

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3745 of 26 November, 2009

LEGAL NOTICE NO. 68 OF 2009.

EQUAL OPPORTUNITIES ACT 2006

EQUAL OPPORTUNITIES (AMENDMENT) REGULATIONS 2009

In the exercise of the powers conferred on it by section 82(g) of the Equal Opportunities Act 2006 and for the purpose of transposing Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services into the law of Gibraltar the Government has made the following Regulations—

Title and commencement.

1. These Regulations may be cited as the Equal Opportunities (Amendment) Regulations 2009 and shall come into operation on the date of publication.

Amendment of the Equal Opportunities Act 2006.

2. The Equal Opportunities Act 2006 is amended in accordance with regulations 3 to 12.

Amendment of section 2.

3.(1) In section 2(1), after the definition of “directive 97/80/EC”, insert—

““directive 2004/113/EC” means Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;”.

(2) In section 2(1), after the definition of “equal treatment rule”, insert—

““excluded matter” has the meaning given in section 38(3);”.

(3) In section 2(4), at the end of subparagraph “(d)” replace the full stop with a semi-colon and add after that—

“(e) directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.”.

Amendment of section 6.

4. In section 6(5), for “This section is” substitute “This section, and the provisions of this Act dealing with discrimination against women on the ground of sex, are”.

Amendment of section 7.

5.(1) In section 7(1)–

- (a) for “A person” substitute “Subject to section 38A (definition of pregnancy and maternity for the purpose of Part V) a person;
- (b) in paragraph (a) delete “than he would treat her had she not become pregnant”;
- (c) in paragraph (b) delete “than he would treat her if she were neither exercising nor seeking to exercise, and had neither exercised nor sought to exercise, such right”.

(2) In section 7(2) delete “that he would treat her if that provision did not have to be complied with in respect of her”.

Amendment of section 14.

6. In section 14(1) for “where on an equal opportunities ground A engages in conduct”, substitute “where A engages in conduct related to an equal opportunities ground”.

Amendment of section 15.

7. After section 15(3) insert–

“(3A) For the purposes of subsection (3), the circumstances in which an employer is to be treated as subjecting a person to harassment include those where–

- (a) a third party subjects the person to harassment in the course of her employment; and
 - (b) the employer has failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.
- (3B) Subsection (3A) does not apply unless the employer knows that the person has been subject to harassment in the course of his employment on at least two other occasions by a third party.
- (3C) In subsections (3A) and (3B)–
- (a) “third party” means a person other than–
 - (i) the employer; or
 - (ii) a person whom the employer employs; and
 - (b) it is immaterial whether the third party is the same or a different person on each occasion.”.

Amendment of section 16.

8. For section 16(3) to (5) substitute–

- “(3) Section 15(1)(b) and (2) do not make it unlawful to deprive a woman who is on statutory maternity leave (as defined in section 2(1)) of any benefit from the terms and conditions of her employment relating to remuneration; except that the reference to benefit from the terms and conditions of a woman’s employment relating to remuneration does not include a reference to–
- (a) benefit by way of maternity-related remuneration (including maternity-related remuneration that is increase-related);
 - (b) remuneration (including increase-related remuneration) in respect of times when the woman is not on maternity leave; or

- (c) remuneration by way of bonus in respect of times when a woman is on compulsory maternity leave.
- (4) For the purposes of subsection (3), remuneration is increase-related so far as it falls to be calculated by reference to increases in remuneration that the woman would have received had she not been on maternity leave.
- (5) In this section–

“increase-related remuneration” means remuneration which falls to be calculated by reference to increases in remuneration that the woman would have received if she had not been on statutory maternity leave (as defined in section 2(1));

“maternity-related remuneration”, in relation to a woman, means remuneration to which she is entitled as a result of being pregnant or on maternity leave;

“on compulsory maternity leave” means absent from work in consequence of the prohibition on working during the two weeks following childbirth in regulation 5 of the Employment (Maternity and Parental Leave and Health and Safety) Regulations 1996;

“remuneration” means benefits–

- (a) that consist of the payment of money to an employee by way of wages or salary; and
- (b) that are not benefits whose provision is regulated by the employee’s contract of employment.”.

Amendment of section 38.

9. For section 38 substitute–

“Meaning of equal opportunities ground in this Part.

38.(1) Subject to sub-section (2), for the purpose of this Part “equal opportunities ground” means–

- (a) the ground of racial or ethnic origin;
- (b) the ground of sex;
- (c) the ground of pregnancy or maternity as defined in section 38A;
- (d) victimisation.

(2) Where the discrimination relates to an excluded matter as set out in subsection (3), for the purpose of this Part “equal opportunities ground” means–

- (a) the ground of racial or ethnic origin;
- (b) victimisation.

(3) For the purpose of this Part each of the following is an excluded matter in relation to discrimination on the grounds of sex, pregnancy or maternity–

- (a) education (other than vocational education);
- (b) the content of media and advertisements;
- (c) the provision of goods, facilities or services at a place (permanently or for the time being) occupied or used for the purposes of an organised religion.

Meaning of discrimination on the ground of pregnancy or maternity in for this Part.

38A.(1) In any circumstances relevant for the purposes of this Part, a person (“A”) discriminates against a woman if A treats her less favourably–

- (a) on the ground of her pregnancy; or

- (b) within the period of 26 weeks beginning on the day on which she gives birth, on the ground that she has given birth.
- (2) For the purpose of this Part, a person (“A”) is taken to discriminate against a woman on the grounds of her pregnancy if–
 - (a) A refuses to provide her with goods, facilities or services because A thinks that providing them would, because of her pregnancy, create a risk to her health or safety; or
 - (b) A provides or offers to provide them on conditions intended to remove or reduce such a risk because A thinks that provision of them without the conditions would create such a risk.
- (3) Subsection (2) does not apply if–
 - (a) it is reasonable for A to think as mentioned in paragraph (a) or (b); and
 - (b) A applies an equivalent policy.
- (4) An equivalent policy is–
 - (a) for the purposes of subsection (2)(a), refusing to provide the goods, facilities or services to persons with other physical conditions because A thinks that to do so would, because of such physical conditions, create a risk to the health or safety of such persons;
 - (b) for the purposes of subsection (2)(b), imposing conditions on the provision of goods, facilities or services to such persons which are intended to remove or reduce the risk to their health or safety because A thinks that the provision without the conditions would create such a risk.”.

Insertion of new sections 45A to 45D.

10. In Part V, after section 45, insert—

“Exception for voluntary bodies: discrimination on the grounds of sex.

45A.(1) This section applies to a body—

- (a) the activities of which are carried on otherwise than for profit; and
- (b) which was not set up by enactment.

(2) Nothing in sections 43 to 45 shall make it unlawful for a body to which this section applies to treat a person in the manner set out in sub-section (3) if the treatment is—

- (a) an appropriate and necessary means of achieving a legitimate aim; or
- (b) for the purpose of preventing or compensating for a disadvantage linked to sex.

(3) The treatment referred to in subsection (2) is—

- (a) the—
 - (i) restriction of membership of a body to which this section applies to persons of one sex (disregarding any minor exceptions);
 - (ii) provision of benefits, facilities or services to members of any such body where the membership is so restricted,

even though membership of the body is open to the public, or to a section of the public;

- (b) a provision for conferring benefits on persons of one sex only (disregarding any minor benefits to persons of the opposite sex which are exceptional or are

relatively insignificant), being a provision which constitutes the main object of a body within subsection (1) or an act done in order to give effect to such provision.

Exception for charities: discrimination on the grounds of sex.

45B.(1) This section applies to a provision for conferring benefits on persons of one sex only (disregarding any benefits to persons of the opposite sex which are exceptional or are relatively insignificant), being a provision which is contained within a charitable instrument.

(2) If the criteria in subsection (3)(a) or (b) are satisfied, nothing in sections 43 to 45 shall—

- (a) be construed as affecting a provision to which this section applies; or
- (b) render unlawful an act which is done in order to give effect to such a provision.

(3) The criteria in this subsection are that—

- (a) the conferral of benefits is an appropriate and necessary means of achieving a legitimate aim; or
- (b) the conferral of benefits is for the purpose of preventing or compensating for a disadvantage linked to sex.

(4) In this section—

“charitable instrument” means an enactment or other instrument so far as it relates to charitable purposes;

“charitable purposes” has the meaning given in the Charities Act.

Further exceptions for sex discrimination.

45C.(1) A person who provides at any place facilities or services restricted to men does not for that reason contravene section 42 or 43 if any of the conditions in sub-sections (2) to (4) are satisfied.

(2) The condition is that the place is, or is part of—

- (a) a hospital; or
- (b) other establishment for persons requiring special care, supervision or attention,

and the restriction is an appropriate and necessary means of achieving a legitimate aim at the place.

(3) The condition is that the place is (permanently or for the time being) occupied or used for the purposes of an organised religion, and the facilities or services are restricted to men so as to comply with the doctrines of that religion or avoid offending the religious susceptibilities of a significant number of its followers.

(4) The condition is that the facilities or services are provided for, or are likely to be used by, two or more persons at the same time, and—

- (a) the facilities or services are such, or the persons are such, that male users are likely to suffer serious embarrassment at the presence of a woman; or
- (b) the facilities or services are such that a user is likely to be in a state of undress and a male user might reasonably object to the presence of a female user.

(5) This section applies equally to discrimination against, and harassment of, men and for that purpose references to—

- (a) restrictions of services and facilities to men shall be read to mean restrictions of services and facilities to women; and

- (b) references in subsection (4) to—
 - (i) male users shall be read to mean female users;
and
 - (ii) to the presence of a woman or female user shall
be read to mean a man or male user.

Further exceptions for sex discrimination: positive action.

45D. Nothing in this Part shall render unlawful any act done for the purpose of preventing or compensating for disadvantages linked to sex.”.

Amendment of section 53.

11. In section 53(1) after “in Part III” insert “, or Part V”.

Amendment of section 55.

12. At the end of section 55 (which becomes subsection (1)) insert—

- “(2) In the case of discrimination under section 43, 44 or 45, subsection (1) applies only in so far as that section relates to—
 - (a) an excluded matter; or
 - (b) differences in premiums and benefits applicable to a person under a contract of insurance or related financial services entered into on or before the appropriate date.
- (3) Despite subsection (2), the treatment is not unlawful under section 43(1) if—
 - (a) in the case of discrimination under a contract entered into after the appropriate date which relates to differences in premiums and benefits, each of the following conditions is satisfied—

- (i) the use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial and statistical data;
 - (ii) the data referred to in subparagraph (i) are compiled, published (whether in full or in summary form) and regularly updated in accordance with guidance issued by the Ministry of Finance;
 - (iii) the differences in treatment are proportionate having regard to the data mentioned in subparagraph (i);
 - (iv) the differences do not result from costs related to pregnancy or to the fact that a woman has given birth at any time in the period of 26 weeks ending on the day the treatment occurs or begins; or
- (b) insurance or related financial services are provided only to members of one sex in relation to risks which only affect that sex.
- (4) For the purposes of this section, “the appropriate date” means the date on which the Equal Opportunities (Amendment) Regulations 2009 come into force.”.

Dated 26th November, 2009.

P R CARUANA,
For the Government.

EXPLANATORY MEMORANDUM

These Regulations transpose Council Directive 2004/113 EC of 13 December 2004 (“the Directive”). The Directive is concerned with implementing the principle of equal treatment between men and women in

the access to and supply of goods and services which are available to the public.

The Directive is transposed by extending the application of Part V of the Equal Opportunities Act 2006 to cover discrimination on the grounds of sex, pregnancy and maternity. Part V of the Equal Opportunities Act 2006 deals with discrimination in the provision of goods, facilities or services by either the public and private sector. In particular it covers education, the disposal or letting of premises, and the provision of goods, facilities and services by the public or private sectors (for example provision of health care or access to a hotel, a club or banking facilities).

The regulations do not however cover discrimination in relation to certain “excluded matters”. The excluded matters are: (a) education (other than vocational training); (b) the content of media and advertisements; and (c) the provision of goods, facilities, services at a place (permanently or for the time being) occupied or used for the purposes of an organised religion.

In addition the regulations contain specific provisions on insurance, accommodation, charities and voluntary organisations and permit discrimination on the grounds of sex where such discrimination prevents or compensates for disadvantages linked to sex.

The regulations also amend provisions in Part III of the Equal Opportunities Act 2006 dealing with harassment and with pregnancy and maternity discrimination in accordance with the UK case of *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin).

