



Sexual orientation discrimination and pensions

Employment, pensions and benefits: briefing 98

Executive summary

New legislation will imply into occupational pension scheme rules a rule prohibiting discrimination on the grounds of sexual orientation in respect of periods of service from 1 December 2003. This briefing looks at the current law and considers the changes to be made by the new law.

Current law

There is currently no prohibition in the UK against discrimination on the grounds of sexual orientation. There are no UK laws that expressly prohibit discrimination on the grounds of sexual orientation. There have merely been attempts to bring claims under the Sex Discrimination Act 1975 on the basis that discrimination on the grounds of sex not only referred to gender but also included sexual orientation.

If there was ever any doubt as to whether discrimination on the grounds of sexual orientation is prohibited under existing EU law, it was extinguished by the leading case of *Grant v South West Trains*¹.

In *Grant*, Ms Grant applied for a concessionary travel ticket for her same-sex partner. The tickets were available to a spouse or a 'common law opposite-sex spouse'. Ms Grant claimed that differences in treatment based on sexual orientation are included within 'discrimination based on sex', which is prohibited by article 141 (then article 119) of the Treaty of Rome, and that failure to provide her same sex partner with the concessionary tickets was contrary to the Equal Pay Directive. The court dismissed this, concluding that the same condition applied equally to gay men and gay women. The court observed that stable homosexual relationships do not fall within the scope of the right to respect for family life under article 8 of the Human Rights Convention. The court said:

'an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a

person who is married or has a stable relationship outside marriage with a partner of the opposite sex.'

In the Scottish case of *MacDonald v Ministry of Defence*², in which the Grant case surprisingly does not seem to have been considered, Mr MacDonald argued that his dismissal on the grounds of his homosexuality contravened the Sex Discrimination Act 1975 on the basis that a woman would not have been dismissed on the grounds of being sexually attracted to a man. In his dissenting opinion, Lord Prosser of the Court of Session was satisfied that there had been a breach. However, on appeal, the majority of the House of Lords confirmed that the Sex Discrimination Act 1975 could not be interpreted so expansively to include discrimination on the grounds of sexual orientation rather than sex.

The current position in the UK is therefore very clear that there is no prohibition against discrimination on the grounds of sexual orientation.

Law from 1 December 2003

The Employment Equality (Sexual Orientation) Regulations 2003³ and the draft Employment Equality (Sexual Orientation) Regulations 2003⁴ (Amendment) Regulations 2003 (together EESOR) will change the position from 1 December 2003.

¹ [1999] 39 PBLR; [1998] All ER (EC) 193.

² [2002] ICR 174.

³ SI 2003 No. 1661.

⁴ Consultation draft issued on 15 September 2003.

EESOR implements those provisions of the European Equal Treatment Directive⁵ which make it unlawful for an employer, in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person on grounds of sexual orientation in employment and vocational training. This includes discrimination as to terms of employment or opportunities for receiving any benefit. EESOR prohibits direct discrimination, indirect discrimination, victimisation and harassment.

Some terms

Sexual orientation

A sexual orientation towards persons of the same sex, persons of the opposite sex or persons of the same sex and of the opposite sex.

Employment

Includes employment under a contract of service or of apprenticeship or a contract personally to do any work; parallel provisions apply to employees, contract workers and office holders.

Discrimination

Treatment which is either (direct discrimination) less favourable or puts or (indirect discrimination) could put persons of a particular sexual orientation at a disadvantage when compared with other persons in materially the same circumstances and which cannot be shown to be a proportionate means of achieving a legitimate aim. (There is an exception for a genuine occupational requirement, but this is unlikely to be relevant to pensions.)

(Employment and contract work) at an establishment in Great Britain

The employee

- does his work wholly or partly in Great Britain; or
- is ordinarily resident in Great Britain but does his work wholly outside Great Britain for an employer with a place of business in Great Britain.

Harassment

This is unwanted conduct which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for another person.

The draft amending regulations extend the provisions of the original regulations to the trustees and managers of occupational pension schemes (including those relating to harassment). This briefing considers those parts of EESOR which may have an impact on pensions.

Remedies

EESOR provides remedies for individuals, including compensation, by way of proceedings in employment tribunals and in the county courts; claims must normally be brought within three months of the act complained of in the case of the employment tribunal and six months in the county court. The burden of proof is on the respondent to prove that he did not commit the alleged discriminatory act. Claims in relation to discrimination by a pension scheme will also be possible before the Pensions Ombudsman and the courts.

Discrimination by occupational pension scheme trustees

Admission and benefits

The amending regulations extend the provisions of the original EESOR to the trustees and managers of occupational pension schemes. They make it unlawful, with regard to rights accrued or benefits payable in respect of periods of service from 1 December 2003, 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).

For this purpose, every occupational pension scheme is to be treated as including, in respect of periods of service from 1 December 2003, an overriding 'non-discrimination rule' to that effect. All rules of the scheme are to be read subject to that non-discrimination rule. If trustees wish to include an express non-discrimination rule in the scheme rules but do not have power to do so under the scheme documentation, EESOR grants them an overriding power to make such an amendment by resolution.

The requirement for a non-discrimination rule means that any scheme which provides survivor benefits for unmarried opposite-sex partners must also provide them for same-sex partners.

⁵ Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and training. The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003 No. 1660), which will implement other parts of the Directive and which will come into force the following day, are unlikely to have an impact on pension schemes. The government's consultation on age discrimination is dealt with in our briefing 99, *Age discrimination and pensions* (November 2003).

Exception for benefits dependent on marital status

EESOR contains an express exemption allowing access to a benefit to be limited by reference to 'marital status'. Current pension practices of limiting some benefits to spouses will therefore continue to be permissible, although not without challenge. For example, several trade unions have recently taken a case to the High Court on the grounds that the restriction by reference to marital status is detrimental to same-sex partners and amounts to a failure to properly implement the European Equal Treatment Directive and could also breach the Human Rights Act. A scheme which provides survivor benefits for unmarried heterosexual couples but not for (unmarried) homosexual couples will, however, be in breach of EESOR.

This leads on to the question of whether, in the absence of amending regulations, registered civil partnerships will

be treated under EESOR as 'marital status'. Our recent briefing⁶ dealt with the government's proposals for civil partnership registration, which would be broadly the equivalent, for adult same-sex couples, of marriage between opposite-sex couples in terms of legal status; rights and responsibilities (during the relationship, on dissolution and following the death of one partner); and formalities for registration and dissolution.

As we noted in our previous briefing, both the civil partnerships consultation paper and EESOR were issued by the Department of Trade and Industry, yet neither makes reference to the other.

The differences in the scope of the consultation paper and EESOR as they apply to private pension schemes may be summarised by the following table.

	Civil partnership registration	EESOR
Formal evidence of same-sex partnership (and its dissolution) available?	Yes.	No.
Spouse benefits (in excess of contracted-out rights) payable as of right to same-sex partner?	Yes, if scheme rules permit ⁷ .	No, if scheme restricts survivor benefits to married partners; in that case, benefits will be payable to same-sex partners, if at all, only: <ul style="list-style-type: none">• at discretion of trustees;• if there is no spouse; and• the same-sex partner can prove financial dependency (or interdependency). Yes, if survivor benefits are payable to unmarried opposite-sex cohabitantes.
Spouse's contracted-out rights payable as of right to same-sex partner?	Yes (but not clear whether schemes may apply this to past, as well as future, contracted-out rights).	No.
Pension sharing available?	Yes.	No.
State pension rights the same as for married couples?	Yes, from 2010.	No.

⁶ *Government proposals for civil partnerships: impact on pension schemes* (EPB briefing 93, July 2003). Government consultation paper available at www.womenandequalityunit.gov.uk.

⁷ The consultation paper seems to envisage that it would be for private sector schemes to decide whether or not to extend these benefits to registered partnerships.

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Action

Pension scheme trustees should check the rules of their pension schemes: if the scheme provides for survivor benefits for unmarried opposite-sex partners but not same-sex partners, then this will have to be rectified with effect from 1 December 2003. While an overriding rule will be implied into the scheme rules from that date, trustees may prefer the insertion of an express rule for the sake of clarity.

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