



COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT-GENERAL

Brussels,

SG-Greffe(2009)D/

UNITED KINGDOM  
PERMANENT  
REPRESENTATION TO THE  
EUROPEAN UNION  
Rue d'Arlon 85  
1040 Brussels

**RO 226 EC/cases other than failure to notify measures**

**05**

**Subject:** Reasoned Opinion  
Infringement No 2006/2450

Please find enclosed the text of the Reasoned Opinion addressed by the Commission of the European Communities to the United Kingdom of Great Britain and Northern Ireland under Article 226 of the Treaty establishing the European Community, on account of failure to transpose correctly Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

For the Secretary-General,

Karl VON KEMPIS

Encl. C(2009)

### **REASONED OPINION**

addressed to the United Kingdom under Article 226 of the Treaty establishing the European Community, on account of failure to transpose correctly Articles 2(4), 4 and 9 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation .

## REASONED OPINION

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### **Introduction**

1. Council Directive 2000/78/EC of 27 November 2000 establishing a general principle for equal treatment in employment and occupation ("the Directive") was transposed in the United Kingdom (UK) by the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003, the Disability Discrimination Act 1995 (Amendment) Regulations 2003, the Employment Equality (Age) Regulations 2006, the Independent Schools (Employment of Teachers in Schools with Religious Character) Regulations 2003, the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006, the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) Order 2003, Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, the Industrial Tribunals (Interest on Awards in Sexual Orientation Discrimination Cases) Regulations (Northern Ireland) 2003, the Employment Equality (Age) Regulations (Northern Ireland) 2006 Regulations.
2. A "pre-226 letter" was sent to the UK on 1 August 2006 and a reply was received on 25 October 2006 (EMPL-CAD A/23729) from the UK Permanent Representation. The letter of formal notice in Case 2006/2450 was sent to the UK on 23 March 2007 (SG(2007)D/201410). The reply was received on 3 July 2007 (SG(2007)A/5145).
3. The letter of formal notice raised a number of issues, of which the following remain problematic:

#### **1. Instruction to Discriminate:**

4. Article 2(4) of the Directive provides that an instruction to discriminate shall be deemed to be discrimination based on the grounds of discrimination prohibited by the Directive. Under article 9 of the Directive, Member States must ensure that judicial and/or administrative procedures are available to persons who consider that their right to equal treatment has been infringed.
5. As the Commission pointed out in the letter of formal notice, there is no specific prohibition of instructions to discriminate in the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003 or the Employment Equality (Age) Regulations

2006, nor are instructions to discriminate an explicit part of the general definition of discrimination in those Regulations. Under the Disability Discrimination Act 1995, the new section 16C (as added by the Disability Discrimination Act 1995 (Amendment) Regulations 2003) makes it unlawful to instruct someone to discriminate. Under section 17B of the Act, only the Disability Rights Commission may bring proceedings in respect of a breach of section 16C. It does not appear that the Disability Rights Commission is under an obligation to bring such proceedings and this potentially leaves the individual victim of an instruction to discriminate without effective legal redress.

6. In their reply to the letter of formal notice, the British authorities explain that a provision exists in Age Regulations (regulation 5) which prohibits less favourable treatment by reason of not carrying out an instruction to discriminate. The UK recognises that no such provisions exist in the Sexual Orientation and Religion or Belief Regulations, but point to *Weathersfield v Sargent* as a valid precedent, even if it is limited to the Race Discrimination Act, since provisions on discrimination in this Act are similar to the provisions in the above Regulations.
7. As regards the Disability Discrimination Act 1995, the UK points out that under section 3A and 3B a disabled person can make a claim for discrimination where the instruction results in less favourable treatment or harassment. A personal right to take enforcement action is guaranteed under section 17A. The UK also considers that the power of the Disability Rights Commission to bring proceedings in respect of a breach of section 16C (instruction to discriminate) is an "additional means" of enforcement which does not replace the individual right to take action.
8. As the Commission pointed out in the letter of formal notice, the European Court of Justice has consistently held that the provisions of Directives must be implemented with sufficient clarity and precision to satisfy the requirements of legal certainty (see in particular cases 29/84 *Commission v Germany* [1985] ECR 1661 paragraph 23, C-159/99 *Commission v Italy* [2001] ECR I-3541 paragraph 24, case C-365/93 *Commission v Greece* [1995] ECR I-499, paragraph 9; and C-144/99 and case *Commission v The Netherlands*, [2001] ECR I-3541, paragraphs 17 and 21).
9. The Commission accepts that in relation to a common law legal system a Court of Appeal judgment with precedent value may constitute an adequate transposition of a provision of a Directive. As the Commission understands the judgment quoted by the British authorities, the term "on racial grounds" was given a wide meaning and held to apply not only to the race of the alleged victim of discrimination but also to a third party, thus covering a person asked to discriminate against others.
10. However, the judgment is concerned with race discrimination and is based on the Race Relations Act. In the Commission's view it would be extremely difficult, if not impossible, for an individual who had been the victim of an instruction to discriminate on grounds of religion, sexual orientation or age to

know that he or she was in fact protected from this form of discrimination. Consequently, the Commission is of the view that the transposition of the Directive in this regard lacks the requisite clarity and precision.

11. As regards the Disability Discrimination Act, this Act, in its section 17B(1), states that "only the Disability Rights Commission may bring proceedings in respect of a contravention of (...) section 16C (instruction and pressure to discriminate)". The individual right to take action under section 3A and 3B pointed out by the UK thus only covers the consequences of the instruction to discriminate, but not the instruction to discriminate *per se*. The Commission therefore maintains its position that the above provision constitutes an incomplete transposition of the Directive.
12. The UK Government has informed the Commission that the new Equality Bill currently under discussion before the UK Parliament will amend these aspects of the law and bring UK law into line with the Directive.
13. However, in the absence of adoption and a formal date of entry into force of the new law, the Commission maintains its position that the UK has failed to correctly transpose articles 2(4) and 9 of the Directive.

## **2. Genuine and Determining Occupational Requirements:**

14. Article 4 (Occupational requirement) of the Directive provides that:

"1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground."

15. Under Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003, the Commission noted that an employer can apply a requirement related to sexual orientation in respect of employment for an

organised religion in order to comply with the doctrines of the religion or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

16. As the Commission noted in the letter of formal notice, these provisions are based on Article 4(1) of the Directive, the general provision allowing differences of treatment where a particular characteristic is a genuine and determining occupational requirement of the job in question. The provision contains a strict test which must be satisfied if a difference of treatment is to be considered non-discriminatory: there must be a genuine and determining occupational requirement, the objective must be legitimate and the requirement proportionate. No elements of this test appear in Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003.
17. The Commission has read carefully the arguments of the British authorities, in particular the reference to the judgment of the High Court in the case *R(Amicus) & Others v. The Secretary of State for Trade and Industry*.<sup>1</sup> As regards regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003, the UK points out that the exception as regards religious organisations is limited to "organised religions" and cases of incompatibility with "doctrines of the religion" or in order to avoid conflict with strongly held beliefs of a significant number of religion's followers.
18. The Commission maintains that the wording used in regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 is too broad, going beyond the definition of a genuine occupational requirement allowed under Article 4(1) of the Directive. The Commission reiterates its view, expressed in the letter of formal notice, that the rationale behind Article 4(1) is not the exclusion of "negative" characteristics. Furthermore, the wording of the national legislation contradicts the provision under Article 4(2) of the Directive which provides that permitted differences of treatment based on religion "should not justify discrimination on another ground".
19. The UK Government has informed the Commission that the new Equality Bill currently under discussion before the UK Parliament will amend this aspect of the law and bring UK law into line with the Directive.
20. However, in the absence of adoption and a formal date of entry into force of the new law, the Commission maintains that the UK has incorrectly transposed Article 4(1) and 4(2) of the Directive.

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<sup>1</sup> 2004 EWHC 860 (Admin) IRLR 430

**FOR THESE REASONS**

**THE COMMISSION OF THE EUROPEAN COMMUNITIES**

after giving the United Kingdom the opportunity to submit its observations by letter dated 23 March 2007 (SG(2007)D/201410), and in view of the reply was received on 3 July 2007 (SG(2007)A/5145),.

**HEREBY DELIVERS THE FOLLOWING REASONED OPINION**

under the first paragraph of Article 226 of the Treaty establishing the European Community that

- 1) by not providing that an instruction to discriminate shall be deemed to be discrimination based on the grounds of disability, religion or belief, age or sexual orientation prohibited by the Directive,
- 2) by allowing requirements related to sexual orientation in respect of employment for an organised religion,

The United Kingdom has failed to fulfil its obligation to transpose correctly Articles 2(4), 4 and 9 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Pursuant to the first paragraph of Article 226 of the Treaty establishing the European Community, the Commission invites the United Kingdom to take the necessary measures to comply with this Reasoned Opinion within two months of receipt of this Opinion.

Done at Brussels,

For the Commission

Vladimir SPIDLA  
Member of the Commission

