Chapter 10: Introduction to employment equality law

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1. Consider the arguments in favour of and against the introduction of anti-discrimination laws. In your opinion, which of these arguments is/are the most convincing?

Author's answer: A number of justifications have been presented for the subject of anti-discrimination law. The most obvious one is 'equality', i.e. that workers in the same position should be treated the same. Another ground for anti-discrimination law is 'dignity', i.e. that such laws are needed to protect an individual's dignity, which is closely tied up with his/her identity as a female, male, Christian, etc. A separate justification put forward by Khaitan is that anti-discrimination law is oriented towards the prevention of serious, persistent and pervasive forms of relative disadvantage. Others suggest that anti-discrimination laws are needed to respect and reflect people's fundamental choices, or to recognise the historic prevalence of stigmatization of certain characteristics. As for the arguments against such laws, they are mainly based on economics. For example, there is the claim that the free market is sufficiently robust to eradicate discrimination and that there is no need for such regulations or laws. Other economic reasons involve the proposition that such laws are anti-competitive, or that they backfire in the sense that they end up hurting the groups and constituencies that they are supposed to protect.

2. In what circumstances do you believe it is warranted to move beyond the formal equality model to introduce laws whose purpose is grounded in the pursuit of substantive equality? Give reasons for your answer.

Author's answer: Formal equality involves the consistent treatment of two or more disparate groups, in terms of which such like groups are treated alike. It is not overly concerned with equality of outcomes or results. In contrast, substantive equality is about uprooting and eradicating structural disadvantages or barriers experienced by particular groups in the workplace. It has been suggested that laws reflective of formal equality are impoverished insofar as they are insufficient to ensure radical reforms that enable under-represented groups to be lifted up and given full access to opportunities available in society and the workplace. However, the anxiety about policies and laws that implement substantive equality to benefit structurally prejudiced groups is that they often involve reverse discrimination against the 'mainstream' group, i.e direct discrimination.

3. Is it ever justifiable to statutorily intervene to enable employers to positively discriminate in favour of certain classes of employee, i.e. to treat them more favourably than the mainstream?

Author's answer: Positive discrimination is controversial for the reason that it enables employers to directly discriminate against mainstream groups and constituencies in employment, e.g. by treating the latter less favourably than the particular group of persons that the positive discrimination policy is designed to promote. This is often justified on the basis that it is necessary to do so in order to achieve 'substantive equality', i.e. to ensure that endemic systemic barriers impeding the full involvement of certain groups in the workplace are reduced

or eradicated. The point being made here is that reliance on the implementation of policies designed to achieve the formal model of equality which demands consistent and symmetrical treatment, i.e. treating like with like, are insufficient of themselves to uproot ingrained prejudices and disparities in wealth and opportunities. In such a context, the question is whether laws that enjoin the preferential treatment of the under-represented or disadvantaged group ought to be pursued in policy terms in order to swing the pendulum back in their favour, and at the expense of the mainstream or advantaged protected group if necessary.

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3. Consider the employer's proportionality defence in the context of the concept of indirect discrimination. Which of the approaches do you think is the most appropriate: (1) the 'least restrictive means' approach or (2) the 'balancing' approach whereby the harm suffered by the employee is weighed against the employer's need to apply the PCP to achieve the legitimate aim?

Author's answer: In the case of (1), the employer must convince a court or tribunal that the application of the offending provision, criterion or practice which puts the employee (and those with the same protected characteristic in the same group) at a particular disadvantage is appropriate and necessary to achieve an objective that the employer has identified and been accepted by the court as objectively legitimate. As part of that process, if the employee is able to point to a less discriminatory means of achieving the employer's legitimate aim, i.e. which does not involve the application of the offending provision, criterion or practice, then the employer will be held to have failed to meet the requisite standard of proportionality and the alleged indirect discrimination will have been established. This can be contrasted with (2), the 'balancing' approach, where the court or tribunal weighs the harm done to the employee (and the group of which he/she forms part, i.e. with the same protected characteristic) by the employer's application of the provision, criterion or practice, against the employer's need to apply the provision, criterion or practice to achieve the legitimate aim. The greater the degree of harm suffered by the employee and/or the group, the more pressing it must be for the employer to need to apply that provision, criterion or practice to achieve the legitimate aim. As demonstrated and explained in chapter 10 of the textbook, (1) involves the application of a much more intensive degree of scrutiny of managerial conduct and decision-making than (2). The version of the proportionality standard of review at (1) is applied by the Court of Justice of the European Union, whereas, the laxer balancing approach sanctioned by (2) is pursued at the domestic level. Without doubt, the effect of (1) is that it will often be difficult, if not impossible, for an employer to successfully meet the proportionality standard if its reason for the application of the provision, criterion or practice is based on cost alone, or efficiency considerations, without more.