

EU law issues

Welfare law is governed by EU in terms of free movement of EU migrant workers, the scope of the Race Directive 2000 and Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

NICEM has made submissions on the first two provisions.

1 The 1979 Directive

There appears to have been less attention paid to the 1979 Directive. Article 3 of the Directive states:-

"Article 3

1. This Directive shall apply to: (a) statutory schemes which provide protection against the following risks:

- sickness,
- invalidity,
- old age,
- accidents at work and occupational diseases,
- unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).

2. This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1 (a)."

Article 4 states:-

"Article 4

1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: - the scope of the schemes and the conditions of access thereto,

- the obligation to contribute and the calculation of contributions,

- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity."

2 Developments in EU law since the 1979 Directive

I make reference below to case law from the early 1990s of the (then) European Court of Justice on 1979 Directive. However, it is important to appreciate developments in EU law since that time.

First the Lisbon Treaty¹ specifically identifies "equality between women and men" amongst the 'Common Provisions' in the opening Articles of the Treat. Article 2 states:-

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human

¹ Formally known as the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union (6655/2/08 REV 2, Brussels, 28 May 2010),

rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Secondly, the EU Charter of Fundamental Rights,² incorporated into the Lisbon Treaty, makes particular reference to "equality between women and men" in Article 23 ('Equality between women and men'), which states:-

"Equality between women and men must be ensured in all areas, including employment, work and pay." (emphasis added)

Thirdly, the Charter now includes a right to social security and assistance within the fundamental rights recognised by the EU. Article 34 ('Social security and social assistance') states:-

"1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices."

In these circumstances, I submit that provisions in the Welfare Reform Bill (and any subsequent Regulations) must be viewed from the perspective that those which may be indirectly discriminatory against women must be subject to rigorous standards of objective justification.

² The Court of Justice of the European Union (CJEU) recognises fundamental rights, in the Charter as equivalent to Treaty rights. For example, in Case C-229/11 Alexander Heimann ([2012] EUECJ (08 November 2012), the Court, in relation to the right to annual leave, states, "The right to paid annual leave is, as a principle of European Union social law, expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) TEU recognises as having the same legal value as the Treaties.

3 Case law on the 1979 Directive

The most significant case on the 1979 Directive is Commission of the European Communities v Kingdom of Belgium. (Social policy) [1991] EUECJ C-229/89 (7 May 1991).³ The Court applied a lower threshold of objective justification in welfare cases than it did, at that time, in employment cases. Nonetheless, justification must be established.

"19 On the other hand, if the Kingdom of Belgium can show that the means chosen meet a necessary aim of its social policy and that they are suitable and requisite for attaining that aim, the mere fact that the system of allowances favours a much greater number of male workers cannot be regarded as an infringement of the principle of equal treatment." (emphasis added)

On the facts of the case, "in the current state of Community law",⁴ the Court accepted that Member States could favour those with dependants in their welfare policy.

4 Case law on indirect discrimination

A recent case⁵ on the non-employment provisions of the Race Directive 2000, which include 'social security' and 'social protection', shows how the Court deals with indirect discrimination cases. The

³ According to the judgment, the case concerned the following. "The Belgian provisions on unemployment benefit, which have remained in force after that date, accorded, in so far as the calculation of such benefit is concerned, preferential treatment to unemployed persons who in their capacity as head of household had as a dependant a spouse, a person with whom they were cohabiting, a parent or a child without income. The Commission took the view that this category was predominantly made up of men."

⁴ Para 22 of the judgment.

⁵ C-394/11 Valeri Hariiev Belov [2012] EUECJ (20 September 2012)(Opinion of the Advocate General).

Advocate General states, at paragraph 100 of his Opinion, "Article 2(2)(b) of Directive 2000/43 provides in relation to indirect discrimination that the provision, criterion or practice in question is lawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, i.e. proportionate."

I submit that, in light of the Lisbon Treaty, including the Charter, a more rigorous approach to the test of objective justification must be taken, namely:-

- 1) Does the measure have a legitimate aim?
- 2) Is the measure appropriate, or suitable, to achieve that aim?
- 3) Is the measure necessary to achieve that aim? As the Advocate General states, at paragraph 109 of his Opinion, "[a] measure is necessary where the legitimate aim pursued could not have been achieved by an equally suitable but more lenient means."
- 4) In any event, is the measure proportionate? As the Advocate General states, at paragraph 117 of his Opinion, "[a]ccording to the principle of proportionality, measures which adversely affect a right guaranteed by EU law - here the prohibition of discrimination based on ethnic origin - must not cause disadvantages for the individual which are disproportionate to the aims pursued. In other words the legitimate aim pursued must be reconciled as far as possible with the requirements of the principle of equal treatment and the right balance must be found between the different interests involved."

5 The 1979 Directive - 'nominated person'

On this point, it can be mentioned that the original intention to pay UC to a 'nominated person' within a couple may be indirectly discriminatory under the 1979 Directive.

It is submitted that the nominated person will most likely be the male partner in an opposite-sex couple.

Applying the four tests of objective justification, we can say the following: _

1) Does the measure have a legitimate aim? Yes, it is legitimate to have a single payment for UC.

2) Is the measure appropriate, or suitable, to achieve that aim? Yes, if having a single payment is a legitimate aim, it is suitable to require a couple to nominate a recipient.

3) Is the measure necessary to achieve that aim? No, there has already been a 'concession' that it is not necessary and that the payment can be split between partners.

4) In any event, is the measure proportionate? No. If the concession had not been made, payment to a nominated person in a couple could not be judged as proportionate as the entire payment would have been made predominantly to male partners in couples and the female partner would not have received any payment.

Indeed, we also submit that this provision would have not satisfied the lower objective justification test from the early 90s case against Belgium.

5.2 The 1979 Directive - other gender issues

It is also necessary to consider the gender implications of other aspects of the Bill in order to establish whether an indirect discrimination challenge can be mounted.

For example, in Congress's submissions, it is stated, in relation to Lone Parent Conditionality,⁶ "The document states that **Lone Parents with children aged 5** and over will move either to Jobseekers Allowance or Employment and Support Allowance dependant on their circumstances. The movement of Lone Parents into the full conditionality group of Jobseekers Allowance will have an adverse effect on this group and this has a **direct impact on women** as more than 96% of Lone Parents are women. The document talks of an agreement under Jobseekers Allowance but this will be replaced by a commitment and the stringent conditionality requirements will apply to this group under Universal Credit.

The document refers to increased opportunity and equality of opportunity between men and women but as Northern Ireland has no childcare strategy and Lone Parents are already dealing with cuts applied to the help for childcare this mitigation has no tangible credibility."

Applying the four tests of objective justification, we can say the following:-

1) Does the measure have a legitimate aim? Arguably, yes; it is legitimate to encourage lone parents with a child of 5 or over into the labour market.

2) Is the measure appropriate, or suitable, to achieve that aim? Arguably, yes; if encouraging lone parents with a child of 5 or over into the labour market is a legitimate aim, it is suitable to apply conditions to them.

⁶ At para 7.7.

3) Is the measure necessary to achieve that aim? Arguably, no: there are other ways to encourage lone parents into the labour market without applying conditionality to them.

4) In any event, is the measure proportionate? No. In light of the particular circumstances of NI, where there is a significant lack of childcare facilities and no childcare strategy, there will be a significant disproportionate impact on female lone parents.

I therefore submit that this measure is not objectively justified in NI legislation.

I also submit that this measure is not objectively justified under the terms of the Commission v Belgium judgment.

6 Conclusion

All UK legislation, including devolved NI legislation, is subject to EU law, including provisions on free movement of EU workers, the Race Directive 2000 and the Equal Treatment in Social Security Directive 1979, and are subject to interpretation and application in accordance with EU Treaties, including the EU Charter of Fundamental Rights.

In this section, I have focused on the 1979 Directive and sought to show that the provisions of the Bill must be tested on the basis of 'particular disadvantages' suffered by women which cannot be objectively justified.

I have identified two issues of particular concern. First, I submit that the previous intention to provide a single UC payment to a nominated claimant in a couple is not objectively justifiable. Any attempt to renege on this concession would be subject to challenge as being indirect discrimination against women contrary to the 1979 Directive.

Secondly, I have picked up on Lone Parent Conditionality. In light of the particular circumstances of NI, in this context, the inadequacy of childcare facilities and the absence of a childcare strategy in NI, I submit that the imposition of conditionality on lone parents with children of 5 or over is also indirectly discriminatory against women and is also contrary to the 1979 Directive.