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W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

*The Effectiveness of Discrimination Law*

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## W.G. HART WORKSHOP 1990

### The Effectiveness of Discrimination Law

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Despite the creation of two administrative agencies charged with the task of working towards "the elimination of discrimination", most of the burden of testing the effectiveness of discrimination law has in practice been shouldered by individual complainants, the majority of whose cases have been concerned with employment discrimination and hence have come within the jurisdiction of the industrial tribunals.

In this workshop we will begin by looking at the steady accumulation of research evidence which identifies a number of serious shortcomings in the tribunal system with regard to its adjudication in discrimination cases. This evidence will provide the backdrop for a discussion of the ways in which the system might be improved. Below are some suggestions as to the issues that workshop participants may wish to address; we may not cover all of them (some will have been raised in other workshops) and there may be additional issues that participants wish to raise.

#### 1. Supporting the complainant

Tribunals no longer dispense "simple, informal justice in an atmosphere in which the ordinary man (sic) feels he is at home" (Conroy 1971). Should legal aid therefore be extended to cover legal representation at industrial tribunals or would this be counter-productive/irrelevant? Should the powers/duties of the two Commissions be extended or would an alternative system of support be more appropriate? Would the introduction of class action into the U.K. legal system help to reduce the isolation experienced by individual complainants or would the technical difficulties associated with such a development be likely to neutralise any possible benefits? Perhaps most importantly, is it possible to strengthen the victimisation provisions in order to provide effective protection against victimisation for all complainants?

#### 2. Improving the quality of adjudication

Do we need a separate discrimination division within the tribunal system to hear sex and race discrimination cases, or should we concentrate on improving the quality of training for tribunal members within the present system? Should we press for a programme of positive action to ensure that a larger proportion of the tribunal membership is young, female and black? Would it help if we shifted from an adversarial to an inquisitorial system of adjudication, or can we improve the quality of evidence available to the tribunal in other ways? Is the system of "independent experts" as used in equal value cases a useful model that could be extended to other discrimination cases or does it merely cause further delays and complications?

### 3. Devising effective remedies

How can we devise new ceilings and new guidelines on appropriate levels of compensation in discrimination cases, and how can we ensure that successful applicants actually receive the sums awarded? Should the exemption from damages for employers found guilty of unintentional indirect discrimination now be lifted? Should the tribunals be empowered to require specific remedial action from employers found guilty of discrimination; if so, how could this be monitored? Finally, perhaps we should consider lifting the burden of combating discrimination from the individual complainant altogether and move instead towards a proactive law, which would place responsibility for the elimination of discrimination squarely on the employer, closely monitored by an appropriately resourced and empowered Commission. The Fair Employment (Northern Ireland) Act 1989 or the Ontario Pay Equity Act 1987 might provide useful reference points for devising such legislation.

#### Useful Reading

- A.M. Leonard                      Judging Inequality: the effectiveness of the tribunal system in sex discrimination and equal pay cases (1987 London: Cobden)
- A.M. Leonard                      Pyrrhic Victories: winning sex discrimination & equal pay cases in the industrial tribunals, 1980-84 (1987 London: HMSO)
- J. Gregory                          Trial by Ordeal: a study of people who lost equal pay & sex discrimination cases in the industrial tribunals, 1985 & 1986 (1989 London: HMSO)
- V. Kumar                            Industrial Tribunal Applicants under the Race Relations Act 1976 (1986 London: Commission for Racial Equality)
- Justice                              Industrial Tribunals (1987 London: Justice)
- G. Chambers                        "How do Tribunals affect Employers?" Between Equals (Issue 2, Autumn 1989)
- "Victimisation is Discrimination" (Equal Opportunities Review No. 30 March/April 1990)