

**RACE RELATIONS ACT 1976 (AMENDMENT) REGULATIONS 2003**

**BRIEFING PAPER**

The **RACE RELATIONS ACT 1976 (AMENDMENT) REGULATIONS 2003 Statutory Instrument 2003/1626** (hereafter ‘the Race Regulations’) which aims to implement the Race Directive<sup>1</sup>, came into effect on 19 July 2003. The main changes of practical significance to the Race Relations Act (RRA) include: ‘**new definition of Indirect Discrimination**’, ‘**free standing definition of racial harassment**’ and ‘**changes in the burden of proof**’. The changes are important but they will only affect some forms of racial discrimination under the Race Relations Act 1976 (RRA76) and not others due to the mismatch in definitions of prohibited grounds of discrimination as between the RRA and the Regulations. The changes although important are minimal, the consequences of which are two-fold: -

1. The changes only relate to cases alleging discrimination on the grounds of ‘race’, ‘ethnic or national origins’, but **not** ‘colour’ or ‘nationality’. This is because the EU Race Directive only prohibits discrimination on grounds of ‘ethnic origin’ and ‘race’. **Acts of discrimination on ground of ‘colour’ and ‘nationality’ are still prohibited under the RRA76**
2. Changes only apply to limited spheres of discrimination which are within the scope of the Directive. For example, the new changes do not affect all claims of discrimination by public authorities under s.19B of the RRA<sup>2</sup>, but only those s.19B claims which also fall within the scope of the Directive.

**KEY CHANGES:**

**1. New definition of Indirect Discrimination (Regulation 3)**

Regulation 3 inserts a new **s.1 (1)** and makes the trigger for an indirect discrimination claim a ‘**provision, criterion or practice**’, which is broader and more flexible than the concept of a ‘condition or requirement’ as found under s.1 (1) (b) of the RRA76. The test of whether the employer can show that the condition or requirement is “justifiable” is replaced. The new definition provides that the employer must show that application of the provision, criterion or practice is “a proportionate means of achieving a legitimate aim.”

The new definition covers informal and formal practices and can be extended to practices which tend to discriminate i.e. word of mouth recruitment. Also, the test for ‘disproportionate impact’ is that the provision, criteria or practice puts others at a “**particular disadvantage**”, which is a relatively vaguer test compared to that used with the old (RRA76) definition i.e. that the condition or requirement “**could be complied with by a considerably smaller number of persons from a different racial group**”<sup>3</sup>.

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<sup>1</sup> This implements the principle of equal treatment between persons irrespective of racial or ethnic origins (2000/43/EC)

<sup>2</sup> inserted by the Race Relations (Amendment) Act 2000, with effect from 4/2001

<sup>3</sup> See Perera v Civil Service Commission [1983] IRLR 186

Note there are now two definitions of indirect discrimination – the old and the new. The new definition will only apply to cases of **race, ethnic or national origin** discrimination. For discrimination cases concerning **colour or nationality**, the old definition necessitating proof of a ‘requirement or condition’ and affording the use of the justification defence, will continue to apply.

The new definition applies to: -

- ✓ All employment cases under Part II of the RRA
- ✓ Education cases falling under ss.17 – 18D
- ✓ Public authority claims under s.19B (this was introduced by the RR(A)A 2000, effective as of 4/2001)
- ✓ Facilities and services claims falling under ss.20-24
- ✓ Claims against barristers and advocates under ss.26A and 26B
- ✓ Claims in relation to government appointments and office holders under s.76 and 76ZA

## 2. Statutory definition of Harassment (Reg 5)

The new and freestanding definition inserts a new **s.3A**. Broadly, harassment is defined as engaging in *“unwanted conduct which has the purpose or effect of ... violating that other person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment...”*

Discrimination can be made out in employment (Reg 6) and contract worker (Reg 10) cases, but also inter alia in relation to:-

- ✓ Partnerships (**Reg 12**)
- ✓ Trade unions, etc (**Reg 13**)
- ✓ Qualifying bodies (**Reg 14**)
- ✓ Vocational training (**Reg 15**)
- ✓ Employment Agencies (**Reg 16**)
- ✓ Bodies in charge of educational establishments (**Reg 18**)
- ✓ LEA’s (**Reg 19**)
- ✓ Public Authorities which fall within the scope of the Directive (**Reg 20**)
- ✓ Provision of goods, facilities and services (**Reg 22**)
- ✓ Barristers and advocates (**Regs 27 and 28**)

## 3. New Burden Of Proof Reg 41)

Regulation 41 inserts a new **s.54 for Employment** cases and this is replicated by **Reg 43 for County Court** cases. Previously applicants/claimants had to fulfil the burden of proof by showing the act(s) complained of amounted to racial discrimination. Although, the burden was **informally** shifted to the respondent/defendant following **King v Great Britain China Centre**<sup>4</sup>, **Zafar v Glasgow City Council**<sup>5</sup> and **Anya v University of Oxford**<sup>6</sup>, Regulation 41 now **formalises** this. Thus, once a prima facie case has been established, the onus shifts to the respondent/defendant to prove that it did not commit the act of discrimination and, if this onus is not discharged, a tribunal “**shall**” - i.e. **must** – find

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<sup>4</sup> [1991] IRLR 513

<sup>5</sup> [1998] IRLR 36

<sup>6</sup> [2001] IRLR 377

that the respondent/defendant unlawfully discriminated. This contrasts with the principle set out in **King v Great Britain China Centre**, which says that if the tribunal considers the explanation to be inadequate or unsatisfactory it will be “legitimate” (not obligatory) for it to infer that the discrimination was on racial grounds. The precedent of shifting the burden<sup>7</sup> has already been set in a sex discrimination case<sup>8</sup>. In that case the EAT held:

*“...the Regulations clearly go further than King and Zafar. They compel a tribunal, once a prima facie case has been established, to find unlawful sex discrimination unless the employer proves that there has been no discrimination – “the tribunal shall uphold the complaint unless the respondent proves that he did not commit ... that act.”*

A similar approach will be taken with Race and Disability discrimination cases.

NB: These provisions only apply to cases based on ‘race’, ‘ethnic or national origins’ and those falling within the new definition of Indirect Discrimination. The traditional method of deciding race cases, as lay down by **King**, will still apply in cases involving discrimination on the grounds of ‘colour’ and ‘nationality’.

#### 4. **New Genuine Occupational Requirements (Reg 7)**

**Regulation 7** repeals the list of Genuine Occupational Qualifications (GOQ) in s.5 and **replaces** it with a broader, general Genuine Occupational Requirements (GOR) by inserting a new **s.4A**. At s.4A(c) employers are afforded a substantial discretion in determining that someone does not meet the GOR. This provision only acts to provide a defence to discrimination on grounds of race, ethnic or national origins.

#### 5. **Relationships post-employment (Reg 29)**

**Regulation 29** inserts **S.27A** which provides that it will be unlawful for an employer to discriminate against a former employee, by subjecting them to a detriment or to harassment, where “the discrimination arises out of and is closely connected to the employment relationship”.

In the **post-employment discrimination** cases of **Relaxion Group v Rhys-Harper/D’Souza v London Borough of Lambeth/Jones v 3M Healthcare**<sup>9</sup>, these three appeals, heard consecutively, raised the issue of whether discriminatory acts done by an employer after the employee’s employment has come to an end are outside the scope of the Sex Discrimination, Race Relations and Disability Discrimination Acts. In the House of Lords it was agreed that protection against discrimination does not end when the contract of employment ends, and that the Court of Appeal’s decision to that effect in **Adekeye v The Post Office (No.2)**<sup>10</sup> is not good law. Following the decision, the government has laid the Sex Discrimination Act 1975 (Amendment) Regulations 2003<sup>11</sup>.

With regards references, the proper comparison in order to establish whether there has been unlawful discrimination is not with how existing employees are treated as regards reference (because their circumstances are not the same), but with how the employer treats other ex-employees. Employers

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<sup>7</sup> Implemented by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulation 2001 SI 2001/2660, effective as of 12 October 2001.

<sup>8</sup> **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] IRLR 332

<sup>9</sup> [2003] IRLR 484 - These cases were discrimination claims of sex, race and disability, respectively.

<sup>10</sup> [1997] IRLR 105

<sup>11</sup> effective from 19 July 2003

who decline to provide anyone with references after a given length of time cannot, by definition, be said to have discriminated against anyone. Where references are provided, employers will need to ensure that nothing is said which suggests discrimination on grounds of sex, race or disability, or victimisation for having brought a discrimination complaint.

## **6. Questionnaires (Reg 47).**

Regulation 47 amends s.65 to provide that “*where the question relates to discrimination on the grounds of race or ethnic or national origin, or to harassment*”, the respondent must, in order to avoid the possibility of adverse inferences being drawn, respond within the “*period of eight weeks beginning with the day on which the questionnaire was served*”. Previously s.65 (2) (b) required a response within a “*reasonable period*”.

### **Further reading:**

DLA Briefing 290-306 (volume 20).

Visit [http://www.cre.gov.uk/ledgal adv/rra\\_regs.html](http://www.cre.gov.uk/ledgal adv/rra_regs.html)

Equal Opportunities Review June 2003 (No.118) and July (No. 119)

IDS Brief August 2003 (No.738)

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