

European Anti-Discrimination Law Review

8
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For Diversity



Against Discrimination
An initiative of the EU

THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE NON-DISCRIMINATION FIELD

European Anti-discrimination Law Review

No. 8 - 2009



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The information contained in this eighth issue of the review reflects, as far as possible, the state of affairs on 15 January 2009.

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Joke | 1975



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Introduction

The European Network of Legal Experts in the non-discrimination field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. The Network is also composed of one national expert per EU Member State, senior researchers and ground coordinators. The Network has the aim of monitoring the transposition of the two Anti-discrimination directives¹ on the national level and to provide the European Commission with independent advice and information. It also produces the European Anti-discrimination Law Review and various thematic reports. In October 2008, the latest thematic report was produced, titled "Limits and potential of the concept of indirect discrimination" authored by Professor Christa Tobler. Thematic reports, similarly to the Law Review are being made available in English, French and German.

In November 2008 the Network organised its legal seminar for representatives of the Member States, Equality bodies and its own members; for the first time, it was decided to hold the legal seminar together with the European Network of Legal Experts in the field of gender equality and to approach the topics with a view to address all 6 grounds of discrimination. The legal seminar involved 165 participants and included workshops on the following themes: Positive obligations/positive duties; Multiple discrimination and potential conflicts between grounds; Reasonable accommodation; Exceptions to the principle of discrimination: what justification; and Enforcement and role of equality bodies: best practices. This seminar combining the two Networks and issues of interest for both the equality and anti-discrimination fields was very successful; it will be reiterated in the same form with the two Networks in October 2009.

Additionally, a decision has been adopted to create a website providing information about the Network, its reports, publications and activities. This website is to be launched in June 2009 and will enable the user to find all documents produced by the Network as well as other information relating to anti-discrimination Law. The legal state of affairs at the national level will be presented in the country pages, where the annual country reports and national executive summaries will be listed. Furthermore, legislative developments and non exhaustive case law at the European (both the European Court of Justice and the European Court of Human Rights) and national level will be published on an ongoing basis. All data collection will be easily identifiable through the use of key criteria, such as the ground of discrimination (i.e. race/ethnic origin, religion/belief, disability, age and sexual orientation, plus multiple grounds) and the field (i.e. employment, social protection, social advantages, education, access to and provision of goods and services, housing, etc). The website is accessible at the following address: www.non-discrimination.net.

This is the eighth issue of the European Anti-discrimination Law Review, prepared by the European Network of Legal Experts in the non-discrimination field. The Law Review provides an overview of the latest developments in European anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 January 2009). Moreover, it includes an article addressing the question of equal access to workplace benefits for same-sex couples, reflecting on the European Court of Justice Maruko case, written by Mark Bell, Professor at the Centre for European Law and Integration of the University of Leicester, and an article by Christopher McCrudden, Professor at the University of Oxford, on the application of the principle of equality in public procurements. In addition, there are updates on legal policy developments at the European level, updates from the case law of the European Court of Justice and the European Court of Human Rights, which also include important complaints that have been brought before the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the Member States of the European Union can be found in the section on News from the Member States. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Eirini-Maria Gounari) on the basis of the information provided by the national experts and their own research in the European sections.

Isabelle Chopin
Piet Leunis

¹ Directives 2000/43/EC and 2000/78/EC

Meet ordinary people in this Review,
facing discrimination

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Equal access to workplace benefits for same-sex couples: reflections on the Maruko case

Mark Bell²

Introduction

Sexual orientation discrimination in employment and vocational training has been forbidden in EC law since the adoption of Directive 2000/78.³ Even before the Directive was adopted, it was evident that one of the key instances of sexual orientation discrimination in the workplace concerned benefits provided by the employer which are linked to the family status of the worker. Notably, in *Grant v South-West Trains*,⁴ the European Court of Justice (hereafter the Court of Justice or the Court) had to consider the policy of a train company to provide free travel for its workers and their partners, but only if the worker's partner was of the opposite-sex. On that occasion, the Court held that such a policy did not constitute discrimination on grounds of sex. It did, however, indicate that it was a difference of treatment based on sexual orientation and that the Community legislator had the power under Article 13 EC to adopt provisions on this subject. It is unsurprising, therefore, that the first case concerning sexual orientation discrimination to reach the Court of Justice since the adoption of Directive 2000/78 is once again on the topic of workplace benefits.

The practice of providing benefits to workers which are linked to family status varies between companies and between Member States. At one end of the spectrum, it involves benefits of considerable financial value. This is especially true in those states where it is common for employers to contribute to an occupational pension scheme, which may be inherited by a surviving partner upon the death of the worker. Other examples of such benefits include free or discounted health insurance for the worker and her family and free or discounted use of the employer's services (eg free travel for public transport workers). At the other end of the spectrum, there are less tangible benefits which relate essentially to recognition and inclusion of the worker's family. For example, if an employer provides a free Christmas party for its workers, it might allow the workers to bring their partners.

The provision of such benefits creates a risk of discrimination against same-sex partners. This concerns two situations. First, where the employer explicitly provides the benefit only to workers with opposite-sex partners (as in *Grant v South-West Trains*). It seems clear that this type of distinction will constitute direct discrimination; the difference in treatment between workers is unequivocally based on the sexual orientation of their relationship. There does not appear to be any basis within the Directive which would allow such discrimination to be justified. The second situation (which is probably more common) is where the employer limits a benefit only to married workers. There are a small number of EU Member States where same-sex couples can marry (Belgium, the Netherlands and Spain). In these states, limiting workplace benefits to married couples will not, on the face of it, give rise to sexual orientation discrimination. Yet for the great majority of Member States, limiting benefits to married workers will have the effect of excluding those workers in same-sex relationships. It is this scenario which confronted the Court of Justice in *Maruko*.⁵ This article will present the facts and judgment in the case, followed by a reflection on the legal

² Professor, Centre for European Law and Integration, University of Leicester. This paper was originally delivered at the Judicial School, Barcelona, 22 October 2008.

³ Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁴ Case C-249/96, [1998] ECR I-621.

⁵ Case C-267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen*, judgment of 1 April 2008.

issues which remain unresolved. It will also briefly consider how the judgment has impacted upon the Commission's 2008 proposal for a further anti-discrimination Directive.⁶

Maruko: the facts

In 2001, Germany adopted legislation on 'registered life partnerships' which allowed for the legal recognition of same-sex couples and the consequent attribution of a bundle of rights and obligations. This legal status was not identical to marriage, but it included some of the rights/duties attached to marriage and its legal effects were subsequently extended by a 2004 amendment. Mr. Maruko formed a life partnership with another man in 2001, but his partner died in 2005. His partner was a theatre worker. He had first joined the theatre workers' occupational pension scheme in 1959 and he had made uninterrupted contributions between 1975 and 1991. Following his death, Mr. Maruko requested the widower's pension. The institution which managed the theatre workers' pension scheme refused to provide this to him on the basis that its regulations only covered married members of the pension scheme and did not extend to registered life partners. Mr. Maruko challenged this refusal before the Bavarian Administrative Court, which referred several questions to the Court of Justice for a preliminary ruling.

Maruko: the judgment

There are several key strands to the judgment of the Court in this case. The first issue which arose was whether the pension scheme fell within the scope of the Directive. In particular, Article 3(3) of Directive 2000/78 states:

This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

The institution which managed the pension scheme argued that it was covered by this exception; it underlined that it was a compulsory scheme, based on statute and governed by public law.⁷ In approaching this issue, the Court drew attention to Recital 13 in the preamble of Directive 2000/78:

This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty ...⁸

The reference to Article 141 EC was deemed by the Court to support an application of the principles it had already established in gender equality case-law on whether a pension scheme constitutes part of a worker's 'pay' or instead part of state social security. Noting that the scheme was financed exclusively by employer and worker contributions, and that the amount payable reflects the level of contributions from those parties, the Court held that the scheme was not state social security and did fall within the scope of the Directive.⁹ Although this conclusion is unsurprising, it provides a clear illustration that the Court is willing to read across well-established principles in its gender equality case-law into cases concerning other discrimination grounds.

⁶ COM (2008) 426.

⁷ Para. 36, judgment of the European Court of Justice.

⁸ Article 141 EC guarantees the right of women and men to receive equal pay irrespective of gender. It provides a broad definition of pay as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer' (para. 2).

⁹ Para. 56.

The next issue for the Court concerned the legal effect of Recital 22 of Directive 2000/78:

This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

The German pension institution, supported by the intervention of the UK government,¹⁰ argued that this Recital meant that such benefits were outside the scope of the Directive. A similar argument already arose in the *Palacios* case concerning a different part of the preamble which appeared to exclude the application of the Directive to retirement ages.¹¹ Consistent with its interpretation in that case, in *Maruko* the Court held that the preamble of the Directive could not have the effect of reducing the scope of application of the prohibition of discrimination.¹² Underlying the contentious status of Recital 22 is the potential impact of EC law on national law concerning marriage (and its privileges). Whilst acknowledging that the issue of civil status is not, *per se*, within the competence of EC law, the Court emphasised that: 'in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination'.¹³ This approach has familiar echoes in the Court's case-law on nationality discrimination under Article 12 EC, where it has applied the principle of non-discrimination to areas which are otherwise outside the scope of EC law.¹⁴ Moreover, the Advocate-General drew attention to the patent fact that this case was not about *access* to marriage; rather it concerned consequences in the employment sphere of choices made in national family law.¹⁵

Having decided that the case did fall within the scope of the Directive, the Court then progressed to determining whether the denial of the widower's pension actually constituted an infringement of the principle of non-discrimination. In approaching this issue, the Advocate-General treated the denial of the pension as a form of *indirect* discrimination.¹⁶ In essence, he viewed the pension scheme as applying a neutral requirement (being married) for access to the pension, but this gave rise to a particular disadvantage for same-sex couples who could not get married. In contrast, the Court adopted an analysis based on *direct* discrimination. It held that if registered life partners are in a comparable situation to married partners, then denial of the pension to registered life partners is less favourable treatment on grounds of sexual orientation, in respect of which there is no possibility for justification. The crucial proviso in the Court's decision is, though, the question of whether registered life partners can be viewed as being in a comparable situation to married couples.

In a possible recognition of the sensitivity of the case, the Court concludes that the decision on whether such partnerships are comparable to marriage is a matter for the national court to decide.¹⁷ Nevertheless, it notes that the referring court had already stated that it viewed registered life partners as comparable to married partners,¹⁸ so the Court appears to anticipate that the national court will view the denial of the pension as unlawful direct discrimination on grounds of sexual orientation.

¹⁰ In any case before the European Court of Justice, any of the Member States are entitled to intervene and make submissions to the Court concerning how the law should be interpreted in that case.

¹¹ Para. 44, Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.

¹² Para. 60.

¹³ Para. 59.

¹⁴ eg national law on registration of names: Case C-148/02, *Garcia Avello v Belgium* [2003] ECR I-11613.

¹⁵ Para. 99, Opinion of AG Dámaso Ruiz-Jarabo Colomer of 6 September 2007.

¹⁶ *Ibid* para. 102.

¹⁷ Para. 72.

¹⁸ Para. 69.

Direct discrimination and the comparable situation dilemma

The Court's emphasis on direct discrimination can, at one level, be accounted for by the questions asked by the referring court; the preliminary reference only inquired as to whether the pension scheme regulations constituted direct discrimination.¹⁹ As Bonini-Baraldi has observed, the Court applies the classical concept of formal equality: equal treatment of persons in similar situations.²⁰ The willingness to apply a direct discrimination analysis can be contrasted, however, with earlier gender equality case-law. In *Schnorbus*,²¹ there was preferential treatment for persons who had completed compulsory military service, which was only performed by men. The Court characterised this as indirect discrimination; the Advocate-General reasoned that compulsory military service could (hypothetically) be extended to women, therefore it was not a distinction based directly on gender.²² In *Maruko*, the Court elides the fact that the difference of treatment was not based on sexual orientation *per se*, instead it was via a legal status closely connected to a person's sexual orientation. Recognising the possibility of direct discrimination in these circumstances seems to demonstrate a better appreciation of the de facto impact of preferential treatment for married couples than, say, the formalistic approach taken in the *Schnorbus* case. Yet the value of relying on direct discrimination begins to wane as the case subsequently becomes stuck in the quagmire of determining what constitutes a comparable situation.

By leaving the comparability test in the hands of the national courts, the Court opens the door to conflicting interpretations. Several weeks after the decision in *Maruko*, the German Federal Constitutional Court held that it was justified to limit a family allowance for civil servants only to married couples. It did not regard same-sex couples as comparable to married couples for the purposes of this benefit, arguing that married couples were more likely to have children.²³ The ambiguity in the *Maruko* judgment lies in how courts should go about assessing whether same-sex partnerships are comparable to marriage. A broad reading might suggest a complete comparison of all aspects of the rights and duties of same-sex partners with those of married partners. Such an approach will make it more difficult to establish comparability. A close reading of the Court's judgment suggests that the comparison should be more limited in scale.²⁴ Specifically, the Court refers to whether: the referring court decides that surviving spouses and surviving life partners are in a comparable situation *so far as concerns that survivor's benefit ...*²⁵

This implies that the comparison should only concern how national law treats same-sex partners and married partners in this domain; the fact that there may be differences between the two statuses in, for example, adoption law, should not be relevant to deciding if they are comparable with regard to employment benefits.

Clearly, the comparability test will turn on the specific legal situation in each Member State. In some states, legal recognition of same-sex partnerships is extremely close to the status of marriage (eg Denmark, Sweden, Finland, the UK). In others, the comparability of the statuses is more debatable (eg the PaCS legislation in France).²⁶ This poses the question of what happens where same-sex partners are deemed not to be in a comparable situation to married partners. This will certainly be the case in the

¹⁹ [2006] OJ C224/20.

²⁰ M Bonini-Baraldi, 'La pensione di reversibilità al convivente dello stesso sesso: prima applicazione della direttiva 2000/78/CE in materia di discriminazione basata sull'orientamento sessuale' (2008) 7 *Famiglia e Diritto* 660, 664.

²¹ Case C-79/99, *Schnorbus v Land Hessen* [2000] ECR I-10997.

²² Para. 40.

²³ See further, *European Anti-Discrimination Law Review*, Issue No. 6/7 - 2008, 97.

²⁴ I am indebted to Helmut Graupner for bringing this point to my attention.

²⁵ Para. 72, emphasis added.

²⁶ On the PaCS, see further D Borrillo, 'Le Pacte civil de solidarité: une reconnaissance timide des unions de même sexe' (2001) *Aktuelle Juristische Praxis* 299.

many EU Member States where there remains no legal recognition of same-sex partnerships (eg Italy, Poland, Cyprus). Although a direct discrimination analysis will not be possible in such contexts, it remains to be determined whether denial of benefits might, nevertheless, constitute *indirect* discrimination. This is not examined by the Court in its judgment, however, the Advocate-General expressed the view that even an analysis based on indirect discrimination would require evidence that same-sex couples were in a comparable situation to married couples.²⁷ This overlooks the fact that the reference to being 'in a comparable situation' is only a requirement in the legislative definition of direct discrimination and it is not present in the definition of indirect discrimination.²⁸ As Schiek comments, 'introducing the category of comparability into the indirect discrimination test conflates the two and is dogmatically unsound'.²⁹ Arguably, the key issue in indirect discrimination is not whether same-sex couples are comparable to married couples. It seems clear that making marriage a precondition for access to workplace benefits will give rise to a particular disadvantage based on sexual orientation for lesbian and gay employees (and their families). Instead, the main focus of the debate surrounding indirect discrimination is likely to be whether preferential treatment for married couples is capable of objective justification.

The 2008 proposal for a Directive on discrimination outside employment

One of the first concrete impacts of the judgment in *Maruko* can be witnessed in the Commission's proposal for a Directive on discrimination in areas outside employment.³⁰ The proposal was issued on 2 July 2008, just three months after the Court's decision in *Maruko*. The core objective of the proposed Directive is to prohibit discrimination in several key fields (education, social protection, social advantages, access to goods and services, housing) on grounds of religion or belief, age, disability or sexual orientation. This should address a lacuna in the existing body of EU anti-discrimination legislation, where there is protection from discrimination based on sex and racial or ethnic origin in areas outside employment, but not for the other discrimination grounds mentioned in Article 13 EC.³¹ The inclusion of sexual orientation within the 2008 proposal means that a range of benefits provided to married couples (or only to opposite-sex couples) are potentially open to future challenge as direct or indirect sexual orientation discrimination. Examples include a policy of giving priority to married couples in the allocation of public housing or a health club which offered discounted membership fees to married couples.

The approach proposed by the Commission in the new Directive is more restrictive than that found in Directive 2000/78. Article 3(2) on the scope of the proposed Directive states: 'this Directive is without prejudice to national laws on marital or family status and reproductive rights'. In the explanatory memorandum to the Directive, the Commission argues that denial of benefits where the same-sex couple are in a comparable situation to a married couple would still be direct discrimination, as established in *Maruko*.³² Yet the placing of this exception in the main text of the Directive will alter the terms of the legal debate found in *Maruko*. As discussed above, the reference to marital benefits in Directive 2000/78 is located in the preamble and the Court of Justice held that this cannot restrict the scope of application of the prohibition of discrimination. In the proposed Directive, the Court would be unable to apply this approach and there is a stronger argument that Article 3(2) would provide an enforceable defence for some benefits linked to marriage.

²⁷ Para. 100.

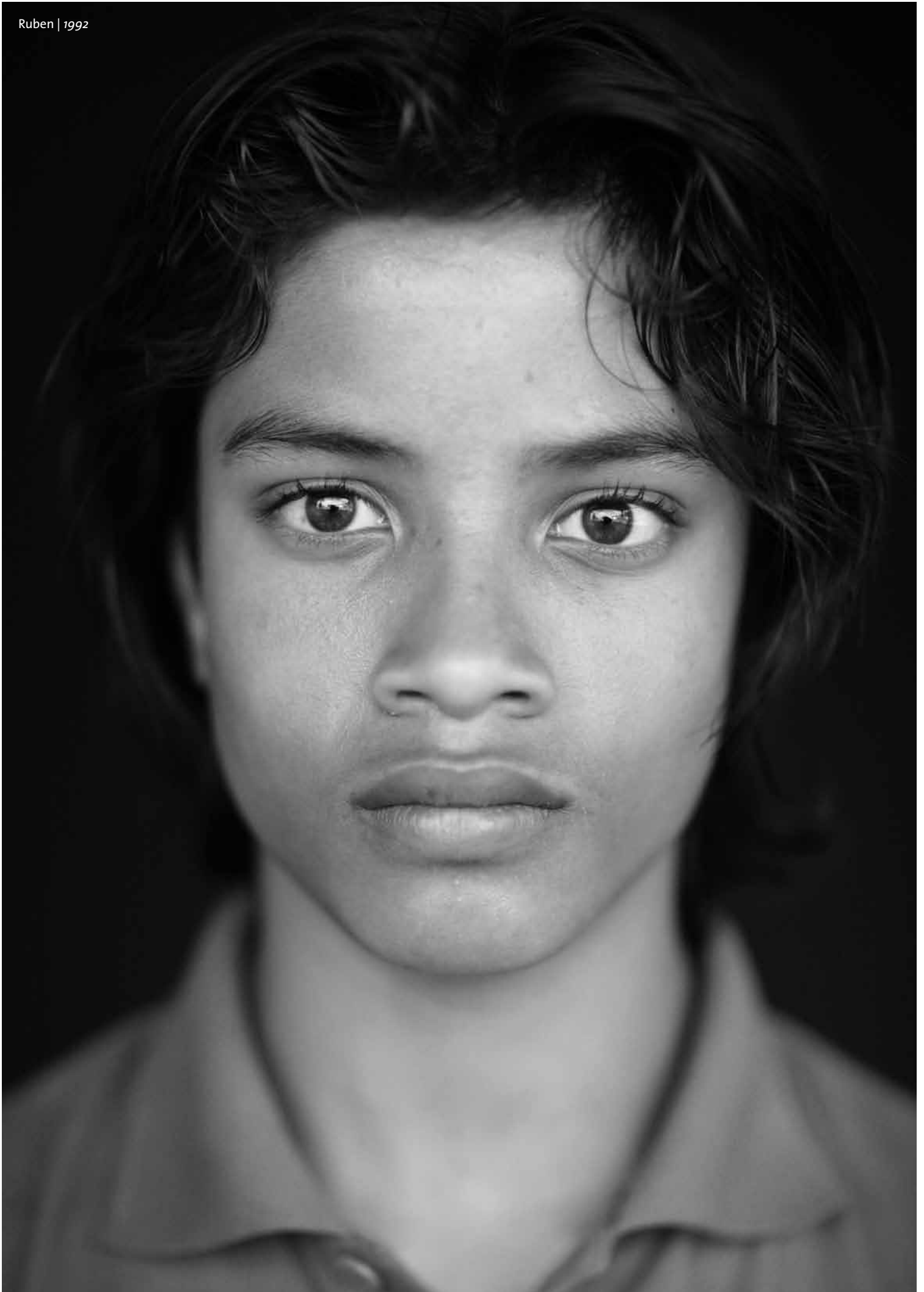
²⁸ Article 2(2), Directive 2000/78/EC.

²⁹ D Schiek, 'Indirect discrimination' in D Schiek, L Waddington and M Bell (eds), *Cases, materials and text on national, supranational and international non-discrimination law* (Oxford, Hart Publishing, 2007) 471.

³⁰ Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426.

³¹ It should be noted, however, that sex discrimination is only forbidden in the provision of goods and services and not in all of the fields included in the Commission's 2008 proposal: Council Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

³² Commission (n 26 above) 8.



It is also notable that the terms of this exception are different to the equivalent text in Recital 22 of Directive 2000/78. Whereas Recital 22 is limited to marital status (and benefits dependent thereon), the proposed Directive would also exclude national laws on 'family status'. There is no guidance within the proposal on the difference between 'marital status' and 'family status', however, it seems logical that the latter covers a wider category than just marriage. In particular, this might be used to justify the limitation of certain benefits to those defined in national law as constituting a 'family'. This creates a danger that in some Member States same-sex couples will be excluded from benefits (eg social welfare allowances) on the basis that they are not treated by national legislation as being in a family relationship.

Conclusions

The judgment in *Maruko* was a progressive signal that the Court of Justice was departing from some of its earlier case-law, which had been rather restrictive when confronted with sexual orientation discrimination. The Court did not select the possible 'escape route' of relying on Recital 22 to place the issue outside the ambit of the Directive. Moreover, by proposing a direct discrimination analysis, it closed-off a thorny debate about whether it is objectively justified to limit employment benefits to those who are married. The counter-balance to this forthright approach is the deference to national courts with regard to when same-sex partnerships are comparable to marriage. This is understandable; national legislation in this area is extremely diverse and it reflects delicate national choices in the area of family law. Nevertheless, uncertainty remains surrounding exactly how national courts should assess comparability. The Court of Justice will have the opportunity to clarify some of these issues in the pending case of *Römer*, which once again concerns a German life partner denied a survivor's occupational pension which was available to married partners.³³

Buying Equality

Christopher McCrudden³⁴

Introduction

States in the early twenty-first century increasingly make policy by spending billions of Euros on private contracts. In the current economic crisis, with shrinking departmental budgets, getting the 'biggest bang for the least bucks' will be even more important now than it was in the past.

Public procurement amounts to between 15 and 20 percent of most Member States' Gross Domestic Product. How do governments use their purchasing power to advance social justice? What are the implications of these developments for equality? Should they do more? If so, how?

Already, government contracting is an important element in many governments' environmental and corporate social responsibility strategies. Business is already seeing increased regulation indirectly through government contracting, dealing with issues as diverse as global warming to healthy eating in schools. This involves what I term the use of 'linkages'.

The European Commission in Brussels has also recently announced that it is considering how Member States can more effectively deliver equal pay through public purchasing. An important element in the British Government's current proposals for a major revision in equality law is the use of government

³³ Case C-147/08, *Römer v Freie und Hansestadt Hamburg* [2008] OJ C171/15.

³⁴ Professor of Human Rights Law in the University of Oxford, and Fellow of Lincoln College, Oxford. He is a Fellow of the British Academy.

contracts to provide an extra incentive for business to address discrimination and equality. There are equivalent issues arising in Sweden, France, Germany, and Italy.

Key issues

Several key questions can be identified: is a compromise possible between the economic and commercial functions of procurement and the political and ethical uses of procurement; what extra value (if any) do such linkages bring, and at what cost; what limits does regulatory globalization place on the uses of such linkages?

In the context of the third issue in particular, there is an important issue of how much legal space do governments have to operate such policies? Has globalization led to significant constraints? How, for example, does international and European law affect such uses of spending in the Member States?

In a book published in 2007, I examined these issues.³⁵ Drawing on international and European law, human rights law, and an analysis of relevant domestic law in a wide range of countries, I considered the challenges associated with using governmental contracting to achieve greater equality. Through a series of detailed case studies, I analysed the scope for these uses of procurement in light of the World Trade Organization legal regime, and in the context of European Community law. In this brief article, I want to concentrate particularly on the use of procurement in the context of the promotion of equality.

Brief history of procurement linkages

The social uses of public procurement date from at least the mid-19th century in Europe and North America, and soon became an established part of the pre-World War II regulatory landscape. Examples included the use of public procurement to do away with sweat shops and provide for 'fair wages' in England, to reduce unemployment during the New Deal in the United States, to ensure the inclusion of disabled war veterans, and most famously as part of moves to ensure equality for black Americans.

Since the 1980s, the use of public procurement to address social issues has multiplied. Canada uses procurement as one tool to address aboriginal economic disadvantage. Malaysia controversially uses the distribution of public procurement contracts as an important way of building up a native Malay entrepreneurial class. Several US states adopted 'selective purchasing' to demonstrate opposition to human rights abuses in Burma (until they were stopped by the US Supreme Court). Public procurement is also central to strategies of campaigners for 'fair trade', and 'sustainable procurement' has been promoted internationally by the United Nations as a key instrument to deliver sustainable development goals.

ILO Conventions

After the Second World War, the ILO focused on ensuring that government contractors would not undermine collectively agreed pay rates adopted by other employers not engaged in government contracting. By then, the ILO had identified a 'tendency towards the internationalisation of the fair wages clause'.³⁶ For example, during the War, the United States had inserted labour and social clauses in contracts for the procurement of strategic material from other countries.³⁷ The British Colonial Development and Welfare Act 1940 made approval of certain grants conditional on the maintenance of certain labour standards.³⁸

³⁵ Christopher McCrudden, *Buying Social Justice* (OUP, 2007)

³⁶ International Labour Conference, 31st session, Report VI (b)(1): Wages: (b) Fair Wages Clauses in Public Contracts (ILO, Geneva, 1947), p. 5.

³⁷ See further for discussions leading to the adoption of this Convention: International Labour Conference, 1948.

³⁸ International Labour Conference, 31st session, Report VI (b)(1): Wages: (b) Fair Wages Clauses in Public Contracts (ILO, Geneva, 1947), p. 5.

The Labour Clauses (Public Contracts) Convention, 1949 (Convention No. 94) in 1949³⁹ provided that workers employed under contracts for certain construction works, the manufacture of goods, the shipment of supplies or equipment, and the supply of services awarded by a central public authority were to be protected. States which were parties to the Convention were required to include clauses in these public contracts ensuring them wages (including allowances), hours of work, and other conditions of labour which were not less favourable than those established by collective agreement, arbitration award or national laws for work of the same character in the trade or industry concerned in the district where the work was performed.⁴⁰ The Convention also required the establishment and maintenance of an adequate system of inspection and the imposition of remedies and sanctions in case of non-compliance with the terms of the labour clauses. This, in turn, contributed to several states adopting such provisions in their domestic legislation.

Arguments in favour of social linkages.

There appears to be a significant increase both in the proportion of countries adopting such uses of procurement and also in the types of issues which procurement is used to advance. The arguments in favour of this use of procurement tend to emphasize the inadequacy of securing compliance by using other regulatory methods, the political limits to seeing public contracting as simply a commercial activity, the need for government to supply public goods that would not otherwise be delivered, the desirability of addressing externalities caused by the use of the procurement instrument itself, and the value in public authorities becoming models of good practice.

Arguments against social linkages.

Arguments against the social uses of public procurement are, however, often made: the perceived irrelevance of such goals to the appropriate functions of purchasing, the extra costs that such linkages are said to bring, the unfairness that such linkages are said to pose to particular stakeholders, the increased opportunities that such uses pose for abuses of power by government and increased corruption, and the fear that such uses bring with them greater protectionism disguised as social justice. In the past, these concerns have resulted in three main issues arising in using procurement as part of the equalities agenda.

First, was it legal? There was a need to clarify what you can and can't do legally. What legal limits are placed on the use of such linkages by, e.g. EC procurement directives, particularly Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁴¹?

Second, was it sensible and do-able? There was a need to meet civil service resistance, lethargy, and fear. More specifically, questions were raised as to what extra value does such procurement linkage bring, and at what cost. Are such linkages consistent with a view of procurement as an economic instrument of government?

Third, was it politically advantageous? There was a need to tackle political ignorance of the possibilities for linkage that procurement offers. What extra value (if any) do such linkages bring, and at what cost?

Of these, the legal issue was ostensibly the most difficult to resolve, hence the delay in moving on this issue. To understand the issues involved in resolving the legal issues, we need to understand more precisely how equality and procurement meet.

³⁹ See further for discussions leading to the adoption of this Convention: International Labour Conference, Thirty-First Session, 1948, Wages: (b) Fair Wages Clauses in Public Contracts, Reports: VI(b)(1) and (2) and Supplement (ILO, Geneva, 1947 and 1948)

⁴⁰ Article 2(1) and (2). See Nielsen, H.K., Public Procurement and International Labour Standards, (1995) 4 *Public Procurement Law Review* 94.

⁴¹ OJ 2004 L 134, p. 114.

Major issues in procurement

There are, essentially, three separate ways in which in the relationship between equality and public purchasing is important. One of the most common contexts in which the relationship between procurement and women's equality has been considered in the past in the Member States concerns the issue of whether to use procurement as a way of delivering services. In the context of equality, this has involved considering whether the effect of using public procurement to deliver particular services, for example, the provision of cleaning services in hospitals, has an adverse impact on the pay of women workers, when the service is transferred from public to private sector.

Certainly in the past, research has shown that the use of procurement may have such adverse impacts. That is an important issue, and one that has rightly occasioned considerable debate in the context of issues of privatization. This issue has by no means gone away, and the more recent controversies over the use of public private partnerships (which despite their fancy name are still essentially procurement contracts). But this is not the issue I want to concentrate on in this article. Instead, I shall be considering two rather different issues, assuming that procurement is used.

Distribution of procurement opportunities as an equalities issue

As government continues to expand the use of procurement as a method of government, so too the importance of preventing discrimination on grounds of race, gender, etc in the procurement process becomes all the more important. In other countries, procurement is used aggressively to expand the entrepreneurial class among previously disadvantaged groups.

This been the tradition in some European countries in the context of other disadvantaged groups, such as disabled workers, but not in the context of other types of inequality, unlike (for example) in the United States. Such reservation of contracts for particular groups would be likely to be contrary to EC law, and this explains why where it is thought desirable, specific exceptions have been provided in the procurement directives- There is no exception allowing reservation of procurement contracts for any groups on the basis of race, gender, age, etc. The only reservations specifically permitted are in the case of workshops employing significant proportions of disabled workers.

Incorporating equality into the procurement process

In the context of equality, European states have, instead, tended to build non-discrimination and equality standards into the procurement process, rather than in the distribution of procurement opportunities. Different Member States have incorporated equality into different stages of the procurement process: (a) when determining the appropriate definition of the subject matter of each of its contracts, (b) when determining the technical specifications of each of its contracts, (c) when establishing selection criteria for each of its contracts, (d) when establishing criteria for the award of each of its contracts, and determining the weighting to be given to these criteria, when the contract is awarded to the most economically advantageous tender, (e) when considering whether a bid is abnormally low, where any of its contracts is subject to competitive bidding, and (f) when considering the inclusion of contract performance clauses in each of its contracts.

Legal concerns

Each of these uses of procurement linkage gives rise to potential conflicts with Community law. There has frequently been concern from lawyers advising governments on the grounds that such social uses of procurement may breach principles of anti-protectionism and free competition encapsulated in international and regional trade agreements. Two major sets of legal issues arise: how far procurement linkages

are consistent with the process requirements of this regulatory system, and how far they are consistent with the requirement of non-discrimination.

Limits deriving from EC law

Since the 1970s, the EC Treaty and procurement Directives have increasingly been seen as regulating the procurement function of government. There have been numerous revision of the procurement Directives, culminating in reforms of the early part of this century, leading to the two main procurement Directives currently in force, one dealing with public procurement by public bodies such as central and local government, and one dealing with procurement in the utilities sector.

The relationship between Community law and the linkages discussed above has changed significantly over time. Initially, up to the mid 1980s, there was a relatively high level of tolerance shown by the Commission and the Council of Ministers towards domestic use of procurement linkages. From 1980s to mid 1990s, however, in the drive for a Single Market, procurement linkages encountered an increasingly hostile reception, particularly from the Commission. From mid 1990s there was another major shift. There was a major 'rediscovery' of linkages at the domestic level: the use of procurement to advance environmental policies ("green procurement"), and Corporate Social Responsibility contributed to a shift of thinking in the Community.

Role of the ECJ

In addition, the European Court of Justice opened up greater legal space, paving way for the revised legislative approach in 2004, which increased further the ability of Member States to use procurement linkages. The role of EC can best be seen as providing a context in which the tensions between the economic and social functions of procurement are mediated now and are likely to be resolved in the future. The outcomes of past controversies concerning the legitimacy of the integration of social values into procurement demonstrate that compromise is possible, not least because several principles that are common to both sides of the argument can be identified, and the adaptability of the procurement instrument can be capitalized on to enable both sets of goals to be pursued successfully.

The EU has progressively given greater domestic regulatory space for procurement linkages as a method of enforcement of Community social policy. The Court of Justice had tended to view the issue of procurement not in isolation from, but as part of the larger economic and social role that the Community had adopted. Effectively what the Court did was to stop the onward march of a purely commercial approach to government procurement, and allow a space for politics in which other interests could compete. Although at first extremely resistant to the Court's approach, by the end of the 1990s the Commission substantially bought into the Court's approach, and in an important Communication set out its approach to the existing Directives in some detail, which (after some modification) was incorporated into legislation in the Directives.

Compliance with collective agreements establishing employment conditions

Although somewhat badly drafted, the Recitals to both procurement Directives make clear that, provided that they themselves comply with EU law, and are applied in a way which complies with EU law, Member States may, by general legislation for example, require that those carrying out a public procurement contract should comply with 'laws, regulations and collective agreements' that are in force and deal with 'employment conditions' during the performance of the contract.⁴² This simply reflects numerous ECJ decisions both prior to and subsequent to the enactment of the Directives.

⁴² Recital 34 Public sector Directive (n 8 above); Recital 45 Utilities Directive (Dir. 2004/17, OJ 2004 L 134, p. 1).

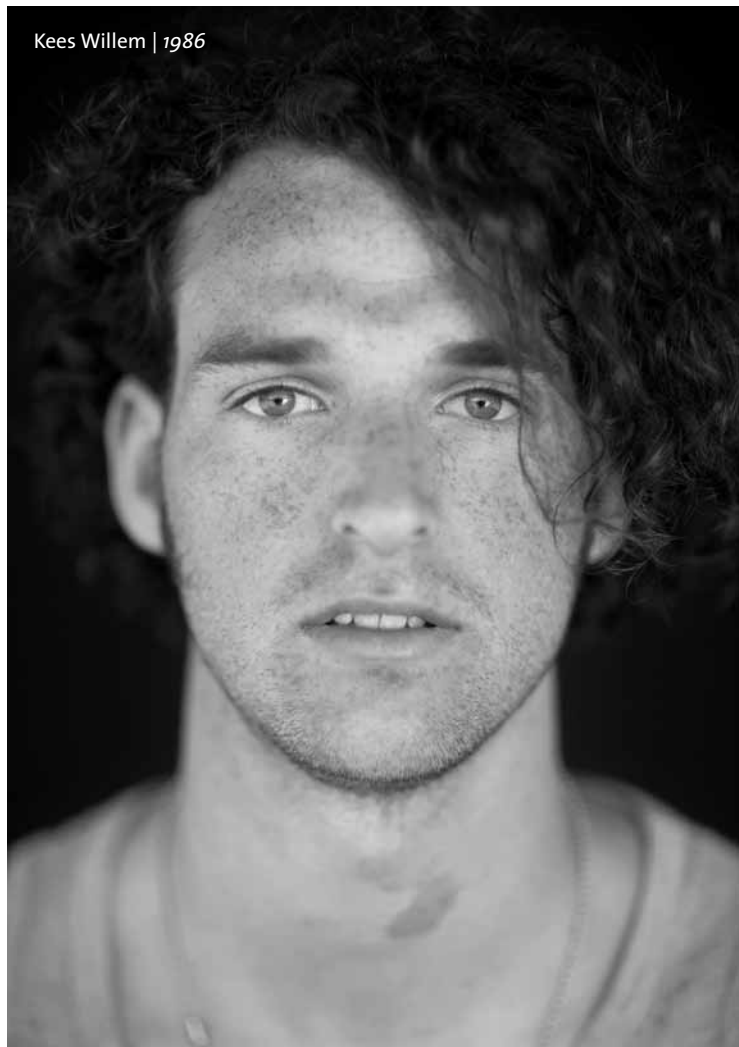
Na | 1960



Janne | 1984



Kees Willem | 1986



A contracting authority 'may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.'⁴³ Contractors might be expected to know relevant legislation and employment rules in the country where they intended to operate, but in the interests of transparency it is clearly better if contracting authorities help contractors by informing them from where the appropriate information may be obtained.

The Directives also provide that a contracting authority that supplies this information 'shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.'

The purpose of this is linked to the fear that contractors may seek to reduce their levels of employment protection in order to be able to submit a lower bid. This provision requires contracting authorities at least to require tenderers to indicate that they have taken the legal requirements 'into account' when drawing up the tender. It is clearly considerably less stringent than a requirement that tenderers must cost full compliance with the legislation when drawing up the tender, or requiring contracting authorities not to award contracts to those bidders that do not comply with employment legislation. We shall see, however, that although this more stringent approach is not included, contracting authorities do have some further discretion to attempt to ensure that tenderers intend to comply with employment legislation.

Abnormally low tenders

The provisions regarding abnormally low tenders are also highly relevant. The first observation to make about these provisions is that they assume that contracting authorities may reject a tender as 'abnormally low'. This means that the tender is considered to be in some way aberrant and not to reflect the full cost that the tender should include. An example would be where the tenderer was being subsidized by another Member State to such an extent that it was able to reduce the cost of its tender significantly enough to be more attractive in comparison with those firms not so subsidized.

Although based on the presumption that abnormally low tenders may be rejected, the Directives provide only for procedures that the contracting authority must adopt before the tender is actually rejected on the ground that it is abnormally low, hence the rather strange phrasing of the provisions in question.⁴⁴ They provide: 'If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.' The details may relate 'in particular' to 'compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed,' among other factors. Each case should be treated on its merits, there should be no automatic exclusion, and tenderers should have the opportunity to rebut the case against them.⁴⁵

The provisions of the Directive indicate, somewhat obliquely, that the tenderer's compliance with the 'provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed' may be one such factor.⁴⁶ This is important as it indicates that the Directive adopts the idea that some methods of competition, including ignoring working conditions that are legally required,

⁴³ Article 27(1) Public sector; Article 39(1) Utilities.

⁴⁴ Article 55 Public sector; Article 57 Utilities

⁴⁵ *Costanzo* Case C-103/88 [1989] ECR I 1839.

⁴⁶ Article 55(1)(d) Public sector; Article 57(1)(d) Utilities.

may be unfair competition. We saw in the previous paragraphs that there was a concern that contractors should not engage in cost cutting to the extent of undermining employment legislation requirements.

May contracting authorities go further than simply applying the 'notice and request' provisions regarding compliance with domestic employment law, discussed above? A key indication that they may is provided in Article 27 Public sector itself, which explicitly provides that the provisions regarding the giving of notice 'shall be without prejudice to the application of the provisions ... concerning the examination of abnormally low tenders.'⁴⁷

Use of contract conditions

Article 26 of the Public sector Directive (and, with minor differences Article 38 of the Utilities Directive) provides for the inclusion of additional contract conditions: 'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.' This provision incorporates into the Directive the previous case law of the Court that extends back as far as 1988, in the *Beentjes* case.⁴⁸ This case established that, provided the public body complied with non-discrimination on grounds of nationality and was transparent in what it was doing, there was nothing preventing the public body from including as a contract condition a requirement that the contractor further some social objective, such as reducing unemployment.

Unfortunately, the recent decision of the ECJ in the *Rüffert*⁴⁹ case in which the Court held that a procurement condition specifying a minimum wage in Lower Saxony contracts, was contrary to the Posted Workers Directive and Article 49EC in discriminating against contractors from Poland, casts some doubt on this picture of general tolerance for procurement linkages, but the ECJ's decision in that case is open to serious doubt. The Court essentially ignored the procurement dimensions and context of the case, and thereby missed an important aspect of the set of relevant legal materials that it should have addressed. There is a useful concept that is used in the legal systems of some countries which goes by the name of '*per incuriam*', literally translated as 'through lack of care', which means that the court has arrived at its decision in ignorance of some relevant legal provision or jurisprudence that should have been taken into account. The decision of the ECJ in the *Rüffert* case is *per incuriam* in this sense. In its apparent rush for consistency with the recent decisions in *Viking*,⁵⁰ *Laval*,⁵¹ *Rüffert*, and *Luxembourg*,⁵² ignoring anything that stood in its way, even its own previous judgments, it has risked undermining the coherence of the corpus of EC law relating to procurement linkages, a corpus of law that the Court itself partly constructed, and of which it should have been justly proud.

On first reading, the ECJ's decision in *Rüffert* tends to indicate that my argument was over optimistic, and that the ECJ has considerably rolled back on its previous efforts at helping to construct a workable compromise. The fact that it has done so, however, without once mentioning the corpus of pre-existing law on procurement means that we are confronted with two conflicting strands of ECJ judgments on procurement linkages: the older judgments of the Court stretching from *Beentjes*, through to *Nord-Pas-de-Calais*, in which the ECJ upheld the use of procurement linkages in France,⁵³ a strand adopted in the procurement directives, versus a newer strand represented in *Rüffert*.

⁴⁷ Article 39 Utilities is in similar terms.

⁴⁸ Case 31/87 *Beentjes* [1988] ECR 4635.

⁴⁹ Case C-346/06, *Rüffert v. Land Niedersachsen* [2008] IRLR 467 (ECJ).

⁵⁰ Case C-438/05, *International Transport Workers' Federation v. Viking Line ABP*,

⁵¹ Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*

⁵² Case C-319/06, *Commission v. Luxembourg*,

⁵³ C-225/98, *Commission v French Republic*, (*Nord-Pas-de-Calais*) [2000] ECR 7445)

Procurement and the public sector equality duties

There is now an important additional factor in several Member States that partly explains this burgeoning use of procurement linkages in the equality context: the development of the public sector equality duties regarding race, disability, and gender. For example, in the United Kingdom, the requirement to have ‘due regard’ to the need to promote equality of opportunity, when exercising public functions led to an initial dispute over whether procurement was included within the concept of a public function – a dispute that has been generally accepted as settled in favour of including procurement.

Guidance from equality bodies in several Member States has helped to stabilize this understanding, and contributed to the incorporation of procurement linkages in some bodies. But apart from these examples, the experience of procurement equality linkages arising out of equality mainstreaming is patchy at best, and my impression is that relatively little is happening in the overwhelming majority of public bodies. There is clearly an opportunity now to make the public sector equality duty more effective in the context of procurement.

Equality duty and the stages of a procurement contract

One of the recurring difficulties in practice has been the failure of public authorities to mainstream equality throughout the whole of the procurement cycle. How would we react if we were told that in the employment context an employer had set up a great system for ensuring equality at the hiring stage, but didn’t include dismissal, or redundancy, or pay in an equality assessment. Readers of this Review would be likely to give such a limited approach to equality in employment short shrift.

But this is precisely what usually occurs in the procurement context. Even the most progressive public authorities usually confine their equality assessments in the procurement context to only one stage of the procurement cycle. There should be a duty to assess the equality opportunities provided by particular contracts at each of the relevant stages of the procurement process.

Proactive duty: mitigation and proactively promoting equality

Even where equality mainstreaming is applied to the procurement function by public authorities, there are usually significant limits. The different dimensions of equality are often under-researched. And there is usually no clear nexus established between projects being undertaken and predicted effect on tackling inequality. More often than not, the equality duty appears to be seen as a subsequent add-on rather than as central; an imposition rather than an opportunity.

Instead, public authorities should be encouraged to consider the procurement function imaginatively. Where adverse impact is discovered, then public authorities should be required to consider whether they can take any action to mitigate this adverse impact. A proactive rather than a reactive approach to the application of equality disciplines to procurement should be incorporated, one which seeks to avoid a defensive attitude to equality mainstreaming. Public authorities should be encouraged instead to see it as an opportunity to get ‘the biggest bang for the least bucks’ by thinking through how the procurement function can be structured to deliver both widgets and equality.

Conclusion

The thrust of my argument is that government should use procurement more extensively to ensure that procurement is used to deliver the broad social justice agenda of the government, particularly the equalities agenda. Procurement is uniquely capable of affecting the distribution of benefits and burdens in

societies, and this approach can be a legitimate, effective, and legal means of achieving greater equality. It is predicted that the uses of procurement to advance social, ethical and human rights goals is likely to significantly increase in the near future, and that this use is likely to become more controversial.

European Legal Policy Update

New Framework Decision on Racism and Xenophobia

The Council of Justice and Home Affairs of the Council of the European Union adopted on 27-28 November 2008 a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (16771/07, 16771/07 COR 4, and 16351/1/08).

According to the Framework Decision, the following intentional acts will be punishable by a maximum sentence of at least one to three years' imprisonment in all EU Member States:

- publicly inciting violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, including by the dissemination or distribution of tracts, pictures or other material;
- publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
- crimes defined by the Nuremberg Tribunal (Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945), directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

Following its adoption, Member States will have two years to comply with the Framework Decision.⁵⁴
http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/104584.pdf

The European Ombudsman criticises age discrimination by the Commission

A complaint of alleged age discrimination was submitted to the European Ombudsman by a freelance auxiliary conference interpreter who worked for the European Commission and the European Parliament for over 35 years on the grounds that he stopped receiving job offers on reaching the age of 65 although he wished to continue working.⁵⁵

After two separate inquiries launched by the Ombudsman, the Commission confirmed that it treated freelance conference interpreters over 65 differently because it needed to give opportunities to new, young interpreters. Although the Ombudsman accepted that different treatment on grounds of age can sometimes be justified under exceptional circumstances, he considered that in this case a complete ban on giving any work to interpreters over 65 was disproportionate. The European Parliament accepted the Ombudsman's recommendations and changed its hiring policy, now basing it solely on the professional ability of interpreters.

⁵⁴ Framework Decisions of the Council of the European Union are important legislative instruments for the European judicial system as they provide the EU with an extended legislative base of great symbolic significance. Framework Decisions are used to approximate the laws and regulations of the Member States. Proposals are made on the initiative of the Commission or a Member State, and they have to be adopted unanimously. They are binding on Member States as to the result to be achieved but leave the choice of form and methods to the national authorities.

⁵⁵ Complaint 185/2005/ELB.

The Commission, however, rejected his Draft Recommendation to abandon this discriminatory policy and to compensate the complainant for the losses incurred due to the application of this policy. The Ombudsman considered that this instance of maladministration by the Commission was sufficiently significant as to justify the submission of a special report to Parliament on 4 December 2008, stressing that unjustified age discrimination is a violation of a fundamental right and requesting support for his position. The European Parliament may consider adopting a corresponding resolution.

<http://www.ombudsman.europa.eu/special/en/default.htm>

<http://www.ombudsman.europa.eu/press/release.faces/en/3700/html.bookmark>

European Court of Justice Case Law Update

References for Preliminary Rulings – Applications

Case C-499/08 Reference for a preliminary ruling in the case of Ingeniørforeningen i Danmark for Ole Andersen v Region Syddanmark, lodged on 19 November 2008

OJ C 19 of 24.01.2009, p.17

Reference for a preliminary ruling was made to the European Court of Justice by the *Vestre Landsret* (Western High Court) of Denmark regarding age discrimination in the context of Council Directive 2000/78/EC. The referring court asked whether the prohibition of direct or indirect discrimination on the grounds of age contained in Articles 2 and 6 of Council Directive 2000/78/EC should be interpreted as precluding a Member State from maintaining a legal situation whereby an employer, upon dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, must pay an amount equivalent to one, two or three months' salary respectively upon termination of employment. The court especially wished to ascertain if this allowance should not be paid where the salaried employee upon termination of employment is entitled to receive an old-age pension from a pension scheme to which the employer has contributed.

<http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en> (search term: Case C-499/08)

Case C-341/08 Reference for a preliminary ruling in the case of Dr Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, lodged on 24 July 2008

OJ C 260 of 11.10.2008, p.8

Reference for a preliminary ruling was made to the European Court of Justice by the *Dortmund Sozialgericht* (Social Court), Germany, regarding the interpretation of the justification of differences of treatment on the grounds of age contained in Council Directive 2000/78/EC. In particular, the questions referred are:

1. May statutory regulation of a maximum age limit for admission to practice a profession (here: to work as a panel dentist) be an objective and reasonable measure to protect a legitimate aim (here: the health of patients insured under the statutory health insurance scheme) and an appropriate and necessary means of achieving that aim within the meaning of Article 6 of Directive 2000/78/EC if it is derived solely from an assumption, based on 'general experience', that a general drop in performance occurs from a certain age, without any account being taken of the individual performance of the person in question?
2. If Question 1 is answered in the affirmative, may a legitimate (legislative) aim within the meaning of Article 6 of Directive 2000/78/EC (here: the protection of the health of patients insured under the statutory health insurance scheme) be taken to exist even where that aim was entirely irrelevant to the national legislature in the exercise of its legislative discretion?
3. If Questions 1 and 2 are answered in the negative, may a law enacted prior to the adoption of Directive 2000/78/EC which is incompatible with that directive be disapplied, by virtue of the primacy of European law, even where the national law transposing the directive (here: *Allgemeines Gleichbehandlungs*



dlungsgesetz - General Law on Equal Treatment) makes no provision for such a legal consequence in the event of a breach of the prohibition of discrimination?

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-341/08)

References for preliminary rulings – Advocate General Opinions

Case C-388/07 Opinion of Advocate General Mazak in the case of the Incorporated Trustees of the National Council for Ageing (Age Concern England), v Secretary of State for Business, Enterprise and Regulatory Reform, delivered on 23 September 2008

A reference was made to the European Court of Justice on 9 August 2007⁵⁶ by the High Court of Justice of England and Wales, Queen's Bench Division (administrative court) regarding the issue of age discrimination. In particular, the High Court asked the ECJ whether the scope of Directive 2000/78/EC extends to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement, if these rules were introduced before or after the adoption of the Directive. Additionally, the referring court wished to ascertain whether Article 6(1) of the Directive permits a general justification of differences of treatment on the grounds of age, such as that provided for by Regulation 3, or whether it requires Member States to specify the kinds of differences of treatment which may be justified by means of a list or other measure which is similar in form and content to the list in Article 6(1).

In his opinion, Advocate General Mazak proposed that the ECJ should rule that the Directive is applicable to national rules, such as those at issue in the main proceedings, which permit employers to dismiss employees aged 65 and over by reason of retirement. The Advocate General held that in order to enable individuals to avail themselves effectively of their right to equal treatment, Member States are additionally required to adopt rules within their domestic law providing specifically and with sufficient clarity for the prohibition of discrimination on grounds of age, as set out in particular in Article 1 in conjunction with Articles 2 and 6(1) of Directive 2000/78.⁵⁷ In his opinion, the Directive does not require Member States to define the kinds of differences of treatment which may be justified under Article 6(1) by means of a list or other measure which is similar in form and content to the list contained in this Article.

As regards the matter of justification of difference of treatment, the Advocate General underlined that the possibilities under the Directive of justifying differences of treatment based on age are more extensive than those based on the other grounds mentioned in Article 1 of the Directive. This constitutes not a matter of value or importance but rather a matter of how to entrench the scope of the prohibition of discrimination adequately. Finally, he emphasised that a rule which permits employers to dismiss employees aged 65 or over if the reason for dismissal is retirement can in principle be justified under Article 6(1) of the Directive if it is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market and it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose.

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-388/07)

⁵⁶ See *European Anti-Discrimination Law Review (EADLR)*, Issue No.6/7, p. 57.

⁵⁷ Article 1 of Directive 2000/78/EC lays out the purpose of the Directive, i.e. to provide a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation regarding employment and occupation. Article 2 establishes the concepts of direct/indirect discrimination, harassment and instruction to discriminate, while Article 6(1) refers to the justification of differences of treatment on grounds of age.

Latest News!

This case was decided on 5 March 2009. A full account of this judgment will be included in the next issue of the *European Anti-Discrimination Law Review (EADLR)*. The judgment can be found here: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-388/07)

References for preliminary ruling – Judgments

Case C-427/06 Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH, judgment of the Grand Chamber of 23 September 2008

OJ C 301 of 22.11.2008, p.6

A reference was made to the European Court of Justice on 18 October 2006⁵⁸ regarding the issue of age discrimination, and specifically a clause in an occupational pension scheme whereby a widow(er) of a private-sector employee who dies in service is excluded from entitlement to a survivor's pension if that widow(er) is more than 15 years younger than the deceased employee. To summarise, Mrs Bartsch, a widow, was 21 years younger than her husband, who died at the age of 60 having worked as a salesman with Bosch-Siemens Hausgeräte GmbH ('BSH') during the 16 years prior to his death. BSH Altersfürsorge, a company provident fund established by BSH, undertook to fulfil any obligations to Mrs Bartsch that the company had contracted concerning her husband's retirement pension. After the death of her husband, Mrs Bartsch requested BSH Altersfürsorge to pay her a survivor's pension on the basis of the BSH Altersfürsorge guidelines regarding the conditions of the retirement pension. The *Bundesarbeitsgericht* (Federal Labour Court) referred to the ECJ the question whether a clause such as the above is contrary to the general principle prohibiting age discrimination and invited the ECJ to provide further clarification as to the circumstances in which that principle may apply.

The European Court observed that the death of Mr Bartsch occurred before the time-limit allowed to the Member State concerned for transposing the directive had expired; Article 13 cannot bring within the scope of Community law, for the purposes of prohibiting discrimination based on age, such situations which do not fall within the framework of measures adopted on the basis of that article. Therefore, the ECJ ruled that 'the application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law' and concluded that 'No such link arises either from Article 13 EC, or, in circumstances such as those at issue in the main proceedings, from Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, before the time-limit allowed to the Member State concerned for its transposition has expired.'

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-427/06)

⁵⁸ See *European Anti-Discrimination Law Review (EADLR)*, Issue No.5, p.52.

European Court of Human Rights Case Law Update

Judgments

Andrejeva v. Latvia, (no. 55707/00), Grand Chamber Judgment of 18 February 2009

On 18 February 2009, the Grand Chamber of the ECtHR held by sixteen votes to one that there had been a violation of Article 14 in conjunction with Article 6 § 1 of the European Convention on Human Rights (ECHR).⁵⁹ The applicant was born in Kazakhstan and came to Latvia in 1954 at the age of 12, when the country was one of the fifteen Soviet Socialist Republics of the Soviet Union. She has been permanently resident there ever since, currently having the status of a permanently resident non-citizen of Latvia. The applicant had been employed at a laboratory of a recycling factory at the Olaine chemical complex in Latvia since 1966, formerly a public body under the authority of the USSR Ministry of the Chemical Industry. The complex is situated in what was previously USSR and now Latvian territory following the restoration in August 1991 of Latvian independence. In 1973 she was assigned to the regional division of the Environmental Protection Monitoring Department of the USSR Ministry of the Chemical Industry; until 1981 she was under the authority of a State enterprise with its head office in Kiev. The applicant was subsequently placed under the authority of a subdivision of the same enterprise, which was subsidiary to a division with its head office in Moscow. Although the applicant's salary was paid by post-office giro transfer, initially from Kiev and then from Moscow, her successive reassignments did not entail any significant change in her working conditions as she continued her duties at the Olaine recycling factory.

Following the declaration of Latvia's independence, on 21 November 1990 the Environmental Protection Monitoring Department was abolished and the applicant came under the direct authority of the plant's management. On retiring in 1997 the applicant asked her local social insurance board to calculate her retirement pension and she was informed that, in accordance with paragraph 1 of the transitional provisions of the State Pensions Act, only periods of work in Latvia could be taken into account when calculating the pensions of foreign nationals or stateless persons who had been resident in Latvia on 1 January 1991. As the applicant had been employed from 1 January 1973 to 21 November 1990 by entities based in Kiev and Moscow, the board calculated her pension solely in respect of the time she had worked before and after that period. As a result, she was awarded a monthly pension of LVL 20 (approximately EUR 35).

The applicant initiated administrative and judicial proceedings, complaining that the application of the transitional provisions of the Latvian State Pensions Act in her case had deprived her of pension entitlements in respect of 17 years of employment. The applicant's appeal on points of law was finally adjudicated by the Senate of the Supreme Court at a public hearing on 6 October 1999 and was dismissed. The Senate upheld the district and regional courts' findings that the period during which the applicant had been employed by Ukrainian and Russian enterprises could not be taken into account in calculating her pension. Additionally, as those employers did not pay contributions in Latvia, there was no reason for the applicant to be covered by the Latvian mandatory social insurance scheme. The applicant requested that her case be re-examined as the hearing started before the arrival of the parties, but that request was also dismissed. In February 2000 the applicant was informed by the Social Insurance Agency that, on the basis of an agreement reached between Latvia and Ukraine, her pension had been recalculated with effect from 1 November 1999 to take account of the years she had worked for her Ukrainian-based employers.

⁵⁹ Article 14 of the ECHR prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 6 § 1 provides for the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The applicant lodged a complaint with the European Court of Human Rights, alleging that by refusing to grant her a State pension in respect of her employment in the former Soviet Union prior to 1991 on the ground that she did not have Latvian citizenship, the Latvian authorities had discriminated against her in the exercise of her pecuniary rights. She also complained, under Article 6 § 1 (right to a fair hearing), that the hearing of 6 October 1999 had taken place earlier than scheduled, which had prevented her from taking part in the examination of her appeal on points of law.

The Court accepted that the difference in treatment complained of pursued at least one legitimate aim that was broadly compatible with the general objectives of the Convention, namely the protection of the country's economic system, but held that it remained to be determined whether there was a relationship of reasonable proportionality between the above-mentioned legitimate aim and the means employed in this case. It further noted that the Latvian courts had found that the fact of having worked for an entity established outside Latvia despite having been physically in Latvian territory did not constitute 'employment within the territory of Latvia' within the meaning of the State Pensions Act. The parties, i.e. Ms Andrejeva and the Republic of Latvia, disagreed as to whether at that time such an interpretation could have appeared reasonable or whether it was manifestly arbitrary. The Court did not consider it necessary to determine that issue separately.

The parties agreed that if the applicant became a naturalised Latvian citizen, she would automatically receive a pension in respect of her entire working life. However, the Court had held that very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention; it could not discern any such reasons in the present case. Firstly, it had not been established, or even alleged, that the applicant had not satisfied the other statutory conditions entitling her to a pension in respect of all her years of employment. She was therefore in a similar situation to persons who had had an identical or similar career but who after 1991 had been recognised as Latvian citizens. Secondly, there was no evidence that during the Soviet era there had been any difference in treatment between nationals of the former USSR as regards pensions. Thirdly, the Court observed that the applicant was not currently a national of any state. She had the status of a 'permanently resident non-citizen' of Latvia, the only state with which she had any stable legal ties and thus the only state which, objectively, could assume responsibility for her in terms of social security. In such circumstances, the arguments submitted by the Latvian Government were not sufficient to satisfy the Court that there was a 'reasonable relationship of proportionality' between the legitimate aim pursued and the means employed. Neither did the Court accept the Government's argument that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of her pension. It considered that the prohibition of discrimination in Article 14 was meaningful only if the applicant's personal situation in relation to the grounds of discrimination of this Article was taken into account exactly as it stands. The Court therefore found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

The Court noted also that the appeal on points of law had been lodged not by the applicant herself or her lawyer but by the public prosecutor attached to the Riga Regional Court. The Government argued that the favourable position adopted by the public prosecutor had dispensed the Senate from having to afford the applicant the opportunity to attend the hearing herself. The Court was not persuaded by this argument and observed in particular that it did not appear that under Latvian law, a public prosecutor could represent one of the parties or replace that party at the hearing. The applicant had been a party to administrative proceedings governed at the time by the Civil Procedure Act and instituted at her request. Accordingly, as the main protagonist in those proceedings, she should have been afforded the full range of safeguards deriving from the adversarial principle. The Court concluded that the fact that the appeal on points of law had been lodged by the prosecution service had in no way curtailed the applicant's right to be present at the hearing of her case, a right she had been unable to exercise despite having wished to do so. It accordingly found that this was a violation of Article 6 § 1. It awarded the applicant EUR 5,000 plus potential taxes in respect of all damage sustained and EUR 1,500 plus any tax chargeable for costs and expenses.

European Committee of Social Rights

Complaint No. 49/2008, International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece

On 23 September 2008 the Committee declared admissible a complaint under Article 16 (right to social, legal and economic protection) of the Revised European Social Charter interpreted in the light of the non-discrimination clause of the Preamble, alleging that the forcible eviction of Roma by the Greek Government without provision of suitable alternative accommodation or effective remedies amounts to a violation of their right of access to housing.

Complaint No. 51/2008, European Roma Rights Centre ('ERRC') v. France

A complaint was declared admissible on 23 September 2008 relating to Article 16 (right to social, legal and economic protection), Article 19 para. 4 c (right of migrant workers and their families to protection and assistance), Article 30 (right to protection against poverty and social exclusion) and Article 31 (right to housing) of the Revised European Social Charter, alone or in conjunction with Article E. The complaint alleges that Travellers in France are victims of injustice with regard to access to housing, including inter alia social exclusion and forced eviction, as well as residential segregation, substandard housing conditions and lack of security; the complaint also alleges that France has failed to take measures to address the deplorable living conditions of Roma migrants from other Council of Europe member states.



News from the EU Member States

*Legislative developments***Province of Vorarlberg expands protection beyond the minimum requirements of the Directive**

The legislator of the province of Vorarlberg introduced amendments to the provincial Anti-Discrimination Act through Vorarlbergian Provincial Law Gazette Nr. 49/2008 published on 12 August 2008. These entered into force on 13 August 2008.⁶⁰

The most important feature of these amendments is that the protection against discrimination on the grounds of religion/belief, disability, age and sexual orientation is expanded to non-employment areas, in particular social security and the health service, social benefits, education and access to and provision of goods and services including housing. As a result, all the grounds are now equally protected in Vorarlberg (apart from the ground-based exceptions established by the Directives).

http://www.ris2.bka.gv.at/Dokumente/Lgbl/LGBL_VO_20080812_49/LGBL_VO_20080812_49.rtf

*Case law***First criminal conviction for racial hatred e-mail**

In its decision of 22 September 2008, the Criminal Court of Vienna ruled on the first case of cyber-hate in the country initiated by the anti-racist NGO ZARA. At the beginning of 2007, ZARA received a complaint about racist, anti-Semitic and homophobic postings on a private weblog that were written by a third person. When the owner of the weblog wrote in the blog that he had reported this case of cyber-hate to ZARA, ZARA received an e-mail that contained unconcealed racist and anti-Semitic hate comments and threats against the organisation. ZARA reported this clearly criminal offence to the Austrian authorities, who successfully tracked down the perpetrator. The latter was sentenced to nine months' imprisonment – two custodial and seven suspended on probation – for incitement to racial hatred.⁶¹ The conviction is not yet final as the perpetrator can still submit an appeal; however, this important ruling against cyber-hate was widely covered by the Austrian media, who made it plain that racial hate was considered a serious offence and that the prosecution was able to trace and identify perpetrators.⁶²

*Policy developments***Immunity suspended for Freedom Party MP to allow criminal proceedings for incitement to racial hatred**

The Parliamentary Assembly unanimously voted on 10 December 2008 to suspend the immunity of Susanne Winter, the Freedom Party Österreich (FPÖ) candidate for the municipal election in Graz. The MP was charged for violation of Article 283 of the Penal Code during the election campaign after she accused the Prophet Mohammed of child abuse and suggested that he had written the Quran during epileptic fits. Court proceedings had to be postponed when Susanne Winter became a Member of Parliament during the national elections in September 2008 and therefore enjoyed parliamentary immunity.

⁶⁰ Publication in a Law Gazette is the last step in formally enacting a legal act in Austria. Vorarlbergian Provincial Law Gazette Nr. 49/2008 published on 12 August 2008 is hence the official name of the amending act which now forms part of the Vorarlbergian Provincial Anti-Discrimination Act.

⁶¹ Verhetzung, § 283 Criminal Code.

⁶² Vienna Criminal Court, decision of 22 September 2008.

The clearly defamatory statements of the MP initiated a broad discussion about the limits of freedom of speech versus the right not to be discriminated against on the basis of religion and ethnic origin. The decision by the Austrian Parliament is a very important step in ensuring that parliamentary immunity in such cases will not result in impunity.

Belgium

Legislative developments

Flemish Decree adopted on 10 July 2008 establishing a Framework Decree for a Flemish equal opportunities and equal treatment policy

The Flemish Decree of 10 July 2008⁶³ implements Directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2004/113/EC within the area of competence of the Flemish Region and the Flemish Community. Its objectives go beyond the mere fight against discrimination; it seeks to put in place a comprehensive equal opportunities policy. It encompasses an exhaustive list of 17 discriminatory grounds that includes all grounds specified in Article 13 EC and in addition it lists colour, ancestry and national origin, civil status, birth, wealth/income, state of health, physical and genetic characteristics, political opinions, language, social position and nationality. The material scope of the Decree applies to employment, health, education, access to goods and services available to the public including housing, social advantages, and access and participation to economic, social, cultural or political activities; however, it is not applicable in the area of employment where the more specific Decree of 8 May 2002 applies.⁶⁴

The Decree contains very detailed provisions regarding the prohibition of direct discrimination; it provides a definition of direct/indirect discrimination that also covers discrimination based on an assumed characteristic or association, harassment, sexual harassment, instruction to discriminate and denial of reasonable accommodation. A system of open justification is included regarding direct discrimination. However, this does not apply to race or ethnicity, religion or belief, disability, sexual orientation, gender and age in order to meet the EU Directives' requirements.

As in the 2007 Federal Antidiscrimination Acts, there is a 'safeguard provision' in the Decree which provides that differential treatment resulting from a legislative Act or from its application will never amount to discrimination within the meaning of the Decree. It also allows for positive action measures permitted under the Directives. Protection against victimisation is applied to the whole material scope of the Decree and not only to the area of employment; the Decree also requires the Flemish Government to designate one or more organisations responsible for the promotion of equality and to designate decentralised offices for the promotion of equality in the main Flemish cities.

http://www.diversite.be/index.php?action=wetgeving_detail&id=62&select_page=12

Ordinance of the Region of Brussels-Capital of 4 September 2008 relating to the fight against discrimination and equal treatment in the field of employment

This Ordinance implements Directives 2000/43/EC, 2000/78/EC and 76/207/EEC, as modified by the Directive 2002/73/EC, in the field of employment. The scope of the Ordinance is limited to the area of competence of the Region of Brussels-Capital, covering policies on the recruitment and promotion of workers

⁶³ Official Journal (*Moniteur Belge*), 23 September 2008, pp. 49410-49424.

⁶⁴ Decreet houdende evenredige participatie op de arbeidsmarkt, 8 May 2002.

and policies on the treatment of unemployed persons, as defined in article 4. 9° of the Ordinance.⁶⁵ The Ordinance enshrines a limitative list of grounds including all those referred to in Article 13 EC as well as political opinion, civil status, birth, income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin. The statute prohibits direct and indirect discrimination, harassment and sexual harassment and instructions to discriminate; it provides that direct discrimination is only justified in the case of occupational requirements and that indirect discrimination does not occur when there is an objective and reasonable justification for a difference in treatment and when no reasonable accommodation can be made for people with disabilities. The Ordinance includes a “safeguard provision”, stating that if a difference of treatment is mentioned in or results from a legislative Act, this difference of treatment never amounts to direct or indirect discrimination. The Ordinance also allows objective and reasonable justification for direct and indirect discrimination on the ground of age.

The Ordinance stipulates that the Government (of the Region of Brussels-Capital) has to designate a body responsible for the promotion of equality in the region and provides for criminal and civil sanctions and protection against victimisation. Finally, it offers positive incentives to put in place more preventive and pro-active measures for equality, namely public grants and a special logo that can be used by businesses that implement diversity plans.

<http://staatsbladclip.zita.be/moniteur/lois/2008/09/16/loi-2008031460.html>

Ordinance of the Region of Brussels-Capital implementing Directives 2000/43/EC and 2000/78/EC in the area of competence of the Region of Brussels-Capital relating to public service

The Ordinance implements Directives 2000/43/EC, 2000/78/EC and the Directive 76/207/EEC (as modified by the Directive 2002/73/EC); it puts in place a wider policy of equal treatment than the mere fight against discrimination and encourages public institutions to adopt diversity plans, as defined in articles 5 and 6.⁶⁶ Its material scope is limited to employment in the public service of the Region of Brussels-Capital. The public institutions of the Region of Brussels-Capital that fall within the scope of the Ordinance are specified in article 4 13°.

The Ordinance prohibits direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate and enshrines an exhaustive list of grounds including all those referred to in Article 13 EC and additionally political opinion, civil status, birth, income, language, state of health, physical or genetic characteristics, pregnancy, childbirth, maternity leave, transgender, nationality, colour, ancestry, national or social origin.

It allows direct discrimination to be justified in the case of occupational requirements and states that no indirect discrimination occurs when an objective and reasonable justification is put forward, nor when the accommodation requested by a person with disabilities cannot be considered to be reasonable. The Ordinance includes a “safeguard provision”, according to which if a difference of treatment is mentioned in or results from a legislative Act, this difference of treatment never amounts to direct or indirect discrimination. It also allows for the shifting of the burden of proof in civil cases. Finally, it provides that organisations with a legal interest in the fight against discrimination that have been established for at least three years and trade unions may file a suit on the basis of the Ordinance.

<http://staatsbladclip.zita.be/moniteur/lois/2008/09/19/loi-2008031472.html>

⁶⁵ Official Journal (*Moniteur belge*), 16 September 2008, pp. 48144-48150.

⁶⁶ Official Journal (*Moniteur Belge*), 16 September 2008, pp. 48150-48157.

President of the National Front resigns after anti-Semitic singing

At the beginning of November 2008, the media released a video showing Michel Delacroix, President of the National Front (the Belgian French-speaking extreme right-wing party) singing an anti-Semitic song, during what appeared to be a family party at a restaurant in Spain, in the company of a political figure linked to the Vlaams Belang (a Flemish speaking extreme right-wing party). Singing to a well known and popular tune, the politician made fun of a little Jewish girl who was going to be gassed in the Dachau concentration camp.

This video has caused upheaval and led to the resignation of Michel Delacroix as the President of the National Front; however, he has not resigned as a Member of Parliament and is keeping his seat in the Senate. The Centre for Equal Opportunities and Opposition to Racism has submitted a criminal complaint and the prosecution officially confirmed the opening of a criminal investigation on the basis of the Federal Act of 23 March 1995 aimed at punishing the denial, minimisation, justification or approval of the genocide committed by the German National Socialist authorities during World War II.

This scandal has re-launched the debate regarding the withdrawal of public funds allocated to the National Front as a political party with elected MPs. It seems likely that the *ad hoc* parliamentary commission will bring the case before the Council of State which has the power 'to deprive a political party of its public funding during a three-month to one-year period when it appears that by its own acts, or those of its members, candidates or elected members, the party clearly and repeatedly shows its hostility towards the rights and freedoms protected under the European Convention on Human Rights' (article 15ter of the Federal Act of 4 July 1989 on political party financing).

Case law

The Constitutional Court rejects a petition submitted by the Government of the French Community to overturn the Flemish wooncode (Housing Code)

The Constitutional Court examined a petition submitted by the Government of the French Community and two associations (one active in the field of human rights and the other in social housing⁶⁷) to overturn the Flemish Housing Code.⁶⁸ The Housing Code (as modified in 2006) imposes the condition that when applying for social housing, the applicant has to demonstrate his or her intention to learn Dutch, for example by enrolling on free courses organised by the Flemish Region. This intention has to be demonstrated continuously to the local authorities, i.e. when the applicant submits the application, when s/he receives the house and while s/he is occupying it.⁶⁹ It is important to stress that the language requirement is not that of speaking Dutch but that of showing willingness to learn it at a basic level. The stated aim of this requirement is to improve the quality of life in social housing associations through easier and better communication in Dutch between the tenant and the owner and among residents, and to promote integration and equal opportunities for all.

The plaintiffs in the case argued that this requirement was discriminatory against non-Dutch speakers and contrary to the right to housing as provided by Article 23 of the Belgian Constitution, in particular,

⁶⁷ The Flemish Human Rights League and the Vlaams Overleg Bewonersbelangen respectively.

⁶⁸ See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 3, p. 52-53.

⁶⁹ For more information on the relevant linguistic requirements, controls and sanctions, please refer to the Executive Regulation of 12 October 2007 of the Flemish Government regulating social housing in the implementation of Title VII of the Flemish Housing Code (*Besluit van de Vlaamse Regering tot reglementering van het sociale huurstelsel ter uitvoering van Titell VII van de Vlaamse Wooncode*), *Moniteur belge*, 7 December 2007, p. 60.428.



the obligation of standstill⁷⁰ enshrined in this article. The Constitutional Court considered that the requirement, which is only the intention to learn, and which therefore cannot be considered a stringent obligation, was not disproportionate with the aim sought by the Flemish Government. However, the Court added that this applied subject to the following two requirements: first, sanctions in case of non-respect by the tenant of his/her obligations should be proportionate to the gravity of the violation and must be pronounced by a judge. Second, the requirement to demonstrate the intention to learn Dutch cannot be imposed on French speakers living in municipalities with linguistic facilities.⁷¹ In fact, in Flemish-speaking municipalities, the tenant can request spoken and written communication with the owner to be conducted in French. As the aim of good communication and thus better quality of life in social housing can be achieved by this means, there was no need to implement an additional provision. The Court considerably restricted the scope of the Housing Code in this sense.

This judgment has been welcomed by both of Belgium's linguistic communities. It also established that the owner's right to unilaterally annul a rental agreement in the case of a major violation by the tenant of obligations put in place by the Housing Code was contrary to the right to housing. It therefore rescinded this provision of the Decree.⁷²
www.arbitrage.be

B G

Bulgaria

Case law

The Supreme Court acknowledges as absolute the positive duty of public authorities to ensure access to public buildings, built infrastructure and means of transport by people with disabilities



On 30 June 2008 the Supreme Court of Cassation ruled against the Municipality of Plovdiv, the second largest Bulgarian city, and held the public authorities liable for discrimination against a woman with a disability. The Court quashed the regional Court of Appeal's decision, which had failed to recognise that lack of access to public buildings and means of transport constituted a violation of discrimination law. The Court of Appeal had held that the fact that the authorities had taken some action to render public buildings accessible and to modify transportation services exempted them from liability for discrimination. It should be noted, however, that the authorities had not taken any measures to accommodate the claimant's disability as a wheelchair user. She initiated court proceedings on the basis of the objective situation in terms of accessibility to public places of people with disabilities, including herself. The claimant alleged that the general existence of non-accessible public buildings and transportation deprived her of opportunities to enjoy a social life. She did not refer to a specific incident, but to the overall inaccessibility of the city's buildings and infrastructure to people with mobility disabilities.

The Supreme Court upheld this claim and ruled that the authorities' obligation laid down in the relevant legislation to eliminate barriers for people with disabilities was absolute. It awarded the plaintiff the sum

⁷⁰ The obligation of standstill is a general principle of Human Rights Law that prevents from lowering the existing level of protection.

⁷¹ The municipalities with linguistic facilities are located around Brussels and along the linguistic border which divides Belgium. They are located both in the French-speaking part and Dutch-speaking part of Belgium. The residents of the Flemish municipalities with linguistic facilities (where sometimes the French-speaking community is larger than the Flemish one) have a constitutional right to interact with public authorities in French, even though Dutch is the official language of the municipality. The reverse is true with respect to Dutch-speaking residents of the Walloon municipalities with linguistic facilities.

⁷² Constitutional Court, judgment No. 101/2008 of 10 July 2008.

of BGN 10,266.49 (the equivalent of EUR 5,250) in non-pecuniary damages for social isolation and deprivation of the right to professional and personal fulfilment. This is an unprecedented amount in Bulgaria for a discrimination case. In addition, the Court ordered the authorities to remedy their failure to provide access without barriers to public buildings and means of transport to people with disabilities, as well as to abstain from such infractions in the future.⁷³

This decision sets a precedent not only in terms of the amount of compensation awarded, but also in terms of over-ruling the lower courts' systematic refusal to hold the public authorities liable for the inaccessibility of public buildings and infrastructure on the grounds that the process was time- and resource-consuming and that the authorities had already taken some measures to remedy the situation, i.e. had rendered some public premises available, had slanted some sidewalks, and had provided very limited transportation services for people with disabilities.

Cyprus

CY

Case law

Employment Tribunal claims lack of jurisdiction over a claim regarding age discrimination in a job advertisement

A claimant applied to an Employment Tribunal alleging that a maximum age limit in a job advertisement for a credit institution amounted to age discrimination. The credit institution argued that the claimant was rejected due to her qualifications rather than her age. At the same time, it claimed that the age limit was appropriate, reasonable and served a legitimate aim as they intended to train the selected applicants on an on-going basis. The latter should therefore have sufficient years ahead of them to progress to higher positions, as the institution did not want to have 'old people' in junior positions. It should be noted that the claimant had already obtained a decision from the Equality Body that established discrimination on the ground of age as well as indirect discrimination on the ground of sex.⁷⁴



On 30 July 2008 the Limassol Employment Tribunal delivered its decision in this case, the first ever in Cypriot courts invoking the law transposing anti-discrimination European directives.⁷⁵ The Tribunal found that the fact that the claimant had fewer qualifications did not preclude the conclusion that she was a victim of age discrimination. It ruled that it was not necessary for age to be the sole reason in order for discrimination to exist; it sufficed that age was a contributory cause of the treatment, with significant impact on it. In its decision, the Tribunal established discrimination on the ground of age in the hiring procedure and decided the sum of EUR 1,500 to be adequate damages.

The Tribunal ruled, however, that it could not award compensation to the claimant because it lacked jurisdiction to decide on this dispute since the claimant was never hired and therefore there was no

⁷³ Supreme Court of Cassation, decision N. 556 of 30 June 2008.

⁷⁴ Equality Body, Ref. No. A.K.I. 7/2004, decision of 17 January 2005. The Equality Body held that setting an age limit excludes those women who, due to family obligations, remain out of the labour market for long periods of time. It concluded that the possibility of eliminating the differential treatment was no longer available since rights in favour of third persons had been created (other persons were hired for the post). The complainant therefore had the right to apply to the Employment Tribunal to claim compensation for any damage suffered.

⁷⁵ *Avgoustina Hajiavraam v The Cooperative Credit Company of Morphou* (Case No. 258/05)



employer-employee relationship between the parties.⁷⁶ The claimant has already filed an appeal against this ruling on jurisdiction, as well as on the ground that the compensation awarded did not provide adequate deterrent.

The Tribunal adopted a very narrow approach towards the scope of the law and towards the definition of the term 'employment' contained therein. Given the Tribunal's interpretation of the law, there is at present no court competent to try disputes relating to access to employment, which renders Cyprus's compliance with Article 3 of Directive 2000/78/EC questionable.

Equality body decisions/opinions/reports

Lack of reasonable accommodation for a candidate with a disability at written examinations for entrance to the civil service

The claimant, who suffers from visual impairment limiting his vision to 1/10, took part in a public service entrance examination and was awarded the mark of 55.56/100. Prior to the exam, which officially lasted 6.5 hours, he had requested certain facilities due to his reduced vision.⁷⁷

The Special Committee granted most of his requests, but allowed him only 30 minutes extra time. This was in keeping with the policy in force during examinations for admission to secondary and tertiary education, where 30 minutes extra time is granted to people with disabilities. The claimant consequently submitted a complaint to the Equality Body arguing that the fact of comparing his performance in the exam with the performance of persons without a disability amounted to discrimination. Upon investigation, it emerged that the 30 minutes extra time was deducted from the break that everyone taking the exam was entitled to, in effect neutralising the advantage of the extra 30 minutes.



The decision of the Equality Body⁷⁸ stated that, while in the case of exams for admission to secondary and tertiary education there is a procedure in place for examining each case separately in order to decide what reasonable accommodation measures must be granted, there is no such procedure in place for exams for entrance into the public service. The decision concluded that the measures granted to the claimant were not sufficient to create conditions of true equality for him to compete with the other candidates; it recommended the amendment of the Law on the assessment of candidates for appointment to the public service to provide reasonable accommodation for candidates with disabilities and for a procedure whereby the decision on reasonable accommodation measures should be made in each case by a team of experts. It further recommended that until the relevant amendment, the decision on measures to be granted to candidates with disabilities must be made after consultation with the Cypriot Confederation of Disabled Persons' Organisations (KYSOA), in accordance with the Law on the consultation process for the State and other services in matters concerning persons with disabilities of 2006.

⁷⁶ The Employment Tribunal relied on Law N.8/67 which sets out its mandate. According to this, the Employment Tribunal can try only labour disputes, defined in the law as disputes between employers and employees. However, the Law on Equal Treatment in Employment and Occupation N.58(I)/2004 which transposed Directive 2000/78/EC (minus the disability component, which is transposed by another law) as well as the employment component of Directive 2000/43/EC, expressly provides that the competent court to adjudicate on matters arising under the law is the Employment Tribunal. Therefore, if the Tribunal's aforesaid decision is correct, Law N.8/67 setting out its mandate must be extended to cover hiring procedures.

⁷⁷ His requests included 50% additional time, the use of a laptop for the English part of the exam; and permission to dictate to another person for the Greek section of the exam as he did not know Braille and could not type quickly in Greek, having lived abroad for many years.

⁷⁸ Ref. A.K.I. 37/2008, dated 8 October 2008.

Czech Republic

Case law

District Court decision recognises discriminatory patterns in the provision of alternative housing

In 1997, huge floods hit the region of Northern Moravia. In Hrušov, a suburb of Ostrava, 140 municipality-owned flats were flooded. After the water subsided, the municipality moved many families, mostly Roma, to the first and higher floors of houses in Hrušov that had been flooded, even though the floods had created a health risk for the whole area. The flats were damp and full of mildew, and rats multiplied excessively. After the return of his family to Hrušov in autumn 1997, the plaintiff in the case, then 9 years old, developed asthma. His mother repeatedly asked to be moved to a municipality flat in a different area, and called the attention of the authorities to the poor and unhealthy state of the flat where they were housed, but to no avail. In 2000, the plaintiff and his family were still housed in Hrušov.



The Ostrava District Court ruled on 27 May 2008 that the municipality was responsible for damage to the plaintiff's health caused by living for several years in a flat posing such a health risk. The Court stated that it was sufficient that the plaintiff demonstrated that he had informed the authorities of the unhealthy state of the flat, and that the authorities should have taken appropriate measures. According to the judgment, the municipality was well aware of the circumstances and did nothing to remedy the situation. The municipality should have provided other housing to the family. It had the means to do so: new flats for families made homeless by the floods were erected by the municipality using state grants, and not everyone who moved there was a victim of the floods. In the end, the Court found the municipality liable for proven ethnic discrimination, which was systematic throughout the provision of alternative housing.⁷⁹ The municipality proposed a settlement shortly afterwards, offering to pay the plaintiff full amount of CZK 250,000 (approximately EUR 9,260) awarded by the court in compensation; this was accepted and the judgment soon after became final.

This is the first case in the Czech Republic where a municipality was held responsible for damage to health caused by failure to provide alternative accommodation and where damage to health was proven to be connected to racially discriminatory patterns of social housing provision by a municipality.

Estonia

Legislative developments

Adoption of the Law on Equal Treatment

The draft Law on Equal Treatment was elaborated in 2006-2007 by the Ministry of Justice in response to concerns raised by the European Commission in an official letter to the Estonian Government. The previous government submitted the bill to Parliament on 25 January 2007 (bill no. 1101) but it was not adopted prior to the national elections of 4 March 2007. However, on 24 May 2007 the new government approved a revised text of the draft Law on Equal Treatment, which was submitted to Parliament on 30 May 2007 (bill no. 67). The bill was not adopted in the final vote on 7 May 2008 due to insufficient votes (one vote too few). On 8 May 2008 the factions of the ruling parliamentary coalition initiated bill no. 262

⁷⁹ Ostrava District Court, decision of 27 May 2008, 62 C 291/2002.

(very similar to the previous version of the bill, no. 67), which was not adopted in the final vote on 23 October 2008 (again, one decisive vote was missing). Another identical bill (bill no. 384) was submitted by the factions of the ruling parliamentary coalition on 6 November 2008 and was finally adopted on 11 December 2008. The Law on Equal Treatment entered into force on 1 January 2009.

The aim of the law is to complete the process of transposition of the anti-discrimination directives (2000/43/EC and 2000/78/EC) into Estonian legislation. Under the law, the protected grounds are ethnicity, race, colour, religion or belief, age, disability, and sexual orientation. The material and personal scope of the Estonian act and of Directives 2000/43/EC and 2000/78/EC are almost identical in the respective grounds; furthermore, there are provisions almost identical with the Directives regarding victimisation, instructions to discriminate, genuine occupational requirements, reasonable accommodation of disabled people, burden of proof, positive action measures, and exceptions for associations and other public or private organisations the ethos of which is based on religion or belief.

Interestingly, the Law on Equal Treatment (Article 5) provides a definition of 'disability': the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person which has a substantial and long-term adverse effect on the performance of everyday activities. The Law on Equal Treatment foresees the creation of the position of a Gender Equality and Equal Treatment Commissioner (Chapter IV). In practice, the authorities have decided to widen the competence of the Gender Equality Commissioner, a specialised body introduced by the Law on Gender Equality (2004). The Commissioner will have an explicit duty to advise and provide assistance to people pursuing complaints of discrimination. This new body was made responsible for drafting specific reports on discrimination-related issues. Furthermore, the Commissioner will provide opinions concerning possible cases of discrimination (Article 16). The purpose of an opinion is to provide an assessment of whether the principle of equal treatment has been violated in a particular legal relationship (Article 17 (2)).

In general the Law on Equal Treatment seems to be in line with the Directives. However, there are some provisions that appear dubious in the context of the Directive 2000/43. Thus, the Law on Equal Treatment (Article 9 (1)) does not forbid the maintenance or adoption of specific measures which are in accordance with law and are necessary to ensure public order and security, prevent criminal offences, and protect health and the rights and freedoms of others. Such actions should be in proportion to the objective being sought. It means, however, that the law would permit even direct discrimination on the grounds of race and ethnicity in circumstances other than genuine and determining occupational requirements or positive action measures. Furthermore, the Law on Public Service explicitly excludes official linguistic requirements for public officials from the scope of anti-discrimination requirements (Article 36-1 (3)).

<https://www.riigiteataja.ee/ert/act.jsp?id=13096445>

France

FR

Case law

First administrative court decision implementing the duty of reasonable accommodation as regards the rules on appointment in the interest of the public service

In the public service, employees are appointed on the basis of their ranking in the qualification process. The plaintiff was a wheelchair user. After he was ranked first in the category of educational attaché for 2004, he requested to be appointed as General Secretary of the Regional Administration of Sport and Youth; his application was ranked third in the list of applicants. The plaintiff was not appointed as attaché;



in addition, the two first applicants for the position of Secretary General refused this appointment, but the candidate who ranked fourth was appointed instead of the plaintiff. The plaintiff was offered an alternative post in a secondary school that provided access for wheelchair users. The Ministry claimed that this was a practical approach which corresponded to the principle of appointments being made in the best interest of the public service, a duty to which every civil servant is subject. The plaintiff submitted a claim to the equality body, the HALDE, which investigated the case and presented its observations during an administrative court hearing.

The court decision of 24 June 2008 repeated the observations presented by the HALDE and noted that the appointment of the plaintiff was decided by the Ministry of Education on the basis of available premises which offered existing access for a wheelchair user. The Ministry of Education had interpreted the criteria of appointment based on the interest of the public service to mean in this case an appointment that would not require investment in reasonable accommodation. The court reasoned that this was not an appropriate application of the duty of reasonable accommodation and that the plaintiff had had the right to be appointed to the post requested after it had been refused by the second ranking candidate. The court referred to Article 5 of Directive 2000/78/EC and stressed that the right to reasonable accommodation was a specific duty of the agent applicable to each particular appointment. It could not be altered by being weighed against management considerations such as 'the interest of the public service' in accommodating a person with disabilities.⁸⁰

First employment tribunal decision recognising discrimination by association

The plaintiff, Ms E, and her cohabitee, Mr M, were both working for the same shop in a supermarket chain. They had a child together and it was publically known that they were a couple, including by their employer. Mr M was store manager and union delegate and Ms E was a head cashier together with a colleague. During the tense annual period of union negotiations, the regional manager entered the store, telling the plaintiff that she was in charge in the absence of Mr M and asking her to account for poor product layout. An employee responsible for product layout was on sick leave and had not been replaced by regional management. The plaintiff was questioned harshly, suspended and dismissed. Her colleague who was also a head cashier was not, and Mr M, who could not account for his short absence, received minor formal disciplinary measures.

The plaintiff sued her employer after having filed a complaint to the HALDE. The HALDE held that since the employer could not act severely against Mr M - as he was protected on account of his status as a union delegate - the basis for this decision was to punish him through his cohabitee. It concluded that protection for the plaintiff against dismissal on the ground of the prohibition of discrimination arose from evidence that her association with the union representative was the reason for the unfavourable and unequal treatment she was subjected to.

The case was further adjudicated by an employment tribunal on 25 November 2008. The tribunal ruled that the absence of evidence that first the plaintiff was more responsible for the store than her colleague and second that formal measures had been taken to replace Mr M, in addition to the disproportionality of the disciplinary measures taken against the plaintiff compared to those taken against Mr M, constituted sufficient evidence of discriminatory treatment on the basis of her cohabitee's union activities.⁸¹

This is the first French legal decision to hold that protection against discrimination can be invoked by any person intimately associated with a person protected against discrimination, if there is a presumption that this association is the ground for unequal treatment.

⁸⁰ *Bouthellier vs. Minister of Education*, Rouen Administrative Court, Judgment no 0500526-3 of 24 June 2008.

⁸¹ *Enault v SAS ED*, Conseil de Prud'hommes de CAEN, F06/00120

The Court of Cassation rules on legal person's liability for instructions to discriminate

The hotel reservation service of the municipal tourism office of the town of Agde acts as intermediary for real estate agents and hotels by booking accommodation for tourists. The manager of the hotel reservation service compiled a list of hotels and real estate agents that refused to provide clients of North African origin with accommodation. As a result, the municipal tourism office was criminally prosecuted by the non-governmental organisation SOS Racism and the public prosecution service for inciting discriminatory behaviour by its employees.

According to Article 121-2 of the Penal Code, corporations can only be held criminally responsible if it is established that the act was committed on their behalf through their structures or representatives. A corporation employing a person prosecuted for racial discrimination in the context of his/her employment is not liable if it is proved that the employee did not have delegated power or a representative function. However, delegated power can be presumed from the management functions of an employee. In this case, the director of the municipal tourism office testified that the manager of the hotel reservation service acted of her own accord and on her own initiative; therefore, the municipal tourism office could not be held criminal responsible for her actions.⁸²



This case imposes the heavy burden on corporations of proving lack of presumed authority regarding the behaviour of a person in authority, since only their manager's permission could effectively counteract this presumption. However, it illustrates the difficulties related to the requirement of demonstrating ill-intention on behalf of a corporation and the need for specific evidence of the employee's hierarchical position and of the basis for attributing his/her actions to the corporation. In essence, the employee must be in a position to act as a representative of the municipal tourism office within his or her sphere of explicit authority in order for the criminal liability of a corporation to be incurred.

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000018166007&fastReqId=775916094&fastPos=98>

Germany

DE

Legislative developments

Age limit for physicians revoked

The maximum age limit of 68 years old for licensing physicians, dentists and psychotherapists to provide services for the public health system (*gesetzliche Krankenversicherung*) was revoked by an amending law of 15 December 2008.⁸³ The repeal of the provision [Sec. 95.7 sentence 3 Social Code V (*Sozialgesetzbuch V*)] came into retroactive force on 1 October 2008.⁸⁴ The respective services can thus be provided beyond the age of 68.

www.gesetze-im-internet.de

⁸² Court of Cassation, Social Chamber, Judgment no. 07-83695 of 29 January 2008.

⁸³ Art. 1 Nr.1i. Gesetz zur Weiterentwicklung der Organisationsstrukturen in der gesetzlichen Krankenversicherung (GKV-OrgWG) vom 15. Dezember 2008, Bundesgesetzblatt 2008, Teil I, S. 2426 (2427f.)

⁸⁴ Art. 7 Abs. 3 Gesetz zur Weiterentwicklung der Organisationsstrukturen in der gesetzlichen Krankenversicherung (GKV-OrgWG) vom 15. Dezember 2008, Bundesgesetzblatt 2008, Teil I, S. 2426 (2444)

Economic costs of anti-discrimination legislation

The German Anti-Discrimination Agency released at a press conference on 14 August 2008 the results of a study indicating that the costs of the implementation of anti-discrimination legislation in Germany had been overestimated.⁸⁵

The new study⁸⁶ demonstrates that these estimates were not based on sound data and methods⁸⁷ and concludes that only EUR 26 million of costs were directly incurred by implementing anti-discrimination legislation. The study illustrates that some arguments about the cost of anti-discrimination legislation are not based on robust research, and it constitutes a helpful reminder that we should not immediately assume that anti-discrimination legislation is a substantial financial burden on the economy.

www.antidiskriminierungsstelle.de

<http://www.antidiskriminierungsstelle.de/bmfsfj/generator/RedaktionBMF>

EL

Greece

Legislative developments

Schoolchildren are finally able to avoid attendance at religious education classes

According to a new circular of the Ministry of Education and Religious Affairs distributed to primary and secondary schools, pupils have the right not to attend religious education classes, without the need for their parents to provide justification as was the case previously.⁸⁸ The only requirement from now is a written note from the parent if the student is a minor, or, if the student is not a minor, from the student himself/herself. According to various sources, the reason usually given in exemption letters was that the child was not of Christian faith; many parents and students had avoided submitting such notes in the past as they did not want to be identified as non-Christians.

http://www.synigoros.gr/pdf_01/religpr.pdf

Equality body decisions/ opinions/ reports

The Hellenic Data Protection Authority fines insurance firm for sexual orientation discrimination

The Hellenic Data Protection Authority⁸⁹ imposed a EUR 60,000 fine on an insurance company that illegally delved into a client's personal records before deciding not to provide him with life insurance coverage.⁹⁰ The Authority discovered that the insurance firm based this refusal on the man's military



⁸⁵ <http://www.antidiskriminierungsstelle.de/bmfsfj/generator/ADS/pressemitteilungen,did=112532.html>

⁸⁶ The study was conducted by the Federal Academic Anti-discrimination Commission, the academic division of the Federal Anti-Discrimination Agency.

⁸⁷ For instance: manipulative questions, and lack of transparent estimates and of an empirical cost analysis.

⁸⁸ Circular No. 91109/Γ2/10.7.2008.

⁸⁹ The Hellenic Data Protection Authority is a constitutionally consolidated independent authority, established by Law 2472/1997, which transposed Directive 1995/46/EC that set out new rules for personal data protection in EU Member States. The Authority also implements Law 3471/2006 with respect to the electronic communications sector which transposed Directive 2002/58/EC.

⁹⁰ Hellenic Data Protection Authority, decision No. 3/2008.

service record, which stated that he had not served because of his sexual orientation. The Authority held that the company did not have the right to use personal data concerning the man's sexual orientation in order to decide whether to conclude a contract with him, as this violated the man's right to privacy. In its decision, the Authority held that the fact that the person had not served his military service due to his sexual orientation resulted neither in danger to his health nor in actual damage that could potentially justify the refusal to provide him with life insurance.

http://www.dpa.gr/portal/page?_pageid=33,15453&_dad=portal&_schema=PORTAL

Hungary

HU

Equality body decisions/ opinions/ reports

The Equal Treatment Authority establishes discrimination in the field of access to goods and services on the ground of ethnic origin

The applicants claimed that due to their Roma origin, they had been regularly charged a higher price than other customers in a bar; one of them alleged that she was overcharged when the place she resided and the fact that she was sharing an apartment with her Roma partner became known. The manager of the bar argued that they had started to issue customer loyalty cards, which was the reason for the different prices; he also claimed that they had issued such cards to several Roma customers. According to the manager, the applicants were not provided with loyalty cards because they had caused problems and on one occasion the police even had to be called.



The Equal Treatment Authority (ETA) received information from the local police which stated that no intervention had been requested by the bar within the given time period. The National Consumer Protection Authority conducted a test purchase at the bar; the test showed that a non-Roma tester had to pay half of the sum indicated on the price list and she was issued with a loyalty card, even though this was her first ever visit to the bar.

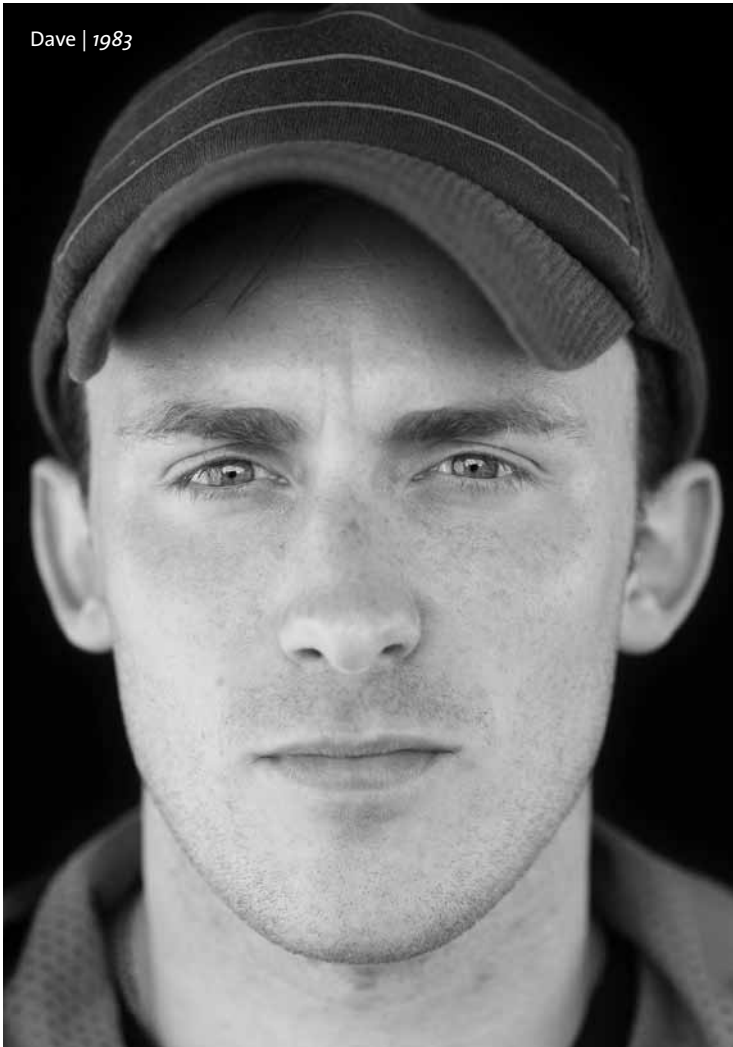
The ETA established that the bar did not have any internal regulations on loyalty cards. Cards were issued on an *ad hoc* basis that took into account various, mostly random factors. The ETA stated that any arbitrary differentiation without a reasonable basis is unconstitutional. Even objective differentiation criteria should be applied to all persons equally. The applicants had proved the disadvantage they had suffered and the existence of the protected ground, whereas the manager was unable to demonstrate that there was no causal link between the two. Consequently the ETA held that there was direct discrimination on the grounds of ethnic origin, prohibited the continuation of the violation and imposed a fine of HUF 1 million (approximately EUR 3,700) on the bar.⁹¹

When adjudicating, the Authority took into account the result of the testing carried out by the National Consumer Protection Authority. Moreover, discrimination by association was established in the case of the applicant who claimed that she had to pay higher prices because she co-habited with a Roma partner. The Authority regarded this not as discrimination based on ethnic origin, but as discrimination based on 'another characteristic'.

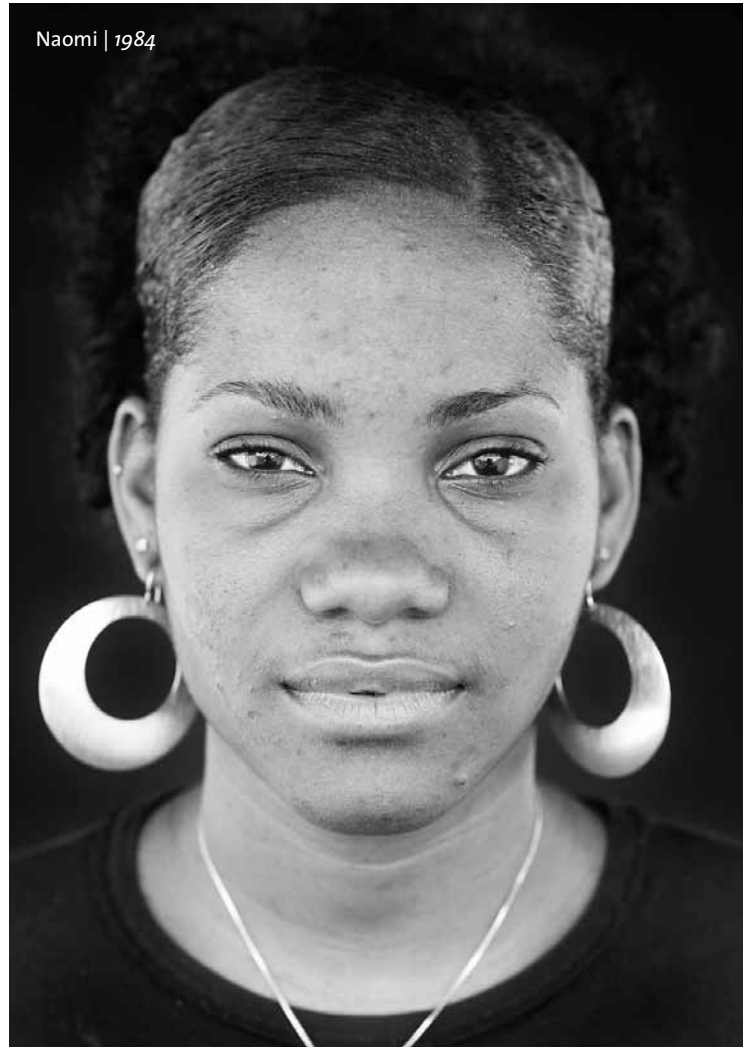
<http://www.egyenlobanasmod.hu/zanza/72-2008.pdf>

⁹¹ Equal Treatment Authority, case no. 72 of April 2008.

Dave | 1983



Naomi | 1984



Tomas | 2007



The Equal Treatment Authority dismisses a discrimination claim due to the lack of a causal link between the protected characteristic and the disadvantage suffered

After submitting his curriculum vitae for a job as shelf stacker at a supermarket, Mr Z was asked to complete a written test. Based on the test result he was invited to a face-to-face interview. He alleged that he was told only after the hour-long interview that the vacancy had already been filled; he was then offered a job as a warehouse operative instead, which he did not accept since it did not match his qualifications. In his opinion, he did not get the job because he was over 50 years of age. The company submitted statistics on the age of the shelf stackers employed by their supermarket and the contracts of the two persons who finally were employed for the advertised job. The company proved that 3 out of the 4 shelf stackers at this supermarket were over 50, and at national level, 16 out of 50 shelf stackers employed by the chain were over 50. The company admitted that Mr Z had not been informed at the beginning of the interview that the vacancy had already been filled, but claimed that the complainant's age did not contribute to the fact that he was not offered the job.



The Equal Treatment Authority decided that the fact that Mr Z was not informed that the vacancy had been filled was a logistic failure, and that it could be not concluded that his rejection was in any way related to his age. The ETA dismissed the claim as the company successfully proved the absence of a causal link between Mr Z's protected characteristic (age) and the disadvantage he suffered by submitting the relevant statistics.⁹²

<http://www.egyenlobanasmod.hu/zanza/1003-2008.pdf>

Ireland

IE

Political development

Future inability of the Equality Authority to carry out its core functions under anti-discrimination directives

Following the Government's decision in October 2008 to cut the funding of the Equality Authority (the national equality body) by 43% in 2009, the organisation's board announced in a public statement that, as a consequence, it will be unable to fully or effectively carry out its core functions of promoting equality and combating discrimination.⁹³ It added that the impact of a cut in funding of this extent could severely curtail its work of providing legal support to people experiencing discrimination, conducting inquiries and raising public awareness of equality. It pointed out that its budget was reduced from just under EUR 6 million to EUR 3.3 million, a cut of 43 per cent. This was disproportionate to the cutbacks imposed on other State bodies, said the board of the Equality Authority. The Equality Authority has calculated that it could lose a minimum of 21 of its current full-time staff representing a significant loss of expertise, capacity and corporate memory. The Government justified the cut in terms of financial savings. However, the amount of money saved will be minuscule in the overall budget of the Department of Justice, about EUR 2.5 million out of EUR 459.5 million. The Chief Executive resigned on 12 December 2008 and six board members followed, saying that the Equality Authority could no longer carry out its role in view of the cuts.

⁹² Equal Treatment Authority, case no. 1003/2008.

⁹³ <http://www.equality.ie/index.asp?locID=135&docID=743>



Large compensation to victim of harassment due to sexual orientation

The complainant, Mr X, worked with the respondent from 1996 to 2006 as a general operative and banksman (i.e. person who directs the operation of a crane) on various building sites. He alleged that he was sexually harassed and claimed that the respondent treated him in a discriminatory manner and victimised him when the respondent changed his conditions of employment, placed him on sick leave and finally made him redundant. In detail, Mr X informed his employer that he was sexually harassed but it was not properly investigated. Mr X mentioned that he had once had suicidal thoughts as a result of the harassment; following this the employer asked him to take sick leave and to seek counselling, although there was no indication of clinical depression; finally he was made redundant. The Equality Officer ruled that Mr X was discriminated against, sexually harassed and victimised on the grounds of sexual orientation and awarded the sum of EUR 14,700 as compensation for lost earnings, EUR 10,000 as compensation for the distress and effects of the harassment and EUR 25,000 as compensation for the distress and effects of the victimisation.⁹⁴ The Equality Officer also ordered the construction company to ensure that its current policies on harassment and sexual harassment are in accordance with the Code of Practice on Sexual Harassment and Harassment issued by the Equality Authority; in addition, to ensure that the staff is fully acquainted with the policy and that a specified contact person be appointed for the employees, being also responsible to make initial enquiries, in line with best practices as included in the Health and Safety Authority's Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work.⁹⁵

<http://www.equalitytribunal.ie/index.asp?locID=139&docID=1828>

Failure to provide reasonable accommodation during job interview



The complainant, Mr Z, applied to an advertisement for the position of graphic designer in February 2006. After a week he received an incoming call on his mobile phone from the company and as he is deaf he texted the caller asking to be texted the content of the message. The received message indicated that he was invited for an interview the next morning. The complainant accepted the invitation and contacted the Cork Deaf Society in order to arrange for an interpreter. This was not feasible, and Mr P, the representative of the Cork Deaf Society, called the respondent on the complainant's behalf, so as to arrange for a solution. It became evident that the company intended to hold the interviews on the following day only. Due to the fact that an interpreter was not available, Mr P indicated that this would mean that the complainant would not be able to attend the interview and suggested that the interview could eventually be held with the aid of a computer, which was rejected by the company as the interviewer was not computer literate. The interview slot originally assigned to the complainant was reassigned to another applicant.

The Equality Officer ruled that the complainant was indirectly discriminated against on grounds of disability when a re-schedule of his interview was refused. She held that the company failed to provide reasonable accommodation to Mr Z, as the requirement to facilitate him through re-scheduling the interview to allow for an interpreter or to provide a computer at interview was not disproportionate, and awarded the complainant the sum of EUR 8,000 as compensation.⁹⁶

<http://www.equalitytribunal.ie/index.asp?locID=139&docID=1929>

⁹⁴ The powers of the Equality Tribunal are delegated to the Equality Officer who has the power to make the ruling.

⁹⁵ DEC-E2008-048 Equality Tribunal, decision of 11 September 2008, *A Construction Worker v A Construction Company*.

⁹⁶ Equality Tribunal DEC-E2008-068, decision of 30 December 2008, *A Complainant v An Employer*.

*Legislative developments***Compatibility with equal treatment rules of the Decree on control of 'nomadic communities'**

In May 2008, the Italian Government issued a decree declaring a 'state of emergency' in three regions (Lombardia, Lazio and Campania), in response to an alleged crisis situation in the settlements known as 'nomad camps' (*campi nomadi*).⁹⁷ The decree, which applied to both legal and illegal settlements, foresaw the adoption of a range of measures, the first of which was to take a census and identify the persons living there. According to public statements by the Minister of the Interior, identification would also include taking fingerprints from both adults and minors. The decree was issued after a long political debate which constantly and unambiguously centred on the Roma.

The first identifications and collection of fingerprints took place in June 2008, with local variations in how this was implemented in practice. In at least one region (Campania) there is evidence that – at least at an early stage – data on religion and ethnicity were collected in addition to personal data and the fingerprints.

The main decree was followed by three 'civil protection ordinances', one for each of the regions covered by the state of emergency, all of them reproducing the basic content of the main decree and empowering special commissioners to implement the census and identification process.⁹⁸ The decree and subsequent civil protection ordinances did not mention Roma and Sinti populations, and the Minister of the Interior constantly stressed in his statements that the decrees were 'ethnic blind' - they simply applied to any persons living in the camps. The wording of the decree and ordinances, however, refer to 'nomads' (the wording is *comunità nomadi*, 'nomadic communities') in a way which reflects the current use, in both popular and administrative Italian language, of the term 'nomad' as synonym for Roma, without reference to an actual travelling way of life.

*Case law***First court case on ethnic profiling rejected**

Against the aforementioned legislative background, an anti-discrimination suit was filed in the ordinary Court of First Instance of Mantova by some Sinti individuals together with two associations, Sucardrom and ASGI (Associazione Studi Giuridici sull'Immigrazione). The suit argued that the decree was discriminatory and void on various grounds, including the improper use of the concept of 'nomad' as a disguised ethnic classification, the absence of any real state of emergency, the introduction of 'ethnic profiling', and the violation of legislation on police identification.



⁹⁷ Decreto del Presidente del Consiglio dei Ministri 21 maggio 2008 (in Gazzetta Ufficiale n. 122 del 26.5.2008, 'Dichiarazione dello stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio delle regioni Campania, Lazio e Lombardia (Decree of the President of the Council of Ministers, n. 122 of 21 May 2008, in the Official Journal, 26 May 2008, 'Declaration of a state of emergency in connection with the settlements of nomadic communities in the territory of Campania, Lazio and Lombardia').

⁹⁸ The ordinance specific to Lombardia, where the first suit has been filed, is: Ordinanza del Presidente del Consiglio dei Ministri n. 3677 del 30.5.2008, Disposizioni urgenti di protezione civile per fronteggiare lo stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio della regione Lombardia' (in Gazzetta Ufficiale n. 127 del 31.5.2008) (Ordinance of the President of the Council of Ministers, n. 3677 of 21 May 2008, in the Official Journal, 30 May 2008, Urgent civil protection provisions to react to the state of emergency in connection with settlements of nomadic communities in the territory of the Lombardia region).

When the first suit was filed, the Ministry of the Interior issued on 17 July 2008 guidelines for the implementation of the decree,⁹⁹ stressing that identification and related activities must take place in the respect of fundamental rights and in a non-discriminatory manner, while fingerprints should in principle not been taken from minors aged less than 14 years (something which contradicted the clear statements of the Minister of the Interior), and only in 'exceptional cases' from children under six years of age. However, the issues addressed in the lawsuits – deriving from the seemingly ethnic construction of the target group to take part in these identification activities – seemed not to be resolved.

In its decision of 8 January 2009, the judge in Mantova dismissed the case, declaring that he did not have jurisdiction to rule on the issues put forward by the claimants. According to the decision, only the first instance administrative court (*tribunale amministrativo regionale*) of Rome would be competent to declare the discriminatory character of the governmental acts at issue. This derived from the choice of the claimants to focus on the legality of the act, and not on actual discriminatory behaviour by the administration. The applicable rules on jurisdiction would therefore imply that the action should be brought in the administrative court.¹⁰⁰

This decision seems to give a narrow and formalistic interpretation of Italy's fairly complex rules on the allocation of jurisdiction between administrative and ordinary courts. If confirmed on appeal, it would strongly limit the possibility of effective judicial examination of administrative acts that have a discriminatory character.

The Mantova case represents - together with a previous one challenging the legality of the eviction of a camp in Lombardia - a new direction in the Italian anti-discrimination debate, since they are the first known 'strategic' civil cases dealing with the legality of the current policy concerning the presence of 'nomads', as well as examples of a form of advocacy of Roma rights which was previously not frequently used in Italy.

<http://old.asgi.it/content/documents/dl08072302.ricorsorommn.pdf>

LV

Latvia

Legislative developments

Amendments to the Law on Consumer Protection prohibiting discrimination in access to goods and services based on race/ethnic origin and gender

Article 3.1 of the Law on Consumer Protection introduced by the amendments to this law prohibits differential treatment in access to goods and services based on race/ethnic origin and gender. It provides definitions of direct/indirect discrimination, harassment, instructions to discriminate and victimisation, and provides for a shift in the burden of proof. Differential treatment is permissible if the provision of goods and services to persons of certain race/ethnic origin or gender is objectively justified by a legiti-

⁹⁹ <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2008/luglio/linee-guida-interno-nomadi.html>. According to these guidelines, identification activities would be used simply to understand who was legally entitled to stay in the legal settlements, to eliminate all illegal settlements, to protect minors against exploitation, and to detect foreigners illegally staying in Italy.

¹⁰⁰ A specific provision (enacted in the context of the 'waste emergency' in Naples) concerning the decrees declaring the 'state of emergency' allocates territorial competence to Rome. This is Article 2 bis of legislative decree of 30 November 2005, n. 245, as modified by law of 27 January 2006, n. 21 (*Misure straordinarie per fronteggiare l'emergenza nel settore dei rifiuti nella regione Campania ed ulteriori disposizioni in materia di protezione civile*).

mate aim and the means are proportionate. If a person has been discriminated against, s/he can request compensation as well as moral damages and the performance of the contract. The amendments to the law were adopted on 19 June 2008 and entered into force on 23 July 2008.

The aim of these amendments is to address one of the remaining gaps in Latvian anti-discrimination legislation concerning Directive 2000/43/EC – discrimination in access to goods and services. It is, however, limited to race/ethnic origin and gender.

<http://www.likumi.lv/doc.php?id=177913>

Luxembourg

LU

Political developments

Dissemination of information on anti-discrimination issues

The Ministry of Family, which is the ministry responsible for anti-discrimination issues, sent a brochure to all households in September 2008, explaining the contents of the Law of 28 November 2006 transposing Directives 2000/43/EC and 2000/78/EC.¹⁰¹

Legislative developments

Adoption of legislation allowing accompanying dogs for persons with all types of disabilities to enter public places

The law of 22 July 2008 that entered into force on 11 September 2008 provides that all assistance dogs (not only guide dogs for visually-impaired persons, but also hearing dogs for hearing-impaired persons and service dogs for physically disabled individuals) must be allowed to accompany the person to public places, i.e. on public transport, to places open to the public, including privately owned places (restaurants etc.), as well as to all work places or training facilities, the criteria being the collective use of the place.¹⁰²

An official certificate testifying that the dog has been trained is granted by the Ministry of Family and must be shown upon request. No extra cost may be charged for allowing such a dog to enter a place used by the public and a fine may be imposed on anyone who violates the law.

<http://www.legilux.public.lu/leg/a/archives/2008/0134/a134.pdf#page=2>

¹⁰¹ See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 5, p. 85.

¹⁰² Loi du 22 juillet 2008 'relative à l'accessibilité des lieux ouverts au public aux personnes handicapées accompagnées de chiens d'assistance'.

*Case law***District Court rules that the rejection of an applicant because he refused to shake hands with persons of the opposite sex is justified¹⁰³***religion
or belief*

A male Muslim applicant was rejected for the position of customer manager at the social services department of the city of Rotterdam because he refused to shake hands with persons of the opposite sex. The applicant justified this because of his Islamic religion and filed an action against the municipality of Rotterdam, claiming that he was discriminated on the grounds of religion. The municipality stated that it should protect women against discrimination by a civil servant; in the specific job of customer manager, the applicant would be receiving many people, hence 'greeting' should be regarded as an essential aspect of the position. The case had previously been brought before the Equal Treatment Commission (ETC), the national equality body, which decided that the protection of women against discrimination constituted a legitimate aim, but that the municipality had failed to seek alternative ways of showing respect to both male and female clients equally, as the applicant had offered not to shake hands with both men and women. As a result, the ETC concluded that the rejection of the candidate for the reason of protection against discrimination was not necessary and proportional.¹⁰⁴ The District Court, however, adopted a different decision; it reasoned that a customer manager was an important contact person between the local authorities and citizens. The Court ruled that the community had the right to choose 'to observe the usual rules of etiquette and of greeting customs in the Netherlands'. As a result, the Court considered it necessary and proportional to reject a candidate for this specific position who was not willing to observe those rules of etiquette. According to the decision, the (indirect) distinction¹⁰⁵ made by the municipality of Rotterdam on the grounds of religion was objectively justified.

http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=hand+schudden

*Equality body decisions/ opinion/ reports***Equal Treatment Commission's Opinion on whether police officers should always wear their uniform, given that Dutch rules on police uniform forbid visual religious expressions***religion
or belief*

The Equal Treatment Commission (ETC), the national equality body, has twice recently addressed the issue of police women wearing headscarves in public. Although it has focused on female officers, the rules on uniform could affect religious expressions by male officers as well. First, it has produced a commentary on the proposals recently published by the Ministry of Interior Affairs and Kingdom Relations¹⁰⁶ on the dress code of public officials. The Ministry's proposal advocates 'life-style neutrality' in the personal appearance of all public officials and suggests general measures, such as a ban on piercings and long hair. As far as the police is concerned, this proposal would mean that police officers who are performing their work in uniform should not demonstrate any signs of their religious (or other) belief; also, that if they were otherwise in contact with the general public, they would have to dress in a strictly neutral way. Only persons performing desk (office) tasks or other 'civilian' tasks would be allowed to wear distinctive religious symbols such as a headscarf, on the condition that they did not have any contact with the public

¹⁰³ See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 5, p. 89.

¹⁰⁴ ETC Opinion 2006-202 of 5 October 2006.

¹⁰⁵ The relevant law in the Netherlands uses the word 'distinction' instead of 'discrimination'.

¹⁰⁶ See Tweede kamer 2007/2008, 31.200, VIII, nr 209. See also: <http://www.personeelslog.nl/2008/10/03/minister-wil-af-van-trendy-agenten/>.

while on duty. In its commentary the Equal Treatment Commission warns the Ministry that this proposal could unduly restrict the freedom of religion, and/or the opportunities for e.g. women with headscarves to work in the police force.

Second, the ETC issued an Opinion on a recent change of policy by the Amsterdam-Amstelland police force. A police officer, who until that time had been performing her work in civilian clothes, had been ordered to wear police uniform. This meant that she was no longer able to wear her headscarf (since the uniform instructions do not allow officers to wear anything other than the uniform cap). In its Opinion, the ETC acknowledges the right of the Ministry /Head of Police to require that police officers who are in contact with the general public wear a uniform; however it does not comment on the compatibility of the Islamic headscarf (or any other religious head gear) with police uniform. However, in such cases the ETC recommends a flexible approach to the requirement to wear uniform, especially in cases when there is no contact between a police officer and the general public.¹⁰⁷

Poland

PL

Legislative developments

Labour Code amendments improving the transposition of EC anti-discrimination directives

Following the European Commission's notices, the Act of 21 November 2008 amending the Labour Code¹⁰⁸ was adopted on 18 December 2008 and entered in force on 18 January 2009.

The main changes introduced include:

- Completion of the definition of indirect discrimination by including reference to hypothetical situations, and covering unfavourable disproportion not only 'in conditions of employment' but also as regards the establishment and termination of employment, working conditions, promotion and access to vocational training. The amended definition allows disproportional treatment only if it is justified by a legitimate aim and when the means of achieving that aim are appropriate and necessary (before the amendments, the Labour Code allowed disproportional treatment simply on the basis of 'other objective reasons').
- Extension of the protection of the law against instructions to discriminate, covering both 'encouraging' (which was already mentioned) and also 'ordering' (now added) less favourable treatment.
- The definition of harassment now describes it as *unwanted* conduct with the purpose or effect of violating the dignity of an employee and of *creating an intimidating, hostile, degrading, humiliating or offensive environment*, while the previous provision defined harassment as any conduct with the purpose or effect of violating the dignity, or degrading or humiliating, the employee.
- Regarding the prohibition of victimisation, protection is extended to cover any other adverse treatment whereas under the former law only dismissal and termination of contract were prohibited.
- The criteria for a legitimate aim and proportionality as well as the concept of genuine and determining occupational requirements were added to the list of exceptions that cannot be considered as discrimination. Differentiation because of age as a general exception was removed; however, an additional exception was added: the criterion of length of employment (which may be used in determining the conditions of employment and dismissal, conditions of remuneration and promotion, and access to vocational training) may justify different treatment on grounds of age. Requirements of proportionality and legality of the aim of the differentiation apply.

¹⁰⁷ ETC Opinion 2008-123, <http://www.cgb.nl/opinion.php?id=453056386>.

¹⁰⁸ Dz.U. Nr 223, poz. 1460.



These amendments should be seen as long-awaited positive changes; however there are still several gaps in the implementation of both directives which require further action of the Government.

Case law

Unfair dismissal of older employees by Polish Radio S.A.

When a new Polish government was elected in 2005, the management of Polskie Radio (public radio) was changed and in 2006 it started to prepare for mass redundancies. The lists of employees to be made redundant were created using unclear criteria; however a number of redundancies were listed under the general heading of the need for 'rationalisation of the employment structure'. The process was accompanied by statements by managers that the radio staff were too old (an additional factor behind this was that older employees had worked for the radio during the Communist era). A number of employees were dismissed and several of them lodged claims.



One claimant, Ms K, started a new job so officially her employment contract was terminated by mutual agreement; however, she decided to sue Polish Radio alleging that the agreement was forced on her by persistent pressure from the radio station owing to the fact that she was on the list of people to be dismissed. Ms K argued that the planned dismissal was in fact discriminatory because of age, political beliefs and membership of a trade union. The District Court of Warsaw established indirect discrimination in the dismissal. According to the judgment, 'the very generally and unclearly formulated rationalisation of employment structure outcomes' in the regulations on dismissal of employees (which listed several criteria for dismissal) was discriminatory on the grounds of age. This fact was evident as the list of 295 employees to be dismissed included only 21 co-workers under the age of 40.

The court ruled that Polish Radio did not prove that the reasons indicated for the dismissal were objectively justified by a legitimate aim and that the means of achieving that aim were appropriate and necessary; it awarded as compensation the sum of PLN 1,126 (approximately EUR 258), which is the minimum compensation under the Labour Code.¹⁰⁹

The employment contract of another claimant, Ms S, was terminated by Polish Radio, on the grounds that the claimant had reached retirement age, was slowing down at work and could not cope with digital editing. The claimant argued that there had never been a complaint about her work before and that she achieved the highest scores in her regular appraisals. She also stressed that the reason given for dismissal constituted discrimination on grounds of age. A settlement was reached on 3 September 2008 before the District Court of Warsaw (Employment Division). The settlement led to the withdrawal of the dismissal and to a mutual agreement to terminate the employment contract. As part of the settlement, Polish Radio agreed to pay the claimant the sum of PLN 19,000 (approximately EUR 4,355) as retirement compensation and PLN 18,000 (approximately EUR 4,125) for damages.¹¹⁰
<http://www.hfhrpol.waw.pl/precedens/pl/sprawy-prawne/dyskryminacja.html>

Settlement in the case of access of a blind person with a guide dog to services¹¹¹

Ms Jolanta K, who is blind, was refused entry to the Carrefour Supermarket with her guide dog, even though the dog was adequately marked. She sued the defendant on the basis of the Civil Code, damages to be paid to a particular charity, and requested that action be taken to remove the effects of the violation.



¹⁰⁹ *Małgorzata K.D. v Polskie Radio S.A.*, District Court of Warsaw, Employment Division VII; case VII P 937/07, decision of 21 May 2008.

¹¹⁰ *Maria Sz. v Polskie Radio S.A.*, case lodged in May 2007.

¹¹¹ See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 6/7, p.110.

On 28 January 2009 the parties reached a settlement before the Regional Court of Warsaw. Carrefour expressed regret at the incident and undertook to pay PLN 10,000 (approximately EUR 2,287) to the Vis Maior foundation, which assists persons with disabilities and whose President is the claimant. This is the first such case lodged in Polish courts. Due to the lack of direct legal provisions prohibiting discrimination against persons with disabilities in access to services, the claimant based the lawsuit on the general provisions of the Civil Code – namely, on the ‘protection of personal values’. The lawyer representing Carrefour Poland pointed out that the company had afterwards amended its negative internal rules for people with disabilities. The case sets a precedent, as it makes it possible for people with disabilities in Poland to effectively defend their rights based on general provisions of the Civil Code.¹¹²
<http://www.hfhrpol.waw.pl/precedens/en/aktualnosci/ugoda-w-sprawie-jolanty-kramarz-przeciwko-carrefour-polska-sp.-z.html>

District Court sentence for using the Nazi salute

On 2 May 2006 and 2007 at ceremonies to mark the anniversary of the third Silesian Uprising, members of a right wing organisation, the ONR (Obóz Narodowo Radykalny, National-Radical Camp), raised their right hands in a Nazi salute and shouted slogans such as ‘the glory of heroes’.

The public prosecution office charged them with ‘public propagation of Fascism’ (accusation lodged on 28 November 2007) based on Article 256 of the Penal Code, but the District Court of Strzelce Opolskie (first hearing) decided on 29 February 2008 to suspend proceedings based on explanations of the accused that they used an ancient ‘Roman salute’ and not the Fascist gesture. The prosecution appealed the decision to the Regional Court of Opole on 11 March 2008; the Court held on 24 April 2008 that discontinuation of the proceedings had been premature and referred the case back to the District Court of Strzelce Opolskie to repeat the trial. The District Court decided on 4 December 2008 that the three persons accused were guilty of committing the crime of ‘the public propagation of Fascism’. The Court sentenced two of them to six months in prison (suspended for a probationary period of three years), and the third person to four months in prison. Two of them also received a fine of PLN 1,000 (approximately EUR 229) and the third a fine of PLN 600 (approximately EUR 138). They were also banned from using the Nazi salute and placed under the supervision of a probation officer.

Portugal

Legislative developments

Implementation of measures to promote access to information by visually impaired people

Law No. 33/2008 of 22 July 2008 ‘establishing measures to promote access to information about specific goods by blind and visually impaired people’¹¹³ requires large retail spaces to provide blind and visually impaired people with information in Braille about products on sale by 22 January. Labels in Braille including a product description, its principal characteristics and expiry date will be attached to items. This law is applicable to retailers who own at least five establishments each one with a surface area greater than 300m² and where both food and non-food goods are sold. Such retailers should in at least one shop per municipality provide individual assistance to visually impaired people (i.e. staff to accompany visually impaired people to help them find goods and read labels). Retailers do not have to offer such assistance

¹¹² *Jolanta K. v. Carrefour Polska Sp.z.o.o.*, Regional Court of Warsaw, case lodged on 6 May 2008.

¹¹³ Lei n.º 33/2008 de 22 de Julho Estabelece medidas de promoção da acessibilidade à informação sobre determinados bens de venda ao público para pessoas com deficiências e incapacidades visuais.

in the other four shops. As this measure places a financial burden on retailers, it will be applied in phases. The integration of new technologies into large retail surfaces improves the buying experience of persons with disabilities. This new application of Braille labelling in the retail sector will meet the needs of people with serious visual impairments and also represents the visible face of social responsibility in retail. http://www.inr.pt/bibliopac/diplomas/lei_33_2008.htm

Case law

First instance trial of 36 members of a Nazi group for racist crimes and other offences

In 29 November 2007 a group of 36 persons linked to the Portuguese Hammerskins (a neo-Nazi skinhead group) were accused of racial discrimination and other offences. Their trial started in April 2008 and the sentence was passed on 3 October 2008 by the Criminal Court of Lisbon Boa Hora – Second Criminal Division.¹¹⁴ They were convicted of hate crimes and racial discrimination, and of causing bodily injury, use of weapons, assault, coercion and kidnapping. Six of the defendants were sentenced to imprisonment; 17 were given a suspended sentence; and five were acquitted. The other 10 persons were sentenced to small fines and suspended sentences. Custodial sentences ranged from two years to seven years and four months. The leader of the group was sentenced to four years and 10 months in prison (custodial). The Court awarded a journalist, one of the victims, the sum of EUR 4,000 in damages. No other victims claimed compensation in this case.



The trial, which has been widely publicised, is the first of a group of persons accused under Article 240 of the Criminal Code¹¹⁵ for conspiracy in matters of racial discrimination and the first time that racist crimes have been so severely sentenced in Portugal.

Romania

RO

Case law

The Constitutional Court declares unconstitutional the enforcement of some provisions of the anti-discrimination law by the courts

The Ministry of Justice challenged the constitutionality of Article 1(2)e and 27 of the anti-discrimination law, following a conflict between the court staff and the Ministry of Justice on salary-related benefits and a series of decisions issued by the equality body¹¹⁶ and by various courts of law that found that the provisions regulating salary-related benefits are conducive to discrimination.¹¹⁷

The Constitutional Court (*Curtea Constituțională*) concluded that the provisions of Article 1(2)e and of Article 27 of Government Ordinance 137/2000 are unconstitutional in that they imply that the courts have the authority to nullify or to refuse to apply legal norms if they hold that these norms are discriminatory.

¹¹⁴ Case 1706/04/0PTLSB, judgment of 3 October 2008.

¹¹⁵ See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 6/7, p.110.

¹¹⁶ National Council on Combating Discrimination - Consiliul național pentru Combaterea Discriminării.

¹¹⁷ Article 1(2)e provides for the principle of equality and the prohibition of discrimination in relation to economic, social and cultural rights, in particular the right to work, conditions of employment, the right to establish trade unions, the right to housing, the right to health and the right to education. Article 27 establishes the mechanism allowing victims of discrimination to file a complaint before the civil courts seeking damages and the re-establishment of the *status quo antes* or requesting that the situation caused by discrimination be ended.

Based on the constitutional principle of the separation of powers, the Court ruled that the application of this law by some courts has been unconstitutional as some courts have decided to set aside particular legal provisions deemed as discriminatory and replace them with other legal norms of their choice.¹¹⁸
www.ccr.ro

The Constitutional Court rules in favour of the national equality body

ALRO Slatina, a private corporation against which the National Council on Combating Discrimination (NCCD) issued a decision on discriminatory treatment, challenged in the Constitutional Court (*Curtea Constituțională*) the constitutionality of Article 6-25 of the Anti-discrimination Law that sets out the mandate of the NCCD. The plaintiff alleged that the NCCD has an extraordinary jurisdiction established by ordinary legislation, thus infringing the constitutional prohibition on the establishment of extraordinary instances. A group of 20 NGOs representing various groups of victims of discrimination submitted an *amicus curiae* brief in support of the NCCD.

The Constitutional Court ruled in favour of the NCCD. Its decision maintained the function of the NCCD as quasi-judicial body mandated to condemn discrimination.¹¹⁹ The Court affirmed the legality of the NCCD and its status as a special administrative jurisdiction (i.e. an optional venue for addressing cases of discrimination) and confirmed that proceedings before the NCCD as provided by Article 21 (4) pass constitutional muster. The Court emphasised that the NCCD is an administrative body with a jurisdictional mandate, which guarantees the elements of independence required for administrative-judicial activities and which observes the constitutional provisions of Article 124 and Article 126 (5) on the prohibition of the establishment of extraordinary tribunals.

www.ccr.ro

The Constitutional Court rules against the national equality body (NCDD)

Various defendants condemned by the NCCD (including the Ministry of Justice, the Public Ministry¹²⁰ and various courts) filed more than 12 complaints to the Constitutional Court challenging the constitutionality of Article 20(3)¹²¹ of the Anti-discrimination Law. This Article defines the NCCD's role in responding to petitions filed by victims of discrimination requesting that the consequences of discriminatory deeds be removed and the situation prior to discrimination re-established. The Ministry argued that the NCCD's decision to force the Ministry of Justice and the relevant courts to pay salary-related benefits in a series of cases where the NCCD found discrimination, was unconstitutional. An informal coalition of NGOs representing various groups of victims of discrimination submitted *amicus curiae* briefs in support of the NCCD.¹²²

The Court held that even if the NCDD found that discrimination had occurred and that it was caused by certain legal provisions, its decision could result in the non-application of such legal provisions and by analogy even of provisions which are not related to the person or to the group discriminated against. The Court ruled in favour of the Ministry of Justice, reasoning that in this case the NCDD's right to enjoy such legislative power and to decide not to apply the provisions of a law or an ordinance when it considers that they are not

¹¹⁸ Romanian Constitutional Court, Decision 818 of 3 July 2008.

¹¹⁹ Romanian Constitutional Court, Decision 1096 of 15 October 2008.

¹²⁰ The Public Ministry – Ministerul Public is the Public Prosecutors' offices.

¹²¹ Art.20(3) reads: 'In a complaint filed according to Article 20(1), a person who considers himself/herself discriminated against has the right to request for the consequences of the discriminatory deeds to be nullified and for the situation prior to the discrimination to be re-established (*status quo antes*).'

¹²² A copy of the NGO *amicus curiae* brief and a written statement in support of the NCCD submitted to the Constitutional Court in English is available at: www.antidiscriminare.ro.

in conformity with the constitutional provisions of Article 16 on non-discrimination is questionable.¹²³
www.ccr.ro

Bucharest Court of Appeal sets aside a decision of the national equality body and rules against segregation of the Roma in education

In 2006, two Roma NGOs (Romani CRISS and Amaro Suno) filed a complaint to the National Council for Combating Discrimination (NCCD) alleging that Roma pupils from grades one to eight in School no. 19 in Craiova had been segregated by being placed in separate classes held in classrooms with inadequate educational facilities. The NCCD found that the facts presented in the complaint did not amount to discrimination, without providing a rationale for the decision.¹²⁴



The applicants submitted an appeal calling for the decision to be quashed and for the file to be sent back to NCCD with the request that it conduct an effective and impartial investigation, analyse the 'ethnic imbalance' in the distribution of the children in classes, apply the reversal of the burden of proof, use statistical data and analyse the impact of ethnic segregation on the quality of education. The Bucharest Court of Appeal in its decision of 15 January 2009 accepted the plaintiffs' arguments, annulled the decision of the NCCD and required the NCCD to conduct a new investigation into the case.¹²⁵
www.romanicriss.org

Slovakia

SK

Legislative developments

Amendment of the Civil Procedure Code introducing the right to act as third party in court proceedings

Act No. 384/2008 amending and supplementing the Code of Civil Procedure was published on 15 October 2008 in the Collection of Laws¹²⁶ and entered into force on the same day.

This Act provides the opportunity for 'a legal entity, of which the subject of activity is the protection of rights under a special law', to join a pending court proceeding. 'Special law' refers, among others, to the Anti-discrimination Act. It means that the national equality body -the Slovak National Centre for Human Rights - as well as NGOs working to protect victims of discrimination, can intervene as a so-called 'third party' in court proceedings, on their own initiative or at the request of the claimant. The third party, whose intervention has to be approved by the court, can act only on its own behalf and has the same rights and obligations as the principal parties to the proceedings.

Another modification, which also amended the existing Anti-discrimination Act (Act No. 365/2004 Coll.), made it possible as of 15 October 2008 for the national equality body and NGOs dealing with discrimination to bring a class action in cases where the rights of a considerable or undefined number of people could be violated by a breach of the principle of equal treatment or where public interest could be seriously jeopardised. The equality body or an NGO can request that the person violating the principle of equal treatment refrain from such conduct and, where possible, remedy the illegal situation, but they

¹²³ Romanian Constitutional Court, Decision 997 of 7 October 2008.

¹²⁴ National Council on Combating Discrimination, Decision No. 395 of 14 January 2008.

¹²⁵ Bucharest Court of Appeal, Decision No. 4759/2/2008 of 15 January 2009.

¹²⁶ The Collection of Laws is a collection of all existing laws in the country, a type of Official Journal.

cannot seek compensation on behalf of the victims.

<http://www.zbierka.sk/zz/predpisy/default.aspx?PredpisID=208414&FileName=zz2008-00384-0208414&Rocnik=2008>

SI

Slovenia

Equality body decisions/ opinions/ reports

Refusal to serve a blind person accompanied by a guide dog in a restaurant constitutes indirect discrimination



The applicant, who is blind, entered a restaurant with her sister and her specially trained dog. The waiter refused to serve her because she was accompanied by her dog, although the dog was wearing all the necessary signs confirming he was specially trained, in accordance with the Animal Protection Act. The waiter insisted, even though the applicant showed him the dog's official ID card and informed him about Article 13 of the Animal Protection Act, which stipulates that trained dogs accompanied by their blind owners are allowed access to all public places and means of transport. After a phone conversation with one of the restaurant owners, the waiter demanded that the applicant leave the restaurant. When she refused, the waiter called the police. The police, however, initiated a misdemeanour procedure against the restaurant and its owners due to violations of Article 13 of the Animal Protection Act.

The applicant filed a complaint to the Market Inspectorate due to an alleged violation of Article 25/2 of the Consumer Protection Act, which stipulates that all consumers are entitled to access to services under equal conditions. The Market Inspectorate assessed that the waiter's treatment constituted discrimination. Although not required to by law, the Inspectorate requested the opinion of the national equality body, the Advocate of the Principle of Equality, which found indirect discrimination against the applicant. According to the Advocate's opinion, the prohibition of dogs in restaurants or other public facilities disproportionately affects people with visual impairments as dogs help them to access services available in restaurants and other public facilities, independently and under comparable conditions to other consumers. The owner of such a public facility therefore has to adapt this prohibition to concrete situations in order to avoid indirect discrimination.¹²⁷

The Market Inspectorate continued the administrative procedure against the perpetrator and issued a decision based on Article 25 of the Consumer Protection Law; it imposed a fine of EUR 3,000 on the restaurant as a legal entity and EUR 1,200 on the responsible person (the manager). This decision was appealed to the County Court, but at the time of writing this court has not yet ruled on the case.

The lack of reasonable accommodation regarding meals offered by the employer constitutes indirect discrimination on the grounds of religion



The applicant, Mr K, who was a Muslim, was employed by a company that offered cooked hot meals to its employees. As a Muslim the applicant did not eat pork or dishes made with pork fat. Instead of hot meals employees could choose a cold meal, which, however, also often included pork. The company also offered a monthly allowance to employees to buy food if they could submit a medical certificate showing that they needed special food for health reasons. It is noteworthy that the company adapted the menu to Catholicism, which requires a particular diet on Fridays. When the applicant requested this monthly

¹²⁷ Advocate of the Principle of Equality, decision No. UEM – 0921-1/2008-2 of 16 April 2008.

allowance in order to buy food in accordance with his religion, the company refused, stating that he would need to submit a medical certificate.

The equality body held that since all employees are treated equally in the area of meal provision, regardless of their religion, the applicant as a Muslim is put in a less favourable position on the grounds of religion. Muslims working for the company have the option either to eat food prohibited by their religion, or not to receive either a meal or an appropriate monetary substitute. The Advocate established that reasonable accommodation is already provided for a certain group of employees who belong to the Catholic religion, and the company should simply extend this rule to employees of a different religion.¹²⁸

Due to the lack of company's lack of cooperation, the Advocate forwarded the case to the Slovenian Labour Inspectorate. Soon afterwards the company informed the Advocate that it had adjusted meal provision to suit the applicant's needs in accordance with his religion.

Job advertisement stating that a company is searching for young managers is discriminatory on the grounds of age

The applicant submitted a complaint about a job advertisement placed by a company looking for young managers without stating a particular reason and also requiring the applicants to enclose a photo with their application.

The equality body rejected the company's argument that the wording 'young managers' did not mean young by age but rather 'junior' managers without professional experience, ruling that the job advertisement constituted direct discrimination on the grounds of age. The company also claimed that the personal photo enclosed would only be used in order to get a prior impression of their interviewee, and that they also interviewed people who did not enclose a photo. The Advocate stated that by publishing an advertisement which included the word 'young', the company created the impression that they wished to attract young people while older people were deterred from applying. The Advocate recommended that in future the company refrain from publishing job advertisements that include words which could be linked to the chronological age of job seekers.¹²⁹ Soon after, the company complied with the Advocate's suggestions and the case was not forwarded to the competent Inspectorate.



Spain

ES

Legislative developments

Human Rights Plan adopted by the Council of Ministers

The year 2008 marked the 30th anniversary of the approval of the Spanish Constitution. In this context, the Spanish Government approved a Human Rights Plan, coinciding with the 60th anniversary of the United Nations Universal Declaration of Human Rights. This plan was adopted by the Council of Ministers on 12 December 2008.

The Plan adapts the Spanish legal system to international human rights commitments; it is an instrument to promote, coordinate and jointly evaluate a series of highly diverse actions being planned or implemented by various government actors, the administration, the legislature and the judiciary.

¹²⁸ Advocate of the Principle of Equality, decision No. UEM – 0921-10/2008-3 of 28 August 2008.

¹²⁹ Advocate of the Principle of Equality, decision No. 0921-11/2008-4 of 8 July 2008.

Marga | 1957



Elise | 1987



Siji | 1973



The Plan is divided into two priority areas, which are at the root of the Government's human rights policies: *equality, non-discrimination and inclusiveness*; and *the guarantees* that protect human rights.

The Government will work for equality and against discrimination and racism, and promote the political actions and legal reforms necessary in areas such as racial or ethnic origin, religion or belief, disability, age, gender and sexual orientation. Among other legislative proposals the Plan commits the Government to adopt a bill on equal treatment and non-discrimination.

http://www.la-moncloa.es/ConsejodeMinistros/Referencias/_2008/refc20081212.htm#Derechos

Sweden

SE

Legislative developments

New Discrimination Act enters into force

The new Discrimination Act (2008:567) entered into force on 1 January 2009.¹³⁰ The new Act prohibits discrimination on the grounds of gender, transgender identity or expression, ethnic origin, religion or belief, disability, sexual orientation and age.

The Act applies, *inter alia*, to the areas of working life, education, labour market policy activities and employment services not under public contract,¹³¹ starting or running a business, professional recognition, membership of employers', employees' and professional organisations, access to goods and services, meetings and public events,¹³² healthcare, social services and social insurance, financial support for education, unemployment insurance, national military service and civilian service, and employment in the public sector.

The prohibition of discrimination applies to all grounds in the aforementioned fields, apart from age, which is a protected ground in some, but not all, of these areas.¹³³ It is noteworthy that regarding the other grounds, the prohibition of discrimination is extended to new areas of society such as meetings and public events, national military and civilian service and public employment.

The new Act also broadens protection in the field of employment, as it covers all aspects of the employer-employee relationship and of the recruitment process, including inquiries from a potential job seeker about a job. The prohibition of discrimination on the ground of disability is also extended to the area of healthcare and social services.

The Act provides for the establishment of a new agency, the Equality Ombudsman, which merges the four existing ombudsmen and will be responsible for monitoring compliance with the Act. In addition, a new form of financial compensation has been introduced, the discrimination award (*diskrimineringsersättning*), which is distinguished from the small amounts of compensation foreseen in the Tort Liability Act.

¹³⁰ See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 6/7, p.120.

¹³¹ If the state employment agency implements one of its tasks through a private company, this is still regarded as an activity under a public contract.

¹³² The essential requirement is that the event is open to the general public. A political demonstration, a public lecture, sport, dance, and circuses, are examples of activities covered. This area thus covers both commercial and non-commercial events.

¹³³ Age is a protected ground in the fields of working life, education, labour market policy activities and employment services not under public contract, starting or running a business, professional recognition and membership of employers', employees' and professional organisations.

It therefore aims to both compensate for violations of the law and to act as a deterrent against discrimination, thus making higher awards possible in the future.

<http://www.sweden.gov.se/content/1/c6/11/80/10/4bb17aff.pdf>

Case law

The Supreme Court decides on situation testing in restaurants and night clubs



A group of law students organised situation testing in a number of restaurants and night clubs in order to demonstrate ethnic discrimination. The Appeal Court of Skåne and Blekinge upheld a decision of the Malmö District Court which explicitly stated that, even if the purpose of the visit to the night club was part of an investigation into discrimination in restaurants, the four persons had still been discriminated against under civil law.¹³⁴ The Appeal Court awarded each of the four students the sum of SEK 15,000 (approximately EUR 1,500) in civil damages, which is considered the usual level of damages for denial of entrance. The preparatory works¹³⁵ require the courts to assess damages using an objective and generalised analysis of the discriminator's behaviour. Section 18 of the Prohibition of Discrimination Act (2003:307) makes it possible to adjust civil damages both ways.¹³⁶ According to the government bill (part of the preparatory works), lower damages could be set if there are mitigating circumstances on the perpetrator's side.¹³⁷ There is no mention of mitigating circumstances on the victim's side, i.e. circumstances justifying a lower award of damages.

The Supreme Court allowed an appeal on legal grounds only. As the Appeal Court had already decided, the fact that the victims' purpose was to investigate discriminatory treatment was not relevant to the violation of the discrimination law. Direct discrimination is an objective legal concept and the subjective motives behind the four students' actions were thus irrelevant.

The requirement to assess damages based on an objective and generalised examination of the behaviour as such, limited the opportunity to find mitigating circumstances on the victims' side. However unlike the Appeal Court, the Supreme Court did find scope to reduce damages. The fact that the students had been engaged in situation testing meant that the purpose behind their effort to enter the establishment (a night club) - to prove discrimination - had been fulfilled. They had no genuine desire to enter the establishment and therefore had not been denied something they actually wanted. For this reason it was equitable to lower the amount of civil damages. The Supreme Court in its decision of 1 October 2008 awarded each of the four students damages of SEK 5000 (approximately EUR 500).¹³⁸

<http://www.domstol.se/Domstolar/hogstodomstolen/Avgoranden/2008/2008-10-01%20T%202224-07%20Dom%20skiljaktig.pdf>

¹³⁴ Malmö District Court, judgement of 3-05-2006, case T 3562-05, p. 8. The Appeal Court of Skåne and Blekinge, judgement of 24-04-2007, case T1358-06.

¹³⁵ The groundwork for bills in Sweden is laid by commissions of inquiry, legal experts in the ministries, and Riksdag standing committees. This material together with the government bill itself is known as 'preparatory works' (förarbeten). The Swedish lawmaking process thus generates a large body of printed material which is important when applying legislation. Given the care taken in this material to formulate the reasons and intention of the law, it becomes natural for courts, authorities and individual lawyers to rely on it for interpretation.

¹³⁶ The new comprehensive discrimination law contains a similar provision.

¹³⁷ Government Bill 2002/03:65, p. 213.

¹³⁸ The Supreme Court, *Escape Bar and Restaurant v. The Ombudsman Against Ethnic Discrimination* (case T-2224-07, judgement of 1 October 2008)

Court of Appeal's decision on refusal to sell a puppy to a homosexual person

The plaintiff, Ms X, was interested in buying a golden retriever puppy. She hence telephoned the defendant, who is a dog breeder. At first the defendant was very accommodating and invited the plaintiff to the premises to see the puppy. However, when the plaintiff described her situation, the defendant realised that she was homosexual and said that she would not sell puppies to homosexuals or transvestites because of the risk that such people would abuse the animal by having sex with it ('kraftig djurporr').



The plaintiff reported the incident to the Ombudsman against Discrimination on Grounds of Sexual Orientation; two officers from the authority later contacted the defendant on separate occasions, when she again confirmed the reason why she would not sell a puppy to the plaintiff.

The Nacka District Court of First Instance held¹³⁹ that the defendant violated two provisions of the 2003 Prohibition of Discrimination Act that is applicable in connection with the professional provision of goods, services or housing.¹⁴⁰ The defendant's activities as a dog breeder fell under the scope of this law. Her refusal in principal to sell a puppy to a homosexual buyer was considered direct discrimination under Section 3.1 of the Prohibition of Discrimination Act, while the defendant's justification was considered harassment according to Section 3.3 of the Act.¹⁴¹ The District Court set civil damages at SEK 20,000 (approximately EUR 2,000).¹⁴² The Svea Court of Appeal upheld the decision of the District Court, and the Supreme Court denied the defendant the right to appeal against this judgement.¹⁴³
<http://www.homo.se/o.o.i.s/2700>

United Kingdom

UK

Case law

Disciplining of a local authority official for refusing to register same-sex civil partnerships does not constitute religious discrimination

The applicant was a Registrar employed by the London Borough of Islington since 1992, responsible, among other tasks, to conduct marriage ceremonies. When the Civil Partnerships Act was introduced in 2004,¹⁴⁴ she refused to participate in registering any civil partnerships, as being inconsistent with her



¹³⁹ *The Ombudsman Against Discrimination on Grounds of Sexual Orientation v. A.S.*, Nacka District Court, case T 435-05, judgement of 30-03-2006.

¹⁴⁰ Law (2003:307) on the prohibition of discrimination, Section 8.

¹⁴¹ Section 3.3 defines harassment as 'conduct that violates a person's dignity and that is associated with that person's sex, ethnic origin, religion or other belief, sexual orientation or disability'. What was said about transvestites and homosexuals over the telephone was a 'conduct' falling within this paragraph. A plain refusal to sell a puppy to a homosexual person would have infringed only Section 3.1 of the law.

¹⁴² The Ombudsman asked for 40.000 SEK and the defendant testified to 20.000 SEK being a reasonable amount if a violation of the law was found. In cases where the parties are free to end the dispute with a settlement such dispositions of the parties are binding for the court.

¹⁴³ Svea Court of Appeal, *Ombudsman Against Discrimination on Grounds of Sexual Orientation v. A.S.*, Case T – 3562-06, judgement of 11-02-2008 and Supreme Court decision of 08-10-2008. The Supreme Court decides on the cases in two steps: on the first step it conducts only a prima facie analysis in order to determine whether the case contains any important legal issues that should be clarified. In such case, the appeal is allowed and the Supreme Court issues a judgement of high legal value. If no important legal issues are found, the Supreme Court dismisses the appeal.

¹⁴⁴ The Civil Partnership Act enables homosexual partners to enter into a 'civil partnership' that has equivalent legal rights as marriage.

Christian religious beliefs. The council insisted that she should undertake at least some of the duties associated with registering civil partnerships, as this was part of her work duties and because council employees should not exhibit discriminatory behaviour when performing their official duties. As the applicant refused, the council disciplined her and threatened her with dismissal. The applicant then claimed that she had been subject to direct and indirect discrimination and harassment on the grounds of her religious belief. The Employment Tribunal found that she had suffered direct discrimination because of her beliefs. Additionally it held that the requirement for all Registrars to perform civil partnerships constituted indirect discrimination against individuals having her belief; this could not be justified because the local authority could not show that the rights of the homosexual community would be undermined if the applicant was excused from performing civil partnership ceremonies, as other registrars were able to perform them.¹⁴⁵

The case was appealed to the Employment Appeals Tribunal (EAT), which on 19 December 2008 ruled that based on the evidence presented before the court, there was no proper legal basis to conclude that discrimination had been established. The EAT held that there was no direct discrimination as the applicant had not been discriminated against or subjected to harassment on the basis of her religious beliefs; she had been disciplined on the basis that she had failed to perform work duties. It also concluded that there was no indirect discrimination, as the requirement for all registrars to perform civil partnerships, while adversely affecting persons who shared the applicant's religious beliefs, could be objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect.¹⁴⁶

http://www.bailii.org/uk/cases/UKEAT/2008/0453_08_1912.html

<http://www.christian.org.uk/ladelejjudgment.pdf>

UK House of Lords limits scope of UK Disability Discrimination Law



Mr Malcolm, who suffered from schizophrenia, rented a flat from a public housing authority. As the property was subsidised public housing Mr Malcolm was not permitted to sub-let it, but he did so anyway while he lived elsewhere. When the local authority initiated eviction proceedings against him, Mr Malcolm claimed that he had sub-let the property because he had not been taking medication for his schizophrenia at this time; his lawyers argued that any eviction would constitute discrimination on the grounds of his disability. The local authority claimed that there was no less favourable treatment, as it would have evicted any tenant who had unlawfully sub-let their property; in addition, it was not informed about the tenant's schizophrenia at the time.¹⁴⁷ At first instance, the trial judge considered that Mr Malcolm was not in fact disabled, but the Court of Appeal held that he did qualify as disabled under the legislative definition of disability and proceeded to decide the case in his favour, taking the view that the eviction did constitute less favourable treatment on the grounds of his disability.

The House of Lords reversed the earlier decision of the Court of Appeal and decided the case in favour of the local authority. Their judgment has had a major restrictive impact on the definition of 'less favourable treatment' in UK law: the House of Lords reversed a decade of case-law that had been decided on the basis that the test to identify the correct comparator in disability cases is different from that applied in sex and race discrimination cases. In this case, the treatment of the tenant was compared with the treatment of a non-disabled person who had sub-let his flat, with as consequence that the local authority was able to show that no less favourable treatment had occurred. In addition, the House of Lords established that a defendant will not be liable for discrimination if it does not know about the

¹⁴⁵ *Ladele v London Borough of Islington*, Central London Employment Tribunal, case number 2203694/2007, decision of 3 July 2008.

¹⁴⁶ *Islington v Ladele* [2008] UKEAT 0453_08_1912, decision of 19 December 2008.

¹⁴⁷ *London Borough of Lewisham v Malcolm*, [2008] UKHL 43.

disability (or could not reasonably have known), or where the treatment in question was not based on the existence of a disability.

By allowing defendants to argue that they treated disabled persons no differently from others who breached their housing agreements, the House of Lords has also given the opportunity to employers to argue that it is not discrimination to treat a disabled person who misses work because of their disability in the same manner as they treat persons who miss work because they are sick. Also, by requiring defendants to have knowledge of a person's disability before a disability discrimination case can be established, this may encourage defendants to adopt a 'blind eye' approach, i.e. to do their best not to find out whether a person has a disability.

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080625/lewish.pdf>

The Employment Appeals Tribunal underlines the need to demonstrate group disadvantage for the establishment of indirect discrimination

Ms E, a devout Christian, was employed by British Airways (BA) as a member of its check-in staff. BA's uniform policy allows an employee to wear any item of jewellery s/he wishes under the uniform, provided it is not visible; however, there is an exception for employees whose religion requires them to wear items of religious clothing, such as hijabs or turbans, which could not be concealed under the uniform.¹⁴⁸ In 2006, Ms E began wearing a silver Christian cross on a necklace outside her uniform; when she refused to conceal the cross she was suspended. Attempts were made to resolve the issue but they were unsuccessful. Then Ms E alleged direct and indirect religious discrimination and harassment against BA.¹⁴⁹



At first instance, the Reading Employment Tribunal dismissed the case, finding that the claim of indirect discrimination was not established on the basis that British Airways' policy did not disadvantage Christians as a group. However, the Tribunal stressed that if BA's policy had given rise to such group disadvantage, then the policy would not have been objectively justified. In this case, the Tribunal concluded that the uniform policy was designed to achieve a legitimate aim, namely that of brand uniformity. On appeal, the Employment Appeals Tribunal (EAT) stated that the onus was on the claimant to prove group disadvantage. It considered that while in some cases (such as Sunday working) a tribunal could assume the existence of a group disadvantage that would affect some Christian groups, in this case there was no evidence that a sufficient number of persons other than Ms E shared her strong religious view that she should be allowed to visibly wear the cross; therefore there was no evidence of any form of group disadvantage stemming from BA's policy. However, the EAT also agreed with the Reading Employment Tribunal that if there had been evidence of group disadvantage, the inflexibility of BA's policy would not have been a proportionate response to a legitimate aim.

The EAT's decision is interesting in its emphasis on the need to demonstrate group disadvantage, and also because it rejected Ms E's argument that the requirement of group disadvantage would be fulfilled in respect of any religious belief where it was 'inconceivable' that there would not be some other persons who shared the relevant belief in question. This means that where a religious belief is particularly subjective and not widely shared amongst a specific religious group, a claimant will find it difficult to establish indirect discrimination.

http://www.bailii.org/uk/cases/UKEAT/2008/0123_08_2011.html

¹⁴⁸ See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 5, p. 101.

¹⁴⁹ *Eweida v British Airways plc* [2009] IRLR 78.

