

Litigation for Equality

Legal Entities' Standing



Brussels, October 2011, Margarita Ilieva

Standing Types

- On behalf
- In support
- *Actio popularis*
- Collective redress



Entity and Legal Basis Types

- NGOs/ Trade Unions
- Equality law
- General law
- Special non-equality law






BULGARIAN
HELSINKI
COMMITTEE

Requirements


- Incorporation
- Equality/HR aims/activity
- Legitimate interest
- Permanency
- Representativeness



BULGARIAN
HELSINKI
COMMITTEE

Requirements


- Consent (S, B, CR)
- Victim plurality (AP, CR)
- Capacity (CR)



BULGARIAN
HELSINKI
COMMITTEE

Proceedings


- Judicial
 - civil/ administrative/ criminal
- Administrative
- Equality body



BULGARIAN
HELSINKI
COMMITTEE

Remedies


- Generally applicable relief
 - declaratory
 - compensatory
 - injunctive



BULGARIAN
HELSINKI
COMMITTEE

Scope

- Uneven
 - grounds
 - fields/ proceedings
 - remedies



BULGARIAN
HELSINKI
COMMITTEE

On behalf

Min. 5 states lack compliance

In support
Direct intervention/
Amicus curiae
Min. 7 states lack
compliance



BULGARIAN
HELSINKI
COMMITTEE

Actio popularis

Available in min. 20 states



BULGARIAN
HELSINKI
COMMITTEE

Collective redress
Collective claims/
Class action
Available in min. 15 states


BULGARIAN
HELSINKI
COMMITTEE

Case law

Scarcity
Disparity
Trade Unions far less
than NGOs



BULGARIAN
HELSINKI
COMMITTEE

LEGAL SEMINAR ON EU ANTI-DISCRIMINATION LAW

4 October 2011

Brussels

'Legal Standing of Organisations in Collective Actions Concerning Mass Employment Grievances'

Prof. Rachael Mulheron
Department of Law
Queen Mary University of London
r.p.mulheron@qmul.ac.uk

I. The Need for Better Collective Redress in the Employment Law Sector in England

- a longstanding need for better collective redress in English law, for employment claims – as discussed in the evidence-of-need report prepared for the Civil Justice Council in 2008: R Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Feb 2008), ch 18 – evident from several factors:
- an explosion in particular types of claims in England in which compensatory (monetary) relief has been sought by claimants – according to statistics from the Employment Tribunal – as noted in Table 17 of *Reform of Collective Redress*:

Nature of Claim	2004/5	2005/6	2006/7
Equal pay	8, 229	17, 268	44, 013
Working Time Directives (pertaining to lack of holidays, rest breaks, or pertaining to hours of work)	3, 223	35, 474	21, 127
Sex discrimination (which frequently give rise to compensatory claims)	11, 726	14, 250	28, 153
National minimum wage (NMW) claims	597	440	806

- the potential for reprisals, employees being set off against each other, reluctance to come forward, etc, can be very real concerns in the employment context – e.g, re the litigation giving rise to *St Helens BC v Derbyshire* [2007] UKHL 16 – per Thompsons Solicitors newsletter, '*Victimising the Victims*' (10 May 2007), available at: www.thompsons.law.co.uk/text/lelr-weekly-015-victimising-the-victims.htm (overpage);
- certain representative devices on the statute books with respect to employment disputes had some problems or limitations associated with them, viz –
 - ★ s 189 of the Trade Union and Labour Relations Act 1992 (re a failure to inform and consult in relation to collective redundancies); and reg 15 of TUPE (re a failure to inform or consult in relation to a TUPE transfer) — procedural problems in bringing action under these provisions have occurred, e.g: *Nottinghamshire Healthcare NHS Trust v Prison Officers Assn, R Adams & 716 Others* (Employment Appeal Tribunal, Case No EAT/757/02/DA, 4 Apr 2003);

- ★ s 19(1) of the National Minimum Wage Act 1998 empowers officers to issue enforcement notices and, in the event of non-compliance, present complaints to the Employment Tribunal or the civil courts on behalf of members to whom the enforcement notice relates – but a trade union is not an ‘officer’ under the provision – e.g., *Leisure Employment Services Ltd v Commissioners of Inland Revenue* [2007] IRLR 450

Thompsons’ summary of the *St Helens* case:

‘Section 4 of the 1975 Sex Discrimination Act says that victimising someone for bringing a claim under the Equal Pay Act is, in itself, a discriminatory act.

In *St Helens MBC v Derbyshire*, the House of Lords said that the women were victimised by their employer when they were sent letters warning them of the implications for the school meal service if they continued with their equal pay claims. The women’s union — the GMB — instructed Thompsons to act on their behalf. Almost 500 female catering staff brought equal pay claims against the Council in 1998.

The vast majority settled, but 39 (including Mrs Derbyshire) successfully pursued their claim. However, two months before their claim was heard in 2001, they received a letter from the Council, asking them to withdraw and warning them that it could not absorb the cost of their claims. The second (sent to all catering staff) warned that the cost of school meals would rise and everyone’s job would be at risk, if the 39 were successful.

The women were distressed by the letters, but the Council justified them by saying that the purpose was to get the women “to face facts and to take a responsible view of reality”. ...

The Lords ... agreed ... that the women had been victimised ... They said that although employers had a right to send out letters pointing out the possible consequences of a successful claim, the letter sent by the Council was “intimidating”.’

II. Legal Standing of Organisations – Designating the Type of Organisation as Class Representative

Dilemma 1: Only designated organisations, or any that satisfy specified criteria?

- ☐ pre-designated organisations, which are deemed to be suitable representatives (e.g. trade unions, other employee associations):
 - ★ e.g., the competition law sector – s 47B of the Competition Law 1998;
 - ★ advantages and disadvantages;
- ☐ any organisation which satisfies the court that it is appropriate:
 - ★ the approach adopted by English law reformers under the proposed class actions reforms of 2010 (per *Financial Services Bill 2010*, cl 18–25, and supporting *Draft Rules of Court* (available at: http://www.civiljusticecouncil.gov.uk/files/CJC_Draft_Rules_for_Collective_Actions_Feb_2010.pdf), especially proposed CPR 19.21;
 - ★ advantages and disadvantages.

Dilemma 2: Exclusive, or additional to an actual class member?

- ❑ exclusive claimant has certain advantages, but disadvantages too – again, witnessed under s 47B, above;
- ❑ a wider designation of appropriate representative claimant – to encompass either an organisation, or an actual class member – favoured in English class actions reform of 2010;

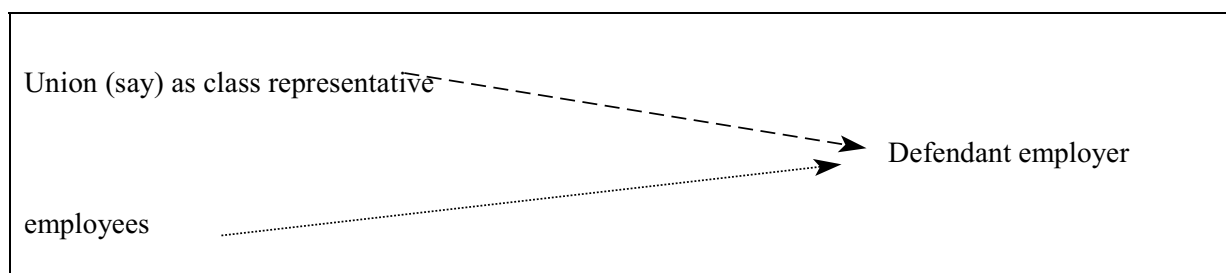
The Financial Services Bill 2010
Financial Services Regulations (per cl 22 and 23 of the Bill)
*** Civil Procedure Rules, Pt 19.IV (CPR 19.16 ff) ***
Practice Direction 19D – Collective Proceedings

III. Legal Standing of Organisations – Proving that the Organisation is an Adequate Representative

- ❑ ‘*permission of the court must be obtained ... to bring a claim in collective proceedings*’: proposed CPR 19.17(2) – unless a specific regime for, say, employment claims before the Employment Tribunal was drafted instead;
- ❑ reasons why certification of *any collective action* was considered mandatory by English law reformers and rules-drafters;
- ❑ several certification criteria were included in the *proposed* rules in the CPR (currently unenacted), which any organisation, acting as class representative, would have to satisfy – e.g., re employment discrimination claims:

Commonality	the employment law claim must raise the ‘same, similar or related issues of fact or law’ among class members
A suitable representative	either an ‘ideological claimant’ or a directly-affected class member may bring the employment law claim, if an ‘appropriate person’
Preferability	the collective proceedings for determining the employment law claim must be the ‘most appropriate means for the fair and efficient resolution of the common issues’, and must be ‘appropriate [to] further the overriding objective’
Minimum class size	a minimum number of class members must allege a common grievance in the employment law claim (‘an identifiable class of persons’)
Preliminary merits threshold	a claim which is weak, but not so weak that it could be struck out, could fail certification because, ‘in all the circumstances’, it should not be certified
Statement of truth	the representative claimant is required to state in its application, verified by a statement of truth, that it believes that the employment law claim has real prospects of success
Cost-benefit test	the court must take into account ‘the costs and the benefits of the proposed collective proceeding’ when deciding whether the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues

- criteria for ‘adequacy’;
- what if the organisation as class representative is seeking a different remedy, or has a different cause of action, from those which the class members (i.e., the actual employees) are pursuing?



e.g., *Finance Sector Union of Australia v Cth Bank of Australia* (1999) 94 FCR 179 (Full FCA)

- plus, no conflicts of interest arising ...

IV. Legal Standing of Organisations – Proving Financial Adequacy

Three types:

- funding the action – what options will be available to the organisation to do that?
- meeting adverse costs, should the claim fail — and note, the certification criterion incorporated in the proposed *Draft Rules of Court* (2010):

Meeting adverse costs	the representative claimant must satisfy the court that he/she/it will be able to pay the defendant’s recoverable costs if ordered to do so
------------------------------	---

- meeting a security for costs order (if any)

The topics covered in this presentation are further discussed in some of the author’s materials noted below:

‘*Recent Milestones in Class Actions Reform in England: A Critique and a Proposal*’ (2011) 127 *Law Quarterly Rev* 288–315
Costs and Funding of Collective Actions: Realities and Possibilities (A Research Paper for submission to the European Consumers’ Organisation (BEUC), Brussels, Feb 2011), vii + 133 pp
 ‘*Inaugural Presentation*’, available at: <http://www.law.qmul.ac.uk/events/podcasts/mulheron2011/index.html>
 ‘*Opting In, Opting Out, and Closing the Class: Some Dilemmas for England’s Class Actions Law-Makers*’ (2010) 5 *Canadian Business LJ* 376–408
 ‘*Costs Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere*’ in D Dwyer (ed), *The Tenth Anniversary of the Civil Procedure Rules* (OUP, Oxford, 2010) ch 10, 183–228
 ‘*The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis*’ (2009) 15 *Columbia J of European Law* 419–462
 ‘*Justice Enhanced: Framing an Opt-out Class Action for England*’ (2007) 70 *Modern Law Review* 550–580
The Class Action in Common Law Legal Systems: A Comparative Perspective (Hart Publishing, Oxford, 2004)
