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DISCRIMINATION AND LAW

The Effectiveness of Remedies for Infringement of Equality Rights

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The Effectiveness of Remedies for Infringement of Equality Rights

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[This paper concentrates upon the effectiveness of compensation as an enforcement mechanism in equality law. The paper to be delivered in July may be extended to consider other enforcement mechanisms also.]

1 Introduction

- examination of remedies presently available in U.K. sex equality law

- with reference to principles of Community law

- and in comparison with remedies available for breach of other equality rights in U.K. law

2 Relevant principles of Community law

1) the principle of effectiveness - a 'level-field' principle - the minimum guarantee of the equality directives, particularly Article 2 of the 1975 directive and Article 6 of the 1976 directive, e.g.:-

"Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process after possible recourse to other competent authorities."

- and Article 6 of the 1975 directive:-

"Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed."

Case 14/83 von Colson and Kamann v Land Nordrhein-Westfalen [1984] E.C.R. 1891, at §23, on Article 6 of the 1976 directive:-

"full implementation of the directive ... does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer."

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- elevation of principle of 'effective judicial protection' into general principle of Community law

Case 222/84 Johnston v The Chief Constable of the Royal Ulster Constabulary [1984] E.C.R. 1651, at §18: in particular, invocation of Articles 6 and 13 of the European Convention on Human Rights

- effectiveness subject to two further principles, as stated by Advocate General Rozès in Case 14/83 von Colson at 1919:-

"Comparable to sanctions applied to offences of the same gravity

Proportionate to the seriousness of the offence, which is a breach of a fundamental principle of the Treaty

The deterrent effect of the sanctions provided for by a particular national law or regulation must be assessed on the basis of these requirements."

ii) the principle of comparability or non-discrimination - a 'national diversity' principle - national rules governing actions for the enforcement of Community rights may not be less favourable than those governing a comparable right of action on an internal matter

Case 118/75 Watson and Belman [1976] E.C.R. 1185, at §21

- see also: -

Case 158/80 Rewe v Hauptzollamt Kiel [1981] E.C.R. 1805, at §44

- applied by A.G. Rozès in Case 14/83 von Colson, at 1920: comparison with the enforcement of comparable but autonomous equality rights in F.R.G., i.e. racial and religious equality

iii) the principle of proportionality

3 Effect of Community law in national law

1) the principle of indirect effect - "national courts are required to interpret their national law in the light of the wording and the purpose of the directive" (Case 14/83 von Colson at §26)

- application to U.K. legislation? (see Fitzpatrick, B. "The Significance of EEC Directives in UK Sex Discrimination Law" (1989) 9 Oxford Journal of Legal Studies 336)

ii) the principle of direct effect

- in relation to principle of effectiveness: can direct effect be applied to Articles 2 and 6 of the 1975 directive and Article 6 of the 1976 directive?

- reconciling Case 14/83 von Colson and Case 222/84 Johnston

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4 Application to U.K. sex equality law

- applying the principle of effectiveness

- points of comparison?

1) Employment Protection (Consolidation) Act 1978, s.75A: special award for dismissal on grounds of trade union membership or non-membership of a trade union (albeit in relation to re-employment orders)

2) Fair Employment (Northern Ireland) Act 1989, s.26(4) of the Fair Employment (Northern Ireland) Act 1976, as amended by s.50 of the 1989 Act: maximum compensation of £30,000

i) Equal Pay Act 1970, s.2(5):-

"A woman shall not be entitled, in proceedings brought in respect of a failure to comply with an equality clause ..., to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings were instituted."

- time-limit?

- mere compensation for unequal pay as "real deterrent"?

ii) Sex Discrimination Act 1975, ss.65 and 66

1) basic provisions

- s.65(1)(b): order of compensation, subject (according to s.65(2)) to maximum for compensatory awards in unfair dismissal (Employment Protection (Consolidation) Act 1978, s.75): at present, £8,925

Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) (No.2) [1988] I.R.L.R. 325 (I.T.) and [1990] I.C.R. 6 (E.A.T.)

- includes compensation for injury to feelings (s.66(4))

Alexander v Home Office [1988] I.C.R. 685 (C.A.) (on R.R.A. 1976)

North-West Thames Regional Health Authority v Noone [1988] I.C.R. 813 (C.A.) (on R.R.A. 1976)

- but not compensation for 'unintentional' indirect discrimination (s.66(3))

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- and ought not to include explemary damages

Bradford City Metropolitan Council v Arora [1989] I.C.R. 719 (E.A.T.) (on both S.D.A. 1975 and R.R.A. 1976)

- nor interest on compensation

Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) (No.2)

2) application of indirect effect

3) application of direct effect

5 Implications for other areas of equality law

a) Race Relations Act 1976, s.56, repeating s.65 of Sex Discrimination Act 1975

b) Regulation 1612/78 on the freedom of movement for workers within the Community - enforcement procedures and remedies?

Reading:

Hepple, B. and Byre, A. "EEC Labour Law in the United Kingdom - A New Approach" (1989) 18 Industrial Law Journal 129

Wyatt, D. "Enforcing EEC Social Rights in the United Kingdom" (1989) 18 Industrial Law Journal 197

O'Donovan, K. and Szyszczak, E. Equality and Sex Discrimination Law (Oxford, Blackwell, 1988), Chap.8: Enforcement

Leonard, A. Pyrrhic Victories, Winning Sex Discrimination and Equal Pay Cases in the Industrial Tribunals (London, H.M.S.O., 1987)

Rubenstein, M. "The Equal Treatment Directive and U.K. Law" in McCrudden, C. Women, Employment and European Equality Law (London, Eclipse, 1987) pp. 98-102