From Prohibiting Discrimination to Transformative Equality in Employment

The prohibition of discrimination in the workplace on grounds of sex and/or race is the historical cornerstone of equality law in most national jurisdictions. Sex and race discrimination in the area of employment continues to be a daily experience for many people in the world. However, for those living in one of the approximately 70% of UN member states that have any equality law to speak of, it would most likely be found in the labour code or similar legislation, and refer to several protected characteristics, almost always including race and/or sex.

In the most progressive jurisdictions, these initial protections from discrimination have been built upon in the last five decades so that the law now provides for equality in areas of life beyond employment, such as in the provision of goods and services, education, the administration of justice, public and government functions, etc. At the same time, the law has evolved to protect people from discrimination on the basis of further personal characteristics, such as religion or belief, disability, sexual orientation, age, etc.

Against the backdrop of this evolution, this issue of the *Equal Rights Review* is about equality and non-discrimination in the area of employment – thus going back home, as it were, to take a look at the oldest area of equality law. In doing so, it confirms that – unsurprisingly – this is where we find equality law to be at its most advanced, both in terms of national legislation, jurisprudence, and effective protection. Michael Rubenstein's article manifests that employment discrimination law deserves this "most advanced" status, at least within the jurisdiction of the European Union, judging from the level of detail and sophistication of the legal questions being adjudicated in the region in the last 30 months, if not necessarily from the progressiveness of the court judgments themselves.

Let me provide a very rough sketch of the thematic map of employment equality. At its centre is the prohibition of employment discrimination on certain grounds, or protected characteristics. Given the history outlined above, it is unsurprising that sex and race are the most immediately recognised. Sex discrimination has generated the largest number of legal claims at all levels. One of the frontiers for policy makers and courts today concerns the achievement of gender-neutral parental rights, where fathers would be equal to mothers in the world of work in respect to parental leave and all related policies. At the Court of Justice of the European Union (CJEU), the key question, as Rubenstein points out, is how far the Court is willing to go in classifying different treatment of fathers as contrary

to EU law; but this is currently unclear as the decisions in recent similar cases have been difficult to reconcile.[1]

Race (racial/ethnic origin) is the most "suspect" protected characteristic in the area of employment as well as elsewhere, meaning that it attracts perhaps the strongest protection from direct discrimination, with very few exceptions likely to be allowed if the jurisdiction makes use of a crucial concept which in EU law is termed "genuine and determining occupational requirements". In other words, direct race discrimination in employment might only be justifiable if the race of a person is absolutely necessary for performing the job in question. How many such jobs can you think of?

Once sex and race discrimination began to be broadly outlawed in an increasing number of states, the time came, around the mid-1990s, for equality law to start to cautiously embrace further characteristics and emanate further strands of protection: sexual orientation, gender identity (gender re-assignment in the UK), disability, age, etc., each requiring ground-specific analysis. Coupled with this, the increasing diversity of workforces has led to an increasing number of discrimination claims being brought on grounds such as religion.

Some of the most controversial issues arise in relation to religious discrimination in the workplace, a matter much grappled with by courts in recent years.[2] We include in this issue a case note featuring a case from June 2015 in which the US Supreme Court[3] held that an employer who had not employed a Muslim woman whose veil was not in accordance with their "Look Policy" had discriminated against her. This is one of a series of religious dress and religious symbols cases that have been reaching courts in a number of jurisdictions, giving judges a difficult job in striking the balance between accommodating religion in the workplace and other rights, interests and values. In a parallel slew of cases, employees have claimed religious discrimination, and/or demanded reasonable adjustment to accommodate their religion, when they have been required to perform certain job duties contrary to their religious beliefs – for example, to sell contraceptives, register same sex unions, or provide counselling to same sex partners. In such cases, in Europe at least, the employers have usually so far prevailed.

Disability discrimination also raises a number of ground-specific legal questions on which the courts are slowly building a body of case law. One such question is that of the comparator

1 Rubenstein, M., "Recent and Current Discrimination Cases in the Court of Justice of the European Union", *Equal Rights Review*, Vol. 15. Rubenstein contrasts *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS),* C-5/12, 19 September 2013 – deciding that in Spain, there was no gender discrimination when the father of a child whose mother was not an employee (as she was a self-employed lawyer and thus not eligible for state social security) was denied paternity leave, to *Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, C-222/14, 16 July 2015 – deciding that in Greece, there was gender discrimination in contravention of EU law when a male judge was refused paternity leave because his partner was not employed.

2 See, for example, *Equal Rights Review*, Vol. 14, 2015, which focuses on religion and equality.

3 Equal Employment Opportunity Commission v *Abercrombie & Fitch*, 575 U.S. 14-86 (2015).

in cases of denial of reasonable adjustment in the workplace, analysed concisely and lucidly by Sarah Fraser Butlin and Rachel Crasnow QC in an article on the approach of the UK courts in this issue. "Discrimination arising from disability", as opposed to discrimination based on disability, is another example of a ground-specific definitional question with potentially serious consequences for employers and employees.

In EU law, age is the least protected characteristic as direct age discrimination is the only type of direct discrimination for which a general justification is allowed. But on many issues, EU law lags behind both national laws of EU member states and non-European states. For example, it permits mandatory retirement at a certain legally specified age, whilst in recent years, mandatory retirement age has been abolished in an increasing number of EU member states, having been illegal in the United States since 1986. In an interview in this issue, Chai Feldblum, Commissioner at the US Equal Employment Opportunity Commission, expresses her surprise at the slow progress made in this regard in the EU compared to her native US. The move towards the approach long since adopted in the US is a very positive trend that goes a long way towards preventing discrimination against older workers.

Other grounds on which employment discrimination is or should be prohibited include citizenship (with an exhaustive list of exceptions for certain jobs such as Head of National Security, perhaps), physical features including size and weight, migration status, caste, and others if they are attributes of vulnerable categories of persons in a specific country context. In this issue, we have included an interesting comparison between UK and US approaches to weightism and weight discrimination – particularly against obese persons – in employment. Certain categories of migrant workers continue to face significant abuses of their rights, including forced labour, trafficking and dangerous conditions of work. However, "migration status" is relatively absent from most lists of protected characteristics, while the judicial practice remains under-developed. Caste discrimination should definitely be also outlawed, and it is a shame that the UK executive continues to refuse to provide explicit protection from caste discrimination by not enforcing the relevant provision of the Equality Act 2010; this is despite the evidence documenting the existence of caste discrimination, particularly in respect of domestic workers.[4]

The personal scope of the right to non-discrimination in employment should not stop at those who possess a protected characteristic but should also include as right-holders persons who, while not having the protected characteristic themselves, are perceived as, or associated with someone having that protected characteristic.[5]

4 National Secular Society, *Calls for Government to outlaw caste discrimination after tribunal rules in favour of victim kept in "domestic servitude"*, 23 September 2015.

5 See, for example, *S. Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008 – where the mother of a disabled child treated less favourably by her employer because of her child's disability was herself recognised as a victim of disability discrimination.

Regarding the material scope of the right to non-discrimination in the area of employment, it covers access to employment, vocational training, conditions of work, pay, benefits, promotion, and dismissal.

Critically, the law providing protection from employment discrimination should define all forms of prohibited conduct in the jurisdiction. In most EU member states, these include: direct and indirect discrimination; harassment (including sexual harassment); denial of reasonable accommodation; and victimisation. The absence of legal definitions of the forms of discrimination constitutes one of the most widespread deficiencies affecting victims of discrimination across the world; only a minority of UN member states actually have meaningful legal definitions of discrimination in their statutes, including their labour laws.

This sketch of the relevant themes would be incomplete without a reference to the procedural aspects of anti-discrimination law in the area of employment. These aspects include: access to justice (including complaint procedures and legal aid); standing; evidence and proof; and remedies and sanctions, among others. For example, as shown in Shira Stanton's article in this issue through a case study on Tunisian garment workers, full access to justice is critical to the enjoyment of equal employment rights. Further, the effectiveness of the protection from discrimination often depends on the breadth of standing rules (i.e., who can file a legal claim) and the breadth of how the duty bearer is defined (i.e., who can be sued for discrimination). For example, in a Romanian sexual orientation discrimination case decided in 2013 by the CJEU,[6] in which homophobic statements were made in public by the sponsor of a football club, the complaint was not brought by the allegedly homosexual footballer concerned but by a Romanian gay rights group. The CJEU held that the Equality Directives do not require an identifiable claimant. Further, the club as employer could be liable for statements made by someone who was only a shareholder and not the club's legal representative. This is because, in the Court's view, the employer could have refuted a *prima facie* case of sexual orientation discrimination by showing it had sufficiently distanced itself from the homophobic remarks.

The prohibition of employment discrimination, as I said above, is at the centre of employment equality – but, structurally, this is only a small part of the whole circle, and historically, it is only the first step toward employment equality. Indeed, only a small proportion of the inequality in employment can be put down to discrimination.

The late Bob Hepple, the Honorary President of the Equal Rights Trust who died on 21 August, reflected on gender inequality in employment, in a piece we published last year:

> *The most significant change in recent decades that influences the position of women at work is the transformation of state-managed capitalism into a globally marketised, privatised, deregulated system. This is accompanied by an ideological change from the post-war spirit of social solidarity, collective action, and partici-*

6 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, C-81/12, 25 April 2013.

> *patory democracy into a belief in individual choice, personal autonomy and meritocracy. Women are told that they will succeed through individual advancement and by being more career-oriented.*[7]

Gender inequality in employment, Hepple pointed out, is rooted in patriarchal social structures and cultures, where discrimination law alone could be of very limited help. For example, the fact that women in many cultures, complying with societal expectations, choose home and children over education and career, and thus are not equal to men in the job market, is a reality which discrimination claims can hardly challenge, even if the law allowed one to bring claims of indirect discrimination. Hepple continued:

> *The roots of gender inequality lie in the socio-cultural traditions of countries, and also in the structures of employment and the way we measure economic value. What is needed is a more or less radical transformation that empowers women to the same degree as men and restores a spirit of social solidarity, collective action and participatory democracy.*[8]

I believe that, similarly, racial, religious, ethno-regional and other employment inequalities are rooted in socio-demographic structures, and in cultures defined by tradition and prejudice. And to achieve radical transformation, we aspire to a right to equality which is broader than non-discrimination and which includes an entitlement to equal participation in employment as well as in all areas of life regulated by law. Equal participation would only be possible if we go beyond simply eliminating discrimination, and address not only our bias (be it even in respect to currently unprotected characteristics such as place of education)[9] but the very structures and traditions that recycle inequality.

Positive action and the placement of positive duties on public and private sector bodies to promote equality are among the key strategies through which the law can contribute to a more equal society. The law is called upon to integrate such strategies, in order to support what Bob Hepple, one of the greatest minds in both equality and employment law, often called "transformative equality". While combating discrimination, we should hold in view this purpose.

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7 Hepple, B., "The Key to Greater Gender Equality", *Equal Rights Review*, Vol. 12, 2014.

8 *Ibid.*

9 See the news of a university-blind recruitment policy introduced by Deloitte, Coughlan, S., "Firm 'hides' university when recruits apply", *BBC News*, 29 September 2015.