



at work



at school



at church

European Threat to

Religious Freedom

a response to the European Union's proposed **Employment Directive**

The Christian Institute is a Company Limited by Guarantee, registered in England as a charity which seeks to promote the Christian faith within the UK. Company No. 263 4440 Charity No. 100 4774



© The Christian Institute
June 2000
ISBN 1 901086 12 7

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“a milestone in the construction of a Social Europe”

European Commissioner Anna Diamantopoulou

“This directive has all the potential to seriously undermine freedom of association for religious people. It places the modern concept of ‘equality’ over and above religious liberty. By requiring religious organisations to radically alter their recruitment practices, it will make it difficult, or impossible, for them to maintain a distinctive religious ethos.

The right of religious people to associate with others of similar belief without legal penalties was established in Britain and in most of Europe only after centuries of struggle against persecution and intolerance. It seems remarkable that so early in the new human rights era we should consider a move to chip away at so basic a liberty. It is all the more remarkable that it should take place in the name of equality and non-discrimination. Nevertheless, the draft directive clearly places a low value on this religious freedom.”

Professor Ian Leigh, University of Durham

Introduction

The Government is about to sign up to a European employment directive¹ that could land religious groups in court. The directive would make it illegal for organisations to refuse to employ an individual because of that individual's religious views or sexual orientation. This means that religious groups could be forced to employ atheists or practising homosexuals in key positions in their organisations. Church schools will have to employ teachers who oppose the religious teachings of the denomination.

All this represents a serious attack on religious liberty.

There are some protections for religious groups, but they are limited to posts with a direct role in religious instruction. Examples would include a church minister or a religious education teacher in a Church school. But under the directive even these 'protected' posts may be challenged via a major loophole in the legislation.

This booklet therefore argues that the UK Government must protect religious freedom by vetoing the directive to enable the stripping out of all references to religion, belief and sexual orientation from the employment directive.

There is considerable urgency. The directive was discussed ahead of schedule at the Social Affairs Council of the EU on 13 March 2000 and the Portuguese Presidency has pressed for rapid progress.²

The UK Government has already indicated its support for the employment directive.³ It is expected to be adopted this Autumn by the EU's Council of Ministers. If it is adopted it immediately becomes law for public sector employment⁴ and must be fully implemented in the private sector by 31 December 2002.

The legal case

John Bowers QC and Mark L R Mullins have written a highly readable legal opinion which shows how the directive will have serious consequences for religious organisations. John Bowers is author of *Employment Law* (Blackstone Press) one of the leading textbooks in the field. The opinion is given in its entirety in Appendix One.

Appendix Two outlines Article 13 of the Amsterdam Treaty under which the employment directive was made. It also includes some important extracts from the directive.

The employment directive is expected to be implemented before the European Charter of Human Rights. The relationship of the Charter to the directive and other European Law is outlined in Appendix Three.

Finally we are very grateful indeed to Professor Ian Leigh and Professor Paul Beaumont for allowing us to quote their views on the directive. Both are leading experts in their fields. Professor Beaumont argues the case that the directive breaches the law of subsidiarity in Appendix Four.

Colin Hart
Simon Calvert
Mike Judge
8th June 2000

Examples of Possible Conflict

Examples of how the employment discrimination directive will work in practice:

- The headmaster of a Church school becomes a Muslim. The school dismisses him. The headmaster takes the school to an employment tribunal. The headmaster proves that his job did not involve teaching religious education. The tribunal finds that the school acted illegally in dismissing him for changing his religion.
- An evangelical youth organisation recruits a full-time youth worker. When appointed the youth worker was married but she subsequently turns out to be a practising bisexual. The organisation feels unable to remove her from her position for fear of an expensive court order against them. The organisation would have no defence - the dismissal would undoubtedly be because of her 'sexual orientation'.
- A Muslim charity for the homeless refuses job applications from non-Muslims. A Hindu takes the matter to an employment tribunal. It rules that jobs within the charity only *indirectly* involve religious guidance. Being Muslim is not a genuine occupational qualification - it is just the preference of the organisation.
- A Christian Bible publishing business wants its Christian ethos to permeate all it does. A bright job interview candidate declares that he is 'openly gay'. If the firm reject him in favour of another candidate, they fear a possible action for discrimination.

- A church advertises for a “committed Christian” to work as the Minister of the Church. A court challenge against this discrimination would fail since, because the Minister is required to preach every Sunday, his job involves direct religious guidance. However, the same church also advertises for a “committed Christian” to work as the Minister’s secretary. The duties indirectly involve counselling and communicating Christian teaching on various subjects in countless informal settings. The directive does not allow any discrimination for those in support roles. The only applicant for the job is an experienced and qualified secretary who is also an ardent atheist. They fear being sued if they reject her.
- A denominational social work organisation requires employees to be committed members of the denomination. A job applicant indicates that he belongs to the denomination but refuses to attend church. When he is rejected, he sues for discrimination on the grounds of his religious beliefs.
- A large family-friendly company provides certain benefits to the spouses of employees. A group of homosexual employees sues. They say homosexual partners should be entitled to the same benefits.
- A Christian hospice is established with a pro-life foundation. A member of the medical staff loses his faith and with it, his belief in the pro-life position. He is asked to leave. He sues for religious discrimination.
- A group of Doctors set up a GPs practice based around the fact that they are all Muslims. They employ other medical staff who share their faith. A Buddhist applies for a job and is rejected in favour of a Muslim. The Buddhist re-applies and threatens to sue unless he is taken on.

The Proposed Employment Directive

Article 13 of the Amsterdam Treaty gives the European Commission the power to propose legislation to combat discrimination on various grounds, including religion, belief and sexual orientation. It is under Article 13 that the new employment directive has been proposed.

Article 1 of the Employment Directive States:

Purpose

The purpose of this directive is to put into effect in the Member States the principle of equal treatment as regards access to employment and occupation, including promotion, vocational training, employment conditions and membership of certain organisations, of all persons irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The directive applies much wider than the appointment and dismissal of staff.⁵ It also applies to the granting of employment perks. The clear implication from a recent case in the European Court of Justice is that under the directive homosexual couples will be entitled to the same employment benefits as married couples. A train company which grants travel perks to the spouses of staff will also have to grant them to homosexual lovers of staff.⁶

The Council of Ministers of all the Member States must agree to the directive before it can come into force. The European Commission is proposing a package of four measures, of which the employment directive is just one.⁷ The Commission's enthusiasm for the measures is considerable, Commissioner Anna Diamantopoulou heralding them as "a milestone in the construction of a Social Europe".⁸

Church School “Anxiety is Entirely Unfounded”

When the House of Commons debated giving the EU power to legislate against discrimination on the grounds of religion or sexual orientation, concerns about Church schools were specifically raised with the Foreign Secretary. He rejected those concerns about Article 13 saying they were “entirely unfounded”.

The Government’s main argument was that any EU legislation under Article 13 would need the agreement of the UK.

House of Commons, Hansard, 12 November 1997, Columns 914-915

Mr. Edward Leigh (Gainsborough): The right hon. Gentleman asked what in the treaty should concern ordinary people who usually are not actively interested in politics. Will he comment on article 13—formerly known as article 6a—which is of concern to many religious groups? Religious groups representing 1 million members have written to the Prime Minister about the article, which outlaws discrimination. There is great concern that some schools—such as Anglican and Catholic schools—that currently can insist on being run by a practising member of their denomination, may be banned from doing so by the article. Reassurances—for example, on a unanimity requirement—have been given. In the Grimaldi case, however, the European Court of Justice extended the law. Will the Foreign Secretary reassure all those groups that the Government are aware of the article, and take those worries seriously?

Mr. Cook: We take very seriously any worries that people might have that religious schools will be struck by any part of European legislation. However, the Bill and the treaty of Amsterdam do not do that. The treaty provides the basis for the Commission and the Council to legislate on grounds of discrimination wider than simply gender discrimination. It is, however, only an enabling clause; it is not itself a directive or a binding law.

The Council and the Commission would have to make proposals to put into effect any new measure against discrimination. In those debates and in that Council meeting, Britain would have a full voice, as would the many countries of the European Union that have religious schools. Therefore, that anxiety is entirely unfounded, and I hope that the hon. Gentleman will be able to reassure his constituents.

When the Government brought forward legislation to incorporate the European Convention on Human Rights there were also concerns that Church schools would be affected.

Many argued that the Convention could be used against Church schools which sought to employ only Christian staff or to dismiss teaching staff who repudiated the Christian ethos of the school.

After many debates in both Houses of Parliament the Government amended the law. It did this in a way which robustly set out the right of Church schools to appoint staff on the basis of their denomination and to dismiss staff whose conduct is incompatible with the teaching of the Church.

Section 60 of the Schools Standards and Framework Act 1998 enshrines what has been the long standing 'common-sense' practice which has been upheld by the Courts.⁹

But the new employment directive will over-ride Section 60 and its protection for Church schools. More generally, it also will over-ride the freedom of religion under Article 9 of the Convention on Human Rights and Section 13 of the Human Rights Act which gives extra protection to religious organisations.

The Foreign Secretary has said that the Government will use its 'full voice' in the Council of Ministers and that it takes 'very seriously' any worries about Church schools. Yet so far the Government has remained silent on this issue.

Freedom of Association Requires Discrimination

The Labour Party has a policy of employing only Labour Party members. For there to be freedom of association in any meaningful sense, organisations like the Labour Party must be free to have such employment policies. They must be free in their employment policies to discriminate against those who do not share their beliefs. This extends to behaviour. The Labour Party would presumably dismiss a staff member who was discovered to be a major donor of the Liberal Democrats.

In fact, the definition of ‘religion or belief’ in the proposed directive is so wide that it may include political beliefs. It could therefore become illegal for the Labour Party to refuse to employ an individual who is a member of the Conservative Party! Deciding to reject an applicant because they are opposed to the very foundation of the organisation is not unfair discrimination, it is plain common sense.

Most reasonable people would accept the right of a religious organisation to employ people who follow the religious beliefs of the organisation.

Article 4(1) of the directive offers a very limited protection to religious groups. If an organisation can prove that a certain characteristic is a “genuine occupational qualification” it may prefer candidates with that characteristic.

“A Roman Catholic school would probably be allowed to stipulate that a teacher of Religious Education be a practising Roman Catholic, but for all other subjects the school would be acting unlawfully if it refused to employ non Roman Catholics, neo Nazis, atheists, communists, Seventh Day Adventists or practising homosexuals”

Opinion of John Bowers QC and Mark L.R. Mullins

”

What is a Genuine Occupational Qualification?

Christian organisations routinely claim that being a practising Christian is a genuine occupational qualification for a particular job. The same is true for other faiths. The problem is that the directive in effect defines what is meant by a genuine occupational qualification in Article 4(2).

Article 4(2)

“Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.” [emphasis added]

Only organisations which ‘directly’ pursue ideological guidance are covered, and only then if they are engaged in education, information or the expression of opinions. Even when these hurdles have been cleared, only those posts which relate ‘directly’ to that aim are protected. As John Bowers QC has made clear, “This will be a very difficult test to satisfy”.¹⁰

Since many religious organisations are involved in social or medical care it will clearly be argued that *virtually all* posts in these organisations do not have the essential aim of providing ideological guidance. So under the directive, jobs with these organisations would have to be opened up to all-comers irrespective of their beliefs or sexual orientation.

Organisations affected would include:

- Tear Fund
- Muller Homes for the Elderly
- The Salvation Army
- The Church of Scotland Board of Social Responsibility
- The Shaftesbury Society
- United Christian Broadcasters
- Mission Aviation Fellowship

Even the Limited Protection is Fatally Flawed

The Government will argue that religious organisations will be protected since the directive protects those posts where being a believer is a genuine occupational qualification. But it is clear that this protection only applies to a very limited range of posts. And even with these posts there is a loophole.

The European Commission envisage that, for example, a Roman Catholic Church school would be entitled to appoint Catholic teachers of religious education (RE). But as John Bowers QC and Mark L R Mullins point out in their legal opinion, the Commissioner responsible for the directive, Anna Diamantopoulou, admits that a Catholic school could not discriminate on the basis of sexual orientation.

This means that a teacher claiming to be a Catholic who applied for an RE post in a Church school and was turned down for being a practising bi-sexual or homosexual, would be entitled to sue.

An evangelical Baptist Church could require their Minister to be an evangelical, but they would be in great difficulty in refusing to employ a practising homosexual who claimed to be an evangelical.

Christian organisations would not want to discriminate against people who were sexually attracted to their own sex *but* who lived a faithfully celibate life in accordance with Christian teaching. The problem is that the term 'sexual orientation' fails to distinguish between those who are celibate and those who are practising.

Since all sexual activity outside of marriage is incompatible with orthodox Christian doctrine it is difficult to see how Article 4(2) could be a protection in any meaningful sense as the directive still prevents religious groups from rejecting practising homosexuals and bisexuals.

To protect themselves religious bodies will have to draft staff contracts requiring certain religious views or the abstention from sexual activity outside of marriage. Though this is a sensible step to take, it will probably fail in court.

The directive proposed by the European Commission would place all religious organisations in an intolerable dilemma: Either they must adopt an open employment policy and allow virtually all posts to be filled by people who reject even their most basic beliefs; or they continue to discriminate and face court action with the potential for financial penalties.

Why Open Employment Policies **Close the Door to Religious Freedom**

To require a church, synagogue or mosque to open all posts to those of other faiths is to curtail religious freedom. A mosque or a Muslim organisation should be entitled to employ Muslims. Why should any secular court have the right to judge whether a particular post in a mosque should or should not be held by a Muslim?

A Christian GP's surgery would be forced to employ atheists. It would be difficult for any business to maintain a Christian ethos in terms of its employment policy.

Why should a Vicar have to explain to a secular Court why the verger or the church secretary needs to be a Christian? Would a secular Court even understand?

Why should an atheist or a Christian be given as much legal right as a Sikh to be employed by a Sikh temple?

At present the law has not intruded into the religious freedoms of places of worship. In practice many Churches employ ancillary staff who are not Christians, but that is up to them. These matters are best left to common sense.

Church schools have the legal right to employ teachers who adhere to the faith of the Church. The same applies to Jewish and Muslim schools. In practice non-Christian teachers are employed in Church schools. Once again these matters are best left to common sense. The existing legal arrangements work well.

This is not only true of religious organisations but of others with a strong ideological foundation. The British Humanist Association and the National Secular Society should not have to open up posts to members of all faiths.

Gay Rights and Religious Freedoms

The employment directive seeks to protect employment rights based on race, ethnicity, religion, belief, disability, or sexual orientation.

Race, ethnicity and disability are traits that a person cannot change.¹¹ But a person can control their sexual behaviour.

General Colin Powell, the first black chairman of the US Joint Chiefs of Staff, has said, “Unlike race or gender, sexuality is not a benign trait. It is manifested by behaviour. While it would be decidedly biased to assume certain behaviours based on gender or membership in a particular racial group, the same is not true for sexuality.”¹²

The directive does not make any distinction between sexual behaviour and sexual desire, yet for religious people the distinction is crucial. There is no difficulty for a Church or a Church school employing a person who experiences homosexual temptation but holds to Church teaching that all sexual activity outside of marriage is wrong and remains celibate.

Sexual behaviour is a moral issue and not only for religious people. According to the largest study of sexual attitudes ever carried out in Britain, 70% of men believe that sex between two men is always or mostly wrong.¹³

Under the directive, Christian organisations, Church schools and Churches will be forced to employ practising homosexuals. Even teaching posts involving religious instruction could be vulnerable as has been seen above.

The directive gives ‘gay rights’ precedence over religious freedoms.

Other Problems with the Directive

Burden of Proof

Article 9 of the directive requires that, in civil cases, employers will be assumed guilty of discrimination unless they can prove themselves innocent. At an Employment Tribunal, an employee will simply have to make out an allegation. If the employer cannot prove the allegation to be false, the Tribunal will have to give judgment against them.

This will guarantee that many more employers will have to pay out to people who claim discrimination on the grounds of belief or of sexual orientation. Not only will this ensure that more employees win their cases, it will give more encouragement to employees to start cases in the first place. And it will certainly increase the number of speculative and even malicious cases. Employers will be under even more pressure to agree a settlement out of court, rather than risk the prospect that a judgment will be made against them.

For religious groups, this will mean even more time and money spent defending themselves in court - and more defeats.

Subsidiarity

The concept of subsidiarity in the Maastricht Treaty states that individual member states should, where possible, have the freedom to implement legislation at the national level in the ways that they see fit. Anti-discrimination employment laws appear to be exactly the type of legislation which should be left to the individual member states.

In Appendix 4, Professor Paul Beaumont, co-author of *EU Law* (one of the standard textbooks) argues the case that the directive breaches the law on subsidiarity.

Vexatious litigants

The directive recognises that there will be a cost involved in firms having to defend legal actions under the new law.¹⁴ Yet it makes this prospect even worse by requiring that campaign groups and other bodies must be able to sue on behalf of someone who is a 'victim' under the terms of the directive.¹⁵ Gay rights groups, for example, can be litigious and could sue employers who refuse to endorse the validity of a homosexual lifestyle.

Indirect Discrimination

Article 2 of the directive extends the concept of discrimination to anything which "has the purpose or effect of creating an intimidating, hostile, offensive or disturbing environment". No doubt a person who did not like criticism of his religious beliefs or sexual morality would feel uncomfortable working in an organisation with a religious ethos. Not only would the directive force the organisation to employ such a person regardless of his beliefs or sexual orientation; it would also require the organisation to avoid any speech or conduct which might create a "disturbing" environment for that person.

"Positive discrimination"

The directive allows Governments to make provision for positive discrimination *in favour* of groups that are perceived to be disadvantaged.¹⁶ Will this mean companies being required to meet gay quotas? Gay rights groups routinely claim that 10% of the population are homosexual, but the largest academic study of its kind ever carried out in the UK has found that only 0.3% of British men and 0.1% of women are exclusively homosexual.¹⁷ Employment policies under this proposal will become bogged down in statistics and gay rights propaganda.

Conclusion

It is clear that this directive is a serious attack on the rights of religious organisations to have the freedom to employ those people who share their religious and moral convictions. This can only serve to undermine the religious foundations of many organisations.

In our view the safest course for religious bodies is for the Government to veto the directive until it is amended.

The directive should be amended so that 'religion', 'belief' and 'sexual orientation' are removed. It is true that to take this step will result in some cases of genuine religious discrimination not being covered, but The Christian Institute takes the view that the harm caused by this directive far outweighs any benefit that may accrue for religious people.

Merely exempting religious groups from the scope of the directive would not protect organisations which, although not constituted as religious, have a clear religious ethos such as a hospice or a Christian medical practice.

This area is far too sensitive for interference from the EU or from national governments. Religious people should continue to be able to exercise their freedom to establish and run organisations in ways which are consistent with their beliefs.

The Government has promised to use its 'full voice' to protect religious liberties. It is about time that the Government started speaking up.

Appendix 1

ADVICE IN THE MATTER OF THE PROPOSED COUNCIL DIRECTIVE ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

1. We are asked to advise upon the impact of the Proposed Council Directive establishing a General Framework for Equal Treatment in Employment and Occupation which was issued by the European Commission on 25th November 1999 for adoption during the year 2000. If the Directive is adopted then Member States will have to implement it by 31st December 2002¹.
2. Specifically the issues for us to address are these:
 - a. The impact of the Directive on religious organisations operating in the UK;
 - b. The effect of Article 4 of the proposed Directive;
 - c. The requirement to implement Article 4(2) of the Directive in the light of Article 4(1);
 - d. Examples of activities which are likely to be affected by this Directive.

Background to the Directive

3. This Directive has been proposed under Article 13 of the Treaty of Amsterdam 1997 (Cmd 3780). This Article states:

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.
4. The effect of Article 13 is to allow the Commission to propose legislation to combat discrimination based, *inter alia*, on religion and sexual orientation. This represents a

¹ Article 15 of the Draft Directive.

new and significant enlargement of the powers of the Commission which has hitherto been concerned only with discrimination based on nationality² and gender³.

Articles 1 and 2

5. Articles 1 and 2 of the Proposed Directive *require* member states to implement equal treatment in employment irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation to prevent either direct or indirect discrimination against individuals or groups.

Indirect Discrimination

6. The Directive covers both direct and indirect discrimination and this significantly broadens the potential areas of challenge. The definition of indirect discrimination in Article 2(2)(b) of the proposed Directive states as follows:

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to adversely affect a person or persons to whom any of the grounds referred to in Article 1 applies, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary.

7. This definition is substantially different from the definition of indirect discrimination found either in current EU legislation or in our own. The Burden of Proof Directive (97/80) states that indirect discrimination occurs:

Where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the member of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

8. It is, in our view, significant that the directive introduces the concept of a measure being *liable* to adversely affect a person. This would enable someone to make a claim against their employer before proving that they had actually suffered prejudice from any particular measure.

²Article 12 of the Treaty of Amsterdam.

³ Council Directive 76/207/EEC of 9th February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions; and Council Directive 86/613/EEC of 11th December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood.

9. Secondly there is no sense of comparison between groups in the proposed definition so that a person could make out a case that they were the victim of indirect discrimination even if the measure complained about also affected other people, who do not share that characteristic upon which discrimination was being alleged. In our view such a definition is very broad.
10. The Commission states that it derived its proposed definition of indirect discrimination from the *O'Flynn* case⁴ but the contents of the judgment when carefully examined are narrower in scope than the proposed Directive. In that case a migrant worker was refused a funeral grant because grants were only available for those having funerals in the United Kingdom. Even though only one person was affected by this policy it was obvious that this condition was indirectly discriminatory because it was “*intrinsically* liable” to affect “migrant workers as a class”. In Article 2(2)(b), however, “*intrinsically*”, which is a limiting word, is not mentioned. The case of *O'Flynn* is thus saying that in and of itself the measure must be liable affect the group whereas the definition in Article 2(2)(b), without “*intrinsically*” lends itself to a much wider interpretation.

Harassment

11. Article 2(3) states that harassment “which has the purpose or effect of creating an intimidating, hostile, offensive or disturbing environment” shall be deemed to be direct discrimination. We consider that this provision (which is very broad and not included in existing legislation) could very well be used against religious bodies which employ people who do not share their beliefs. A homosexual secretary in a church could very well claim that the environment is hostile to his sexuality which could then lead to a compensation claim (without any limit on the award).

Definition of Religion or Belief

12. There is no definition of “religion or belief” in Article 1. This could mean that somebody’s political belief could be covered by the directive. Political parties would therefore in our view be in danger of facing charges that they have discriminated

⁴ *O'Flynn v United Kingdom*, Case 237/94 [1996] ECR I-2617

against somebody belonging to another party who seeks employment with them (subject only to a genuine occupational qualification defence).

13. Additionally we are concerned that there is no definition of religion. It leaves the position completely open as to whether protection would be offered to groups such as Moonies, Jehovah's witnesses and satanists. On the other hand it may be suggested that there should be some kind of regulating register either at a European or National level but there would then be concern whether it would include respectable non-denominational Christian groups such as Baptists, Plymouth Brethren, Pentecostals and the House Church Movement⁵. The scope would inevitably be highly controversial.

Exemptions under Article 4

14. Article 4(1) *permits* member states to allow discrimination on these grounds where such a characteristic constitutes a genuine occupational qualification.
15. Article 4(2) specifically provides for genuine occupational qualification as a defence to a claim for discrimination to apply to any public or private organisations which aim to directly pursue ideological guidance in the field of religion or belief. This is, however, restricted to those organisations operating in education, information and the expression of opinions and to occupational activities within those organisations directly related to that aim. The characteristic relied upon must also constitute a genuine occupational qualification on account of those activities. The narrowness of this exception is emphasised by the requirement that the "particular occupational activity" within the religious organisation be not only "directly" related to "ideological guidance" but also be "essentially" related to it. This will be a very difficult test to satisfy.
16. There is nothing in Article 4(2) similar to Section 13 of the Human Rights Act 1998 requiring that particular regard be given to the importance of the right to freedom of thought, conscience and religion to a religious organisation.

⁵ Such examples would be New Frontiers International, the Ichthus Fellowship and the Vineyard movement.

17. We should also point out that, whereas the Directive *requires* member states to prevent discrimination on these grounds it is not mandatory for member states to provide the exemptions set out in Article 4.
18. When this matter was debated by the European Parliament⁶ Commissioner Diamantopoulou made it clear that Article 4 referred only to positive discrimination so that it would be permissible for a religious body to discriminate in favour of those who held the same religious views but not against someone who held those views but was also, for example, a homosexual.
19. Article 4 only exempts from discrimination those posts for which such discrimination provides a genuine occupational qualification. It will, we think, be difficult for relevant organisations to demonstrate that support staff are within the terms of Article 4. Some organisations would find this difficult to accept.

Possible Consequences of the Directive in the light of Article 4

20. The exceptions in Article 4 could be interpreted very narrowly leading to the following consequences:
 - a. A Roman Catholic school would probably be allowed to stipulate that a teacher of Religious Education be a practising Roman Catholic, but for all other subjects the school would be acting unlawfully if it refused to employ non Roman Catholics, neo Nazis, atheists, communists, Seventh Day Adventists or practising homosexuals;
 - b. Religious based charities who, for example, work with homeless people are likely to have to employ workers who do not ascribe to their creed on the basis that looking after the homeless only requires compassion, a quality shared by a much wider spectrum of people than envisaged by that charity's statement of belief. Such ventures will also face a similar erosion of their religious character through forced open-employment policies;
 - c. A hospice may, under the draft Directive, act unlawfully if it refused to employ a doctor who believes in euthanasia on the basis that this was not a genuine occupational qualification for the post;

- d. This Directive is similarly likely to rule out businesses with a religious foundation being able to exclusively hire employees who share their religious or moral convictions. Therefore a Roman Catholic GP's practice may be forced to engage an atheist. An evangelical Christian law firm would face the same prospect;
- e. All denominational social work ventures will also face a similar erosion of their religious character through forced open-employment policies.

Effect on Schools

- 21. Organisations with a Christian focus, entitled to employ Christians in certain key positions under Article 4, may be open to claims that it is legitimate to be, for example, a gay Christian, so that a requirement for an employee to be heterosexual (or a preference for heterosexuals) would be discriminatory. This point has been made by the Commissioner for Employment and Social Affairs, Anna Diamantopoulou, speaking on behalf of the Commission, when this matter was debated in the European Parliament.
- 22. Section 60 of the School Standards and Framework Act 1998 currently allows a foundation or voluntary school with a religious character to give preference to teachers whose religious view concur with its own. This new directive will require this Section to be redrafted in the much more limited form set out above.
- 23. In our view the significance of Article 4(2) is that the protection in Article 4(1) is very narrow and does not specifically recognise that a religious body might consider religious views to be important since almost all other organisations consider religious views to be irrelevant in the workplace.
- 24. Please do not hesitate to contact us if we can assist any further.

⁶ Verbatim Report of Proceedings, 18 January 2000

17th May 2000



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Appendix 2

Article 13 of the Amsterdam Treaty & other parts of the directive

Article 13 of the Treaty of Amsterdam

Article 13 of the Treaty of Amsterdam expanded the EU's anti-discrimination powers to cover more than just nationality or gender. The previous UK Government had vetoed the measure but the current Government accepted it.

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹⁸

Article 13 gives the European Commission the power to introduce anti-discrimination directives. The Council, which is made up of ministers from all the member states of the EU, must unanimously agree to any directive before it can become law.

Even before this power was used, the European Court of Justice (the EU Court) had demonstrated the EU's willingness to move beyond traditional categories of 'discrimination'. The ECJ ruled that transsexuals – people who have had sex change operations – should have protected employment status on the basis of their transsexualism. The particular case before the court involved the sacking of a teacher in Cornwall who underwent a sex change operation.¹⁹ As a result of the judgment, all EU countries must afford transsexuals special employment protections in all areas of the public sector.

In another ECJ case involving a woman seeking employment perks for her lesbian partner,²⁰ the court indicated its frustration that it did not have power to give the woman what she wanted until the EU had legislated under Article 13.

Other parts of the employment directive

Article 3 of the Employment Directive

Material scope

This directive shall apply to:

- (a) conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, whatever the sector or branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any other organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Article 13 of the Employment Directive

Compliance

Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations, are declared null and void or are amended.

Appendix three: **The two separate European Courts and the European Charter of Human Rights**

To understand why an EU directive is so powerful it is first necessary to consider the legal position of the UK with respect to 'European' law. In fact there are two entirely separate European Courts established by separate treaties which the UK has signed. Judges from both Courts have developed the law well beyond the courts' original terms of reference.

The European Court of Human Rights

The European Convention on Human Rights was adopted in 1952. The European Court of Human Rights (ECHR) based in Strasbourg upholds the Convention. There are currently 41 states which have ratified the Convention.

Many of these nations have also adopted the Convention directly into their national law. Citizens in these Countries can seek to get the Convention applied directly in their own national Courts without going to the Strasbourg Court. The UK has now incorporated the Convention under the 1998 Human Rights Act. This comes into effect in October 2000.

Under the Act, Parliament is still supreme over the Convention. UK judges have to 'take account' of judgments from the ECHR, but they must interpret the law in line with the Convention. In the event of a conflict between the Convention and existing law, Judges may make a 'declaration of incompatibility' but it is for Parliament to decide what to do, if anything, about that incompatibility.

Only Governments can be taken to The European Court of Human Rights in Strasbourg, but this Court cannot strike down UK laws. If a particular judgment goes against the UK then the Government is expected to bring UK law into line with the Convention. This has happened on a number of occasions. The Government often has room to manoeuvre since the Court

recognises 'a margin of appreciation' where precise legal arrangements are determined at the level of the nation state.

Many legal actions brought before the ECHR have failed because the Court has ruled that a particular national law is outside its remit because it is within the margin of appreciation.

ECHR Judges have declared that the Convention is 'a living instrument' to be interpreted in line with 'present-day conditions'.²¹ This doctrine has led to the expansion of Convention law into areas unforeseen by its founders.

The European Court of Justice (ECJ)

This court is based in Luxembourg and is primarily an economic Court which adjudicates on the various treaties signed by the 15 member states comprising the European Union.

Under the terms of Community law, in particular Article 234 of the EC Treaty, the UK has agreed that it will abide by decisions of the European Court of Justice. What the ECJ rules is therefore law in the UK.

Decisions of the European Court of Justice 'trump' the UK Courts and also the European Court of Human Rights.

The Council of Ministers may adopt directives. This is EU wide legislation made under the terms of the various European Treaties. The Commission proposes the directive which is then considered by the European Parliament before being signed into law by the Council of Ministers. The ECJ then ensures that the directive is enforced.

Directives have direct effect in the *public* sector (e.g. state schools) without the need for implementing legislation.²² Beyond this, the ECJ has developed the concept of 'indirect effect' where law affecting the *private* sector has to be reinterpreted, as far as possible, to give effect to directives.²³

European Treaties have given the Court a role in combating discrimination on the grounds of gender and nationality. Until recently the UK Government had vetoed any wider human rights role for the European Union. In 1997 the new Labour Government of Tony Blair reversed the policy of John Major and agreed to Article 13 of the Amsterdam Treaty, widening considerably the EU's powers in this area.

European Charter of Human Rights

A new 'European Charter of Human Rights' is currently being discussed. The Charter would incorporate EU anti-discrimination principles and large sections of the Convention on Human Rights.

It is the employment directive and *not* the Charter which will *first* change EU law. The Charter will be adopted *after* the employment directive has been agreed by the Council of Ministers. It may be that the Charter will only bind the institutions of the EU. This would mean that only the actions of the EU (not national Governments) would be subject to the Charter.

Up to now the UK Government has indicated that it wants this to be non binding. Countries such as Germany want the Charter to be legally enforceable. They want it to become a constitutional 'Bill of rights' for EU citizens. The Charter draws heavily on the European Convention of Human Rights which the 15 members of the EU are all signatories to.

The Times has reported the desire of the German government that under the Charter an individual will be able to sue the UK Government in the European Court of Justice (ECJ) to force changes in the UK law.²⁴ If this is so then the ECJ will in effect adjudicate on the European Convention of Human Rights.

The ECJ is already a much more powerful Court than the ECHR. Its judgments are automatically binding on EU members and on individual citizens, businesses and organisations within the EU. The ECJ can fine member states and its rulings must be followed by the national courts.

One effect of a Charter legally enforceable *against Governments* would be to side-line the European Court of Human Rights. The main substance of the Convention (contained within the Charter) would be enforced in a much more powerful way by the European Court of Justice.

The Government argues that it only wants the Charter to be a 'showcase' of existing rights rather than granting any new rights. It remains to be seen what will emerge.

One thing is clear. It is the employment directive which will dramatically change employment law in Europe.

Appendix four: **Breaking its own rules: Why the employment directive breaks the law of subsidiarity**

By Professor Paul Beaumont of the University of Aberdeen, co-author of *EU Law* (Penguin Books, 1999).

“There is a strong case for saying that this directive intrudes into the normal matters of internal life in Member States and, in so doing, breaches the principle of subsidiarity enshrined in Article 5 of the EC Treaty and the Protocol on Subsidiarity and Proportionality. Most cases caught by this directive will be purely domestic or internal to the country concerned. In such circumstances there is a very strong case for saying that these decisions should be taken as ‘closely as possible to the citizen’ (Article 1 of the Treaty on European Union). Decisions about the balance between the rights of particular groups in society to preserve their rights to group identity (Christians, Jews, Muslims, political parties) and thereby to discriminate against people who want to work for the group but will not accept some or all of the group’s core values (e.g. a male only leadership or a rejection of the validity of homosexual practice) should be taken much closer to the citizen than in Brussels. This is a matter to be decided in Edinburgh or London where the decision makers can take account of the delicate balancing needed between conflicting rights such as the rights in the European Convention to freedom of religion and belief, freedom of association and the right to non-discrimination (which does not include sexual orientation discrimination).


It would seem that the draft directive does not leave enough scope for the balancing of conflicting rights and elevates non-discrimination to the highest right of all. This is a kind of liberal fundamentalism which makes it difficult or impossible for a Christian medical practice to only hire Christian doctors, for a Jewish hospice to only hire Jews, for a Muslim society to only appoint male heterosexuals to office, etc. Such fundamental value judgments should

not be made for the whole of the European Union in Brussels given its remoteness from the full democratic processes and the capacity of citizens to effectively influence the outcomes or allow for national and regional variations.

In order to make the rights to freedom of religion, association and expression meaningful it should be possible for groups of people in society to explicitly set themselves up as offering a service based on a particular set of beliefs and to ensure that the people who work for those groups adhere to the common values which are at the heart of the group. Therefore a Christian medical practice should be able to employ only people that adhere to Christian teachings - including the teaching that homosexual practice is sinful and should be able to exclude non-Christian doctors or Christian doctors that are practising homosexuals. Yet such a Christian medical practice would not, it seems, be protected by either of the possible exceptions in Article 4 of the directive. The rights of these Christians to associate as Christians and provide a specialist medical service based on a clear Christian ethos is being removed in Brussels.”

References

- ¹ Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation
- ² *EU Proposals to Combat Discrimination*, Ninth Report of the House of Lords Select Committee on the European Union, 16 May 2000, para.2
- ³ *Blunkett Backs EC Plans To Combat Discrimination At Work*, Press release 532/99 from the Department for Education and Employment, 25 November 1999. Can be viewed at <http://www.dfee.gov.uk/news/99/532.htm>
- ⁴ This was decided by the European Court of Justice in the English case of Marshall v Southampton Area Health Authority, Case 152/84. See discussion in EU Law, Weatherill S & Beaumont P, Penguin, 1999, page 740
- ⁵ See Appendix 2 for the directive's text governing the scope of the directive
- ⁶ Case C 249/96, *Grant v Southwest Trains* [1998] ECR I-0621. Referred to on page 4 of the Directive, *Op. Cit.*
- ⁷ The four measures are: a Communication from the Commission on Certain Community Measures to Combat Discrimination [13536/99]; Proposal for a Council Decision Establishing a Community Action Programme to Combat Discrimination (2001-2006) [13537/99]; Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation [13540/99]; Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [COM(99) 566 final].
- ⁸ Commission press release, 25 November 1999, IP/99/895
- ⁹ See for example *Board of Governors of St Matthias Church of England School v Crizzle (1993)*
- ¹⁰ See paragraph 15 of the opinion in Appendix One.
- ¹¹ Save for medical treatment which in some cases may be available to remedy disability.
- ¹² Ministry of Defence *Report of the Homosexuality Policy Assessment Team* February 1996, Appendix 6 to Annex H
- ¹³ Johnson A M, Wellings K, et al *Sexual Attitudes and Lifestyles*, Blackwell, 1994, page 475
- ¹⁴ Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation, page 28
- ¹⁵ Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation, Article 8
- ¹⁶ Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation, page 11
- ¹⁷ Wellings K, et al *Sexual Behaviour in Britain*, Penguin, 1994, page 209
- ¹⁸ *The Treaty of Amsterdam*, 1997, Cmnd 3780, page 138
- ¹⁹ *P v S* [1996] IRLR 347
- ²⁰ Case C 249/96, *Grant v Southwest Trains* [1998] ECR I-0621. Referred to on page 4 of the Directive, *Op. Cit.*
- ²¹ *Tyrer v UK (1981) 2 EHRR 1*
- ²² Marshall v Southampton Area Health Authority, Case 152/84 [1986] ECR 723, [1986] I CMLR 688
- ²³ Marleasing v La Comercial Internacional, Case C-106-89 [1990] ECR I-4135, [1992] I CMLR 305
- ²⁴ *The Times* 1 June 2000, 5 June 2000

The background of the entire page is a close-up, slightly blurred image of the European Union flag, showing the blue field with the twelve gold stars arranged in a circle.

“This directive has all the potential to seriously undermine freedom of association for religious people. It places the modern concept of ‘equality’ over and above religious liberty. By requiring religious organisations to radically alter their recruitment practices, it will make it difficult, or impossible, for them to maintain a distinctive religious ethos.”

Professor Ian Leigh, University of Durham

“This is a kind of liberal fundamentalism which makes it difficult or impossible for a Christian medical practice to only hire Christian doctors, for a Jewish hospice to only hire Jews, for a Muslim society to only appoint male heterosexuals to office”

Professor Paul Beaumont, co-author of *‘EU Law’*



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ISBN 1 901086 12 7