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Failure to produce an anti-poverty strategy: The Committee on the Administration's Application [2015] NIQB 59, June 30, 2015

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had argued that the territorial reach in discrimination cases should be wider than ordinary employment rights. LJ Burnett rejected this argument in his decision, but did not rule out the possibility that there may be circumstances in which the territorial scope might be wider ‘... where the application of the 2010 Act to the employment could conflict with local laws and customs. Should such a case arise, the issue will need consideration.’

There may be some merit in the claimants’ proposition. Dismissing an employee because of a protected characteristic is insidious compared to dismissing an employee for, say, gross misconduct. The law already recognises differences between non-discrimination and general employment rights – for example, the length of service requirement for unfair dismissal does not apply to discriminatory dismissals. There is therefore no reason why a broader approach should not be adopted in discrimination cases.

Implications for practitioners

Employees of British employers working abroad

The decision provides useful guidance on the approach to be taken in cases of discrimination against peripatetic or expatriate workers. It will be easier to establish whether

such a worker can rely on the EA, although it does not necessarily mean that a worker who is unable to show a ‘sufficient’ connection to the UK will automatically be precluded from making a discrimination claim. Practitioners will need to look very closely at not only the circumstances of the employment but the wider societal context.

Public sector equality duty P

The law is clear that the ‘due regard’ duty ‘must be fulfilled before and at the time when a particular policy is being formulated.’ (*R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [See Briefing 702]. However, there may be circumstances in which a court may consider that it would be inappropriate to quash a decision or policy on the basis that a public authority did not have ‘due regard’ at the outset. Much would depend on the implications for doing so.

The court has given leave to appeal the decision; the appeal will be heard in March 2016.

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Failure to produce an anti-poverty strategy

The Committee on the Administration of Justice’s Application [2015] NIQB 59, June 30 2015

Implications for practitioners

The Northern Ireland High Court has ruled that the Northern Ireland Executive acted unlawfully by failing to fulfil its statutory duty to adopt a strategy setting out its proposals for tackling poverty, social exclusion and patterns of deprivation based on objective need. The decision is a rare, if not unique, example of a court ordering a government department to strategise in an objectively verifiable manner. It might serve as a useful precedent for campaigners who in other settings are seeking to hold public bodies to account for not developing effective strategies to reduce socio-economic inequalities.

Facts

In October 2006, as part of the St Andrews Agreement, the UK government promised to publish an Anti-Poverty and Social Exclusion Strategy to tackle deprivation in all communities of Northern Ireland based on objective need. The strategy was to have built on existing initiatives concerning neighbourhood and community renewal and was then to have been taken forward by the new Northern Ireland Executive (the current one was in suspension). To give legal force to these promises, s28E of the Northern Ireland Act 1998, inserted by s16 of the Northern Ireland (St Andrews Agreement) Act 2006, explicitly stated that the Executive ‘shall adopt a strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation based on objective need’.

Early in 2007 an 86-page document entitled *Lifetime Opportunities: Government's Anti-Poverty and Social Inclusion Strategy for Northern Ireland* was published. Its Foreword was written by the Secretary of State for Northern Ireland, who referred to it as a British government document, even though the title page says that it was produced by the Office of the First Minister and Deputy First Minister (OFMDFM) in conjunction with all other Northern Ireland government departments. The document carried the OFMDFM's logo and appeared on its website. At several points it recognised the need to target policies and programmes at those in greatest objective need.

The difficulty facing the Committee on the Administration of Justice (CAJ), the most prominent human rights and equality NGO in Northern Ireland, was that it could not work out if the OFMDFM had in fact been applying an anti-poverty and social inclusion strategy based on objective need. An OFMDFM official informed the CAJ that in November 2008 the Executive had formally adopted *'the broad architecture and principles of Lifetime Opportunities as the basis of its strategy'*, but in response to a Freedom of Information Act request the department admitted that it held no information regarding the definition of objective need.

High Court

In trying to discern whether OFMDFM had fulfilled its obligation to produce a strategy based on objective need, Treacy J based himself on the Oxford English Dictionary's definition of 'strategy', which sees it as *'a plan of action designed to achieve a long-term or overall aim'*. While he acknowledged that the Executive had formally adopted *'the architecture and principles'* of Lifetime Opportunities, and had later adopted other *'initiatives / policies / interventions / frameworks'*, the judge concluded that the Executive's so-called strategy was 'inchoate', a word which most dictionaries define as *'just beginning', 'not yet fully developed' or 'rudimentary'*.

What the judge said he had been looking for was a *'road map'*, a *'guide, to set a course'*, something capable of *'providing policy level guidance to the stakeholders charged with achieving its goals'*. He added:

that strategy must be identifiable, it must be complete, it must have a start, a middle and an end, it must aim to be effective, its effectiveness must be capable of measurement and the actions which are taken in attempting to implement that strategy must be referable back to that overarching strategy.

Comment

The case represents a remarkable victory for the CAJ and arguably takes the law further than it has already reached. In the English High Court case of *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin) Singh J ruled that the Secretary of State had acted unlawfully in preparing a national poverty strategy without first complying with the statutory duty, imposed by s10(1) of the Child Poverty Act 2010, to request the advice of the Child Poverty Commission. No such advice had been sought because no such Commission had been created, despite s8 of the 2010 Act asserting *'[t]here is to be a body called the Child Poverty Commission'* and making further provision for it elsewhere in the Act.

The CAJ relied on this precedent when arguing its case in the Northern Ireland High Court. But in the CPAG case the government's failure did not lie in neglecting to produce a strategy but in neglecting to consult properly before doing so. In persuading the judge that in its case there was no strategy in the first place, the CAJ probably achieved more than it set out to do. Despite the considerable documentation which the OFMDFM produced to show that it had thought about and acted upon plans for reducing poverty and promoting social inclusion, the CAJ persuaded the judge to demand more from the department. So unconvinced was he that a strategy existed at all that he relegated to obiter dicta his views that whatever plans did currently exist could not be said to be based on objective need.

The decision does not so much take the law on judicial review of policy-making any further as provide an excellent example of the power of the existing law to embarrass a government and force it to keep its policy-making promises. The Northern Ireland Executive is not appealing the decision, so we await with interest the strategy document which will now have to emerge and the criteria for objective need which will have to lie at its base.

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