



Executive Summary

Country Report UK 2011 on measures to combat discrimination

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1. Introduction

The United Kingdom (UK) comprises England, Wales, Scotland and Northern Ireland (NI), with the term Great Britain (GB) used to refer to England, Wales and Scotland. The UK is a parliamentary democracy, based around the core principle of parliamentary sovereignty. It has neither a written constitution nor an entrenched constitutional bill of rights but an extensive set of constitutional conventions establish what has been described as an unwritten constitution. The English, Welsh, Scots and Irish have historically been regarded as the four major ethnic groups in the UK but the UK has always been a country of migration, and the increase in the size and variety of different ethnic groups since the late 1940s, added to the constant influx of migrant labour from EU and non-EU states has made the UK a multicultural state..

Certain ethnic minorities, including the native Traveller communities, continue to suffer from high rates of unemployment, social exclusion and poverty. Media campaigns against asylum-seekers and Travellers has contributed to greater hostility towards these particular groups. The events of 11 September 2001 and the London suicide bombings in July 2005 have had a similar impact upon British Muslim community.

Some prejudice also exists against disabled persons and gay/ lesbian/ bi-sexual/ transgendered people and age discrimination is not unknown. In recent years, however, there has been much wider social acceptance of the rights of gay men and women to full equality across the political and media spectrum, and the UK has introduced comprehensive civil partnership legislation that permits same-sex couples to register their partnership and obtain equivalent legal rights as those available to opposite-sex married couples. There are proposals to recognise same-sex marriage despite opposition from a number of prominent religious figures.

In Northern Ireland the ongoing tensions between the Unionist/Protestant majority and Nationalist/Catholic minority continue to generate sectarian division, though much less so than during the period of “the troubles”. Sectarian divisions also feature in parts of Scotland.

The UK traditionally permitted very limited scope in law for preferential treatment for disadvantaged groups, but since 2000 a series of positive duties have been imposed upon public authorities to promote equality of opportunity on the grounds of race/ethnicity, disability and gender, while a similar duty in Northern Ireland extends across all of the six equality grounds (sex, race, disability, sexual orientation, religion/belief and age). Positive action strategies have been adopted at national,

regional and local level across the various equality grounds and private employers are also subject to monitoring requirements and obligations to take action to remedy under- representation of either of the two main communities (Catholic and Protestant) in Northern Ireland.

The Equality Act 2010, which came into force in October 2010, made a number of important changes to equality/ discrimination law in GB. In particular, and in addition to codifying and clarifying the existing law, it significantly extended the ability of employers and others to adopt positive action measures to promote equality, and from April 2011 imposed a single cross-ground general equality duty on all GB public authorities.

2. Main legislation

As the UK has no written constitution, legislation is the primary tool for establishing anti-discrimination law in the UK. The UK has ratified all the major international human rights treaties and the main Council of Europe human rights instruments, including the ECHR, the Charter on Minority Languages and the Convention on Minority Rights. International treaties are not directly applicable in UK law unless incorporated by an Act of Parliament, although they can be used to interpret legislation in certain circumstances. The Human Rights Act 1998, which gives effect to the ECHR in UK law, can provide valuable protection in some contexts against discrimination.

Anti-discrimination legislation in the UK was first introduced in the field of race/ethnicity in the 1960s. It mainly consists of civil law provisions but there are in addition some criminal offences such as incitement to racial and religious hatred. In Northern Ireland, a separate legislative framework has been introduced for political and constitutional reasons.

The Equality Act 2010 now prohibits direct and indirect discrimination, harassment, victimisation and instructions to discriminate because of race (defined as ethnicity, colour, national origin or nationality), sex (including married or civilly partnered status, pregnancy and gender reassignment), disability, sexual orientation, religion or belief and age in employment and occupation and (other than in the case of married or civilly partnered status or, pending full implementation, age) access to goods and services, education, housing and the performance of public functions. Duties of reasonable accommodation are imposed in relation to disability. The provisions of the Equality Act 2010 are at least broadly in conformity with the requirements of the 2000 Directives, though its material scope is considerably broader. Northern Ireland's legislation adopts broadly similar definitions of discrimination though there is there no single equality provision.

3. Main principles and definitions

There is no definition in statute or case law of "race" or "racial origin": the legislation

prohibits discrimination on “racial grounds”, which are defined as to include colour, nationality (including citizenship), and ethnic and national origins (s.9 Equality Act 2010). The meaning of “ethnic origins” and “ethnic group” has been clarified by the UK courts through precedent. “Religion”, “belief”, “age” or “sexual orientation” are not defined in detail in the Equality Act 2010 or the equivalent provisions of NI law. Section 10 of the Equality Act 2010 now provides that “Religion means any religion and a reference to religion includes a reference to a lack of religion” and that “Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.” “Sexual orientation” is defined by s.12 as “a person's sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex”.

A person is regarded as disabled for the purposes of the Equality Act 2010 (the Act protecting only those with disabilities against disability-related discrimination) if s/he “has a physical or mental impairment ... [which] has a substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities.” A disability will only be considered to have “substantial and long-term adverse effect” if it impacts substantially upon how the person performs day-to-day activities, and has lasted for at least 12 months, or the period for which it is likely to last is at least 12 months, or for the rest of the person's life.

There is a consistent definition of direct discrimination across all GB legislation (s.13 Equality Act 2010): “a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.” S.13(2) goes on to provide that “If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim”, s.13(3) that “If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B”. Only in relation to age can direct discrimination be justified. S.23 of the Equality Act 2010 provides that “On a comparison of cases for the purposes [establishing discrimination] there must be no material difference between the circumstances relating to each case”. In particular, where disability discrimination is at issue: “[t]he circumstances relating to a case include a person's abilities”. The Equality Act 2010 also makes segregation on racial grounds a form of direct discrimination (s.13(5)). The position in NI is broadly similar though the definition of direct discrimination refers to less favourable treatment “on grounds of” rather than “because of” the protected characteristic.

The Equality Act 2010 provides (s.19) that “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's”, s.19(2) further providing that “a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B

does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim". The prohibition against indirect discrimination applies in GB to all the protected grounds whereas, in NI, there is not as yet any prohibition on indirect discrimination relate to disability. The definition of indirect discrimination in NI are materially similar to that in the Equality Act 2010 except that, where the discrimination at issue falls outside the scope of the 2000 Directives, the original definition of indirect discrimination that was used in the UK race and gender discrimination legislation continues to apply.

Insofar as it applies to disability, the Equality Act prohibits direct and indirect discrimination and also prohibits unjustified discrimination "arising from disability" (s.15), and failures to make reasonable adjustments (ss.20, 21). S.15 defines the former as occurring where "A treats B unfavourably because of something arising in consequence of B's disability, and ... A cannot show that the treatment is a proportionate means of achieving a legitimate aim", unless "A shows that A did not know, and could not reasonably have been expected to know, that B had the disability". In NI, the DDA does not prohibit indirect discrimination but does (s. 3A) prohibit three different concepts of discrimination:

- a) Discrimination for a reason relating to a disabled person's disability, which can be objectively justified;
- b) Direct discrimination on the grounds of a person's disability in employment and occupation, i.e. where a person is treated differently because of the fact he or she is disabled and not for a related reason, which cannot be justified in law, and
- c) Discrimination by virtue of a failure to comply with the duty to make reasonable adjustments, which cannot be justified in the employment and occupation context but can in the context of goods and services.

The Equality Act 2010 is thought, because of prohibition of less favourable treatment "because of" any protected ground, to regulate all discrimination based on assumed or perceived characteristics. In NI, judicial interpretation is required to achieve this in relation to age and disability as the relevant legislation refers in each case to discrimination on the grounds of the age or disability of the person discriminated against..

The Equality Act 2010 defines harassment as occurring (s.26(1)) where "(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—(i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B". Section 26(2) further provides that "A also harasses B if—(a) A engages in unwanted conduct of a sexual nature, and (b) the treatment has the purpose or effect referred to in subsection (1)(b)" and s.26(3) explicitly defines and prohibits less favourable conduct arising from submission to or rejection of unwanted conduct of a sexual nature or that is related to gender reassignment or sex. The Equality Act imposes a partly objective test to the question whether conduct which is not intended to violate dignity

etc can nevertheless regarded as having the effect of so doing. In NI a common definition of harassment has been incorporated into the legislation that covers the scope of the 2000 Directives across all the equality grounds, which is broadly similar to that in the Equality Act 2010.

Victimisation is prohibited across all the equality grounds in GB and NI, the definitions which apply differing between the two jurisdictions. In GB the Equality Act 2010 provides (s.27(1)) that “A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act”, s.27(2) defining as a “protected act” “(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act”. The approach in NI is similar save that the person alleging victimisation has to establish *less favourable* treatment on the ground of his or her having performed the protected act, a formulation which has given rise to significant difficulty at times. In both GB and in NI the protection from victimisation does not apply if the allegation made by the victim was *both* untrue *and* made in bad faith.

Section 111 EqA provides in its first paragraph that: “... A person (A) must not” instruct or cause or induce another person “(B) to do in relation to a third person (C)” anything which breaches the Act. In NI, both instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited in the case of religious belief or political opinion.

In NI, instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited on all the protected grounds, but only in the case of religion/ political belief and age can an individual bring enforcement action. In other cases the Equality Commission alone can act. Having said this, there is authority that a person who is instructed to discriminate against another can bring enforcement proceedings against the instructor where (as in *Weathersfield Ltd. v Sargent*, where the instruction was issued by an employer)¹ the instruction amounts to the imposition of a detriment on the person to whom it is issued.

Discriminatory advertisements are currently only explicitly prohibited in Northern Ireland, and then only when they relate to the race, religion/ belief or disability. Only the ECNI has the power to bring enforcement action in respect of such advertisements. Individuals across the UK may only bring legal claims in respect of discriminatory advertisements if they are actually subject to less favourable treatment on a prohibited ground, (as, for example, where they apply for the posts in question and are rejected on the relevant ground). Perhaps on this basis, the UK government has indicated that it considers that UK law is in conformity with the *Feryn* decision

¹ [1999] IRLR 94.

and it did not take the opportunity provided by the EqA to extend legislation in this area, instead removing such prohibitions (enforceable by the EHRC) as had previously applied

The EqA provides an exception for genuine and determining occupational requirements together with broader exceptions applicable to religious organisations. In NI, the DDA does not provide an exception for genuine and determining occupational requirements, GORs or specific exceptions being provided in relation to other protected characteristics. The EqA and NI Age Regulations make provision for age differences in minimum wage schemes and seniority-linked pay differentials but the state “default retirement age” of 65 was abolished in April 2011. Different exceptions exist for national security and public order across the various legislative instruments. The Armed Forces are largely exempt. Outside the scope of the 2000 Directives, exceptions exist for actions authorised by other statutes.

4. Material scope

The UK anti-discrimination legislation applies to all sectors of employment, both public and private. It also applies to some but possibly not all forms of self employment, which may fall short of the Directives, especially where voluntary work related to self-employment is concerned.

Discrimination in the provision of goods and services, housing, education, social protection including social security and health care, social advantages and the performance of public functions is also now prohibited across all the equality grounds except age in both GB and Northern Ireland. Having said this, UK law does not contain any clear definition of social advantage, and whether the existing legislation is adequate to implement EU law will not be known until a body of case law has been developed, both within the UK and in the European Court of Justice. The Equality Act 2010 contains provisions extending protection against age discrimination for GB to the provision of goods and services, health care, social advantages and the performance of public functions. These would not apply to children under the age of 18. The Coalition Government began consultations in March 2011 on how these provisions might be implemented.

5. Enforcing the law

Individuals who consider they have been discriminated against can bring legal proceedings, with cases involving allegations of employment-related discrimination (public sector and private sector) going to the employment tribunals (industrial tribunal or Fair Employment Tribunal in NI), and complaints concerning any other unlawful discrimination (by public sector or private sector bodies) going to the civil courts. The main remedy available is damages, which are calculated as in civil proceedings for tort. Injunctive relief can also be obtained. Compensation awards vary across the grounds, and from context to context. Average and maximum awards made by employment tribunals varied in 2010-11 between EUR 10 448 (£8 515) and



EUR 24 812 (£20 221) in religion/ belief cases to EUR 37 166 (£30 289) and EUR 222 200 (£181 081) in age and disability cases respectively. No figures are available from county courts which enforce the non employment-related provisions of the legislation. Various conciliation or arbitration procedures are also available.

There are no restrictions under the normal rules of civil procedure on any organisation offering support to complainants in discrimination cases. Some trade unions, the equality commissions and some specialised NGOs employ qualified lawyers and therefore can and do offer full support to complainants. But such organisations cannot usually initiate a complaint, except that the equality commissions can bring a case where instructions to discriminate or unlawful advertising is concerned. Anti-discrimination cases are quite common, and attract considerable publicity. However, complainants can suffer from a lack of available skilled advice, assistance and representation in discrimination cases.

Remedies are in general reasonably dissuasive, although the inability of courts and tribunals to order wider remedial measures to be adopted by discriminating organisations is a real problem. The Equality Act 2010 has extended the powers of courts and tribunals to make recommendations for wider remedial action, though such recommendations will remain non-binding.

All of the relevant UK legislation makes provision for shift of the burden of proof in relation to each of the grounds of discrimination and to all of the activities considered to be within the scope of the Directives.

6. Equality bodies

The three previous GB equality commissions, the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission, have been replaced by a single Equality and Human Rights Commission (EHRC) in October 2007, which can support complainants in legal proceedings, has enforcement powers of its own, and also has powers to promote and encourage respect for equality of opportunity through research, public comments and other methods. There is a separate Equality Commission for Northern Ireland, which has similar functions (and in places, greater powers relating to positive action) to those of the EHRC.