

## THE ROLE OF TRADE UNIONS: ERA conference 26 – 27 May 2008

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1. When considering equality law in both Europe and the UK, the focus of attention is invariably on individual rights: the right of an individual who has been unlawfully discriminated against to pursue a remedy. Yet both the Framework Directive 78/2000 and the Race Directive 43/2000/EC require EU member states to take measures to promote social dialogue between employers and trade unions as a means of enforcing equality.
2. Our experience in the UK indicates that focusing solely on the pursuit of individual rights may not be the most effective way of securing equality in the workplace, and that greater emphasis should be placed on the collective and the role of trade unions if equality is to be delivered in a more widespread and sustainable way.

### The Framework and Race Directives

3. Article 13 of the Framework Directive is headed Social Dialogue, and provides:  
*“1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreement, codes of conduct and through research or exchange of experiences and good practices.*  
  
*2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, 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 by the relevant national measures.”*
4. Broadly identical provisions are set out in Article 11 of the Race Directive 43/2000/EC.
5. A collective approach to litigation is also reflected in the wording of Article 9.2 of the Framework Directive. Headed “Defence of Rights”, the Article provides:  
*“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 of or in support of the complainant, with his or her approval ...”*
6. Again, similar provisions are contained in Article 7 of the Race Directive.

7. These Articles require Member States to encourage collective bargaining between trade unions and employers on equality matters as a means of securing equality. They also require a mechanism which allows trade unions to engage either “*on behalf of*” or “*in support of*” their members to enforce equality rights. These are not optional provisions, but mandatory. The only proviso is that the collective agreements respect the relevant minimum requirements of the Directive, and, in relation to enforcement, that the unions act with the agreement of their members.
8. Of course, both the Framework and Race Directive also establish a structure for individual rights. So Article 2 of both Directives defines discrimination in terms of the treatment of an individual. Effectively, the directives establish a framework of both individual and collective rights, both with enforcement provisions.

### **Individual rights in the UK**

9. UK law implements the provisions relating to individual rights in the two Directives using words that broadly follow the wording of Article 2. So, for example, the UK’s Race Relations Act defines direct discrimination as occurring where “A person discriminates against another ... if on racial grounds he treats that other less favourably than he treats or would treat other persons ...”
10. Following this structure, the Race Relations Act requires individuals to enforce their rights by pursuing civil claims, through Employment Tribunals, alleging that they have been unlawfully discriminated against in the way that they have been treated.
11. The other equality legislation is structured similarly in terms of the centrality of individual rights.
12. The focus on individual rights is essential. It allows individuals to determine whether or not they have been discriminated against, and if so whether they wish to make a complaint or pursue a Tribunal case. It focuses on the experiences of the individual, and uses that individual’s experience to establish acceptable and unacceptable conduct. Nonetheless there are disadvantages in structuring enforcement of discrimination legislation through individual circumstances.
13. Firstly, complaints and legal cases are not necessarily pursued by those who are most disadvantaged. By way of illustration, the numbers of individual claims brought through the UK Employment Tribunals are high. In 2005/06, the numbers of individual claims submitted to Employment Tribunals were as follows:<sup>1</sup>

Sex Discrimination	14,250
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<sup>1</sup> Employment Tribunal Service Annual Report 2005/06

Disability Discrimination	4,585
Race Discrimination	4,103
Religion	70
Sexual orientation	61

14. These figures do not necessarily reflect disadvantage<sup>2</sup>. In large part they reflect who is in a position to pursue a case.

15. The recorded outcomes are also significant:

Type of claim	Successful at hearing	Unsuccessful at hearing	Negotiated settlement	Other outcome
Sex discrimination	17% (2)	4%	13%	66%
Disability discrimination	4%	12%	45%	39%
Race discrimination	3%	28%	31%	38%
Religion	3%	18%	37%	42%
Sexual orientation	4%	14%	37%	45%

16. It can be seen from these statistics that statistically few cases succeed before Employment Tribunals, even though many more are settled. This is significant, because the vast majority of settlements are concluded by way of a financial payment by the employer to the claimant on condition of the claimant agreeing to a confidentiality clause preventing them from referring to the circumstances of the settlement. As a consequence, it is only in the small number of claims that proceed to a tribunal and succeed, that lessons from the experience can be publicly learnt. In all other cases, either the claims are unsuccessful, in which case the message tends to be negative, or they are settled, in which case the primary outcome is a transfer of money from employer to employee and little else.

<sup>2</sup> A significant number of the gender cases were in fact brought by men in a multiple claim emanating from the civil service

17. Even where cases are successful, research carried out back in 1987 as to the impact of concluded tribunal cases on the workplace revealed that the impact is often surprisingly negative and little is gained in terms of overall benefits or changes in the workplace.<sup>3</sup> The position may have changed now in 2007. But the impact of successful cases may be significant for the individual concerned, but have limited further impact.
18. Discrimination cases in particular can lead to long hearings, often lasting several weeks. Increasingly due to the complexity of the law, claimants are legally represented. If they are successful, they are awarded unlimited compensation. Awards can extend to hundreds of thousands of pounds, and in a very few cases have exceeded £1m, though the average award is under £10,000.
19. The cost of pursuing individual cases is also becoming prohibitive: tribunal claims in the UK now tend to be pursued either by wealthy individuals, or by trade union members, leaving non-wealthy non-union members unable to obtain redress. Because union membership is focused on the public sector, discrimination tends to be more widespread in the private sector. If an individual cannot or decides not to pursue a claim, then the discrimination goes unchecked.
20. But perhaps most significantly, the right to pursue a claim is structured in terms of seeking a remedy after the discrimination has occurred. The primary remedy that tribunals provide is compensation, which is important but does not undo the wrong that has taken place. A structure of individual rights to compensation tends to do little to prevent the discrimination from occurring in the first place.
21. But it would be misleading to suggest that the impact of individual rights in the UK is limited. The very existence of the legal framework provides a strong message to both workers and employers as to what amounts to acceptable and unacceptable conduct. Further, whether tribunal claims are pursued or not, the legal framework has a significant normative impact on workplace behaviour. But for this to be effective, the impact of the legislation has to be publicised, disseminated and understood. This is where the role of the trade unions can be so critical. As summarised in the International Labour Conference report 'Equality at Work: Tackling the Challenges' 2007, 'The potential impact of the social partners in fostering equality, given their involvement in the shaping of broader economic and social policies that have major implications for the structures of labour markets, as well as for social inclusion and poverty reduction.'

### **Collective equality rights in the UK**

22. Historically, there has been a voluntary system of collective bargaining in the UK, with less legal intervention than in other European countries.

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<sup>3</sup> *Pyrrhic Victories*, Equal Opportunities Commission 1987, "Monitoring the Disability Discrimination Act (DDA) 1995, Institute of Employment Studies on behalf of Disability Rights Commission, 2004

Collective agreements have frequently covered equality issues. Research commissioned by the Equal Opportunities Commission back in 1998<sup>4</sup> revealed extensive benefits attaching to union membership in terms of increased access to sick pay, occupational pension rights, training and promotion opportunities. So, for example, the research found that 3% of part-time trade union members had access to all four of these benefits, compared to 1% of non-trade union members. Conversely, 16% of union members had access to none of those four benefits, compared to 41% of non-union members.

23. Since then, many collective agreements have been negotiated in relation to maternity benefits, parental leave, adoption leave, part timers' rights, pay and general equality policies etc. The UK's overarching trade union body, the Trades Union Council (TUC), proposes a model equality policy, for negotiation between individual employers and trades unions. One of the many advantages of incorporating this or another equality policy is that it means that equality is likely to become mainstreamed into the bargaining agenda, with an agreed procedure and supporting structures.

24. The TUC's second biennial equality audit in September 2005 found that people employed in workplaces with a trade union presence are likely to have a better work/life balance and face less discrimination at work than individuals in non-unionised workplaces. Just under half of those unions interviewed (46%) had successfully negotiated a better deal at work for lesbian, gay, transgender and bisexual workers – for example the negotiation of parental leave rights for same sex partners. Just under half reported having achieved improvements for ethnic minority employees and migrant workers, including a joint charter agreed by the civil service unions and Government to try to address the under-representation of ethnic minority staff at senior levels, and work to limit the influence of the far right, with the banning of British National Party members from the Prison Service. Slightly more than half the survey respondents (52%) had won improvements for disabled employees, with many making progress on disability leave, a special form of leave that staff can take for rehabilitation, assessment or treatment purposes.

25. The International Labour Organisation report 'Equality at Work: Tackling the Challenges' 2007, records that in the United Kingdom there is a 32% pay gap between unionised and non-unionised black workers, perhaps accounting for the highest unionisation of black workers amongst all groups - 33% (compared to 29% of white workers).

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<sup>4</sup> *Tackling Sex Discrimination through Collective Bargaining* Equal Opportunities Commission 1988

26. The same report records the increasing focus on work-family measures in collective agreements across the European Union<sup>5</sup>, and that in most European countries there are collective agreements on disability.
27. These are substantive and sustainable achievements that lead to the prevention of discrimination at work, and do not just focus on the provision of compensation. They potentially can affect everyone in the workplace, and not just isolated individuals.
28. The scope of collective bargaining has recently extended significantly into the training and skills agenda, which has had significant impact on engaging “hard-to-reach” workers, frequently from minority groups. So for example in May 2006, a £4.5 million TUC-led academy, Unionlearn, was launched to further training and skills provision for union members, which will give priority to training and skills for women and minority trade union members. A further £5 million has been provided by central government to fund equality representatives – workers who are trained to promote equality in the workplace.
29. These significant advances by the trade union movement depend heavily on the existence of a legal structure to provide legal underpinning to union collective negotiations. For example, advances in promoting disability leave as a contractual right would probably not have occurred without the existence of disability legislation.
30. Trade unions also have a history of engaging in judicial reviews in the High Court of administrative or regulatory decisions which impact on their members. For example, in 2004 six trade unions coordinated legal action to challenge whether the UK sexual orientation regulations properly implemented European law.<sup>6</sup> The impact of this case was to clarify the scope of the Sexual Orientation Regulations, not for one individual or even just one workplace, but for all employees seeking the protection of the Regulations.
31. Nonetheless, a High Court judicial review challenging the legislation will only arise in limited circumstances. What is missing from the UK legislation is any mechanism for trade unions to pursue representative actions in an individual workplace on behalf of its members, for example to pursue legal action where a public sector employer is failing to implement its duties under the Race Relations Act or where the discrimination is widespread. So even where a work practice has widespread discriminatory impact, the only legal remedy provided for in an Employment Tribunal is for an individual or individuals who have been affected to pursue individual claims. There are many examples where this remedy is inadequate: for example where performance related pay systems impact adversely on ethnic minority employees, or where a redundancy scheme contains terms which inappropriately

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<sup>5</sup> European Foundation for the Improvement of Living and Working Conditions (Eurofound):

‘Reconciliation of work and family and collective bargaining in the European Union’, 2006.

<sup>6</sup> *R (on the application of Amicus and others) v Secretary of State for Trade and Industry 2004*

penalise sickness absence so disadvantaging disabled employees, or where a uniform policy is inappropriate for Muslim staff etc. From a trade union perspective, the prospect of backing a string of individual claims is unattractive and expensive, leaving aside the practical difficulty of persuading significant numbers of union members - assuming the relevant people are union members - to submit legal cases.

32. The TUC and others have frequently called on the Government to make provision for representative or class actions on behalf of a number of their members.<sup>7</sup> This is particularly relevant to issues of pay discrimination, where pay systems can impact on thousands of members, yet the legal system requires individual claims to be pursued.
33. As an alternative, the TUC has called on the Government and the Equal Opportunities Commission to make a general finding out of an individual case, and to make changes to a collective agreement or pay structure as a result of an individual case where the impact of the decision goes beyond the circumstances of the individual. Indeed it has been argued<sup>8</sup> that the European Court of Justice decision in *Kowalska v Freie und Hansestadt Hamburg 1990* determined that in a case of indirect discrimination, the group which is disadvantaged must have the same work system applied to them as the other advantaged workers. So, it is argued, in order to comply with this ruling employment tribunals must be given the power to vary discriminatory collective agreements or other discriminatory rules.
34. The arguments of the TUC in this respect are reinforced by the requirements of Articles 9 and 7 of the Framework and Race Directive requiring member states to allow for trade unions and other representative bodies to engage not only in support of, but also *on behalf of* members. It is frequently argued that these provisions of the Directives have not yet been properly implemented in the UK.
35. At a more basic level, trade unions can play a key role in disseminating information about equality rights to workers. All trade union websites in the UK contain information about equality rights, and most trade unions run regular training sessions and workshops, organise equality networks, and distribute publications and leaflets. Given that the UK (and EU) system of equality primarily relies on individuals pursuing rights, this dissemination of information about what the rights members have is critically important.
36. Particularly driven by disability groups, there has been an increasing emphasis in the UK on the importance of consultation with minority groups, particularly disabled people. The argument is that disabled people have to be involved in any decisions about how best their

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<sup>7</sup> For example “*Implementing the Employment and Race Directives*” TUC March 2002

<sup>8</sup> A TUC response to the Equal Opportunities Commission, May 1998

disability can be accommodated in the workplace. Trade unions have provided the means for that consultation to take place with their disabled members.

37. There do however remain significant issues about the extent to which trade unions promote equality rights. It is a fundamental principle of trade unionism in the UK that unions negotiate to improve the collective rights of the majority. This can sometimes conflict with the principle of equality if, for example, achieving equality between men and women involves reducing men's rights. Also, UK equality law is extraordinarily complicated, having developed incrementally over the last 40 years. Many employees, and trade unions, struggle to understand the law, and probably would often prefer to ignore it rather than understand it. This tendency to avoid is on occasions exacerbated by a suspicion of the law amongst trade unionists, in that the law can be regarded as representing individual not collective rights, and representing the "establishment" rather than tried and tested forms of collective negotiation controlled by the workers.

### **The role of trade unions**

38. It is clear from our UK experience that a system of equality legislation that relies on individuals pursuing compensation claims after discrimination has occurred is not in itself a sufficient solution to eliminating unlawful discrimination. When considering the likely impact of the European Directives, a structure that focuses solely on Article 2 individual rights is unlikely to succeed in isolation. But the Directives do not just focus on individual rights. They contain clear mandatory provisions requiring member states to promote social dialogue on equality issues. Our experience in the UK is that collective agreements can have significant impact in the workplace, particularly when employers are willing to negotiate constructively with trade unions and trade unions choose to prioritise equality rights, not just by providing representation but by using the broader means at their disposal to promote equality.
39. Unions have a critical role to play in disseminating information about equality rights, and encouraging or supporting individuals to take up and pursue their rights. The extent to which trade unions in the UK have fully played their part in promoting equality may be open to debate. But what is beyond doubt is that without trade unions, the chances of seeing real and sustained implementation of the equality rights set out in the Directives would be very much reduced.

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May 2008