Employment

Centrum's impact

Does *Centrum* mark the end of discriminatory advertising? **Chris Bryden** and **Michael Salter** report

IN BRIEF

- Employment legislation in England and Wales prohibits the advertising of a job that indicates an intention to discriminate.
- Following *Centrum* the question arises as to who is the appropriate claimant in any claim involving a discriminatory statement.

The past 30 years have seen employment legislation enact an important shift away from discrimination on the basis of race, sex, disability, age and other such differentials towards an ideal of equal treatment. While anti-discrimination legislation is often utilised where a person is treated less favourably in the course of their employment, it applies equally in situations pre-employment so as to ensure that recruitment processes are also free, so far as possible, from discrimination. In a recent case the European Court of Justice (ECJ) has restated the position in respect of discriminatory advertisements.

Adverse advertising

Employment legislation in England and Wales therefore prohibits the advertising of a job that indicates, or might reasonably be understood as indicating, an intention to discriminate on the basis of colour, race, nationality or ethnic or national origins: ss 29 and 3(1) of the Race Relations Act 1976 (RRA 1976). The enforcement of such a prohibition falls within the remit of the employment tribunal, but individuals may not bring such claims. The only body empowered to do so, since the Equality Act 2006, is the Equality and Human Rights Commission (previously the Commission for Racial Equality).

That individuals could not bring claims based on discriminatory advertisements was established in the case of *Cardiff Women's Aid v Hartup* [1994] IRLR 390. At first instance, the industrial tribunal decided that Mrs Hartup could bring a claim under RRA 1976, s 4(1)(a). The tribunal held that the advertisement in question discriminated against her by its requirement for "a black or Asian woman", even though (it appeared) she had never intended to apply for the job. The Employment Appeal Tribunal (EAT), however, overturned this decision, holding that the tribunal had no jurisdiction to hear the complaint. Further, the EAT went on to state that Cardiff Women's Aid had not and could not have committed an act of discrimination in the employment field against Mrs Hartup. As the advertisement in question was placed in *The Guardian* newspaper, the correct potential breach was of RRA 1976, s 29; as such Mrs Hartup was unable to bring a claim.

> **"Traditionally the courts have taken a purposive view of the legislation"**

Closing doors

The ECJ has recently handed down its decision in the case of *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] IRLR 732. In that case a director of a Belgian door fitting company reportedly made statements in the course of a newspaper interview to the effect that, when recruiting workers for his business, he "would not employ Moroccans", as his customers would not allow them access to their homes. These comments were made during the course of a recruitment drive. It was not alleged that the advert itself was discriminatory.

The applicant in that case is the Belgian body equivalent to the Equality and Human Rights Commission designated to promote equal treatment (CGKR). The Belgian labour court (equivalent to the Employment Tribunal) held that the public statements made by the director did not amount to discrimination, but rather were evidence of potential discrimination. The CGKR appealed; on appeal the matter was referred directly to the ECJ.

The UK government intervened in the reference. It argued that, provided that an employer had not acted upon its own discriminatory statements, any discrimination was only hypothetical. As such it could not amount to direct discrimination so as to be covered by the EC Race Discrimination Directive 2000/43. Further the UK government contended that, in the absence of an

identifiable complainant who has become the victim of the discriminatory conduct, the Directive does not apply.

The CGKR took the opposite view. Its argument was premised on the basis that the prohibition on discrimination concerns recruitment processes as well as the eventual decision to employ. Further, it argued that its standing as a public interest body to bring such enforcement proceedings had no bearing on whether direct discrimination had occurred.

The ECJ rejected the UK's argument. It went on to state that: "the fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim".

Points of view

The legislation concerning direct discrimination is contained within Pt II RRA 1976, and therefore s 54 is the operative section when considering who can bring a claim. It is submitted that the key words of s 54 appear in this context to be: "against the complainant". Following *Centrum* it appears clear that individuals can now bring claims for direct discrimination in these circumstances. The question therefore arises as to who is the appropriate claimant in any claim involving a discriminatory statement. Who can it be said has had an act of less favourable treatment committed against them?

Traditionally the courts have taken a purposive view of the discrimination legislation. Under s 1(1)(a) RRA 1976 racial discrimination is defined as less favourable treatment of a person "on racial grounds", not "on grounds of their race". Thus, associative discrimination (that is discriminating against a person for a reason connected to race, such as refusal to carry out racist instructions) is prohibited: *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7, [1984] 1 All ER 836.

It is submitted that, by reference to the facts of *Centrum*, people that fall within the group referred to by the director, who are unsuccessful in an application for the advertised job, would clearly be able to bring a claim of discrimination. Therefore Moroccan door fitters who unsuccessfully applied for the job would be able to claim. Similarly the ECJ felt that a person put off from applying, because of the statement, could also bring proceedings: thus disheartened Moroccan door fitters are also able to claim.

But what of a person who did not fall within the discriminatory category of the statement of the director, such as, for example, an indigenous Belgian door fitter? It is submitted that if such a person could show that they had intended to apply for the job, but were put off from so doing owing to the existence of such a statement, and what that indicated about the company, they would have been subject to less favourable treatment, being the denial of an opportunity to apply. Such treatment would be on racial grounds, and therefore an indigenous Belgian door fitter could also bring a claim.

While *Centrum* does not in fact relate to a discriminatory advert per se (the acts of discrimination were the statements of the director, and not the apparently acceptable advert itself), the principles set out in the case will apply to adverts with a discriminatory element to them. Therefore, while *Centrum* goes further than dealing merely with discriminatory advertisements, such cases will nevertheless fall within its ambit.

Cardiff Women's Aid

Would this decision therefore assist those in a similar position to the claimant in the *Cardiff Women's Aid* case? The authors venture that it does not, and that *Centrum* cannot be taken as overruling the jurisdictional decision therein. The EAT in that case recorded that it was "common ground" that Mrs Hartup never intended to apply for the advertised job. In the circumstances therefore, the contents of the advertisement, or any statement made by a manager or director would not amount to an act "against the complainant". Section 54 is therefore not engaged and the tribunal remains without jurisdiction to hear complaints from individuals.

Centrum is a case of wide application. Obviously, the finding that the statements amount to direct discrimination means all types of discrimination are caught. There is now the potential for individuals to bring claims in circumstances where previously they could not. However, when considering cases involving discrimination and prospective employees, it remains important to consider the evidential background. If a person falls directly within a discriminated category, and is unsuccessful having applied, a claim may succeed. Further, if a person can show that they were put off from applying for an intended job due to the fact of discrimination, they too may succeed. However, if it cannot be demonstrated evidentially that a person intended to apply for the role, s 54 cannot be engaged. In those circumstances unlawful discrimination cannot be demonstrated. Therefore any such claim will fail, pursuant to s 29, for lack of jurisdiction. NLJ

> **"There is now potential for individuals to bring claims in circumstances where previously they could not"**

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