EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/49 UK protection against dismissal on grounds of political opinions inadequate (UK)

<p>The European Court of Human Rights (ECtHR) has ruled that an employee dismissed for being a member of the far-right British National Party (BNP) did not have adequate redress under United Kingdom law. The relevant legislation was incompatible with the European Convention on the Protection of Human Rights and Fundamental Freedoms (the ‘Convention’) because it did not provide sufficient protection against dismissal on grounds of their political opinions or affiliations, including extreme views that “offend, shock or disturb”.</p>

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Facts

The case involved Mr Redfearn, a white British man, who was a bus driver employed by Serco Ltd ('Serco'). The company provided transport to local authorities, including Bradford City Council (the 'Council').

Mr Redfearn was responsible for transporting children and adults with disabilities within the Bradford area. Seventy to eighty per cent of Serco's customer base and 35 per cent of its workforce were of Asian origin. There were no complaints about Mr Redfearn's work and his supervisor, who was of Asian origin, had nominated him for a "first- class employee" award.

In May 2004, a local newspaper identified Mr Redfearn as a candidate for the BNP in the local elections. At this time, membership of the BNP was limited to white nationals. The public sector workers' trade union Unison wrote to Serco, stating that many of its members found Mr Redfearn "a significant concern, bearing in mind the BNP's overt and racist/fascist agenda". Unison requested that Serco take immediate action to ensure that its members were not subjected to racial abuse. The following month, Mr Redfearn was elected as a local BNP councillor. Serco decided to dismiss him without notice, stating that the reason was the potential health and safety risk to his passengers and their carers, given the considerable anxiety they were likely to feel. Serco also expressed concern that Mr Redfearn's continuing employment could severely prejudice its reputation and result in the loss of its contract with the Council.

Mr Redfearn was unable to bring a claim for unfair dismissal as he did not have the one year's service which was at that time required under the Employment Rights Act (the 'ERA') (the qualifying period has since been increased to two years). Instead, he submitted a claim to the Employment Tribunal ('ET') for race discrimination.

Mr Redfearn alleged that his dismissal constituted less favourable treatment (i.e. direct discrimination) on racial grounds, because, owing to his views on race, he had been dismissed from a job working with people of Asian origin. He also asserted that he had suffered indirect racial discrimination, on the basis that the BNP was a 'whites-only' party.

The Employment Tribunal's Decision

The ET appreciated that Mr Redfearn's employment might lead to problems with other employees and attacks on Serco's minibuses, which could put staff, passengers and Mr Redfearn himself in danger and cause considerable anxiety among passengers and their carers. The ET also accepted the argument that his presence might damage Serco's reputation, putting existing contracts and future tenders at risk. Accordingly, the ET dismissed the claim for direct race discrimination as Mr Redfearn's dismissal was for legitimate health and safety reasons and not on racial grounds. The ET also rejected the claim of indirect discrimination as dismissal was a proportionate means of achieving a legitimate aim, namely, ensuring the health and safety of everyone involved. Mr Redfearn appealed to the Employment Appeal Tribunal ('EAT').

The Employment Appeal Tribunal's Decision

The EAT upheld the appeal, finding that the ET had erred failing to interpret the term "on racial grounds" broadly. With regard to indirect discrimination, the ET had not explained how it came to the conclusion that dismissal was a proportionate means of maintaining health and safety, because it had not considered any alternatives to dismissal. Serco appealed to the Court of Appeal.

The Court of Appeal's Decision

The Court of Appeal allowed Serco's appeal and reinstated the ET's decision. Rejecting Mr Redfearn's claim of direct discrimination, the Court said he was treated less favourably on the ground of a particular non-racial characteristic shared with him by a tiny proportion of the white population, that is, membership of a political party such as the BNP. The Court reasoned that Serco would apply the same approach to a member of a similar political party, regardless of whether its membership was confined to white or black people.

The Court also rejected the claim for indirect discrimination, on the basis that this required Mr Redfearn to identify a provision, criterion or practice which Serco had applied or would apply irrespective of race or colour, and he had failed to do so. The Court noted that the ET had suggested the relevant criterion was membership of the BNP, but that could not be applied to a person who was not the same colour or race as Mr Redfearn because only white nationals were eligible for membership. Mr Redfearn also relied on the UK's Human Rights Act 1998 ('HRA'), asserting that less favourable treatment arising from membership of a political party contravened various of his rights under the Convention –Article 9 (freedom of thought, conscience and religion); Article 10 (freedom of expression); Article 11 (freedom of assembly and association); and Article 14 (prohibition of discrimination).

However, the Court ruled that he was not entitled to claim under the HRA because Serco was a private sector company and not a public authority. Furthermore, the provision in the HRA which requires UK law to be read and given effect in a way that is compatible with Convention rights did not assist Mr Redfearn, because the relevant race discrimination legislative provisions were compatible with the Convention.

The Court concluded that "properly analysed, Mr Redfearn's complaint was of discrimination on political grounds, which falls outside the anti- discrimination laws".

Mr Redfearn then focused his attention on human rights law and brought a claim against the UK Government in the ECtHR.

The European Court of Human Rights' Decision

Mr Redfearn submitted that losing his job for exercising his right to freedom of association under Article 11 struck at the "very substance" of that right. He contended that the UK Government had a positive obligation to enact legislation which would have afforded him protection, as he did not comply with the one-year qualifying period required to claim unfair dismissal.

In reply, the UK argued that if an employee was dismissed for manifesting certain political beliefs, it did not necessarily mean that there would be an interference which struck at the very substance of the right under Article 11. In the alternative, if there was a positive obligation on the UK, this was satisfied by the right to claim unfair dismissal under the ERA. The UK submitted that where the one-year qualifying period has accrued, employees are generally protected against dismissal on grounds of political involvement, unless the involvement affected the capacity of the employee or amounted to a "substantial reason" for dismissal. The UK also claimed that the qualifying period pursued the legitimate aim of encouraging employers to recruit staff.

The ECtHR observed that the one-year qualifying period did not apply to all employees: various exceptions had been created to offer additional protection to employees dismissed on certain prohibited grounds, such as race, sex and religion. However, no additional protection had been provided to those dismissed on account of their political opinion or affiliation.

The ECtHR held that association with political parties is essential to the proper functioning of democracy and Article 11 is applicable not only to persons whose views are favourably received, but also to those whose views offend, shock or disturb. An employee's Article 11 right should be balanced against the employer's interests in each particular case, regardless of his or her length of service, but currently, employment tribunals are not required to do this when the employee has less than one year's service.

As a result, the ECtHR concluded (by a majority of four to three judges) that UK legislation was incompatible with the Convention. The UK needed to adopt "reasonable and appropriate measures" to protect employees from dismissal on grounds of political opinion or affiliation, including those with less than one year's service). The ECtHR offered two suggestions as to how this could be done: the creation of a further exception to the one-year unfair dismissal qualifying period, or by a free-standing claim for discrimination on the grounds of political opinion or affiliation.

Commentary

It remains to be seen whether the UK will appeal to the Grand Chamber of the ECtHR, which would allow the decision to be reconsidered by a full panel of 17 judges. If the UK chooses not to appeal, or the decision is not overturned, the UK Government will have to consider whether and how to comply.

One option might be to include political beliefs within the definition of "religion or belief" under UK's Equality Act 2010. However, the Government has previously commented that political views are not akin to religious or philosophical beliefs and it was not the intention of the Equality Act to protect such beliefs. It is also interesting that the ECtHR did not regard Mr Redfearn's case as engaging the right to freedom of thought, conscience and religion.

Another problem with this approach would be how to implement appropriate protection within the UK's anti-discrimination laws. The ECtHR recognised that an employer should be able to dismiss employees for their political views in appropriate cases – it is a matter of balancing the employee's rights against the employer's interests. However, discrimination law is more of a blunt instrument: there is generally no scope or potential for employers to justify direct (as opposed to indirect) discrimination under the Equality Act.

The idea that the Government must change the law to protect employees whose political opinions or affiliations "offend, shock or disturb" has some worrying implications. Does the ECtHR really intend to protect members of extreme and even violent organisations? Perhaps the answer is provided by the ECtHR's important observation that the BNP is not an illegal party under domestic law, nor are its activities illegal. Proscribed parties and organisations are therefore probably outside the scope of the ruling.

One part of the UK already affords employees protection against political discrimination. In Northern Ireland, it is unlawful to discriminate against employees on the grounds of their political opinion, which does not include an opinion that condones the use of violence for political ends. It remains to be seen how, if at all, the Government will respond to the ECtHR's ruling, but the Northern Ireland legislation may provide a useful starting point.

Unless or until UK law is changed, those employed by private-sector employers will not be directly affected by the ruling. However, it may encourage members of the BNP and other extremist parties to bring discrimination claims on the grounds of religion or belief, asserting that the Equality Act should be interpreted consistently with the ECtHR's approach.

In contrast, if public sector employees are dismissed for manifesting certain political beliefs, they can now bring civil claims directly under the HRA citing Article 11, even if they do not qualify for the right to claim unfair dismissal. This is because the HRA stipulates that public authorities must act in a way which is compatible with Convention rights.

The increase in the unfair dismissal qualifying period from one to two years (with effect from April 2012) has exacerbated the problem for the UK because it means that a greater number of employees' rights under the Convention are potentially breached. Also, it may mean that more employees, if they do not qualify for the right to claim unfair dismissal, will instead seek to bring discrimination claims if they are dismissed for being associated with extremist political groups.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): German case law will not be influenced by the ECtHR's decision. Membership of a political party cannot be grounds for a termination of the employment relationship in the private or even in the public sector. For the public sector however, it has been decided by the Federal Labour Court that membership of a political party with extreme views can be grounds for termination if those views collide with the allegiance to the Law and Constitution which state officials must swear on entering an employment contract. In the private sector, an employment contract could only be terminated summarily if criminal offences were committed as a result of membership of an extreme-right party. Possible offences include the use of propaganda or symbols of unconstitutional institutions (e.g. use of the Hitler swastika, SS-Letters, or Heil-Hitler), incitement to hatred or dissemination of material depicting violence.

Subject: Freedom of expression; other forms of discrimination

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