual harassment incidents in the course of employment and possibly outside the work place, particularly since the term 'in the course of employment' has been widely construed by the Courts.

An example of good employment practice would be to have a sexual harassment equal opportunities policy in place. The policy should explain the types of behaviour considered inappropriate in the work place, the procedure for investigating the complaint and the disciplinary measures that may be taken. Merely having a policy in force is not enough and employers must ensure that it is effectively communicated to all employees, and used when necessary.

What are the new statutory definitions of harassment and sexual harassment?

The Employment Equality (Sex Discrimination) Regulations 2005, introduce a statutory definition of sexual harassment into the 1975 Act. /the definition is complicated, so it is beneficial to examine it in detail.

i) Harassment

A person subjects a woman to harassment if -

a) On the grounds of her sex, he engages in unwanted conduct that has the purpose or effect of i) violating her dignity or ii) of creating an intimidating, hostile, degrading or offensive environment for her.

ii) Sexual Harassment

b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect i) of violating her dignity or ii) of creating an intimidating, hostile, degrading, humiliating or offensive work environment for her or

c) On the grounds of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b) he treats her less favourably than he would treat her had she not rejected or submitted to the conduct.

Conduct shall be regarded as having the relevant effect on a woman only if, having regard to all the circumstances, including in particular the perception of the woman; it should reasonably be considered as having that effect.

The provision applies equally to the harassment of men, and for that purpose shall have effect with such modifications as are requisite.

What are the issues relating to pregnancy?

Employers should avoid questioning a job applicant about whether she intends to start a family, has young children or is pregnant as this can give rise to a claim by her that she has been discriminated against on the grounds of her sex. Similarly a refusal to employ a woman because she is pregnant will almost certainly be direct sex discrimination.

However, if the position is for a short fixed term period covering the whole of the person's pregnancy, then the House of Lords decision in Webb v EMO Air Cargo (UK) Ltd (1994) indicates that a refusal to employ in that situation would not be discriminatory if a man who was similarly unavailable would not have been recruited.

To dismiss a woman for a reason connected with her pregnancy is automatically unfair. The refusal to allow a woman to return back to work after the birth of her child on a part time basis could constitute direct sex discrimination. If the employer can show that it is justified in requiring the woman to return on a full time basis - for example due to the resources and the size of its business - then the employer may be able to defend such a claim.

Temporary workers engaged under a contract for services are not entitled to return back to work after maternity leave because they are not employees as defined under the Employment Rights Act 1996. However, members need to treat such requests with caution as they or the client's refusal could be deemed to be discriminatory under the 1975 Act.

This was highlighted in the case of Patefield v Belfast City Council (2000). Ms Patefield worked for a recruitment agency, which supplied her services to Belfast City Council from February 1995. In September 1997 she became pregnant. In February 1998 she wrote to the Council informing

them of her intention to return back to work. They replied that they could not provide confirmation and in any event she was not an employee under a contract of employment. In August 1998 Ms Patefield wrote to the Council that she would be available to return to work. The Council replied that she could not return to her previous position, as a permanent employee now filled it. Ms Patefield brought a claim under the Sex Discrimination Act and argued that they discriminated against her by failing to make her former post available to her on her return from maternity absence. She also claimed that she was the employee of Diamond Recruitment. The Industrial Tribunal held that Ms Patefield was the employee of Diamond Recruitment and also held that she had been discriminated against on the grounds of her sex by Belfast City Council. The Council appealed to the Court of Appeal, which in reaching a decision, asserted that the Council could have lawfully replaced Ms Patefield with a permanent employee at any time whilst she was in the post, however, it was unlawful to replace her while she was on maternity leave.

The facts of this case were unusual in that the Industrial Tribunal found that Ms Patefield would have remained in her post if she had not been off work for maternity reasons. She was also held to be the employee of Diamond Recruitment. The other distinguishing factor was that Ms Patefield had been continuously working for the Council for several years before taking maternity absence. REC has always advised members that the longer a temporary worker is placed with a client the more likely they are to be deemed to be the employee of the employment business. Clearly if a temporary worker's assignment has genuinely come to an end then they will not have the right to return back to work.

Equal pay

The Equal Pay Act 1970 ("the 1970 Act") governs the equal treatment of men and women as far as contractual benefits are concerned such as wages, commission and bonus payments and other benefits associated with their employment. The Equal Pay Act makes it unlawful to discriminate on the basis of sex by providing less favourable contractual terms. If a woman is treated unlawfully in this manner, she is entitled to have an equality clause read into her contract to ensure she receives the same benefits as a man.

In what circumstances can the 1970 Act be invoked?

To rely upon the 1970 Act, a woman (or a man) has to establish one of the following:-
that she is carrying out work which is the same, or is broadly similar to work being carried out by a man, or men in the same employment, or that she is carrying out work which has been rated as equal, through a job evaluation study, to work being carried out by a man or men in the same employment or, that she is carrying out work which is of equal value to the work of a man or men, in the same employment.

The equal pay directive

Workers who are not able to bring a claim under the 1970 Act may bring a claim under EU Law. The appropriate legislation is Article 119 of the Equal Pay Directive, which requires equal pay for men and women to be introduced for the same work, or for work to which equal value is attributed. The Directive also requires the elimination of all discrimination on the grounds of sex with regard to all aspects and conditions of remuneration.

Article 119 has been relied on in employment terms which discriminate against a person but the individual could not pursue a claim in the United Kingdom under the 1970 Act, which, originally excluded claims relating to retirement such as pensions. There was however no such exclusion in Article 119 so complainants in the UK relied directly on Article 119 to claim equal pay with regard to pension benefits.

The impact of Article 119 is illustrated in McCarthy's Ltd v Smith (1980). Mrs. Smith took over a job as a stockroom manager from a man who was paid £60 per week. She, however, was paid only £50 a week. The European Court of Justice held that she could bring a claim under Article 119 notwithstanding her comparator was not employed at the same time as her.

The case of Diocese of Hallam v Connaughton (1996) also concerned the 1970 Act and Article 119. Ms Connaughton was employed by the Diocese of Hallam earning £11,138. When she resigned she was replaced by a man who was paid £20,000. Although she could not use her replacement as comparator under the 1970 Act, the Employment Appeal Tribunal held that he was a valid comparator under Article 119, remitting the case to the Tribunal to enquire whether there was a defence of any genuine material factor justifying the difference.

Which party bears the burden of proof?

Like the other areas in discrimination laws, the burden of proof is reversed if the complainant can make out a basic case to the tribunal, after which it is effectively then for the accused to prove he did not discriminate.

More precisely, where, at the hearing, the complaint proves facts from which the tribunal could conclude, in the absence of an adequate explanation, that the accused (which could be an employer, agency or employment business) has committed an act of discrimination, the tribunal shall uphold the complaint, unless the employer, etc, proves he did not commit the act.

Consequences of discrimination

If an employer is found guilty of sex discrimination under the Sex Discrimination Act 1975 before an Employment Tribunal, the Tribunal can make a declaration that the individual has been

discriminated against, and make a recommendation that steps are taken by the employer to remedy the situation and assist the person making the complaint. In addition, the employer could be ordered to pay compensation (and interest at the Tribunal's discretion) for loss suffered and injury to feelings. There is no limit on the amount of compensation payable and in situations where an employer has been found to act unlawfully, such an award of compensation is commonplace. If an employer or defendant is found guilty of breaching the Equal Pay Act 1970, a Tribunal can invoke an equality clause as described in Q8 - Equal Pay above, and order payment of future (equal) pay and back pay for a maximum of two years, plus interest.

Advertising

Any advertisement which indicates, or could reasonably be understood as indicating, an intention by anyone to commit an act of unlawful discrimination is itself unlawful.

'Advertisement' is very widely defined in the 1975 Act and covers every form of advertisement, whether or not to the public. This means that newspapers, publications, TV, radio, notices, signs, labels, show cards and circulars would all be considered to be an advertisement for the purposes of the 1975 Act.

Unless there is an indication to the contrary, an advertisement could be said to indicate an intention to discriminate if a job is described as 'waiter', 'salesgirl', “sportsman' or 'stewardess'.

Exceptions – genuine occupational qualifications

There are a few exceptions from the legislation where a person's sex may be a genuine occupational qualification (GOQ) for a job, in which case sex discrimination in advertising is not unlawful. A GOQ is not an automatic exception for a whole category of jobs. In every case, the employer must show, at the beginning of the recruitment process, i.e. before the vacancy is advertised that, if an exception is being claimed, that the GOQ applies to the job in question. If an employer already has employees of the appropriate sex who could reasonably carry out those duties, a GOQ cannot be claimed.

It is always necessary to check carefully the facts about the particular job in question when a GOQ is being considered, to be sure that to require a worker of a particular sex, is necessary, and not merely because it is preferable. A GOQ must be re-assessed on each occasion a post becomes vacant to ensure that it can still be validly claimed. GOQ provisions apply to both men and women. A GOQ can only be claimed where it is necessary for the relevant duties to be carried out by a specified sex. A GOQ exception can apply where only some of the duties of the job come within the exception. However, a GOQ does not apply in relation to marital status.

The list of GOQs recognised by the 1975 Act (as amended by the 1986 Act), is set out below. It is an exhaustive list, so any other reasons which do not fit any of the categories, such as administrative convenience, client pressure etc. are not valid defences to a sex discrimination claim.

Where the "essential nature of the job" calls for either a man or woman:-

- for reasons of physiology (excluding strength or stamina), or
- in dramatic performances or other entertainment,
- For reasons of authenticity so that the essential nature of the job would be materially different if carried out by someone of the other sex.

'Physiology' applies to jobs where only one sex is appropriate, i.e. a model for maternity clothes.

'Strength' and 'stamina' are expressly excluded to discourage employers from applying stereotyped presumptions, such as assuming physical strength and stamina are exclusively male characteristics, or that slender and nimble fingers are an exclusively female characteristic.

'Authenticity' covers requirements for male or female actors or models.

The job needs to be held by one particular sex in order to preserve decency or privacy

Because:-

i) It is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or

ii) the holder of the job is likely to do his work in the circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities (e.g. men's changing room attendant if it is unavoidable for the attendant to be present when and where facilities are in use)

iii) the job is likely to involve the holder of the job doing his work or living in a private home and needs to be held by a man because objection might reasonably be taken to allowing a woman: -

iv) The degree of physical or social contact with a person living in the home, or

v) the knowledge of intimate details of such a person's life, which is likely, because of the nature or circumstances of the job or of the home, to be allowed to, or available to the holder of the job (e.g. nurse/companion in the home).

For this GOQ to apply, tribunals have frequently pointed out that it must be necessary, rather than merely preferable, to have a member of the sex in question perform the job.

The last category in this section, i.e. the private home exception can cover a wide range of jobs including, for example, nursing care, domestic cleaners and nannies. In Neal v Watts, a tribunal ruled that a man, who was a professionally qualified nanny, was unlawfully discriminated against on grounds of sex when he was refused a job as a nanny because being a woman was not a GOQ for the job. The tribunal remarked, however, that in many cases concerning male nannies, the GOQ defence would apply.

Other genuine occupational requirements

[i] the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in the premises, provided by the employer, and both of the following circumstances apply:-

- the only such premises which are available for persons holding that kind of job are lived in, or normally lived in by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men, and
- It is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women (e.g. a job involving use of communal crew accommodation in some ships).

'Premises' has the ordinary common-sense meaning of the word, and employees 'live in' only if they have temporary or permanent residence at the employer's premises. Lack of separate accommodation for members of one sex, will only provide a GOQ defence if it is not reasonable to expect the employer to change this. 'Reasonableness' will be determined on the facts and circumstances of each particular case.

[ii] The nature of the establishment, or of the part of it within which the work is done, requires the job to be held by a person of a particular sex

- because:- it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision and attention (such as a children's or elderly people's home) and
- those persons are all of one sex (disregarding any whose presence is exceptional),
- and it is reasonable, having regard to the essential character of the establishment, that the job should not be held by a person of a different sex from the occupants of the establishment.

[iii] Where the holder of a job provides individuals with personal services promoting their welfare or education, or similar personal services - and those services can most effectively be provided by a member of a particular sex.

Examples of this include rape counsellors, or birth control advisers.

The services to be provided must be personal, i.e. face-to-face contact between the giver and the recipient, and in any particular situation, it is important to consider whether the personal services would be less effective if provided by others.

[iv] being a man is a GOQ if the job is likely to involve the performance of duties outside the United Kingdom, in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman

This GOQ would cover jobs in a number of Middle Eastern countries, and it is important that the defence rests on laws and customs, and not general prejudice or preference.

[v] When a job is one of two to be held by a married couple, being a man or woman is a GOQ

In such a case, employers would be entitled to insist that they want a husband and wife team and not two men or two women.

NOTE:
Although being a member of a particular sex can amount to a GOQ in certain circumstances, the availability of a GOQ defence may be lost if the employer already has employees of the appropriate sex who:

- are capable of carrying out the duties for which sex is a GOQ and,
- it would be reasonable to employ them on those duties and,
- their numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience.

If this is the case, an employer cannot rely on any GOQ's to justify sex discrimination. The REC recommends that a job for which a GOQ was used in the past should be re-examined if the post falls vacant, to see if the circumstances have changed as to whether the particular GOQ, or any other GOQ, still applies or not. If it does not, then no GOQ defence will be available, and both sexes would have to be treated equally, if they wanted to apply for the job.

Retirement ages

It is unlawful to discriminate against women in relation to retirement, or to set different retirement ages for men and women:

- in the terms on which employment is offered as regards access to promotion, transfer or training;
- during employment, as regards access to promotion, transfer or training;
- By dismissing her or subjecting her to any detriment that results in dismissal or involves demotion.

There is however nothing in the 1975 Act which prevents employers from setting different retirement ages for different groups of worker s, provided there is no sex discrimination involved.

This is illustrated in the case of Bullock v Alice Ottley School 1993. Ms Bullock was employed as a part time pantry assistant. She was dismissed when she turned 60 – the retirement age for administrative and domestic staff. She argued that colleagues who worked as gardeners and maintenance personnel, who were almost exclusively men, were allowed to work until 65, and that she had therefore been discriminated on the grounds of sex. The Court of Appeal in reaching a decision accepted that the later retirement ages for the gardeners and maintenance men was necessary because of the difficulty in recruiting staff and the need to retain them as long as possible. The school had therefore objectively justified its different retirement ages.

The Occupational Pension Schemes (Equal Access to Membership) (Amendment) Regulations 1995 makes it unlawful for employers to discriminate on the grounds of sex, in deciding on membership of an occupational pension scheme. Employers will have to be careful not to discriminate indirectly by imposing conditions which have a disproportionate effect on one sex, for example, the number of hours worked per week, unless it can be objectively justified on grounds other than sex.