

equality briefing

Achieving Equality at Work – a summary review of contents

This briefing summarises a new IER publication *ACHIEVING EQUALITY AT WORK*, edited by Professor Aileen McColgan. The full report is available from the address below, price £12 (trade unions and subscribers), £30 (others). Prices include UK p&p.

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**THE
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EQUALITY AND DIVERSITY: A NEW FRAMEWORK?

Over the last 30 years there have been significant developments in the legal regulation of discrimination and the promotion of diversity at work in the UK. Yet discrimination and inequality of opportunity are endemic. The introduction of the Human Rights Act in 1998 and the rolling implementation of the Race Directive and Framework Directive on Equal Treatment in Employment and Occupation over the next few years, offer an opportunity to simplify and strengthen current UK provisions.

But what are the main aims of the Directives and will the new Regulations proposed by the government adequately transpose the provisions into domestic law? In this timely report from the Institute of Employment Rights these questions and more are addressed in detail by an expert panel of contributors. Aileen McColgan, Editor, states that the aim of the report is to “initiate a debate about how the various grounds of equality protection can be brought together in a way that is comprehensive, comprehensible and coherent. The three main issues that need to be addressed are:

a a protection must be comprehensive and coherent removing the existing hierarchy of rights and extending protection from employment to the provision of goods and services across all grounds of discrimination

- b the ‘individual litigation’ model of enforcement is an inadequate basis to pursue the stated equality objectives. The collective mechanisms envisaged by the original authors of discrimination legislation should be revived and reactivated, and*
- c we need a more aggressive model of positive action to address entrenched inequalities.*

In raising the need for a Single Equality Act, Professor Aileen McColgan notes: “The law relating to discrimination involved no fewer than 30 Acts of Parliament, 38 Statutory Instruments, 11 codes of practice and 12 European Community Directives and Recommendations in 2000. Since then many additional provisions have been introduced, usually in a piecemeal way in response to immediate problems and with little consistency between the different grounds of discrimination. It is crucial that discrimination law undergoes a radical process of reform. The piecemeal approach will serve only to make a bad situation worse.”

Other members of the Institute’s equality working group then go on to consider in some detail the strengths and weaknesses of the law relating to their area of speciality.

RACE AND WORK

Karon Monaghan, a Barrister specialising in race equality protection, begins her chapter by highlighting the fact that black and

ethnic minority workers still suffer disadvantage and discrimination at work despite legislation dating back to 1976.

She then examines current legislation in some detail (the Race Relations Act 1976 and the Race Relations Act (Amendment) Regulations 2003) and concludes that the protection offered by both is limited in two main ways. First, the concept of indirect discrimination is limited because while it prohibits disadvantaging certain groups, it does not require positive measures to overcome existing disadvantages or differences. Second, the protection is restricted by the catch-all 'justification' clause, which often *"accommodates the interests of the dominant community at the expense of the minority"*.

She goes on to consider the details and the likely impact of the European Race Directive 2000 on the existing framework and notes that while the Directive offers improved protection, the improvements are marred by the complexity and incoherence of the structure.

On the positive side, the Directive extends the grounds of protection beyond the workplace to include the provision of goods and services; it shifts the burden of proof away from the victim; it extends and improves the definition of indirect discrimination and removes the need for statistical proof of disadvantage; it provides a legislative (though narrow) definition of harassment for the first time ever in domestic law which, due to the non-regression clause in the Directive must – according to the author – be extended to embrace the wider definition as developed by UK case law.

On the negative side, the Directive does not include discrimination on grounds of nationality. It is transposed by way of Regulations rather than primary legislation, which according to the author *"have rendered an already complex area of law impossible for anyone but the most expert discrimination practitioners to negotiate. This will have serious implications for the costs of litigation as well as for the wider*

issue of access to justice for victims of discrimination".

For that reason the author concludes that the two professed aims of the government – to develop effective legislation that will have a real impact in removing unfair discrimination and to ensure coherence in new and amending legislation – have been undermined by the way in which the Directive has been transposed into domestic law.

SEXUAL ORIENTATION DIVERSITY AT WORK

Sarah Hanett, a lecturer at King's College London specialising in anti-discrimination law, considers the implications of one of the new areas of discrimination law – that relating to sexual orientation. While the author welcomes the Regulations (due to come into force on 1 December 2003) as the first legislative step in proscribing discrimination on the basis of sexual orientation, she also says that the Regulations fall far short of the government's own objectives. She highlights a number of weaknesses:

First the failure of the Regulations to outlaw discrimination on the basis of marital status – a weakness that will deny equal access to workplace benefits such as pensions. Second the fact that protection is restricted to employment matters and not extended to the provision of goods and services. Third, the Regulations specifically allow religious organisations to discriminate against lesbians, gay and bisexual employees.

Finally, by using Regulations rather than primary legislation to introduce protections covering sexual orientation, the Regulations are in danger of leading to even more complexity in an area of law in desperate need of simplicity and clarity.

DIVERSITY OF RELIGION AND BELIEF AT WORK

Mark Bell, senior lecturer at the University of Leicester, begins his chapter by providing statistics on the diversity of beliefs found within the UK and by highlighting (with reference to case law) the kind of discrimination encountered at

work. He welcomes the introduction of the Employment Equality (Religion or Belief) Regulations, due to be implemented on 2 December 2003 and goes on to examine in some detail the extent to which the Regulations comply with the requirements of the Directive.

He first looks at the concept of religion and belief and welcomes the government's decision not to provide a comprehensive list of protected religions and beliefs but warns that difficult boundaries are likely to be encountered, particularly in relation to political beliefs. Definitions of direct and indirect discrimination are then considered and the author notes that the new definition of indirect discrimination helpfully shifts the debate away from statistical analysis in favour of scrutinising the possible justification for the practice. However, he believes that the justification clause in the UK Regulations is "more flexible" than that found in the Directive and "rather unhelpful", weakening the concept of a duty to make reasonable accommodations introduced in other anti-discrimination legislation.

The author also outlines the way in which the Regulations will offer protection against victimisation and harassment but notes that in contrast to the Directive, the government has failed to include a specific clause in the Regulations making it unlawful to direct another to discriminate (eg. an employer who instructs an agency not to send a Sikh for interview). The author is also disturbed by the 'triple-tier' exception in the Regulations, which means that different rules relating to so-called 'occupational requirements' apply to religious ethos employers, faith-based schools and general employers. On a more positive note, the author notes that the scope of the Regulations is wide, protecting contract and agency workers and extending coverage to the post-employment relationship – the provision of references.

In conclusion, the author welcomes the Regulations for establishing a balanced framework in which to manage religious diversity and protect against unfair

discrimination. However, just as with Sexual Orientation, there is no institutional support in terms of a Commission and this, according to the author, is *"entirely unsatisfactory... It is to be hoped that the Regulations are only an interim stepping stone to be replaced with a Single Equality Act"*.

ERADICATING DISABILITY DISCRIMINATION

Mary Stacey, a lawyer, begins her chapter by noting that 15 per cent (8.5 million) of the total population of the UK are disabled and that disabled people are twice as likely to be unemployed than non-disabled people. Despite these stark figures, legislation protecting individuals from disability discrimination was not implemented in the UK until 1996 and was then greeted with scepticism. With six years of case law to review, the author then examines how far fears of the Act's ineffectiveness have been realised and to what extent any shortcomings in the Act are likely to be corrected by the Disability Discrimination Act (Amendment) Regulations 2003 (due to be implemented in October 2004). Finally she considers what further action is required if disability discrimination is to be eradicated from UK workplaces.

When considering the current situation the author welcomes the fact that the Act acknowledges the principle that more is required than a prohibition on direct discrimination and particularly welcomes the duty on employers to make reasonable adjustments in an effort to reduce disadvantage. However, the limited scope of the Act's coverage is less welcome. According to the author, *"The exclusion of small companies (fewer than 15 workers) is without precedent in discrimination legislation and denies more than 300,000 workers protection from discrimination"*.

Other weaknesses identified and discussed include the lack of clarity in the statutory definition of disabled, a definition which relies on a medical rather than social model and which contains too many obvious gaps relating both to

occupations and conditions (eg. severe short term conditions like strokes or heart attacks). The need for clinically recognised tests is also criticised as an unnecessary hurdle, which often leads to expensive medical reports and delays in proceedings. Similarly the absence of the concept of indirect discrimination (job criteria, inflexible working practices etc) means that discriminatory barriers to employment are not systematically tackled by the legislation. Indeed according to the author, the low justification test and the reasonable responses test *"serve to endorse the status quo as opposed to establishing new standards of behaviour"*.

The author notes that weaknesses in the current legislation were identified by the Disability Rights Task Force (December 1999) and the Disability Rights Commission (April 2003) but many of their proposals remain unimplemented. Moreover, the author expresses disappointment that the government has not used the opportunity provided by the Directive to introduce more wholesale reform. She then provides a detailed account of changes required by the Directive (establish the principle of indirect discrimination, repeal most exemptions, introduce harassment as a specific form of discrimination, extend protection to the pre- and post-employment relationships, protect against instructions to discriminate and reverse the burden of proof requirements in favour of the victim).

Finally the author welcomes the regulations as a significant step forward and believes they will go a long way towards helping the Disability Discrimination Act lose its 'poor relation' status. However, more is required. The concluding section of the chapter then offers specific policy ideas on how to further improve the framework of law and ends by calling for a Single Equality Act backed by a Single Equality Commission.

WHAT'S THE DIFFERENCE?

THE QUESTION OF AGE

Lucy Anderson, a senior policy officer in the TUC's Equality and Employment Rights Department,

looks at how the government proposes to implement the age discrimination aspects of the Employment Directive, due to be introduced in October 2006. Having recently completed a consultation process on possible new age discrimination regulations, new regulations are expected to be circulated in the first half of 2004.

The author begins by lamenting the fact that contrary to their position in opposition (*"an incoming Labour government will introduce comprehensive legislation to make age discrimination in employment illegal"*), the government has opted for the voluntary route of self-regulation. This reluctant and minimalist approach also informed the government's approach to the Directive. Due to UK lobbying, a number of fundamental weaknesses were built into the Directive – not least the introduction of a general justification for age discrimination – the first to be permitted in the framework of UK discrimination law.

According to the author, the government's approach to age discrimination is driven in part by its policy on pensions and as the author notes, whilst unions have no difficulty with anti-ageist rights in principle, *"unions have been worried that employers will use the opportunity of new legislation to 'level down' rights to pensions or benefits linked to age or seniority"*. The government's adherence to the idea of a pensions crisis has led it on a collision course and its proposal to raise the normal pension age for public service pension schemes from 60 to 65 is adamantly opposed by the unions and the TUC.

According to the author, a default compulsory retirement age may breach international labour law. She said: *"The ILO has recently declared that a comparable Swedish law giving a default compulsory retirement age of 67 is in breach of ILO Convention 87 on freedom of association on the basis that it amounts to government interference with the right to bargain collectively on this issue"*.

Government arguments about the need for 'flexible retirement'

schemes are then considered but rejected on the basis that financial necessity, not choice, too often remain the key factor in determining a worker's retirement age according to research on similar European schemes.

Other weaknesses in the government's proposals include reducing the calculation for unfair dismissal awards for the 41 to 65 age group from one and a half weeks' to one week's pay. Again the author warns that such a move could be open to a legal challenge as article 8 (2) of the Directive bans regressive measures.

The author concludes by saying that while the proposed regulations provide a welcome first step in this area of equality law, they will be weak in comparison with equivalent provisions in Ireland, United States, Australia and Canada. She concludes by noting that the largest overall flaw will be the lack of a statutory commission charged with investigating and enforcing rights at work and says that the only way to ensure age discrimination is taken seriously is to properly incorporate age protection in a Single Equality Act.

SEX EQUALITY AT WORK

Professor Aileen McColgan (editor and contributor) begins this chapter by highlighting the extent of inequality suffered by women at work. Whether it is employment and training opportunities, segregation or equal pay – women still suffer from glass ceilings, sticky floors and lower pay. And, according to the author, attempts to ameliorate the worst aspects of inequality have often had the result of simply institutionalising women's status as second class citizens in the workplace.

McColgan suggests that the government would do better to take radical steps to tackle the long-hours culture in the UK by adopting a more aggressive implementation approach to the Working Time Regulations rather than fiddling with maternity and paternity leave and extending part-time working patterns. As the author points out, workers in the UK have the longest working hours in Europe. British fathers work 47 hours a week on average compared

to an average working week of 40 hours across Europe.

"The increasingly long hours demanded of full-time workers not only serve to exclude men from family life and involvement with their children, they render it virtually impossible for most mothers of dependent children to work more than part-time. Add to that the fact that only a minority of fathers can afford to take advantage of the unpaid parental leave provisions and we can see how the new provisions fail in their proposed aim of promoting family-friendly working practices."

The author then critically analyses the UK framework of equality legislation before assessing the extent to which the amended Equal Treatment Directive, due to be implemented in the UK by September 2005, will address the flaws identified. The author concludes on a note of warning, highlighting the fact that the Directive provides that 'Member states shall actively take into account the objectives of equality between men and women when formulating and implementing laws... in relation to employment'. As the author states: *"This opens up the possibility of challenges to failures on the part of the government to take positive steps to eliminate sex inequality in the workplace. One such challenge might be the reluctance of the UK to radically tackle the long hours culture whose impact on equality can not be denied"*.

ENFORCEMENT AND REMEDIES

Perhaps one of the most forceful chapters of the book is the final one dealing with enforcement and remedies. As the author (Aileen McColgan) notes, the current enforcement approach is a highly individualistic one, which ignores the many collective mechanisms envisaged by the creators of the 1970s discrimination legislation. The power to launch Formal Investigations has been *"emasculated by the judiciary"*. The jurisdiction of the Central Arbitration Committee, which could amend discriminatory provisions of pay structures and collective agreements, was rendered meaningless by the

decisions of the Divisional Court and then removed by the Sex Discrimination Act 1986. The result is that by far the most commonly used enforcement mechanism consists of individual legal action in the employment tribunal – for which no legal aid is available. In legal terms, the main enforcement weakness is the fact that the burden of proof lies on the applicant.

Reviewing the likely impact of the new Directives on domestic law the author highlights the positive point – that the burden of proof in most discrimination cases will shift from the victim to the accused. This of course is to be welcomed but, as she points out, it leaves untouched many of the more fundamental problems with discrimination:

- the newly protected grounds of sexual orientation, age and religion and belief have not been assigned to an existing Commission let alone allocated a specific Commission of their own. In allocating responsibility for awareness and enforcement to ACAS, the author suggests that the arrangements *"fall short of the government's obligations under article 12 of the European Directive to ensure that information on the Regulations is made available to everyone"*
- the government does not appear to intend to provide for the award of compensation in unintentional indirect race discrimination cases
- the individualistic enforcement mechanisms remain. According to the author it is essential that these mechanisms be supplemented by the duty on employers to take active steps to scrutinise their employment practices and eliminate any discrimination
- levers such as the award of public contracts to employers who make genuine efforts to improve workplace practices should be used, and
- the equality commissions (or Single Equality Commission) must be given strengthened powers of formal investigation.