FEATURES

The equality agenda in 2015

This will be a year of political and constitutional turbulence for equality law. What changes can we expect after the general election? **Professor Sir Bob Hepple QC** examines some of the key issues and makes proposals for the priorities of an incoming government.

This article is based on Professor Sir Bob Hepple's presentation at the TUC/EOR Discrimination Law 2015 conference on 23 January 2015.

Constitutional issues

So far, the political parties have said little specific about their intentions in regard to equality law. They have focused on matters such as the economy, the future of membership of the EU and immigration. The Conservatives' threat to withdraw from the European Convention on Human Rights (ECHR), and their undertaking to hold a referendum on future membership of the EU, could fundamentally affect the constitutional basis of our equality law. One of the main purposes of the Equality Act is to make our domestic law consistent with Britain's international and European treaty obligations. The courts interpret the Act so as to give effect to those obligations.

David Cameron and his colleagues have announced the intention to "end the ability of the European Court of Human Rights to force the UK to change the law", and to allow "only the most serious cases" to proceed (EOR 252). Dominic Grieve, the former Conservative Attorney-General, has said that this move would be "damaging for the UK and for human rights across Europe", and warned that non-compliance with the European Convention on Human Rights would call into question the devolution settlements for Scotland, Wales and Northern Ireland, which all enshrined convention rights (*Times,* 4 December 2014). Yet Cameron has said that the UK will withdraw from the ECHR if the Council of Europe does not accede to giving Strasbourg judgments only advisory status.

The Human Rights Act already preserves the sovereignty of parliament to refuse to change the law, although if parliament does so the UK may be in breach of its international obligations. Unless the UK withdraws from the Council of Europe and the EU altogether, victims of discrimination and other breaches of convention rights will still be able to go to the Strasbourg Court, putting us back to the pre-2000 position. There have been several discrimination cases where the ECHR has "led to pioneering decisions" for example on the rights of gay people and transsexuals, the right to manifest religious belief and dismissal on grounds of political opinion (EOR 252). If implemented, the proposals will create confusion and uncertainty in an already complex area of law. If a British Bill of Rights replaces the ECHR it is unclear what it will say about the principle of equality as a fundamental human right.

There appears to be no likelihood of Cameron succeeding in negotiating any changes to the EU Treaty which would remove or modify the principle of non-discrimination against EU nationals. If he makes this amendment a condition for continued membership of the EU, precipitating a "Yes" vote for withdrawal, the UK will lose one of the major pillars of domestic equality law. Without the EU, British law would not have the principle of equal pay for men and women for work of equal value, nor laws against discrimination because of age, sexual orientation and religion, nor equal treatment of part-time, fixed-term and agency workers. The case law of the Court of Justice of the EU over the past 40 years has vastly expanded the scope of our domestic law. Withdrawal from the EU would be a major setback for the advancement of equal rights in Britain.

Another constitutional issue which will loom large, is the devolution of powers to Scotland. The report of the Smith Commission (published on 27 November 2014) envisages that the Equality Act will remain a "reserved matter" (for the UK Parliament), but goes on to say that "the powers of the Scottish Parliament will include, but not be limited to, the introduction of gender quotas in respect of public bodies" and that "the Scottish Parliament can legislate in relation to socioeconomic rights in devolved areas". It appears from paras. 63 and 64 of the report that there will be devolved legislative powers over the operation of tribunals, such as in respect of rules and fees, even though substantive discrimination law remains reserved[1]. Scottish and Welsh Regulations on the enforcement of the public sector equality duty (PSED) already go further than those applicable to English public authorities. We face the not unwelcome prospect of "regulatory competition", which may encourage England to follow the more progressive practices in the other home countries. However, significant differences

between these countries could be confusing and burdensome for UK-wide companies.

Access to Justice

This year is the 800th anniversary of Magna Carta. So it is not inappropriate to recall clause 40 (still on the statute book), which states: "To no one will we sell, to no one will we refuse or delay, right or justice." The imposition of employment tribunal fees since 29 July 2013 has proved to be a devastating obstacle to access to justice contrary to the spirit of Magna Carta, denying justice to thousands of victims of discrimination who cannot afford the fees and have also been deprived of free legal advice and representation.

Evidence gathered by the TUC, Citizens' Advice in England and Scotland, the Law Society of Scotland and researchers at Bristol and Strathclyde universities show that people with genuine claims are being prevented from lodging them because of inability to pay. All types of discrimination claim, for which a fee of £1,200 is now payable by a single claimant, fell by around 80%, and sex discrimination claims by 91%, in the period April to June 2014 in comparison with the previous year. The latest statistics (July to September 2014), published in December 2014, show a slight increase in sex discrimination claims but this is still more than 80% below pre-fees level. The numbers of race, disability and other discrimination claims were broadly unchanged from the previous quarter. Richard Dunstan, Project Officer at Maternity Action, comments that: "Overall, the quarter's figures suggest that the number of tribunal cases may now have stabilised at about one-third of the level pre-fees." The next set of statistics (March 2015), says Dunstan, "will provide the first meaningful indication of the steady-state impact of ACAS early conciliation, which so far appears not to have been as significant as predicted"[2].

Hopes that the courts would strike down the Fees Regulations have now been dashed on two occasions. In February 2014 in *R (Unison) v Lord Chancellor (EHRC intervening)* [2014] EWHC 218 (Admin), [2014] EqLR 215 [*Unison No.1*] (EOR 246), Moses LJ and Irwin J held that the level of fees did not breach EU principles of effectiveness or equivalence, nor was there a breach of the PSED. They concluded that the application was premature because there was insufficient evidence of the disparate impact on individuals of a protected class. A second application relied solely on a breach of the principle of effectiveness and of unjustified indirect discrimination. On 17 December 2014, this was dismissed by Elias LJ and Foskett J (*Unison No.2*, case CO/4440/2014 (see p.2)). The Court indicated it could not evaluate the arguments without reliable evidence as to the impact on particular individuals; and, in any event, the Government's aims in setting up the fees scheme were legitimate and proportionate. Those objectives were to transfer a portion (one-third) of the annual cost of running the ETs and EAT to those seeking to benefit from them, to reduce unmeritorious claims and to encourage alternative means of dispute resolution.

The Government is currently reviewing its fees policy and it can be expected that if re-elected to office, the Conservative Party will maintain a fee-charging system, possibly with some modifications, for example through an expansion of the fees remission arrangements, if significant disparate impact on particular groups is shown. The Labour Shadow Business Minister, Chuka Umunna MP, told the TUC conference in September 2014 that a Labour Government would reform ETs and put in place a new system that ensures that workers have access to justice.

What reforms are possible that would simultaneously reduce the cost of tribunals to the taxpayer and ensure access to justice? The objective of reducing unmeritorious claims is already met by various rules on striking out, deposits and costs. Paradoxically, s.138 of the Equality Act (based on earlier legislation) was repealed in 2013. This helped to avoid unnecessary litigation by allowing a person who thought there may have been unlawful discrimination to send a questionnaire on a prescribed form to a potential respondent, and thus could avoid litigation where an innocent explanation was given. The deletion by the Deregulation Bill 2014–15 of the power of ETs under s.124 Equality Act to make wider recommendations has also removed an incentive for employers to take remedial action that would prevent future litigation. A Government that is serious about reducing litigation would restore ss.124 and 138.

Greater use of preliminary hearings is another way of reducing lengthy and expensive hearings. There has been a considerable increase in the number of such hearings. No further fees are charged for these. The former President of Employment Tribunals, David Latham, has pointed out that these hearings can resolve many issues (EOR249). It will be necessary for an incoming Government to evaluate the impact of the new system of early conciliation. In addition, the "arbitration alternative" under the auspices of Acas (introduced in 1998 for unfair dismissal but not utilised) should be re-examined, with a view to adapting it for discrimination cases. The advantages of such an alternative could be speed, informality, an investigative approach and cheapness – all aims of the original tribunal system, which could have been achieved had proposals by a JUSTICE Report on industrial tribunals in 1987 been adopted. The direction of reform should be towards restoring those aims and ensuring an equality of resources between claimants and respondents.

Advancing equality

In a climate of public spending cuts and with political priorities in areas such as the NHS, it will prove difficult for any incoming Government in the short term to reverse the drastic reduction in the EHRC's budget. None of the main parties has so far promised to do so. This makes it incumbent on the EHRC to focus its limited resources on those areas where it can have the most significant impact in changing the policy and behaviour of organisations. It needs to select a few prominent organisations (as it is doing in the case of the Metropolitan police) which can serve as role models for others. Selective strategic enforcement by the EHRC needs to be complemented by changes in the legislation to support self-regulation.

The parties have been silent on this, so I want to suggest two important measures for advancing equality that would not involve major public expenditure:

1.Equality representatives (ERs)

If an incoming Government enacts only one new piece of equality legislation it should be to strengthen the role of equality representatives (ERs) at workplaces who would be involved in equality audits and in drawing up and enforcing employment and pay equity plans. One opportunity for this kind of engagement will arise when an employment tribunal has ordered a mandatory pay audit, under s.98 of the Enterprise and Regulatory Reform Act 2013, following an equal pay breach.

The TUC promoted an amendment to the Equality Bill in 2010 to allow ERs paid time off work to carry out their functions. The then Labour Government refused this on the ground that there was insufficient evidence that time off should come through law. A TUC equality representatives survey found that ERs can make a real difference. The effectiveness of ERs depends on having time off to devote to their functions. There is a ready-to-hand model in the Safety Committees and Safety Representatives Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996. A regulation for ERs could provide that if an employer recognises a union it must consult with union-appointed ERs on equality matters, and provide them with paid time-off and training. The regulations could go further than the health and safety regulations by requiring consultation with other representatives if there is no recognised union.

This needs to be supplemented by bringing into force s.78 Equality Act, which enables a Minister to make regulations requiring private and voluntary sector employers with at least 250 employees to publish information relating to differences in pay between their male and female employees. The Coalition Government did not implement this power, arguing that its voluntary "Think, Act, Report" (TAR) programme was a sufficient encouragement to employers to be transparent about pay for men and women. However, TAR has failed to deliver the promised target of getting private and voluntary sector employers to be more transparent (EOR 251). The TUC reports that the "vast majority of employers do not monitor or review their employment or pay practices". It found that only one-quarter provide training in equal opportunities for managers.

2. Strengthening the public sector equality duty (PSED)

In the period of austerity in which the PSED has functioned since 2008, it has played an important role in delaying or stopping cuts in public services where it has been possible to show that the authorities failed to have "due regard" to the impact on one or more protected groups. The effective enforcement of the duty by judicial review (JR) will be seriously hampered if the Criminal Justice and Courts Bill 2014–15 is enacted in its present form (at the time of writing this is a matter of "ping-pong" between Lords and Commons).

The Bill would require the High Court or Upper Tribunal to refuse permission for JR or withhold a remedy if they think it "highly likely" that the outcome for the applicant would not have been substantially different had the conduct of the public authority not occurred. The Bill also establishes a presumption that interveners in a JR would, unless there are exceptional circumstances, have to pay the costs incurred by another party as a result of the intervention. This will have a deterrent effect on interventions by the cash-strapped EHRC and other organisations such as the TUC. The EHRC's interventions, such as in the *Bracking* case [2014] EqLR 60, have had a major impact on the outcomes of JR .There are also provisions in the Bill on costs-capping orders, which risk restricting access to the courts. These changes to JR, if enacted before the election, should be reviewed by an incoming Government.

The next review of the PSED is due to take place in 2016. Among the issues that need to be considered are the extent of the duty. The present "due regard" standard means that the focus of JR applications has had to be on procedures – a "tick-box" approach – rather than substance. The courts have emphasised that the duty is not to achieve a particular result; the *Unison (No.1)* judgment shows that it can be relatively easy for a public authority to pass this hurdle, despite the undoubted adverse impact of their actions on disadvantaged groups. Unfortunately, in 2010 the then Labour Government rejected an amendment moved by Lord Ouseley (former CRE chair) aimed at ensuring that the PSED involves more than a paper exercise. An incoming Government should remedy this by reformulating the duty so as to oblige public authorities to eliminate discrimination and to take proportionate steps towards the advancement of equality. This could encourage public bodies to institute real changes, which would be judged by the EHRC and the courts on the basis of the proportionality principle.

This is closely linked to the issue of engagement of stakeholders and ERs (above). The all-important function of the public duty is to involve stakeholders in formulating and implementing equality plans. The current regulations for England (unlike those for Scotland and Wales) do not require the authority to publish details of their engagement with stakeholders. They should oblige the authority to take reasonable steps to involve stakeholders.

Conclusion

I have not been able in this short article to address many other possible major and minor reforms. The biggest gap is the absence of a legal duty on large and medium-sized employers in the private and voluntary sectors to conduct employment equity and equal pay audits at regular intervals. Employers are likely to resist legislation on this, and none of the major parties is inclined to impose what will be categorised as further "burdens on business". One way to overcome this would be for the EHRC to make greater use of its investigatory powers where the Commission reasonably suspects discrimination and then seek to negotiate a legally binding positive action agreement in lieu of enforcement. In a cold climate hostile to equality, we have to find ways to use existing powers more effectively and creatively. ■

Professor Sir Bob Hepple QC is Emeritus Master, Clare College, Cambridge. He is also a member of EOR's advisory panel.

1. https:/www.smith-commission.scot/smith-commission report.
2. http:/www.hrbullets.co.uk/hr-news/employment-tribunal-statstics-july-september-2014.