

Multiple discrimination: the need for justice for the whole person

There is now an increasing realisation within Europe of the complexity of the operation of discrimination within our society. People do not simply fit into single issue categories as black, disabled or gay. They are diverse, complex and multi-layered, and sometimes they are treated badly for more than one reason. However, our equality laws tend to assume that the treatment of people should be analysed by reference to a single characteristic at a time. Yet multiple identities are part of the diversity of our society.

Recognising this kind of diversity is now understood to be important in the next step in promoting social inclusion of the most disadvantaged. The European Commission has recognised multiple discrimination to be a problem and commissioned research on this during 2007 as part of their activities for the Year of Equal Opportunities for All. This research has been published in the report *Tackling Multiple Discrimination: practices, policies and laws*.¹

Understanding the operation of Multiple Discrimination

To understand the problem of multiple discrimination better requires some further consideration. For example, ethnic minority people may find themselves discriminated against not only because of their racial or ethnic origin but also because they are women, or disabled, or gay or old or any combination of these. Yet frequently the law only focuses on one of these factors at a time. There is no serious reason why should this be so. It may not be possible to separate these different aspects of a person's identity; the discrimination that a black woman experiences, for example, may be wholly different from that experienced by a black man or a white woman. In a way this single issue approach is itself a form of discrimination. Sandra Fredman has observed 'The more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection.'²

This kind of analysis is not new; nearly 20 years ago in 1990 Kimberlé Crenshaw discussed this kind of problem in relation to African American women and pointed out the inadequacy of a single ground approach to discrimination law:

...in race discrimination cases, discrimination tends to be viewed in terms of sex or class-privileged Blacks; in sex discrimination cases, the focus is on race- or class-privileged women.

This focus on the most privileged group members marginalises those who are multiply burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more

¹ *Tackling Multiple Discrimination: practices, policies and laws*, European Commission, 2007.

² *Double trouble: multiple discrimination and EU law*, Sandra Fredman, *European Anti-Discrimination Law Review*, Issue no 2, 2005, p13-18 at p14.

*complex phenomenon...Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.*³

This distorted single issue way of thinking about discrimination influences the way that politics are presented: struggles against prejudice become posed as arising only from singular issues and remedies are therefore crafted to reflect this. Kimberlé Crenshaw's comments were written in relation to the United States but they are certainly true of the way that both UK and European discrimination law has been approached.

What is multiple discrimination?

The first stage in dealing with this issue is to find an adequate description of the problem. 'Multiple' discrimination is said to occur when someone experiences discrimination on more than one ground, for instance, by being treated less favourably not only on grounds of sexual orientation but also because of their gender or disability. There are broadly three ways in which multiple discrimination may manifest itself.

Firstly, it occurs when someone experiences discrimination on different grounds on separate occasions. For example, when a disabled woman is passed over for promotion because her employers want a man to take the lead, and, on another occasion, she is excluded because she is unable to attend a key meeting held in an inaccessible place because of her disability. Here the current laws are adequate, because a single aspect of a multiple identity is relevant to each occasion.

Secondly, it can be additive, so that a series of attributes are required and if you lack one you lose one point but if you lack two you will lose two points thus increasing your chance of failure in achieving this objective. In cases of 'additive discrimination' the steps in the overall treatment can be analysed separately. Such a case arises where there are, for instance, a series of requirements, perhaps in a job description, such that the lack of one decreases the chance of success in getting the job, and the lack of a further characteristic decreases the chance of success still more. The UK case of *Perera v Civil Service Commission (no 2)*⁴ provides an example of this kind of approach. In this case the employer set out a series of requirements for a potential post-holder. Mr Perera was turned down for the job because of a variety of factors which were taken into account by the interviewing committee - his experience in the UK, his command of English, his nationality and his age. In this case the lack of one factor did not prevent him getting the job but it did make it less likely, and the lack of two factors decreased yet further his chance of selection for the job. Ultimately he was unsuccessful because his

³ *Demarginalising the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, Kimberlé Crenshaw, 1989, University of Chicago Legal Forum, p 150.

⁴ [1983] IRLR 166.

personal circumstances were such that he was not preferred on a variety of different grounds.

The third type occurs when the discrimination involves more than one ground and the grounds interact with each other in such a way that they are completely inseparable. This is often called '*intersectional discrimination*'.

For example, a Turkish woman machinist complains of direct discrimination against her employer. Her employer argues that it has employed non-Turkish women and Turkish men. But, this only shows that they do not always exclude Turks or women. The woman may be able to show that it is the fact of the combination that was critical. But, this may not be enough. The treatment may be simply about Turkish women. So to show the full extent of the discrimination that such a person is experiencing she must be able to compare her situation to that of a non-Turkish man. To show the full extent of the discrimination that she experiences it is necessary to consider the combined effect of both her race and her gender.

Although this problem of intersectional discrimination is widespread there have been few cases where it has been raised directly. In practice, lawyers will tend to take up cases on the strongest ground available to them and ignore the other aspects. They will craft the case to meet the limitations of the law.

How widespread a problem is it?

The European Commission report *Tackling Multiple Discrimination: practices, policies and laws*⁵ examined this problem further. Their research entailed both a literature review as well as discussions with National Equality Bodies, Ministries responsible for equal opportunities, European, National and local equality NGOs, European and National Social Partner organisation and individual victims in ten European Member States. They concluded that:

*It is evident that Multiple Discrimination exists. However, a lack of documentation and statistical data makes the phenomenon of Multiple Discrimination less visible..*⁶

A 2003 study commissioned by the Joint Equality and Human Rights Forum of the UK and Ireland, *Re-thinking Identity: the Challenge of Diversity*, examined the position of people belonging to a number of multiply disadvantaged groups from disabled minority ethnic groups to young gay people. This study concluded that:

People with multiple identities...are not adequately protected by current legislation...Even with harmonised legislation, people with multiple identities that increase their social vulnerability and marginalisation

⁵ *Tackling Multiple Discrimination: practices, policies and laws*, European Commission, 2007.

⁶ *Ibid* p48

may require an 'intersectional approach' to equality and human rights claims.⁷

European law

So far the European legislator has not been active in dealing with multiple discrimination. There is no doubt that the existing European directives are not as clear about this as they could be. However, the directives whilst they do not expressly provide for the consideration of multiple discrimination, do not exclude it and obliquely acknowledge its existence. Both the Race Equality Directive and the Equal Treatment Directives recognise that different grounds may intersect. Thus Recital 14 of the Race Directive, for instance, says:

In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

Germany, for example, in implementing its obligations under the equality directives has permitted consideration of cases of multiple discrimination. Romania has also made provision for additional grounds to be considered as an 'aggravating circumstance'. This has been used by the National Council for Combating Discrimination to take up cases about the treatment of Roma women.

However, as only race and sex discrimination are addressed outside the field of employment multiple discrimination cases involving access to goods, facilities and services on grounds other than race or sex are not covered.

What changes are needed?

The EC report has recommended that more research into this problem is needed alongside greater awareness raising, data collection, training and education, the promotion of good practice and the development of more multiple ground NGOs. Legislative changes would be beneficial too. The current legal provisions should be amended to ensure that multiple comparisons are expressly permitted; where there are any differential provisions, for example, any specific justifications, exceptions or genuine occupational requirements that apply to one ground for discrimination these should, in effect, be treated as cumulative, and that the amount of damages awarded can reflect the impact of multiple grounds. Additionally, there should be new EC legislation to address the grounds of disability, religion or belief, sexual orientation and age outside the field of employment as has been proposed by the EC in its 2008 Workplan.

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⁷ *Re-thinking Identity- the challenge of diversity*, edited by K Zappone, Joint Equality and Human Rights Forum, 2003.

