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Race and Employment Directives: Remedies

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INTRODUCTION

I have been asked to address the question of the provision for remedies made under the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[2] and the Council Directive establishing a general framework for equal treatment in employment and occupation[3]. I shall refer to these as the Race Directive and the Employment Directive respectively.

During this talk I propose to look at the provisions in these Directives on remedies. I will also look at the way that these have been implemented in the UK and discuss what have been the limitations of that implementation.

The UK legislation in relation to race started in 1965 and has been developing ever since. The principle Act now is the Race Relations Act 1975 which has been added to and amended by many other Acts since 1975.

Our provisions in relation to disability date back to 1944. However the protection has only been framed in the context of non-discrimination since the Disability Discrimination Act was enacted in 1995. Great Britain has had no provisions dealing with religion or belief or sexual orientation until regulations designed to implement the employment Directive were introduced. Discrimination on grounds of religion or political opinion has been protected in Northern Ireland since the 1970s. We still have no provisions on age discrimination as our government has elected to postpone their introduction until 2006.

I shall use the UK experience to illustrate a way in which the provisions of the Directives in relation to remedies can be implemented. I will also refer to the experience of some of the other EC Member States to provide further examples.

I shall start by looking at the European provisions by which we have to measure our national provisions.

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[2] Council Directive 2000/43 EC

[3] Council Directive 2000/78 EC

DEFENCE OF RIGHTS

Article 9 of the Race Directive and Article 7 of the Employment Directive, provide that:-

> *1. Member States shall ensure that **judicial and/or administrative procedures**, including where they deem it appropriate conciliation procedures, for the **enforcement of obligations** under this Directive are **available to all persons who consider themselves wronged** by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.*
>
> *2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*
> *3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.*

It is important to note that these provisions allow for 'judicial *and/or* administrative procedures'. This is in contrast to the original parallel provisions relating to gender found in the Equal Treatment Directive and the Equal Pay Directive. The Equal Treatment Directive originally provided that Member States should put in place the means by which aggrieved persons may 'pursue their claims **by judicial process** after possible recourse to other competent authorities'. However, this has now been amended by the new amending Directive so as to be consistent with the race and employment Directives with effect from October 2005[4].

It is thought that this provision for administrative procedures as an alternative to judicial provisions was introduced to make allowance for those countries that deal with discrimination by way of an Ombudsman scheme or a form of conciliation. However, to comply with the provisions on sanctions that require an 'effective remedy' such administrative procedures must have legal ramifications. So, for example, in Sweden employment discrimination cases can be brought to an Ombudsman but also to a Labour Court. In the Netherlands complaints of discrimination can be brought to the Equal Treatment Commission who will then be able to investigate and rule on whether there has been unequal treatment or discrimination. The Commission can make recommendations in addition to the rulings and can take cases to court. Legal enforcement of a Commission ruling together with damages and other remedies are only available through further court action.

[4] EC Directive amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions 2002/73/EC.

The other point to notice here is that the Directives do not specify whether these procedures should be civil or criminal.

Criminal proceedings generally require a higher burden of proof and they are controlled by the prosecutor. In such systems the victim of discrimination will have only a minor role in the conduct of the proceedings.

Additionally, it should be noted that criminal proceedings can be more susceptible to political control and governments can become more or less willing to prosecute according to the proximity of elections.

However, criminal sanctions are necessary to send out a clear signal of the state's abhorrence of acute and the most severe discrimination. So criminal sanctions are essential for really serious discrimination and harassment. Thus in my view prosecutions are necessary in the more serious cases. In the UK, we do have specific legal provisions to deal with racially and religiously aggravated offences and incitement to race hatred. As yet we have no such offences in respect of other grounds of discrimination. It is possible that these should be included in future.

Civil sanctions, with which I will deal more fully when we look at the Article dealing with sanctions are likely to include any combination of preventative orders, remedial orders, compensation and punitive orders.

In order to be truly effective, both as a norm for societal behaviour, and as a readily accessible and enforceable remedy, both civil and criminal procedures, should co-exist and complement one another.

SANCTIONS

Race Directive, Article 15 and Employment Directive, Article 17.

> *Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The* ***sanctions****, which may comprise the payment of compensation to the victim,* ***must be effective, proportionate and dissuasive****.*

The key words here are 'effective, proportionate and dissuasive'. What sanctions are to be regarded as 'effective, proportionate and dissuasive'?

Firstly, they **may (but need not)** comprise of the payment of compensation, this leaves the way open to remedies by way of re-instatement or re-engagement instead of compensation. It could also consist of orders to an employer or other discriminator to change his/her practices to prevent further instances of discrimination. If this option is taken they must be shown to be 'effective, proportionate and dissuasive'.

There are four broad categories of civil law sanctions:

- Preventative orders
- Remedial orders
- Compensation
- Punitive orders/compensation

Preventative orders: Where the discrimination is continuing the Court may order that the discriminator must take action or refrain from certain actions failing which s/he will be subject to a penalty from the court. This will include interim injunctions and declarations.

Remedial orders: These can require the discriminator to take a specified course of action in order to prevent the further recurrence of discrimination. For example, the Equality Officers in Ireland have wide powers to investigate a complaint and where it is found proved they can order both compensation and/or a specified course of action.

Compensation: The awarding of compensation is a more commonly used remedy within the EC.

Punitive orders/compensation: This can include exemplary damages and publicity based sanctions. Publicity could be ordered in the local press, in the workplace concerned, directed at public authorities (particularly useful in the case of contractors for public works), in a public registry of decisions and as an obligation to declare information in certain circumstances. These can be particularly useful tools when they connect with the ability to acquire contracts for public works. Thus, for example, in Italy, the judge must send his decision to any relevant public authority which will then withdraw the benefit of any contract or benefit which that company was receiving.

What does the European Court of Justice say?

There is already some case law on what the European Court of Justice as to what amounts to an effective sanction in relation to gender discrimination. In *Marshall v. Southampton and South West Hampshire Area Health Authority (no 2)*[5] the ECJ ruled that the terms of the EC Treaty required each Member State to adopt:

> *'all the measures necessary to ensure that its provisions are fully effective, in accordance with the objective pursued by the Directive, while leaving it to the member state the choice of the forms and methods used to achieve that objective.'*

Thus the measures adopted must be 'sufficiently effective to achieve the object of the Directive'. This means that the particular circumstances of each

[5] *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2) (Case C-271/91)* [1994] QB 126; [1993] 3 WLR 1054; [1993] 4 All ER 586; [1993] ECR I-4367; ECJ

breach must be taken into account. In the case of a discriminatory dismissal a situation of equality cannot be restored without **either** re-instating the victim **or** granting financial compensation for the loss and damage sustained.

Where financial compensation is the remedy then this must be adequate. It must enable the loss and damage actually sustained to be made good in full in accordance with the national rules.

Hence, national rules that unreasonably limit the amount of compensation are likely to be unlawful,

> *'since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.'*

Similarly, such awards should include an amount to reflect the passage of time, so an award of interest on the award should be regarded as an 'essential component of compensation' in order to restore real equality of treatment.

In this case Mrs Marshall had appealed against the limiting of her award of compensation to £6,250 (10,416 euros) when her actual losses amounted to £11,695 (19,491 euros). She also claimed interest payments of £7,710 (12,850 euros) because of the length of time that the Courts had taken to resolve her case. The European Court of Justice ruled that she was entitled to receive the full amount of compensation together with the interest payment, as a direct result of this case the UK government had to alter its provisions in relation to damages for sex discrimination.

These are all very helpful guidelines when it comes to assessing how these Directives should be interpreted and implemented by Member States.

This case was followed by the case of *Draehmpaehl v Urania Immobilenservice ohG*[6] where the ECJ ruled in relation to the Equal Treatment Directive that compensation for discrimination on grounds of sex could not be less than the amount of compensation that was awardable in cases of infringements of domestic law of a similar nature and importance.

The UK experience

In the UK the approach to remedies is a largely individualistic. It is primarily based on payments of compensation although in cases of unfair discriminatory dismissal the tribunals can make orders of re-instatement or re-engagement as an alternative remedy.

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6 *Draehmpaehl v Urania Immobilienservice ohG (Case C-180/95)* [1998] ICR 164; [1997] ECR I-2195, ECJ

If the employer does not comply with these orders the tribunals can make an order for compensation together with an increased amount of compensation to reflect the employer's non-compliance with their order.

In the UK compensation is awarded for the damages suffered and these can come under a number of different headings:

- Past loss,
- Future losses,
- Injury to feelings,
- Personal injury,
- Aggravated damages,
- Exemplary damages, and
- Interest.

Past losses can be **loss of wages or the expenses of seeking alternative work**. They are awarded on the principle of putting the claimant in the same position as s/he would have been had the discrimination not occurred.

Future losses include the loss of future earnings or benefits including pensions.

Injury to feelings awards are made to compensate for the distress and suffering that has been experienced as a direct result of the discrimination. It is not assumed by the Tribunal, it has to be proved. It can be for loss of congenial employment, for actual distress suffered, for injury to one's reputation or good name.

This head of damages has largely developed in the alongside the law on discrimination and has been more fully developed in the last few years. I want to give you a couple of examples to show how this works.

The first example is the case of *Armitage, Marsden and the HM Prison Service v Johnson*[7] which set down the principles for assessing awards for injury to feelings. In this case Mr Johnson was a prison guard, he was English-born but of Afro-Caribbean origin. He started to have problems at work after he objected to the manhandling of a black prisoner by other prison officers. After that he was subjected to racist remarks and false accusations. He was asked to come in for particular work and then was not given that work when he arrived. He was warned about his sickness record when a white prison officer with a worse sickness record was not warned and he was reported for leaving his shift early when it was customary for everyone to do so. This continued even after he had made a complaint to the Employment tribunal.

The Employment Tribunal which heard his case described it as a 'campaign of appalling treatment'; it awarded him £21,000 (about 33,000 euros) in respect

[7] Reported as *Prison Service and Others v. Johnson* [1997] ICR 275

of the injury to his feelings. The Prison Service appealed against this award and the Employment Appeal Tribunal confirmed the award setting out some general principles:

"We summarise the principles which we draw from these authorities:

(i) Awards for injury to feelings are **compensatory**. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

(ii) Awards **should not be too low**, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, be seen as the way to "untaxed riches."

(iii) Awards should bear some **broad general similarity to the range of awards in personal injury cases**. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.

(iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the **value in everyday life of the sum** they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(v) Finally, tribunals should bear in mind … the **need for public respect** for the level of awards made."

I will return to this case later when we come to consider aggravated damages.

In *Vento v Chief Constable of West Yorkshire Police*[8] Ms Vento was not confirmed in post at the end of her probationary period as a police constable as a result of less favourable treatment on the grounds of her sex. The Court of Appeal decided to provide guidelines for Employment Tribunals in handling claims for discrimination and assessing the sum, which should be awarded for injury to feelings. The Employment Tribunal found that she would have been confirmed as a police constable but for the discrimination and there was a 75% chance that she would have been completed a full police career if she had not been dismissed. The Court of Appeal identified three broad bands of compensation for injury to feelings:

- The top band, which should normally be between £15,000 (about € 22,000) and £25,000 (about € 37,000) for the most serious cases where the harassment had gone on for up to 18 months. It is only in

[8] *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318.

the most exceptional case that an award should exceed £25,000 (about € 37,000) ;

- the middle band of between £5,000 (about €7,500) and £15,000 (about € 22,000)should be used for serious cases which do not merit an award in the highest band;
- Awards between £500 (about €750) and £5,000 (about €7,500) for less serious cases where the act of discrimination is an isolated or one off occurrence. Tribunals were advised that awards of less than £500 (about €7,500) should be avoided.

Personal injury awards cover damages for injury to mental or physical health.

Aggravated damages are awarded where the complainants 'sense of injury resulting from the wrongful… act is justifiably heightened by the manner in which or the motive for which the Defendant did it'[9]. For example, in *Armitage, Marsden and the HM Prison Service v Johnson* which I have referred to already the sum of £7,500 (about €11,000) was awarded in respect of aggravated damages because every time that he had tried to complain to the proper authorities his complaints were dismissed and put down to defects in his personality. Instead of providing him with a remedy the complaints process had added to his injury.

Exemplary damages, unlike the other classes of damages that we have looked at are not intended to be compensatory, they are punitive. They can be awarded where it is found that

- *Either* the conduct complained of amounts to oppressive, arbitrary or unconstitutional actions by an employee of an emanation of the state (such as a police officer or local government official),
- *Or* the conduct complained of is calculated to make a profit for the discriminator that exceeds the compensation that can be ordered by the Tribunal. It can only be ordered if the compensation otherwise available is inadequate to punish the discriminator,
- *Or* the awarding of exemplary damages is expressly authorised by the relevant statute (currently none of our discrimination statutes do permit this).

Finally, the Tribunal can order **interest** payments on losses incurred up until the date of the hearing. (Note: interest is automatically payable on awards that are not paid by the date that has been ordered). None of this detracts from the victim's duty to 'mitigate' his or her loss.

Additionally, the Tribunal can make several different orders:

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9 *Broome v Cassell* [1972] AC 1027 at p1124.

- An order declaring the rights of the complainant and the respondent, and/or
- A recommendation that the employer take within a specified period defined action for the purpose of obviating or reducing the adverse effect on the complainant of the acts which have been the subject of the complaint.

Unfortunately, the recommendation is limited to correcting the adverse effect on the individual who brought the complaint, so if s/he has left the employment such a recommendation is not possible. It is also not clear whether there is any way of enforcing such recommendations in the event of their not being implemented.

WHAT MORE IS NEEDED?

I do not want to give you the idea that we have the perfect system of remedies in the UK. We do not! This is simply to give some idea of the ways in which remedies can be dealt with. I believe that there are at least two important ways in which the UK's system of remedies fall short of the requirements of the Directives.

Firstly, in relation to race or ethnic origin, damages are only available for indirect discrimination if the discrimination can be shown to be intentional[10].

Secondly, much more profoundly, many of us would question how effective our remedies are in preventing the recurrence of discrimination. I have referred to the power to make recommendations, if such recommendations could be made wherever a discriminatory practice was identified whether or not the victim will benefit from the recommendation we would see a much more effective remedy for discrimination and a greater chance of eliminating discriminatory practices.

The Commission for Racial Equality have recommended that the Act be amended to enable employment tribunals to make recommendations in relation to the future conduct of a respondent in order to prevent further acts of discrimination. In particular, tribunals should have the power to make recommendations to revise or modify procedures which the tribunal has found to be intrinsically discriminatory or to provide protection from victimisation for the complainant whether he or she remains in employment.

Another option is for tribunals to be given an additional power to order remedies to correct the wrong that has been perpetrated. For example, if the complainant is the best candidate, but because of discrimination did not get the job, then the tribunal should order if appropriate that the candidate be given the next available appropriate job.

Additionally, I should point out that it has taken a long period, and indeed a long fight, to get damages up to a reasonable level. Initially, the Courts tried

[10] It is my view that this is not a proper transposition of the Race Directive.

to award purely nominal amounts of damages in discrimination cases. An early case was that of *Alexander v Home Office*[11]. In this case a black prisoner was repeatedly refused work in the prison kitchens; by contrast a white prisoner who had been found guilty of poisoning was given such work, as were several white men who had been found guilty of causing harm with knives. The lower court tried to award him a purely nominal sum but the Court of Appeal ruled that:

> *'Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect.'*

To give you an idea of problems of implementation in some of the other Member States I understand that in Ireland they have an upper limit of compensation of €12,700 and they cannot receive interest on any awards of compensation. These limitations are likely to be in breach of the directives.

Also, queries have been raised about the Netherlands implementation as their system of enforcement entails their Equal Treatment Commission investigating and ruling on claims of discrimination. The Commission can then make a ruling and/or a recommendation and it can take cases to court unless the parties have an objection. The problem here is that legal enforcement, an award of damages or other remedies can only be made through a court and are thus fairly rare.

VICTIMISATION

Article 9 of the Race Directive and Article 11 of the Employment Directive deal with the problem of victimisation. The Race Directive says that:

> *Member States shall introduce into their national legal systems such measures that are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.*

It is important that both those taking discrimination cases and those supporting them are protected from retaliatory action by the alleged discriminator. Thus Member States have to put in place remedies to protect them from any adverse treatment or consequences. Clearly the requirements here are

- a link must be established to a complaint of discrimination or to proceedings aimed at enforcing compliance with equal treatment norms, and
- Adverse treatment or consequences that follow from it.

[11] [1988] IRLR 191.

The adverse treatment or adverse consequences should not be limited to only one type of reaction e.g. dismissal, it should cover other types of action such as a denial of bonus payments or other privileges.

COMPLIANCE

> *Member States shall take the necessary measures to ensure that:*
> *(a)* ***any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished****;*
> *(b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.*

Article 14 of the Race Directive and Article 16 of the Employment Directive require Member States to bring their legislation and administrative provisions into line with the Directives and to ensure that discriminatory provisions in contracts etc are prohibited.

DISSEMINATION OF INFORMATION

> *Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.*

Article 10 of the Race Directive and Article 12 of the Employment Directive require Member States to take positive steps to ensure that information about the provisions in the Directives is publicised 'by all appropriate means' throughout the State.

SOCIAL DIALOGUE

> *1. Member States shall, in accordance with national traditions and practice, take adequate measures to* ***promote the social dialogue*** *between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.*
> *2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.*

DIALOGUE WITH NON-GOVERNMENTAL ORGANISATIONS

> *Member States shall* ***encourage dialogue with appropriate non-governmental organisations*** *which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin/ on any of the grounds referred to with a view to promoting the principle of equal treatment.*

Article 12 of the Race Directive and Article 14 of the Employment Directive require Member States to enter into dialogue with 'appropriate non-governmental organisations'. This requirement is necessarily vague and it is hard to know when/whether a Member States government has taken sufficient action to comply with it.

POSITIVE ACTION

Article 5 of the Race Directive and Article 7 of the Employment Directive permit Member States to take positive action in order to ensure 'full equality in practice'. This is not a requirement, it is a permissive provision.

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

The Race Directive has an additional provision in Article 13 which is not mirrored in the Employment Directive, hence it only applies to race discrimination:

> *1. Member States* ***shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin****. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.*
> *2. Member States shall ensure that the competences of these bodies include:*
> *- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,*
> *- conducting independent surveys concerning discrimination,*
> *- publishing independent reports and making recommendations on any issue relating to such discrimination*

It is to be noticed that the functions of this organisation do not have to be done by a single organisation; there could be several bodies each fulfilling one of these functions. In other words one organisation could provide the independent assistance to victims while another conducted independent surveys and a third published independent reports and made recommendations on discrimination matters.

Equally, these functions can be performed within an organisation with a wider mandate involving the defence of human rights and/or the safeguarding of individual rights. So a Discrimination Commission or a Human Rights Commission could fulfil this requirement if it undertook the functions identified in Article 13 Race Directive – assistance to victims, independent surveys, reports and recommendations.

For example, the Equality Commission of Ireland which covers nine grounds of discrimination would cover this requirement, as would the Belgium Centre for Equal Opportunities and Opposition to Racism or the Finnish Ombudsman for Minorities which only cover race.

The key aspect of these functions that should be carefully noted is the requirement of 'independence'[12]. This means that the body, or bodies, must be wholly separate from Government and from governmental influence, they cannot be fulfilled by a government department.

This is where the proposals put forward to meet the requirement of this Article have fallen short in a number of member states. In Spain their proposed Council is to be attached to the Ministry of Labour and Social Affairs and none of its functions are defined as independent of government. In Italy the proposed new equality body will be set up within the Government Department for Equal Opportunities although its activities are said to be 'independent'.

Finally it is difficult to see why this requirement for a body to promote equal treatment should only apply to the field of race discrimination; the need for such a body to help in other areas of discrimination is just as real. Indeed, many of the new accession states have started with one body which will fulfil their obligation under this Article in relation to race as well as for the other grounds of discrimination.

What happens when a country fails to implement the Directive in whole or in part?

The Race Directive had to be implemented by Member States by July 19th 2003 and Employment Directive provisions in relation to religion or belief and sexual orientation by December 2003. Some countries were given an additional 3 years to implement the provisions in relation to people with disabilities and the provisions in respect of age.

Where Member States have failed to implement the provisions of the Directive and where those provisions are sufficiently clear, precise and unconditional then an individual can rely on them against an 'emanation of the state'. An emanation of the state is an organ of the state whether it is central government, a public authority or a private company providing public functions which are subject to the authority and control of the state. Thus an employee, or victim, of such an organisation can rely on the provisions of the Directive to

[12] This echoes the requirement of independence to be found in the Paris Principles in relation to human rights bodies.

take action directly against the emanation of the State. Thus in *Foster v British Gas PLC*[13] the ECJ ruled that an employee of British Gas could take action directly against British Gas relying on the provisions of the Equal Treatment Directive which had not been fully implemented by the UK Government. The ECJ said:

> *The sole question under the test laid down by the European Court are whether the employer, pursuant to a measures adopted by the State provides a public service under the control of the State and exercises special powers. That the employer engages in commercial activities, does not perform any of the traditional functions of the State and is not the agent of the State is not relevant to this test.*

Those who work for private employers cannot rely on the direct effect of a Directive against their employers in the national courts. They may however, still have remedies. Firstly, the national court is required to interpret the national law, so far as possible, in such a way that implements the Directive provisions. So in *Coote v Granada Hospitality Ltd*[14] the ECJ ruled:

> *In applying national law, in particular legislative provisions which, as in the present case, were specially introduced in order to implement the Directive, the national court is required to interpret its national law, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the third paragraph of Article 189 of the Treaty.*

We have recently seen this provision at work in the UK when one of our leading unions challenged the implementing provisions of the Employment Directives in the Courts alleging that they did not comply with the provisions of the Directive[15]. The High Court ruled that a purposive construction would ensure the correct implementation of the directive.

Secondly, if that interpretive provision does not help, and if the law cannot be interpreted in line with the Directive then they may be able to sue the State directly. In *Francovich & Bonifaci v Italy*[16] the ECJ ruled that community law requires Member States to make good any damage caused to individuals by the state's failure to adequately transpose a Directive. This ruling has been held to apply only to provisions of a Directive where:

- The legal provision infringed was intended to confer rights on individuals,
- The breach was sufficiently serious, and
- There was a direct causal link between the breach of the obligation resting on the state and the damage suffered by the victims.

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[13] Case 188/89 [1990] ECR I-3313.
[14] Case no 185/97 [1998] ECR I-5199
[15] See *R. (on the application of AMICUS - MSF section & 6 ors) v Secretary of State for Trade & Industry* [2004] EWHC 860
[16] Cases 6&9/90 [1991] ECR I-5357

In these circumstances an individual can sue the Member State directly for damages as a result of the Member States failure to implement the directive.

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