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## European Employment Law Briefing

### **The Sex Discrimination Act 1975 (Amendment) Regulations 2008 (“the Regulations”)**

The Regulations came into force on 6 April 2008, and make various amendments to the Sex Discrimination Act 1975 (the “Act”) in order to implement properly the EC Equal Treatment Amendment Directive (No.2002/73). The Regulations are in response to the High Court’s decision in *Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] IRLR 327*, in which it was found that the Act did not adequately implement the Directive.

The Regulations make three key changes:

- an amended definition of sexual harassment;
- an extension of vicarious liability for employers who fail to protect employees from third-party harassment; and
- an amended definition of discrimination on grounds of pregnancy or maternity, which removes any element of comparison to non-pregnant women. Furthermore, pregnant women will now have the right to the same terms and conditions during additional maternity leave (weeks 27 - 52) as they previously enjoyed during ordinary maternity leave (the first 26 weeks). Coinciding with this are changes to the way discretionary bonuses are paid during maternity leave.

#### New harassment definition

S.4A of the Act, in its previous form, provided that a person subjects a woman to harassment if, “*on the ground of her sex, he engages in unwanted conduct that has the purpose or effect of violating her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her*”. The Regulations substitute the words “*on the ground of her sex*” with the words “*related to her sex or that of another person*”. Consequently, a person complaining of harassment under the Act will, in future, only be required to show that the alleged treatment was connected or associated with gender and not, as was previously the case, that it took place because the complainant was a woman or man. This is a much wider test and acts to eliminate the issue of causation between harassment and the sex of the person being harassed - in other words, harassment no longer needs to be motivated by the fact that the victim is a woman (or a man).

For example, where male colleagues dislike a female colleague and decide to put office equipment on a high shelf to make it hard for her to reach, the former definition would have been unlikely to apply (because the men are acting out of dislike of the woman and not because she is a woman) but the new definition may apply because the conduct of putting equipment on a high shelf relates to sex because women are, on average, shorter than men.

Another example is where an employee is in the habit of using sexual language in front of fellow employees generally. Previously this may not have constituted sexual harassment because the employee did not use the language “on grounds” of a woman’s sex, he used it in front of everyone regardless of sex. In future, such a scenario would appear to be a clear-cut case of sexual harassment.

Importantly, the Regulations also mean that witnesses to sexually related behaviour may have claims for sexual harassment if the behaviour they see, for example, violates their dignity. In other words, the behaviour in question no longer needs to be targeted at the person who brings the claim. For example, hearing someone tell a joke about women being bad drivers could be sufficient to form a claim if this creates, say, an offensive environment for someone who hears it.

### Liability for third parties

The Regulations also amend the Act so as to impose liability on an employer for failing to protect employees from harassment by third parties, such as a customer. An employer who fails to take reasonably practicable steps to protect employees from third-party harassment, where such harassment was known by that employer to have occurred on at least two other occasions, will be vicariously liable for those acts. In other words, employers will only be liable for failing to prevent harassment of which they have knowledge, which is repetitive and is within their control. Perhaps surprisingly, liability will be incurred irrespective of whether the third party is the same or a different person on each occasion.

### Pregnancy

The changes set out below apply only to women whose expected week of childbirth falls on or after 5 October 2008.

The changes regarding pregnancy are threefold. Firstly, the Regulations remove the requirement for a woman claiming under the Act to compare her treatment to that of a woman who is not pregnant or not exercising a right to maternity leave. This means that a claim of discrimination need only show that a woman has been treated less favourably on grounds of pregnancy or maternity leave without reference to how she would have been treated had she not become pregnant or chosen not to take maternity leave.

Secondly, the Regulations widen the extent to which it is discriminatory to deprive a woman of the benefit of her terms and conditions of employment during maternity leave. Going forward, the same types of discrimination claim which are permitted during the ordinary maternity leave period can now be brought during the additional leave period. Hence, a woman will be entitled to enjoy benefits such as private medical insurance and accrual of contractual holiday during her whole pregnancy. This is a significant extension of maternity rights as, under the previous law, employees were only entitled to continue to enjoy all of their normal contractual and discretionary benefits (with the exception of their full salary) during ordinary maternity leave whereas during additional maternity leave few contractual terms continued to apply.

Thirdly, a woman on maternity leave will be able to claim discrimination for non-payment of a discretionary bonus that relates to the two-week period following childbirth when she is on compulsory maternity leave (i.e. the period when a woman is legally prevented from working).

### What should employers do?

- Review and update as necessary your equal opportunities and/or harassment policies to prohibit sexually related language or behaviour. Consider rolling out training for employees so that they are aware that certain office “banter” may now create liability under the Act. Further, posters, calendars or magazines with a sexual content may need to be excluded from the office environment.

- Implement appropriate checks and controls as regard how third parties behave towards your employees. Consider implementing a policy advising employees how to respond to third party harassment. Such action will be especially important where employees have significant interaction with the general public, for example in the entertainment or hospitality sectors.
- Review and amend as necessary your company's provision of benefits to and treatment of women on additional maternity leave so that they are in a comparable position to those on ordinary maternity leave. Review discretionary bonus procedures to ensure that women receive appropriate payments in respect of the compulsory maternity leave period.

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