'Words have wings': Advocate General Sharpston considers that homophobic comments made in a radio interview can contravene the Equal Treatment Framework Directive

NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford, Case C 507/18 EU:C:2019:922; October 31, 2019

Implications

Advocate General (AG) Sharpston's opinion is not binding and the judgment of the Court of Justice of the European Union (CJEU) is awaited. However, such opinions are commonly followed by the CJEU, and if this one is, there could be implications for UK law, in particular in relation to the enforcement powers of the Equality and Human Rights Commission.

Facts

A senior Italian lawyer (NH) was interviewed on an Italian radio programme. In the course of the interview he said that he would never hire a homosexual person to work at his law firm, nor would he engage their services. At the time of the interview recruitment was not on going.

The Associazione Avvocatura per i diritti LGBTI (AA) – an Italian association of LGBTI lawyers – brought a discrimination claim against NH seeking remedies including a press retraction, a statement in a national newspaper with an action plan to eliminate discrimination, and damages of €10,000.

The case progressed to the Supreme Court of Italy which made a referral on the following points:

- Does the scope of Article 3(1)(a) of the Equal Treatment Framework Directive 2000/78 (the Directive) which prohibits discrimination in access to employment, extend to generic comments in a radio interview about hypothetically not hiring homosexual applicants?
- Can an association seek enforcement of the prohibition of discrimination in employment where there is no identifiable victim?

Previous decisions

On August 6, 2014 the Tribunale di Bergamo found that NH had acted illegally and his comments constituted discrimination.

NH appealed the decision, and the appeal was dismissed by the Corte d'Apello di Brescia on January 23, 2015.

NH appealed to the Corte Supreme di Cassazione The Corte Supreme made a referral to the CJEU on the question of whether AA had standing to bring proceedings against NH under Article 9(2) of the Directive; and whether NH's comments were within the scope of the Directive as expressions of employment, or if they were excluded as individual expressions of opinion.

Advocate General Sharpston's opinion

Scope of the Equal Treatment Framework Directive:

The referring court raised doubts as to whether there was a sufficient link between NH's comments and access to employment. NH submitted that his remarks were his personal opinions with no professional context.

AG Sharpston returned to the objective of the Directive, and the nature of the rights it seeks to safeguard. Following the broad interpretation of **access to employment** as applied in sex discrimination cases, the comments were judged to be capable of falling within the scope of the Directive.

AG Sharpston confirmed that it is for national courts to establish and assess the relevant categories for determining whether there is a sufficient link between statements and employment opportunities.

Relevant categories can include the:

- status and capacity of the person making the statement
- nature and content of the statements made
- context in which the statements were made
- extent to which these factors may discourage persons belonging to the protected group from applying for employment with that employer.

Standing of the AA to bring proceedings:

AG Sharpston identified three questions:

1. Does the association have standing to bring proceedings in the absence of a direct victim?
2. Are there specific criteria which an association has to fulfil in order to have standing; if so, what are they?

3. Does the possibility of an association bringing proceedings to enforce obligations under the Directive in the absence of an identifiable victim also include bringing claims for damages?

The AG concluded that Articles 8(1) and 9(2) allow national legislation to permit associations with a **legitimate interest** to bring proceedings to enforce the Directive where there is no identifiable victim. The decision as to which associations fit these criteria is for the member state to make, taking into consideration the principles of equivalence and effectiveness.

Comment

AG Sharpston's opinion makes clear that the decision as to whether a link between discriminatory comments and discrimination under the Directive is more than hypothetical, should not be made at face value.

It is crucial to consider the meaning behind the words, and to put the potential victim at the heart of the decision. The fact that recruitment was not on going at NH's firm at the time of the interview did not negate the fact that LGBTI candidates would be discouraged from applying if/when a vacancy did arise. Also, considering the status of the individual making the comments, and the list of (non-exhaustive) criteria AG Sharpston proposes, if NH were a junior member of staff (rather than a senior lawyer), with no hiring power, the link would have been harder to establish.

This is a strong statement on the overriding importance of equality of opportunity and fair treatment, above and beyond the right to freedom of expression. The final, crucial, criterion under 'Scope of the Directive' directs focus back to the protected group, as well as to the individual making the comment.

AG Sharpston's comments are particularly powerful in respect of the need to consider the context of the statements. Are the statements in question private remarks, shared between partners or friends? Or are they comments made in public, to an audience, which could be reproduced online? She dismisses the proposition that offhand remarks, particularly those which claim to be purely opinions, or humorous, cannot constitute discrimination:

> *…I reject emphatically the proposition that a 'humorous' discriminatory statement somehow 'does not count' or is acceptable. Humour is a powerful instrument and can all too easily be abused.* [para 56]

Claire Powell
Trainee solicitor, Leigh Day
cpowell@leighday.co.uk

Briefing 926

Equal pay and pensions

Safeway Ltd v Newton Case C 171/18; [2019] IRLR 1090; October 7, 2019

This case essentially concerns whether an amendment by Safeway (S) to its occupational pension scheme (the scheme), to equalise pension benefits (by way of levelling down) between men and women, could be lawfully backdated from May 1996, when the amendment was eventually validly made to the scheme, to December 1991, when S had first purported to make the same amendment.

Facts

In May 1990, the Court of Justice of the EU (CJEU) gave its decision in *Barber v Guardian Royal Exchange* (Case C-262/88). It was held in *Barber* that having different occupational pension ages for men and women ran contrary to Article 119 of the EC Treaty (now Article 157 Treaty on the Functioning of the EU (TFEU) and referred to as such below), which enshrines the principle that men and women should receive equal pay for equal work.

At that time, the scheme had a normal pension age (NPA) of 65 years for men and a more favourable 60 years for women. In 1991, S sought, by way of two written announcements, to change the NPA in the scheme to 65 for both men and women with effect from December 1, 1991, so levelling down the rights of female scheme members to those of the men. S also stated an intention to subsequently amend the trust deed governing the scheme to the same effect.

It was not, however, until May 2, 1996 that the trust deed and rules of the scheme were formally amended. The 1996 amendment purported to be retroactive as of December 1, 1991, and such a retroactive amendment was permitted under the scheme rules.