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W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

Fair Employment Legislation in Northern Ireland

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Wednesday 4 July 1990

FAIR EMPLOYMENT LEGISLATION IN NORTHERN IRELAND

The Fair Employment Act 1989 was enacted after a five year long campaign involving, amongst other factors, economic pressure from the United States. The campaign drew attention to the persistence of large differences between the rate of Catholic and Protestant unemployment in Northern Ireland, despite the enactment of the Fair Employment Act 1976. The Government's attempt to strengthen the 1976 Act has been critisied in various quarters, not least for its failure to incorporate many of the recommendations of the Northern Ireland Standing Advisory Commission on Human Rights (SACHR). This paper briefly summarises the provisions of the 1976 Act before contrasting the Government's 1989 reforms against the proposals of SACHR.

The Fair Employment Act 1976

Scope

The institutions, duties and powers of the Fair Employment Act 1976 were considerably influenced by the Report of the van Straubenzee Committee published in 1973. The Committee â\200\231s terms of reference were limited to employment in the private sector. Although the 1976 Act was extended to both private and public sectors, it remained restricted to the sphere of employment. There was no equivalent of Part III of the Race Relations Act 1976 dealing with discrimination in other fields.

Prohibition on discrimination

The 1976 Act made unlawful discrimination on religious or political grounds, or victimisation. Religious or political discrimination occured where on either of these grounds a person treats another person less favourably than he treats or would treat another person in those circumstances. There was no prohibition of indirect discrimination, although there was an implicit duty on employers to refrain from indirect discrimination insofar as such action could be found to compromise a failure to provide equality of opportunity. However, indirect discrimination, unlike direct discrimination, was not actionable by private individuals.

Equality of Opportunity

Unlike sex and race discrimination legislation, the Fair Employment Act 1976 gave centre stage to promoting equality of opportunity. Whilst the van Straubenzee report recommended that religious discrimination in employment should be made unlawful, it emphasised that the fundamental aim of the legislation should be the promotion of full equality in all aspects of

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opportunity as occurring when a person has the same opportunity as another person "with due allowance being made for their material suitability! There was no explicit duty on employers to provide equality of opportunity although such a duty could be inferred from the powers of the regulatory agency established by the Act to promote equality of opportunity.

Exemptions

Both the anti-discrimination provisions and the equality of opportunity provisions did not apply to various sectors of employment, most significantly the employment of teachers in schools. Religious and political discrimination was permitted when done for the purposes of national security or protecting public safety or public order. A certificate signed by the Secretary of State would serve as conclusive evidence than an action was done for these purposes.

Enforcement

Individual Complaints

Individuals who believed themselves to have suffered religious or political discrimination were able to take their complaint to the Fair Employment Agency (the Agency). The Agency was headed by a part time executive board (with no specific legal training) appointed by the Secretary of State. A sub-Committee of the board would reach a finding on the complaint upon hearing both parties separately. This would be preceeded by an investigation by a staff member of the Agency who would attempt conciliation. If the Agency found discrimination it had powerful remedies at its disposal. Most notably there was no prescribed limit on the compensation it could award, and the Agency could issue directions enforceable through the county court. Appeals against Agency findings also lay to the county court.

Equality of Opportunity

The Agency was authorised to investigate the existence, nature and extent of equality of opportunity and to consider what action should be taken for its promotion. In contrast toother UK anti-discrimination commissions, the Agency was granted considerable discretion by the 1976 Act over the scope and conduct of investigations. Where following an investigation the Agency formed the opinion that there had been a failure to afford equality of opportunity, it was required to ensure reasonable and appropriate remedial action. However, there was no explicit guidance in the 1976 Act as to what that action might be. The Agency could require a written undertaking which if refused, or given but not complied with, could be superceded by directions. There were enforceable through the courts. Appeals against Agency findings, or the reasonableness of AYEllLy LTMEUulEs, lay LU a Spelldlly CunsiLitucteu Fall cmpioyment

Appeals Board.
Contracts

The 1976 Act provided for the Agency to promulgate a Declaration of Principle pledging subscribing organisations to abide by the Act and to strive to promote equality of opportunity. Whilst the Agency was not legally able to refuse an organisation wishing to register as a subscriber, it could suspend or remove an organisation from the register, an employer shown by an investigation under the Act to have acted in a manner inconsistent with the Declaration. In 1981 it became Government policy not normally to accept contracts from

employers who were not registered as subscribers to the Declaration.

From the 1976 Act to the 1989 Act

The most influential critique of the 1976 Act was provided by the Northern Ireland Standing Advisory Commission on Human Rights (SACHR). The main conclusions of SACHR and the extent to which its recommendations were incorporated in the 1989 Act are summarised below.

1 SACHR recommended that the burden of proof in direct discrimination cases should be eased. This would be done by requiring an aggrieved individual only to show that there had been less favourable treatment, that the treatment involved individuals of different religions or political persuasions, and that he or she met the requirements of the job (rather than was better qualified). Thereafter it would be incumbant on the employer to show that there was less favourable treatment.

The 1989 Act failed to incorporate this recommendation and left the 1976 Act unamended.

Zi SACHR recommended that the prohibition of discrimination should be extended to include indirect discrimination. This would be defined along the lines currently proposed by the Commission for Racial Equality, rather than in the restrictive terms contained in present race and sex discrimination law. Indirect discrimination should be made actionable.

The 1989 Act prohibited indirect discrimination albeit defined in terms similar to those employed in race and sex discrimination law.

BR. SACHR recommended that equality of opportunity should be redefined and new legislation should place an explicit duty on employers to provide it. This duty would be fulfilled when employers refrained from direct and

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inequality of opportunity was indicated, adopted appropriate lawful remedial action.

The new legislation creates no active duty on employers to pursue equality of opportunity. There is, however, a duty employers with over 25 employees (with over 10 employees in two years time) to register with the successor to the Agency, the Fair Employment Commission (the Commission). All public secotr employers and all private sector employers with more than 250 staff must monitor and submit annal returns to the Commission. All registered concerns must review their practices at least once every three years to see if â\200\234fair participationâ\200\231 is provided. The Commission can require affirmative action if it comes to its notice that â\200\234fair participationâ\200\235 is absent.

SACHR considered the best way to resolve the potential conflict between those provisions in the 1976 Act prohibiting discrimination and those provisions involving remedial action directed at a religious group. SACHR recommended that the new Act should spell our what affirmative action should be permitted to employers and that this action should be explicitly exempted from the Act â\200\234s discrimination prohibition. They recommended similar permissions to those contained in sex and race discrimination law for outreach advertising (i.e. targetting advertisements on an under-represented group) and single-religion training. In addition SACHR advocated measures which were not religion specific, but which had the effect of disproportionately including one group. An example of this is adopting a practice of recruitment from the unemployed, which will indirectly benefit Catholics because they are more likely to be unemployed. A more central role was envisaged for targets and timetables.

The 1989 Act explicitly protects outreach advertising from the direct and indirect discrimination provisions contained in the Act. The Government, however, rejected training confined to a particular religious group. Instead the 1989 Act refers to affirmative action training conducted in a certain place or confined to a particular class of person. That class not being â\200\234framed by reference to religious belief.â\200\231 the implication is that such training might disproportionately benefit one religious group without totally excluding the other. However, if this is the purpose of the training then it must ultimately be â\200\234framed by reference to religious beliefâ\200\235. Despite the attempt to limit access to training by some factor other than religion, religion is the raison dâ\200\231etre of that training (or else it is not affirmative action). The 1989 Act therefore appears to obstruct affirmative action training.

SACHR recommended that jurisdiction of individual complaints should be transferred from the Agency to the Industrial Tribunals. Instead the Agency's successor, the Commission, would play a role akin to the EOC and CRE by assisting selected complaints. This recommendation was based on a number of judgements. Among the most important were: that the obligation of the Agency to hear all complaints had soaked up disproportionate resources and detracted from its work on equality of opportunity; that Industrial Tribunal procedures permitting full cross-examination would restore to parties a greater measure of control over their case; and, that hearing regligious discrimination cases in this forum would help integrate the Fair Employment Act into the mainstream of employment law thereby reducing emotive political connotations. SACHR also recommended that the Tribunals be granted new remedial powers so that the remedies available under the 1976 Act would not be diluted.

The 1989 Act transferred jurisdiction over individual complaints to a specialist tier of the Industrial Tribunals (The Fair Employment Tribunal). The Fair Employment Tribunal has power to award victims of religious discrimination compensation up to Â£30,000, although otherwise its remedial powers for individual complainants are similar to conventional Tribunals.

SACHR proposed that any new enforcement body should retain

existing autonomy to conduct investigations but should have its bargaining power vis a vis employers strengthened. On past occasions, the Agency had declined to make public findings of a failure to provide equality of opportunity because it thought it needed to retain employer good-will to ensure appropriated remedial action. The Agency claimed that experience showed that affirmative action programmes needed periodical revision. The Agency preferred not: to rely -on directions because they could not be easily amended. Instead it hoped that by shielding employers from embarassing findings it could ensure their co-operation. Yet by failing to make a clear finding the Agency sacrificed the ultimate enforceability of remedial programmes. SACHRâ\200\234s solution was to bolster the position of the enforcement body by, amongst other things, granting it the power to amend directions. However, it proposed that employers should be allowed to avoid findings of inequality of opportunity if they voluntarily entered enforceable affirmative action agreements.

Whilst the 1989 Act provides considerable autonomy to the Fair Employment Commission in the conduct of investigations it fails to take on board either of SACHRâ\200\234s latter recommendations.

Zs SACHR concluded that the existing Declaration was ineffectual in promoting equality of opportunity because its terms were vague. Organisationscould not be refused registration as equal opportunity employers (no matter what their practices) and organisations could not be struck off the register without a full-blown investigation. Under the 1976 Act no organisation was refused a public contract on equal opportunity grounds. SACHR recommended that the existing Declaration of Principle would be replaced by one of practice which spelt out the steps employers committed to equal opportunity should take. Employers subscribing to the Declaration would register with the Commission and would submit regular monitoring returns. The Commission could refuse registration and would be able to remove employers on the register if monitoring information was not supplied or an investigation revealed inequality. A wide range of public contracts and grants would not normally be given to organisations who were not registered as subscribers.

Unlike SACHRâ\200\231s recommendation, the 1989 Act compels employers to register with the Commission. The denial of contracts and grants is not used as an incentive to register but as a supplementary penalty to employers who have failed to register or have registered and failed to supply proper monitoring returns. The 1989 Act does however widen the range of public contracts and monies which will be witheld from unregistered employers.

8. SACHR recommended that the key exemptions to the legislation should remain, but the issue of certificates by the Secretary of State stating that a discriminatory act was done for reasons of national security would be reviewable by the courts.

This tecommendation has not been included in the 1989 Act.
Conclusion

In key aspects, particularly the requirement to monitor, the introduction of a form of contract compliance, the remedies available to individual victims of discrimination and the latitude afforded to the investigatory body, 1989 Act is stronger than the 1976 Act or for that matter both the Sex Discrimination Act and the Race Discrimination Act. However, in the crucial area of affirmative action, the 1989 Act is comparatively weaker. Therefore, whilst the mechanisms for tackling individual discrimination and detecting inequality of opportunity are improved, the scope for remedial affirmative action is limited.

It is noteworthy that the consensus which ensured a unanimous report by the van Straubenzee Committee in 1973 had broken down

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reasons for the breakdown in this consensus are not clear, but they may reflect a more common theme of opposition to discrimination but concern about the effect of more positive measures to ensure minority participation. It is also noteworthy that in both instances, the legislation was passed by Westminster, an exterior legislature; it is certain that, whatever the social consensus may have been, in neither 1973 nor the late 1980s would there have been a political consensus for legislation within Northern Ireland. On the other hand, distinction can be drawn between the 1976 Act which was passed at the behest of a Westminster consensus that legislation was necessary; and the 1989 Act which was due almost entirely to outside economic pressure from the United States.

In terms of the evolution of United Kingdom anti-discrimination law, the Fair Employment Act 1989 establishes certain precedents that will be of interest to those concerned to strengthen legislation in the spheres of race and sex discrimination. However, in Northern Ireland, the fact that race and sex discrimination .law has â\200\230catching upâ\200\231 to do will not alter the political impetus for further action to provide equal opportunities. Rightly or wrongly, the benchmark for judging the success of the 1989 Act will be the extent to which any impact is made on the differntial between rates of Catholic and Protestant unemployment. The SACHR report shows that the legislation can be strengthened further. Unless the 1989 Act impacts upon the differential unemployment, it is likely that the influential United States lobby will demand such action.

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Reading

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