EU Race Directive

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The new Race Relations Directive will force a robust review of the existing legislative framework on racial discrimination and the practices and policies of employers.

The European Union (EU) Commission has adopted a new social policy agenda with the objective of making Europe a more competitive marketplace with economic growth and greater social cohesion. This social model seeks to maintain European social values such as solidarity and justice at the same time as improving economic performance. The impetus comes, in part, from the impending enlargement process which is welcoming certain Eastern European countries into the privileged EU club of nations.

The dilemma faced by the current Member States is that the track record of some candidate countries, recent democracies in the main, has been appalling with regard to protecting human rights. In particular, the oppression of Romany Gypsy communities has led to an influx of refugees fleeing persecution to Western Europe. At the same time, the shadow of right-wing extremism is now casting itself over parts of the EU creating a fear of political upheaval and unrest. The rise of Jörg Haider in Austria has led to stringent action in the form of sanctions but support of right-wing parties in Germany, Italy and elsewhere in the heart of Europe has also increased. In the minds of European policy advisers, minority communities throughout the EU require not only protection from racial disadvantage but also better integration to prevent them becoming a volatile underclass undermining a more inclusive Europe. The EU Commission recognized this long ago and set about creating the climate within which to take action against the growing menace of racism. It remained vigilant, nevertheless, of the fact that political volatility brought on by economic black spots led to an increase in xenophobia. The fact that economic prosperity also relies on a mobile and younger migrant community, a readily available source of cheap labour, is not to be discounted.

The authority of the EU to take action was established with the Amsterdam Treaty (entered into force 1 May 1999). Article 13 of that Treaty gave the Council of Ministers, acting unanimously, the power to take action to combat discrimination on the grounds of sex, race or ethic origin, religion or belief, disability, age or sexual orientation. The battle against gender discrimination can be traced back to the Treaty of Rome (Article 119) and the Equal Treatment Directive 76/207/EC. The priority was to tackle other forms of discriminatory treatment. However, the requirement for unanimity among governments led most commentators to conclude that the power would lead to an impasse. This pessimistic assessment has been overtaken by the socio-economic and political factors touched on above. The Commission and the European Parliament have to take credit for the expeditious manner in which Article 13 has been given life – it has been truly remarkable.

The Commission announced, after a series of conferences, that it would propose two directives – the first dealt only with race discrimination with application in employment and specific non-employment areas. The scope of the second directive would only apply to employment but would seek to outlaw discrimination on the additional grounds of age, sexual orientation, disability, religion or belief. The Council Ministers are considering the latter Directive on 26 October 2000. The Race Directive has been adopted, requiring implementation by July 2003. It represents a giant leap in the fight against racial discrimination in the EU. The Commissioner for Employment and Social Affairs, Anna Diamantopolou, rightly points out that the measure represents a milestone in the construction of a social Europe. The radical nature and far-reaching effects of the Race Directive can be judged by the fact that the UK, with by far the most enlightened anti-racist statutory framework, will be forced to take steps to amend the Race Relations Act 1976 (RRA). The Government has indicated that the necessary steps will be taken as part of that package of proposals contained in the Race Relations Amendment Bill due to be on the statute books early next year. As the analysis below highlights, the Directive will force a robust review of the existing legislate framework and the practices/policies of employers.

Race Directive

Discrimination – direct and indirect

The definition of direct discrimination mirrors the UK approach and is deemed to occur when 'one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.

Indirect discrimination allows challenges to apparently neutral provisions, criteria or practices which *would* disadvantage persons of a particular race or ethnic origin unless there is objective justification involving a legitimate aim and the means used to achieve that aim are appropriate and necessary (the proportionality test). For the first time, the mere risk of discrimination will be susceptible to challenge. This radical reappraisal is required because some Member States have constitutional or other legal provisions which are inconsistent with the monitoring of ethnic origin on the scale accepted in the UK. Without monitoring, there are no statistics and the kind of arguments that are a regular feature of indirect discrimination cases cannot be sustained. Faced with this legitimate practical problem, the UK had no alternative but to accept that indirect discrimination claims could be made without statistical evidence. This very pragmatic outcome represents a significant development of anti-discrimination law in the UK context. The Commission also relied for its legal argument on a freedom of movement case which accepted that there could be circumstances where statistics were unnecessary, for instance in relation to a rule, as was the issue in the case where a rule could inherently disadvantage a class of persons (migrant workers on grounds of their nationality in this case). [1] It is not uncommon for UK courts to take judicial note of certain obvious facts willingly, without requiring extensive evidence, ie that there are more single parents who are women than men.[2] However, the Directive goes further, since such assumptions can

be forced onto a court without any attempt to obtain statistical evidence. The lack of any data analysis could be made up by reliance solely on expert evidence so as to enable the court to have the insight usually provided by statistics. While there may be force in the argument that a candidate should not always need to establish racial bias in a psychometric test by establishing a disproportionate failure rate by individuals of his/her race, there are real practical difficulties in the use of expert evidence alone in complex cases. It may not be difficult to envisage circumstances in which a dress code would impact adversely on certain racial groups without the need for statistics, eg bans on headscarves. The floodgates would open to assertions of institutional discrimination based on the lack of ethnic minorities in the boardroom coupled with expert evidence that this was caused by recruitment practices favouring individuals of a particular race. In the post-McPherson era, such claims are not only likely but are being made now. Even the Home Secretary's confession that his Department is institutionally racist takes on a more serious tone and using the Directive's approach would be a vital piece in the jigsaw constructed by an able expert. Clearly, the definition of indirect discrimination is much broader than that applied in the RRA. It will prove to be an extremely powerful tool in challenging concepts such as 'institutional' racism. The quality of expert evidence and credibility will be of utmost importance.

Harassment

The definition of harassment in common usage is one that was developed by the courts using the European Commission Code of Practice in relation to sexual harassment. The Directive will transpose an EU definition into UK law. Although along the same lines as that currently used by the courts, the definition in the Directive is wider since there is reference to conduct which creates 'an intimidating, hostile, degrading, humiliating or offensive environment'. The case of *De Souza v Automobile Association*,[3] an old but binding decision of the Court of Appeal, will become obsolete. These would not be a need, as is arguably the case now, to show that the victim was targeted or ought to have been taken into account by the harasser – the existence of an environment which was hostile, degrading, humiliating or offensive because of race as perceived by the victim would be sufficient to make the employer liable. The practical consequences are that only a courageous or foolish employer will fail to investigate a complaint thoroughly, even if the alleged conduct appears at fist sight to consist of insensitive non-racially based treatment of a third party or general demeanour which is not aimed at or is incapable of interfering with the complainant. A complainant upset by a boisterous display of support for the national Olympic team would have a sustainable claim that such conduct affected his/her environment in the way defined in the Directive.

Instructions

Under the RRA, only the Commission for Racial Equality can bring proceeding against individuals who instruct or pressure others to discriminate racially. The Directive has no such limitation. Furthermore the RRA, as far as instructions to discriminate are concerned, requires there to be an existing relationship between the instructor and the instructee, eg an employer and a job center that is regularly used to advertise vacancies.

The broader approach of the Directive would need to be reflected in amendments to the RRA.

Genuine occupational qualifications

The Directive exempts from the principle of non-discrimination any differece in treatment based on a characteristic related to racial or ethnic origin where the nature of the occupational activities or the context within which they are carried out is such that the characteristic constitutes 'genuine and determining occupational requirements". The exception is only permissible if the objective is legitimate and the requirement is proportionate. On the face of it, the exception is more restrictive than the current provisions of the RRA. It is questionable whether the exemption granted to restaurants is capable of surviving the implementation of the Directive. The list of other exceptions coming under the heading of 'genuine occupational requirements' may need to be revisited to ensure compliance. The Commission for Racial Equality (CRE) signalled, in its last annual report, that perhaps some current exemptions had outlived their relevance to a multiracial society.

Burden of proof

The approach is in line with the Burden of Proof Directive (97/80/EC) which only applies to sex discrimination and which is due to be implemented by 22 July 2001. The UK Government has been quite clear in arguing that there is no qualitative alteration necessary to existing practice and, furthermore, that the change is merely a European construction of the approach taken by Employment Tribunals following the decision of *King v Great Britain China Centre*.[4] This contention ignores the policy objectives which lie behind the need to recast the approach to be taken in assessing whether there has been discrimination. More importantly, this position disregards the case law of the European Court of Justice (ECJ) in relation to the whole issue of equal treatment. The more recent decisions of the ECJ recognize that the origins of the Equal Treatment Directive may have been economic but the goal now is to eliminate gender inequality as a matter of social policy. This 'purposive approach' will inevitably mean that the UK has badly misjudged or misinterpreted the ECJ's concerns as regards the need to fulfil the EU's policy objectives. One need only consider the principles illustrated in the cases of *Handels - og Kontorfunkionaerernes Forbund I Dannork v Dansk Arbejdsgiverforenign, ex parte Danfoss A/S*[5] and *Enderby v Frenchay Health Authority*.[6] The essence of the ECJ's position was that where there is statistical imbalance and a lack of transparency in pay systems (the cases concerned equal pay) then judicial authorities could infer the existence of discrimination in the absence of a satisfactory explanation from an employer. There is every reason to suppose that legal coherence will dictate that a consistent approach is taken in relation to race discrimination. The broader definition of indirect discrimination coupled with the pressure on employers to establish no-discrimination lends itself to the likely establishment, if not by the UK courts then the ECJ, of the principle that under-representation in itself is discrimination unless there are reasons to explain the discrepancy.

Non-employment scope

The non-employment areas falling within the Directive include anyone supplying goods, services and facilities, housing, education, social protection (including social security and healthcare) and social advantages. The latter is a European term making reference to economic and cultural benefits such as concessionary travel schemes.

Third country nationals

The Directive does not cover difference of treatment based on nationality. There are other provisions in the EU legal framework which outlaw nationality discrimination against citizens of Member States so as to secure the free movement of workers throughout the EU. Third country nationals are covered except in relation to rules which relate to any treatment arising from the legal status of the third country national concerning issues such as entry into and residence within an EU Member State. On the face of it, the most obvious discrimination faced by third country nationals falls outside the scope of the Directive. The Member States argue that the principle of subsidiarity prevents the EU from gaining competence in the area of immigration policy. Despite this, the inclusion of this class of individuals is significant and also reinforces the social, economic and political factors which led to a unanimous adoption of the Directive by Member States.

Victimization and positive action

Victimization under the Directive is defined in a way that accords with the RRA save that the condition that the individual who claims victimization must have acted in good faith is absent. It is more than likely that the ECJ will read such a requirement into the Directive since the claimant who acts in bad faith on public policy grounds places himself/herself outside the protection guaranteed. The positive action provisions are very broad and allow a Member State to take measures to compensate for disadvantage linked to racial or ethnic origin. There is no requirement to devise positive option programmes or engage in any form of affirmative action, as is the case in Northern Ireland and the United States. Member States are given the facility should they wish to take it up but there is no sanction if they do not.

Non-governmental organizations

Member States will have to promote equal treatment through national organizations. There is no requirement to establish new organizations but a body must be designated the task of promotional work. There was a significant debate between the Member States in relation to the ability of national bodies to bring cases on behalf of individuals. The UK resisted the initial draft, which allowed for representative action to be bought by national bodies such as the CRE instead of individual victims – a kind of class action provision as exists in the USA. The compromise imposes a requirement that the national body act with the consent of the individual. Currently, the CRE has sole rights to take action or it financially supports an individual. The Directive will usher in a new scenario in which the CRE will step into the shoes of the individual and fight the case on his or her behalf.

It is an extremely daunting experience for any employer to face an individual supported by the CRE. It will be an entirely new experience when the individual metamorphoses into the CRE. Clearly, a proactive CRE will prefer cases where it can go head to head with an employer rather than operate through an individual victim as intermediary.

Conclusion

The Directive represents a radical transformation in the approach taken by the EU in establishing minimum standards across the EU. The economic benefits of integration are clearly important but they no longer appear paramount. It is perhaps ominous that there is a synergy in the positions taken by the EU Commission and ECJ insofar as the acceptance that the vehicle for a harmonized Europe must be the social policy agenda and, furthermore, that the enlargement process requires the social model to be in place before the candidate countries join. In the light of these initiatives, there can be no place in the new Europe for countries nor, for that matter, recalcitrant employers unless they, as stakeholders, espouse the anti-discrimination cause. External forces are driving the UK into a position that necessitates social policy changes leading, arguably, to a radical overhaul of domestic anti-discrimination legislation. Unlike the last occasion, this time the UK is following a European model and not one borrowed from the USA.

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[1] *O'Flynn v Adjudication Officer* [1996] ECR I-2617.
[2] *Edwards v London Underground* [1995] ICR 574, EAT.
[3] [1986] ICR 514.
[4] [1992] ICR 516, CA.
[5] Case 109/88, [1989] ECR 3199.
[6] Case 127/92, [1994] 1 All ER 495.