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GENDER EQUALITY IN THE UK—THE LEGAL FRAMEWORK

Introduction

We have come along way in terms of equality law since Lord Davey made his statement. Not only was he unable or unwilling to see the law as a vehicle for protecting individuals from discrimination in employment, he was also very definitely talking about a 'workman' and the fact that this might be a woman had probably not occurred to him. Times and contexts have changed and the law now has a clear role to play in protecting individuals from discrimination on a number of grounds. This Law in Brief summarises the legal framework relevant to gender equality in the employment sphere. This Law in Brief also acts as a background paper for a pilot research project looking at women's progression in the academic sector.¹

The European Union Position

Treaty provisions

The European Union has been active in the field of gender equality for quite some time. The rationale for promoting gender equality however did initially at least not stem from concerns about equality between men and women or a desire to promote women's rights. Equality began with economic policy measures to ensure equal pay. Allowing Member States to pay women less than men would put those countries which already had equal pay legislation, (notably France at the time) at a competitive disadvantage compared to those who could otherwise take advantage of lower labour costs when employing women. The prin-

An 'employer may refuse to employ [an individual] for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him'

Lord Davey in Allen and Flood [1898] AC 1, 172

inciple of equal pay is enshrined in Article 141 of the

EC Treaty.

Article 141 however focuses on equal pay and does little to ensure gender equality more generally. Under Article 13 there are now more general powers to implement

Article 13EC³

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

measure to combat discrimination on a number of grounds including sex.

Secondary Legislation

Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation is one such measure. The directive covers 4 different types of discrimination recognised in European Law. Direct discrimination is defined as less favourable treatment on the grounds of sex; indirect discrimination as that relating to a person of one sex being put at a particular disadvantage by an apparently neutral provision, criterion or practice. The Directive also covers harassment, defined as unwanted conduct violating the dignity of a person and sexual harassment which has a very similar definition to that of harassment but must contain conduct of a sexual nature. Victimisation in employment is also covered in

Article 141EC²

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
 2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means:
 - a. that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
 - b. that pay for work at time rates shall be the same for the same job.
- ...

the directive.

Article 4 of the directive clearly outlaws any form of discrimination in relation to all aspects and conditions of remuneration. Article 14 extends the right to non-discrimination to access to employment and training and to working conditions. By virtue of article 15, women have the right to return to their jobs (or equivalent) following a period of maternity leave and article 16 makes provisions to protect parents from being discriminated against because of paternity or adoption leave periods. All of these provisions have now been transposed into UK law.

The UK provisions

Sex equality law in England and Wales, much of which is based on EU law, can be found in the Sex Discrimination Act 1975 (SDA) and Equal Pay Act 1970 (EPA) both as amended. While the provisions complement each other and are to be regarded as a coherent whole, the provisions are mutually exclusive. The EPA covers all matters relating to pay and conditions and the SDA covers those areas which fall outside of that remit. The SDA would for example include discrimination in relation to advertising positions, hiring or promotion.

Equal Pay

The EPA implies an 'equality clause' into any employment contract ensuring there is no less favourable treatment than the treatment a comparable person receives. A comparator is someone who is of the opposite sex and is employed on 'like work' or rated as equivalent or on work of equal value. The equal pay legislation is in some respects more flexible than the SDA as no adverse affect needs to be established. Sex discrimination is presumed if the complainant can show that a member of the opposite sex is being paid more for 'like work'.

Home Office v Bailey [2005] IRLR 369

'if a woman can point to a job being performed by a man on a higher rate of pay, which is the same job as she is performing or its equivalent in value, the subsection seems simply to place the onus on the employer of proving that "genuinely" there is a material difference which has nothing to do with the difference in sex.... I do not read the subsection... as imposing a two-stage process in which the woman having pointed to a higher paid man has some burden of establishing a prima facie case that there is discrimination, which then imposes and evidential burden on the employer to justify the factor.'

The main problems in relation to equal pay arise in relation to the definition of 'like work or work of equal value'. According to Capper Pass Ltd v Lawton [1976] IRLR 366 'like work' need not be the same, broadly similar is sufficient and 'trivial differences, or differences not likely in the real world to be reflected in the terms and conditions of employment, ought to be disregarded.'

Work rated as equivalent in any job evaluation schemes must be paid at the same level. Where no job evaluation scheme has been carried out, an equal pay claim can still be brought on the basis that the work is of 'equal value'. Pickstone v Freemans plc [1988] ICR 697 HL is the key ruling in this context. Mrs Pickstone, a warehouse operative, claimed equal pay with a male comparator who was a 'checker warehouse operative'. There was also a man employed as a 'warehouse operative'. However the court held that a 'token man' doing a particular job did not preclude an equal pay claim and the issue for the court is whether the work done by 'checker warehouse operatives' is of equal value to that of 'warehouse operatives'.

The SDA provisions

The SDA covers 4 forms of discrimination: Direct discrimination, indirect discrimination, harassment and victimisation. All 4 definitions follow the European definitions and considered in turn below:

Direct Discrimination

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been, or would be treated in a comparable situation on the grounds of sex. The law is based therefore on comparing the treatment of the victim with the treatment of others. This comparison must be between cases where the relevant circumstances are not materially different from each other and the comparator can be a hypothetical one.⁴

The reason or motive for the discrimination is irrelevant. The case of Moyhing v Barts & London NHS Trust [2006] IRLR 860 is a recent example from the employment sphere. In this case male nurses performing intimate procedures on female patients had to be chaperoned. There was no equivalent requirement for female nurses. Whatever the justification, this still amounted to direct discrimination – the whole point of the legislation is not to treat women differently from men or treat one group as capable of doing something and the other group as not capable of doing the same thing.

Discrimination is also unlawful when it occurs because of stereotyped ideas about the characteristics of a particular group. It would render the legislation quite ineffective if this kind of discrimination was not unlawful. A useful illustration is provided by Horsey v Dyfed CC [1982] IRLR 395. Mrs Horsey worked in Wales and when her husband was offered a job in London, applied for a secondment to London. It was refused on the basis that she was unlikely to return because women tend to follow their husband and go wherever he gets a job. This was held to amount to direct discrimination.

All direct discrimination is automatically unlawful. It cannot be justified unless it falls within the exceptions defined as genuine occupational qualifications which are briefly considered below.

Indirect discrimination

SDA

1(2) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if

...

(b) He applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –

- i. Which puts or would put women at a particular disadvantage when compared with men
- ii. Which puts her at that disadvantage, and Which he cannot show to be a proportionate means of achieving a legitimate aim

Indirect discrimination occurs if a seemingly neutral provision affects one group more than another. This is a straightforward idea but the implementation of it has caused problems. One problem arises in relation to the definition of 'provision, criterion or practice'. In British Airways v Stamer [2005] IRLR 862 a female pilot asked to reduce her working hours to 50% of a full time position after having her first baby. The request was refused and her employer argued that the refusal was not a provision criterion or practice but a one-off decision taken in this particular situation. The Employment Appeal Tribunal disagreed and held that indirect sex discrimination had occurred because it was more difficult for women, who generally bear the brunt of family responsibilities, to work full time. The refusal to allow part time working in this case could indeed amount to a provision, criterion or practice.

One of the fundamental differences between direct and indirect discrimination is that indirect discrimination can be justified. If the measure under scrutiny is a 'proportionate means of achieving a legitimate aim' then the discrimination is not unlawful. In Hardy & Hansons plc v Lax [2005] IRLR 726 the claimant asked if she could return to work part-time following her maternity leave. The request was refused on the grounds that the employer needed a full-time employee for operational reasons. The tribunal felt that the employer had exaggerated the difficulties in allowing the claimant to return part time and found for her. The employer appealed arguing that the tribunal should not have substituted its own view but should have applied a 'band of reasonableness test'. The Court of Appeal dismissed the employer's appeal stating that 'it is for the tribunal to weigh up the real needs of the undertaking, expressed without

exaggeration, against the discriminatory effect of the employer's proposal'.

Harassment

In EOC v Secretary of State for Trade and Industry [2007] EWHC 483 the High Court ruled that the Employment Equality (Sex Discrimination) Regulations 2005 which amended the SDA 1975 did not properly implement the Equal Treatment Directive (2002/73/EC). As a result, sections 4A, (harassment) 3A and 6A (pregnancy/maternity) had to be redrafted.

The wording in the Directive and the newly drafted s 4A means the harassment need not be caused by the claimant's sex. It includes a situation where a woman is harassed by conduct directed at a man or another woman. It can also cover the position where an employer knowingly allows a work environment to continue where an employee is subject to repeated harassment by a customer or member of the public.

SDA s4A.

- (1) For the purposes of this Act, a person subjects a woman to harassment if
- (a) he engages in unwanted conduct that is related to her sex or that of another person and has the purpose or effect
 - (i) of violating her dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,
 - (b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect—
 - (i) of violating her dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or
 - (c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct

Victimisation

The SDA also prohibits victimisation on the grounds that the victim or another person has brought proceedings under the legislation. It is important to remember that an action for victimisation can only be brought in relation to acts which would breach the SDA in the first place. The case of Waters v Metropolitan Police Commissioner [1997] IRLR 589 serves as a useful example. The employee made allegations of rape and claimed she had been victimised by her employer for making the allegations. For the protection against victimisation to apply the alleged act must be one for which the employer is vicariously liable. As the alleged act in this case was not committed in the course of employment the employer could not be held vicariously liable for it and could therefore not be held to have victimised the complainant for mak-

ing the allegations.

However in relation to the same case the House of Lords considered that a claim for negligence on the part of the senior police officers arose because they did not stop the harassment and that this action could be successful.⁵

The Personal Scope of the Provisions

The SDA applies, amongst others, to matters of employment defines employment as follows:

S82 (1) "employment" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;...

The scope of equality law under the SDA is therefore wider than the traditional definition of employee found in English employment law, which relates to employment under a contract of service only. Equality law has a greater reach extending to some independent contractors as long as personal service is the dominant purpose of the contract between the parties.⁶

Genuine Occupational Qualifications

The SDA contains a list of genuine occupations qualifications which can justify discrimination on the grounds of sex. They can be found in S7 of the Act and relate primarily to questions of authenticity (e.g. in acting) and decency/privacy. The job may involve physical contact, or there may be circumstances where members of one sex might reasonably object to the presence of the other because they are in a state of undress or using sanitary facilities. The work may be concerned with one sex only and require special care, supervision or attention e.g. in hospitals or prisons. These exceptions will however be interpreted narrowly

The Equality Duty

The Equality Act 2006 introduced a new section 76A into the SDA which imposes a general and positive duty on Public Authorities to promote equality. They must have regard to the need to eliminate discrimination and harassment and should produce equality schemes and action plans to help them achieve equality in all aspects of their work.

Equality and Human Rights Commission:

Instead of depending on individuals making complaints about sex discrimination, the [equality] duty places the legal responsibility on public sector organisations, authorities and institutions to demonstrate that they actively promote equality between men and women.⁷

Summary and Conclusions

The Law provides some protection and relief for those employees and other workers offering personal service suffering from less favourable treatment on the grounds of their sex. The legislation covers direct and indirect discrimination, harassment and victimisation. Whether the law, even with the new equality duty imposed on public authorities, actually protects victims from less favourable treatment is a debate for another day!

About the Author

Jessica Guth is a lecturer in employment and European Law. She joined Bradford University Law School in August 2007 having previously worked as a research fellow. Her research interests include a variety of issues in employment and EU law, legal education and law as an academic discipline. She is also interested in socio-legal and empirical approaches to research and teaching. Jessica has an LLB degree from Leicester, the LPC from Nottingham Trent and an MA in Social Research from Leeds. She is due to complete her PhD shortly.

References and Further Reading

¹The Project Women in the Higher Education Sector – Confronting the Issues for Academics at the University of Bradford was funded by the University of Bradford's Human Resources Directorate and carried out by Jessica Guth and Fran Wright of Bradford University Law School. The full report and executive summary can be downloaded at www.bradford.ac.uk/management/lawinbrief

²Article 141EC becomes article 157 in the consolidated texts as amended by the Treaty of Lisbon

³Article 13 EC becomes Article 19 in the consolidated texts as amended by the Treaty of Lisbon

⁴Note the difference with the equal pay provisions where there must be a real comparator.

⁵Water v Commissioner of Police of the Metropolis [2000] IRLR 720 HL

⁶see Mirror Group Newspapers Ltd v Gunning [1986] ICR 145 CA for an example.

⁷<http://www.equalityhumanrights.com/en/forbusinessandorganisation/publicauthorities/Pages/PublicauthoritiesGenderequalityduty.aspx>

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