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DISCRIMINATION AND LAW

Complainant Aid - A Crisis

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COMPLAINANT AID - A CRISIS by Martin Mabiletsa

In the introduction to the Commission for Racial Equality's Annual Report Michael Day, the Commission's Chairman states in an almost dejected pessimistic tone, in an revaluation of the decade between 1977, when the Race Relation Act 1976 began to be implemented and 1987.

"The decade also saw the dispiriting growth of the phenomenon of the inner cities, dying neighbourhoods that were left behind in the wake of declining or relocated industries. The overall unemployment rate of ethnic minorities rose to twice that of white. Among young blacks the unemployment rate was even higher, peaking at 60-70 per cent in some London boroughs. The racial segmentation of the labour market, combined with persistent discrimination by employers, whether direct or indirect, made it difficult for black people to move into different jobs. As the Policy Studies Institute Survey concluded in 1984 the British job market had changed little in its hostility to black workers except to turn more of them from work altogether". About the Commission's achievement he says -
"Each case won and each formal investigation completed seemed only to expose the sheer weight and pervasiveness of the discrimination facing black people .....The scale and persistence of discrimination are insupportable in any civilised society"

The issue of why this parlous state of affairs exists despite an enactment of the RRA 76 needs to be addressed seriously and urgently if we are to find a solution. However, any explanatory analysis must take into account problems of the complexity of the subject.

The first and primary issue that has to be examined is the half hearted attitude of the Government towards the problem of the elimination of racial discrimination and the policy behind the passing of the Race Relations Act 1976. Reports in Hansard about the debates when the act was considered are rather revealing.

Both the Conservative Party and the Labour Party (which was in government then) agreed that the "British People have accepted, for the greater part, a very substantial influx of alien culture and alien voice in their midst without any open conflict of racial prejudice". Therefore the problem was identified as a "small minority" one. This attitude logically led to the view which was espoused with great vigour by the Tories that since only a "tiny minority of people were racist" and "three quarters of the people were not....the Bill will perhaps do more to irritate than encourage the population at large"

It was also argued with some force by the Tories that

"If there is little racial prejudice inherent in British people, it demonstrates by thesis that unabated discrimination - indeed, it has increased since the passing of the 1968 Act - is based not on racial prejudice but on disadvantage".

Since a large number of the British populace also suffered from disadvantage, strong legislation in favour of ethnic minorities was not necessary. In the House of Lords, Lord Hailsham had depicted the Bill as violative of free speech, due process and time honoured principles of English Law.

It was under this sustained weltering attack by the Tories that Roy Jenkins, the then Secretary of State revealed the awesome truth that he did not visualise too much individual litigation.

"In order to proceed in this matter (that is, an anti-discrimination case) a complainant has either to get the assistance of the new Commission, in which case he has to go through an important sieve or he has to take his own responsibility for bringing action before an Industrial Tribunal or a County Court. There is no Legal Aid before Industrial Tribunals. Some people think that there should be but there is not and there is no immediate prospect of it. So there is a considerable disincentive to people, most of whom in these circumstances are very badly off, to indulge in frivolous or pointless complaints. That preserves a fair effective barrier against people doing things which are totally frivolous, malicious or without any essential basis".

This was the ethos of the birth of Race Relations Act 1976 introduced by a Labour Government which intended a minimal use by the individual complainant and opposed by an Oppostition which, 3 years later, took power and are still the Government of the day.

WHAT have been the consequences of those policy attitudes?

1. NO LEGAL AID

Both the Labour Government and the present Tory Government have consistently refused to extend Legal Aid to the individual complainant in Industrial Tribunal cases. The argument which has been put by even the present Chancellor who is regarded as relatively liberal is that the Tribunals were intended to be the Layman's Court where they could represent themselves. Providing Legal Aid would lead to the introduction of a large dose of Lawyers. This would in turn make the whole procedure and process legalistic.

The fallacy of this argument is demonstrated by the historical reality of what has happened since the Act was passed. Proving racial discrimination is almost a Herculean task. Secondly the sheer numbers of cases (this includes all other IT cases) which are being appealed on points of law have clogged up the system at the EAT level. At the beginning of this year Mr Justice Wood, the EAT President, was faced with over 400 outstanding appeals. Some cases that were lodged at the beginning of last year have up to date not been heard. A relief second Judge has had to be appointed.

The Industrial Tribunals have become legalistic because of the complex legislation that they have to preside over. Very few Lay Representatives are able to cope. Woe betide the unassisted inexperienced individual complainants.

Thirdly, in race cases judicial precedent is fast developing. As the CRE ventures into the use of judicial review this area of the Law will become even more complex. How is the unassisted individual supposed to cope in this quagmire of unknown depths and proportions?

2. THE C.R.E.

There is overwhelming evidence that the intent of our legislators was that the C.R.E. was intended to be a bare bone, an empty gesture, to the ethnic minorities. Every attempt to give it some flesh and teeth has so far been defeated.

When the Commission was set up its staff complement was supposed to be 226. It has had to operate at less than 200 because the salary budget imposed by the Home Office could not accommodate more. This has been the position for 12 years. The result is that the Complaints Section which processes individual complaints of people who have applied for assistance to the C.R.E. is constantly in a chronic staff shortage. The spin-off is that senior officers whose job is partly to run clinics about racial discrimination in the various regions find themselves pinned to the desk by fantastic workloads. It's a crisis management situation. This means the C.R.E is hampered in its role of informing the General Public about their rights and promoting Complainant Aid.

Under Section 66 of the Act, the Commission is empowered to assist an individual claimant either on the ground that the case raises a question of principle, or it is so complex that it would be unreasonable for the individual to deal with it unaided; or by reason of any other special consideration. The Complaints Committee of Commissioners that makes decisions in this regard is a fairly high powered highly representative one. It has 3 lawyers, (including a prominent Law Professor who is a part time Tribunal Chairman), an educationist , a trade unionist (who chairs the Committee), a former executive member of the NACRC who is now a Deputy Chairman of the Commission, and a member of the CBI. They are a committed group who will assist even the most borderline cases. They definitely have refused to act as part of the **"considerable disincentive to people".** But , funding by the Home Office which has increased at about 2 per cent a year, has steadily fallen behind the rate of inflation. So for instance, whereas in 1987 the CRE funded 213 cases and lost fewer than 60 (its highest success rate) and had won a number of significant actions in the Court of Appeal in 1988 , it had to turn away a significant number of cases. It was decided then that the number of cases to be supported between August 1988 and January 1989 would be cut from 125 to 75. However there is an improvement this year.

Under Section 43 of the Act the Commission is enjoined to keep under review the working of the Act in the elimination of racial discrimination and submit to the Secretary of State proposals for amending it. Proposals for a review of the act were submitted by the Commission in 1985. Among the issues dealt with is the consistently low success rate (one in 4/5 cases) in the Tribunals and County Courts. The Commission had come to the conclusion that **"unless the General Public's awareness of how racial discrimination occurs is raised far beyond its present level, it is unlikely that Tribunal members will develop that awareness despite the presence of special**

race members". The Commission therefore advocated for a specialist Tribunal division to deal with discrimination cases.

Such Tribunal would have full remedial powers, including "injunctive-type remedies." It would also be able to call on members of the High Court Bench to deal with more complex cases.

The Commission also proposed that the burden of proof should be altered so that once the applicant demonstrates less favourable treatment, the burden of disproving racial discrimination should be with the respondents. This proposal was in line with the Employment Protection Act cases under which there is a significant success rate.

The Commission has since also made the recommendations which include the American type of classification, compulsory monitoring as provided in the FAIR EMPLOYMENT (NORTHERN IRELAND) Act 1989 and others which would strengthen the Act. Not surprisingly, the Government has refused to amend the Act. A delegation of the Society of Black Lawyers was told in no uncertain terms by John Patten, Minister in the Home Office, that this Government did not intend to introduce major legislation to amend the Act.

Well, without teeth you can't bite.

3. INDUSTRIAL TRIBUNAL

A colleague, who had represented in quite a significant number of cases, once said even after years of experience he still could not get used to the hostile atmosphere generated by race cases in some Industrial Tribunals. You sort of feel that you and your client are the enemy and the alleged offenders are the angels. He had had to ask two Chairpersons in two separate regions to recuse themselves from the case because of their obvious hostility to the applicant. This is the attitude that practitioners usually encounter when the respondent are a large well established corporation or a government department. It seems to be motivated by the feeling that the English are a tolerant benign people, therefore those who accuse any of their institutions as racist are troublemakers who should not be tolerated. This attitude is easily the most traumatic experience that a practitioner can possible have from what is supposed to be a forum of justice. It is fortunate that only a handful of Tribunals continue in this mould.

The obvious result of this kind of attitude is that fighting a race case in these Tribunals has become a waste of time. The consequence is that at times when faced with a borderline case practitioners feel obliged to advise clients to settle.

On the whole, although in most Tribunals you receive a fair hearing without constant interruption and harassment, the Public will to stamp out racial discrimination still seems lacking. This manifests itself in various forms. For instance, it is a generally held view by practitioners that where Tribunals have a discretion this is seldom used in favour of the applicant. Examples:
a) Where an applicant is out of time in presenting her/his origination application the Tribunal have a discretion to extend if it is just and equitable to do so. They seldom do.

b) Under section 65 the applicant can serve a questionnaire on the respondent to help him/her to obtain information in order to evaluate the case. If the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that reply is evasive or equivocal, the Court or Tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act. Very few Tribunals ever draw this inference.

c) Damages are crucial in race cases. First, they can act as a deterrent to those who discriminate, for instance, in the USA those who discriminate do so at the peril of their pockets. Secondly, reasonable levels of compensation would be an inducement to litigants and lawyers to bring proceedings. Therefore derisory damages that have for a considerable number of years been the norm in the County Courts and the Tribunals have had a debilitating effect on numbers that have come forward to use the Act.

Alexander V The Home Office gave the CRE an opportunity to shift attitudes. In that case the Court of Appeal increased the County Court compensation of 50 to 500 and gave guidance that "**awards should not be minimal, because this would tend to trivialise or diminish respect for the Public Policy to which the act gives effect'.**

Since this decision there has been a slight improvement in awards. Tribunals are prepared to fix 500 as the barest minimum because in the Alexander Case this was the award although the discrimination was minimal, but some Tribunals still continue in their old ways. Just recently an award of 100 was made.

d) Another worrying area is some Tribunals reluctance to draw inferences in favour of the applicant. A leading lawyer in race cases, who was limited to speak at a lawyers conference at the CRE expressed the view that although the standard of proof expected in race cases is the civil one of probability, he often feels that what is expected by some Tribunals is that the applicant must prove his case beyond reasonable doubt. There was consensus on this point amongst the practitioners present. This is a worrying element because the Court of Appeal in **Noone V Nwtha** and the recent case of **Baker V Cornwall County Council** has tried to make it easier for Tribunals and the County Court. In the latter case Neill LJ recognised that a person complaining of unlawful discrimination will almost certainly face great difficulties in proving the case because the alleged discriminator is most unlikely to admit the discrimination. **"Accordingly ", he said, "if discrimination takes place in circumstances which are consistent with the treatment being based on grounds of sex or race the Industrial Tribunal should be prepared to draw the inference that the discrimination was on such grounds unless the alleged discrimination can satisfy the Tribunal that there was some other innocent explanation".**

In a recent report prepared by the Policy Studies Institute for the Home Office on the "THE ENFORCEMENT OF THE RACE RELATIONS ACT 1976" the observation is made that "more of race than other cases proceed to a Tribunal hearing, yet the proportion successful at a hearing is lower (race cases 7 per cent, all cases 13 per cent) while the proportion dismissed at a hearinng is much higher (race cases 33 per

cent, all cases 19 per cent). This study is of Industrial Tribunal cases in England and Wales disposed of in the two years ending March 1988.

As long as Tribunals adopt this rather unsympathetic attitude, so long will the would be complainant be discouraged from mobilising the Race Relations Act 1976 to his aid.

WHAT IS TO BE DONE

Experts and practitioners are agreed that panel members and some Tribunal Chairmen need training in racial discrimination. This may be one way of assisting the complainant.

The CRE has embarked on a programme of training Trade Union full time officers and others who do Tribunal representation so that the Unions are enabled to take on racial discrimination cases. This is already beginning to pay dividends. More Unions are aiding complainants to bring cases. This will serve to relieve the embattled CRE.

The Commission has also entered into a partnership with the Community Relations Councils which are locally based. A programme of intensive training is being planned so that these bodies can ferret out racial discrimination locally and represent in some cases. Programmes for voluntary organisations are also planned.

Consistent with this strategy the Commission has initiated the founding of a Complainant Aid body which will be manned by the ethnic minorities. What the Commission envisages is that this will be another independent anchor body for tackling racial discrimination without, perhaps, the stigma of being associated with any government. The Commission is committed to part-funding the body for an initial period of 3 years. The body which will be a non-profit making trust will also be expected to raise funds elsewhere.

It is hoped that through this body, Complainant Aid will be increased to a level which competent representation in Tribunals and County Court will be provided. This is still yet a dream.

There is still a long way to go before the crisis in Complainants Aid can be resolved. We just have to plug on.

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THE EFFECTIVENESS OF STRATEGIC ENFORCEMENT OF THE 1976 RACE RELATIONS ACT

by

MARY COUSSEY

THE EFFECTIVENESS OF STRATEGIC ENFORCEMENT OF THE 1976 RACE RELATIONS ACT

1. The strategic powers in the Race Relations Act 1976 are generally considered to be those under S.49 which enable the statutory Commission for Racial Equality (CRE), to carry out formal investigations. The courts have defined two types of such investigation; general enquiries which can be carried out after giving general notice, without the Commission holding any belief that there may have been breaches of the Act. Such investigations cannot be confined to the activities of specific named organisations and can result only in a report and recommendations. The second type of investigation is the "belief" or "accusatory" investigation, into suspected unlawful acts by a named person. In these the CRE is required to specify grounds for such belief; and give an opportunity for representations before embarking on enquiries. Belief investigations are accompanied by a power to issue sub-poena notices, and non-discrimination notices; the latter preceded by another obligatory opportunity for representations.

2. The basis for the strategic role of the CRE was set out in the white paper preceding the 1976 Act; in this it was envisaged that the proposed commission would be able to carry out formal investigations on its own initiative into a specific organisation. The decision in the Prestige (1) case in 1984 precluded investigations into named organisations, where no unlawful acts were suspected.

What is the extent of racial discrimination?

3. Any discussion of the effectiveness of the strategic provisions of the 1976 Act has to be set in context. This paper uses employment as an example and considers the recorded levels of discrimination; and how we can measure the effectiveness of the law in reducing these.

4. There are three main indicators which tell something about the position of ethnic minorities. Throughout the 1980's, the unemployment rate for ethnic minority people was double that of whites. In the same period, there was a higher proportion of ethnic minority people in lower level occupations than white people; and they were concentrated in certain industrial sectors. These differences partly reflect historical employment patterns of the 1950's and 1960's. Ethnic minorities were also more likely to be in the lower level jobs, which have been particularly affected by redundancy. But the higher ethnic minority unemployment rate cannot be fully explained by such differences, nor by qualifications, as the proportion with higher level qualifications is above average.

5. The extent of racial discrimination has been demonstrated in several studies. For example, a survey (2) between 1984 & 5 based on hundreds of applications for a range of jobs showed that about one third of employers discriminated against the ethnic minority applicant, in favour of an equally qualified white person; a level of discrimination found in a similar survey conducted in the mid 1970's (3). CRE investigations and research have found similar disparities in graduate recruitment and in particular sectors.(4)

6. Although the unemployment rate for ethnic minorities has recently narrowed to 60% (5) above that for whites, this is partly because of economic changes, and also due to the beginnings of the downturn in the supply of young people the labour market. It is not known whether this labour market pressure has caused any reduction in the level of discrimination.

How effective has the law been?

7. Prestige has meant that since 1984 the CRE has been unable to use its formal investigation powers as envisaged. Investigations into named organisations have been dependent on evidence of suspected unlawful acts; and it has thus been more difficult to aim these at employers who are particularly influential or otherwise significant. The requirements for representations at both ends of the investigation have led to extensive delays, and much of the litigation has concentrated on procedural requirements rather than the substantive issues. After the Commission has made findings of fact, an appeal against any proposed notice has been held to carry with it the right to challenge the facts on which the notice was based, thus reopening and rehearing an already lengthy inquisitorial process. (See for example, the investigations of Westminster City Council and Amari Plastics).

8. The remedy in a belief investigation, is the non-discrimination notice. But this cannot prescribe changes in practices. It can only require cessation of a particular unlawful act. Nor can the notice require individual victims of the unlawful discrimination to be compensated. The resource investment needed to bring about changes though belief investigations has been very heavy; and has caused the Commission to weigh their cost-effectivness compared with other ways of bringing about changes; and use representations as an opportunity to negotiate the desired changes.

9. General investigation have since 1984 been used to make strategic interventions in a particular industry, sector or area, where there are indications that little progress has been made, and where growth and job increases are expected. These have been useful to demonstrate levels of inequality, distinguished from research because respondents can be named, bringing added public pressure.

The Code of Practice

10. No discussion of strategic law enforcement is complete without consideration of the role of the code of practice in Employment. Although a voluntary code, it has authority from having had Government and Parliamentary approval, and a wide basis of consultation behind it. It sets out a framework of good practice, based on previous findings of discrimination and the remedies applied.

These provisions are increasingly being referred to by industrial tribunals, as a yardstick for assessing employers` claims to be practising equality of opportunity. In 1989, code - making was extended to rented housing, and the 1989 Local Government and Housing Act gives the Commission power to issue codes in the non-rented sector. A non-statutory code has also been issued in education.

Research has shown that only a minority of employers is fully implementing the recommendations in the Employment Code. The proportion is significantly higher among large employers; public sector employers, and the employers with a substantial ethnic minority workforce.

Conclusions

11. There has been no objective evaluation of then effectiveness of the strategic law enforcement powers in the 1976 Act; and indeed, it would be difficult to isolate the impact of this from other regulatory activities. Experience in the United States (6) suggests that six conditions are necessary before employers seriously begin to change their practices. Firstly, the standards must be set by law: secondly there must be a vigorous enforcement programme to give the incentive for self-regulations (for example, settlements involving rights or compensation for thousands of minority workers and enforcement agencies alone to have an affect with minimum evidence); thirdly the results to be achieved must be measurable (ie an objective standard of adverse impact); fourthly there must be private access to litigation; fifthly an organisation must be better of after voluntary compuance; that is, the risk from prosecution or regular inspection or a reporting mechanism must a real pressure; sixth there must be sufficient and organised public concern, from organised groups; or from a wide cross-section of individuals and institutions.

Enforcement in Britain meets only one of these tests, that of private access to litigation. Courts and tribunals have not set standards, in the sense of defining the specific steps needed to produce equality, nor have they yet objectively defined disproportionate effect (although the CRE has done so in its reports and recommendation); enforcement cannot be defined as vigorous and there is little economic pressure. Set against the estimated tens of thousands of acts of direct discrimination, in employment, the few hundred cases each year cannot be seen as extensive. There is no satisfactory system for inspection or reporting, and the resources of the CRE do not allow it to attempt any such functions.

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