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[a good paper]
MK 4/9/87

(1) Mr Kinane
To see

(2) Mr Collins
to discuss

4/9

31 August 1987

Mr. Paul Cullen
Special Advisor to the Minister for Labour
Department of Labour
Mespil House
Dublin 2.

Dear Paul

Thank you very much for your offer of further assistance as regards revised and strengthened fair employment legislation in Northern Ireland.

The British intend to publish the revised Guide to Manpower Policy and Practice very soon - certainly before the Secretary of State Mr. Tom King leaves for his visit to the United States next month. There will also be the publications of the major Review of the law on Discrimination and Equality of Opportunity in Northern Ireland possibly before the end of September.

At the same time, the British side have by now had the opportunity to assess the submissions (including our own views and proposals) on their Consultative Document of September 1986 and to revise and adapt their earlier proposals with a view to drafting legislation.

I feel that it is now time that we also reviewed our position and I enclose a document perpared in this section on where we should go from now. I would be very grateful if you could examine this document and perhaps have a meeting with us in about seven to ten days time. We would of course welcome any comments or proposals you would like to make. I feel that there should be another meeting between us (yourself included) and the British side in Belfast to exchange views before the thinking on the substantive changes in the legislation becomes too firm. We could back up such a meeting with the submission by us of a further paper to the British side. This would be in preparation for the discussion of Fair Employment which will be on the agenda of the next meeting of the Intergovernmental Conference - to take place in the Autumn.

Yours sincerely

Eamon O Tuathail

Fair Employment in Northern Ireland
Possible Future Developments

1. This paper examines in detail possible additional views and proposals on the British Consultative Paper on Equality of Opportunity in Northern Ireland. The original Irish submission on the Paper (transmitted through the Secretariat in February 1987) was cautious in its approach. Nonetheless it made a number of important proposals (statutory monitoring in both the public and private sectors and the inclusion of affirmative action - by way of goals and timetables - in the revised legislation) which would be central to the achievement of an effective revised Fair Employment Act. The Irish paper also left the door open to the submission of further views and proposals on the British Consultative Paper. Paragraph 6 of our Paper stated: "we intend to follow the debate closely and put forward additional views and proposals as necessary".

2. We have had two meetings (on 2 April and 24 June) with the British side since our submission of February 1987, but much of the discussion was to do with the draft revised Guide to Manpower Policy and Practice which will be published in September. They have however welcomed our approach and we have maintained our bona fides with them.

3. The British are now in a difficult position. They are hemmed in by the MacBride campaign in the US and the developing debate in Northern Ireland. The proposals in the Consultative Paper (published in September 1986) were not strong enough to attract the attention of Americans who would support the MacBride campaign. In the absence of strong and "sexy" measures from the British, the MacBride

campaign has continued to gain support across a very wide spectrum of US opinion. At the same time influential bodies in Northern Ireland (notably SACHR - the Standing Advisory Commission on Human Rights and the Board of the Fair Employment Agency) have expressed dissatisfaction with the current legislation on Fair Employment.

4. Current indications are that the British side will go beyond the proposals in the Consultative Paper. In doing so, they will be conscious of the likely reaction in the Unionist community. They will also have to "sell" strong measures to the British Cabinet as many Ministers will not accept new legislation on fair employment in Northern Ireland which would go beyond the type of measures contained in the British Race Relations and Sex Discrimination Acts. To do so would give ammunition to those British lobbies seeking reforms of these Acts. In our discussions with the British we will have to seek the maximum possible benefits for the nationalist community while remaining conscious of what will be marketable to both Unionists and other British Ministers. The British side will also look to our own Employment Equality legislation as regards discrimination on grounds of sex.

5. The time-table ahead includes the following:

- issues of revised Guide to Manpower Policy and Practice in early September (i.e. before Mr. Tom King goes to the U.S.);
- publication of SACHR report on general question of discrimination and equality of opportunity in Northern Ireland with the target date September 1987 (SACHR 12 th Annual Report);
- next meeting of Intergovernmental Conference to have fair employment on its agenda;
- Department of Economic Development to instruct legislative draftsman on outline new legislation on Fair Employment by end of 1987;

- possibility of further consultation and or annoucment as to progress;
- possibility publication draft legislation by September 1988;
- completion of legislative process by mid-1989.

31 August 1987.

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POSSIBLE ADDITIONAL VIEWS AND PROPOSALS

1. Indirect Discrimination

Proposal

"The legislation on fair employment should be brought into line with the British Race Relations Act 1976 and the Sex Discrimination (N.I.) Order 1976 by making both direct and indirect discrimination unlawful. The present Fair Employment (N.I.) Act 1976 makes only direct discrimination on the grounds of religious or political opinion unlawful".

Note

The concept of indirect discrimination is defined in the British Race Relations Act 1976 and occurs where all persons are apparently treated equally but when a condition or requirement is applied with which a considerably smaller proportion of the racial or ethnic group can comply as compared with other racial or ethnic groups. The Sex Discrimination (NI) Order 1976 also prohibits indirect discrimination. Our own Employment Equality Legislation prohibits direct or indirect discrimination against female employees.

The question of indirect discrimination is dealt with in a number of submissions to the British on the Consultative Paper on Equality of Opportunity in Employment in Northern Ireland. Both the Fair Employment Agency and the SDLP have called for the inclusion of measures to deal with indirect discrimination in any revised legislation. In addition the interim report of the Standing Advisory Commission on Human Rights on its review of the legislation on discrimination came out strongly in favour of an explicit prohibition on indirect discrimination in a revised Fair Employment Act.

Recommendation

Although both the Race Relations Act 1976 and the Sex Discrimination (NI) Order 1976 contain prohibitions on indirect discrimination, the number of cases taken against employers on the grounds of indirect discrimination has been very small. Indirect discrimination is difficult to prove and, in many cases, the victim of an act of indirect discrimination is unaware that he or she has been discriminated against. However, the widening of the scope of the definition of discrimination would have a certain deterrent effect on employers.

Given that the British can countenance a prohibition on indirect discrimination on the grounds of race or sex, there is no argument against the inclusion of a similar provision prohibiting indirect discrimination on the grounds of religious affiliation in a new and reformed Fair Employment Act.

2. Outreach Measures

Proposal

"The legislation on fair employment should be brought into line with the British Race Relations Act (RRA) 1976 and the Sex Discrimination (NI) Order (SDO) 1976 by permitting "outreach measures" designed to seek out applications from qualified individuals in the under-represented group through more intensive advertising to that group (these advertisements could expressly welcome applications from the under-represented group) and by the provision of training programmes exclusively for members of that group. Both the RRA and SDO have an explicit exception for such outreach measures. Our own Employment Equality Act 1977 in Section 15 permits encouraging job applications for or arranging special training in the case of women. Future fair employment legislation for Northern Ireland should resolve this issue by including a provision for outreach measures similar to that in the Race Relations Act 1976 and the Sex Discrimination (NI) Order 1976. The Constitution Act 1973 (Part III) which prohibits discrimination in legislation, may not permit such measures, but there is no reason why that cannot be amended, to permit an exception for such outreach measures.

Note

"Outreach measures" are measures designed to increase the number of applications from qualified individuals in the under-represented group in the workforce. The two most common forms of "outreach" are (i) advertisements which explicitly welcome applications from the under-represented group and (ii) training courses exclusively for the under-represented group. Because both of these measures involve a degree of discrimination, legislation must make

explicit provision for their use or otherwise employers who implement outreach measures could be brought to Court on charges of discrimination. The British Race Relations and Sex Discrimination Acts permit the use of such outreach measures.

In all of these Acts outreach measures are permitted as a method by which employers can voluntarily seek to redress imbalances in the workforce. None of the Acts permits an enforcement Agency (such as the Commission on Racial Equality) to include the use of such outreach measures in a programme of remedial measures i.e. under present legislation outreach measures cannot be imposed on an employer by an enforcement Agency. Experience to date has shown that employers are reluctant voluntarily to implement outreach measures and such measures have in practice been little used.The experience of our Employment Equality Agency is relevant here also.

Recommendation

As outreach measures are available in both the Race Relations and Sex Discrimination Acts, then there is no strong argument against their inclusion in a revised Fair Employment Act. However in order to ensure that the measures are used effectively, it will also be necessary to propose that revised legislation on fair employment should go beyond existing British legislation on equality in race and sex by permitting the Fair Employment Agency to require the includsion of outreach measures in affirmative action programmes. It will also be necessary to ensure that the use of outreach measures is not hedged about with unnecessary bureaucratic restrictions. A company should not have to apply to the Secretary of State for a special certificate designating the company as a "training body" before it can introduce outreach measures (such a

restriction existed until recently in the use of outreach measures under the Sex Discrimination Act). Secondly, training should be specifically defined to include the provision of apprenticeships and an employer should be permitted to give special training to members of a particular religious group, whether or not they are his employees, where there is under-representation in the workforce. (Under the Race Relations and Sex Discrimination Acts apprenticeships are defined as employment and the use of outreach measures is forbidden in the case of employment i.e. outreach measures can only be used for training purposes and not in employment. Any definition of training in a revised Fair Employment Act should explicitly state that apprenticeships are training and not employment).

3. Statutory Duty

Proposal

"The Consultative Paper proposes that a statutory duty be placed on the public sector to practise equality of opportunity in employment on the basis of those procedures set out in a Declaration of Practice. The Irish Government welcomes this proposal and suggests that the statutory duty be extended to cover all employers in both the public and the private sectors. At the very minimum the Irish Government would wish to see a statutory duty to monitor the workforce and to return the figures collected to the Agency placed on employers in both the public and private sectors. We consider statutory monitoring to be an essential element of an effective fair employment policy".

Note

The interim report on the legislation on discrimination of the Standing Advisory Commission on Human Rights said. "We believe there should be a duty upon employers and others to provide equality of opportunity". SACHR made no distinction between the public and private sectors in relation to this duty.

Recommendation

The British case to limit the statutory duty to practise equality of opportunity in employment to the public sector rests on the desire "not to impose additional burdens or restrictions on business". The British are also looking over their shoulders at the situation in Britain. Neither the Race Relations Act 1976 nor the Sex Discrimination (N.I.) Order 1976 imposes a statutory duty on employers to practise equality of opportunity in relation to the forms

of discrimination dealt with by these Acts. The proposed statutory duty on the public sector will be limited to religious discrimination only.

Without adequate penalties a statutory duty on either the public or private sectors will be of little use. The British have not yet given detailed consideration as to how the statutory duty would work and what sort of penalties would be levied.

The Irish submission of February '87 did not ask for the extension of the statutory duty into the private sector. Instead we proposed that monitoring of the workforce should be a statutory obligation on all employers whether in the public or private sectors. The British have replied that the proposed Declaration of Practice (which will cover the private sector) coupled with strong contract compliance measures will force private sector employers to monitor. Nevertheless, the Declaration of Practice is fundamentally a voluntary approach. Those employers who have little contact with the Government (by way of grants and contracts) would have relatively little incentive to sign the Declaration. In addition, the Declaration, as drafted, does not call for the regular return of the figures collected to an enforcement agency.

The central importance of obligatory monitoring has now been recognised by the Commission for Racial Equality in Britain. The Commission is campaigning to have obligatory monitoring in both the public and private sectors inserted into a new Race Relations Act. "The Commission ... already argues that unless employers monitor equal opportunities policies, using ethnic records as their base for this, there is no real possibility of ending discrimination. The new proposal would make this legally obligatory and the Commission, as it were, would monitor the monitors".*

Christopher McCrudden ** has also called for statutory monitoring - "... it may be advisable, again as a protective device if nothing more, to have a statutory empowerment of employers to engage in the collection of statistics for monitoring and their use for setting goals and timetables. It would also be preferable to go rather further and impose a requirement on employers that they should monitor the composition of their workforces".

The Canadian Employment Equity Act (which has influenced British thinking) imposes a statutory obligation on Federally regulated employers to monitor the workforce. Failure to return the results of monitoring to the enforcement Agency can result in a fine of up to $C50,000.

The British have problems with the extension of the statutory duty into the private sector. Their objections are both philosophical (reluctance to interfere with industry) and political (lack of equivalent legislation in Britain). At the very minimum we should seek statutory monitoring in the public and private sectors. It is widely recognised that statutory monitoring is an essential element of an effective employment equality policy. We should place this demand at the very centre of our policy and inform the British of the importance we place on its inclusion in a revised Act.

* quoted in anti-discrimination Law Enforcement in Britain - Peter Sanders.

** McCrudden. "Re-thinking Positive Action".

4. Remedial Measures

Proposal

"The Irish Paper of February 1987 submitted in response to the Consultative Paper on Equality of Employment in Northern Ireland said "while we understand the limitations that the merit principle imposes, we consider that a much tougher approach will be necessary to remedy the situation".

We have given further consideration to the role of the merit principle in the promotion of equality of opportunity in employment. In doing so we have taken into account the views expressed at the official level meeting in the Secretariat on Fair Employment on 2 April.

We consider that in an ideal situation the merit principle would be the yardstick for applications, recruitment and promotion in the workforce. However, in Northern Ireland there exists a historic imbalance in employment between the two communities. The Consultative Paper correctly points out that this imbalance derives from a number of complex factors of which discrimination is just one (paras 2.5-2.8)

We are concerned, at the lack of progress in redressing this imbalance. Over the ten years of its operation, the Fair Employment Act has had little impact on the imbalance. The provisions of the Fair Employment Act do not in any way detract from the merit principle and yet the Act itself has been ineffective.

In general we agree that the merit principle coupled, where necessary, with effective affirmative action programmes based on the results of statutory monitoring should, over time, result in a balanced workforce in most enterprises.

Nonetheless, we think that in a very small number of cases where affirmative action has not proved effective (or where an employer shows that he is not committed to the implementation of affirmative action), then it will be necessary to to consider introducing measures of reverse discrimination into the affirmative action programme. Already there is a legal provision for quotas in dealing with the handicapped (see Consultative Document pages 20/21/39). We - as also the SDLP - view the possible introduction of measures of reverse discrimination as an approach which should only be used in the last resort. We would not wish to see the widespread use of such measures but would hope that their inclusion in new legislation would have a strong deterrent effect on employers. We are also conscious of the likely political impact such measures would have on the majority community. However, we strongly feel that the British Government should display its determination in no uncertain fashion to deal with discrimination. It is only through such positive action that the campaign for the MacBride Principles can be halted. We realise that the introduction of such a provision would require an exception to be made under the Constitution Act 1973 (Part III) which prohibits discrimination in legislation.

In calling for the ultimate resort of reverse discrimination, we are aware that we are placing a boundary on the use of the merit principle. We agree that the merit principle should govern employment practices in most cases. However, we cannot agree that the merit principle should determine the employment practices of firms which over a period of time have conclusively demonstrated that they cannot or will not tackle the problem of an imbalance. In such chronic cases we consider that the merit principle has been abused and only a resort to a limited form of reverse discrimination can redress the situation.

As we have previously stated we would wish to see reverse discrimination introduced as last resort in the most serious cases. A core set of principles should govern the application of measures involving reverse discrimination. These are:

(i) the use of reverse discrimination should be imposed as a result of a judicial ruling. The enforcement agency would not be allowed to include measures of reverse discrimination without a clear judicial decision in favour of such an approach;

(ii) the introduction of an affirmative action programme which includes measures of reverse discrimination should be of a finite, temporary character. There should be some means of withdrawing the measure when a balance has been achieved in the workforce;

(iii) the enforcement agency which seeks to apply the reverse discrimination should be required to consider the effects of the preferential practices on third parties;

(iv) under no circumstances should serving employees be removed.

Note

The question of whether or not new fair employment legislation should permit the use, as a last resort, of measures involving a degree of reverse discrimination (or preferential treatment) is the most contentious and difficult matter to be tackled in discussions with the British over the reform of the Fair Employment Act.

The Consultative Paper on Equality of Opportunity promotes the merit principle as an inviolable and indivisible concept. The British have made clear that any measure which involves the use of reverse discrimination (and thereby contravenes the merit principle) is completely unacceptable. To the British, the merit principle, to have any meaning, must govern every aspect of an employer's activity and there should be no limits set to its role.

The British claim that the use of reverse discrimination, even as a last resort, completely undermines the merit principle.

Aside from the philosophical objection, the British also point to the enormous political impact reverse discrimination would have on the majority community. They claim that legislation including reverse discrimination would be completely anathema to unionists. Many companies would boycott the new legislation. While strong legislation stopping short of reverse discrimination could, with some effort, be sold, legislation which included reverse discrimination could only be counter-productive producing a 'no surrender' attitude among unionists.

It would also be very difficult to convince other Ministers in the British Cabinet to accept revised legislation which included even the mildest form of reverse discrimination. British Ministers would claim that neither the Race Relations nor the Sex Discrimination Acts include such a measure and would point to lobbies in Britain seeking reverse discrimination, especially in race relations. In addition the British side would point to our own Employment Equality Act 1977.

In favour of the introduction of a limited form of reverse discrimination we could argue:

(i) the Fair Employment Act which is based on the merit principle has been ineffective;

(ii) new legislation not only has to ensure equality of opportunity in future employment practices but must also tackle the historic imbalance in employment;

(iii) only such a strong approach can adequately deal with the expectations in the US created by the MacBride campaign and so defuse that campaign;

(iv) because the reverse discrimination measures would be measures of last resort they would be little used but they would have a significant deterrent effect;

(v) we could only countenance the use of reverse discrimination as a remedial measure, if its introduction required a judicial ruling.

Recommendation

The discussion of reverse discrimination will be heavily influenced by the final report of the Standing Advisory Commission on Human Rights (SACHR) on its review of the legislation on discrimination. At the moment it seems that SACHR Board members such as McCrudden and Cooper are arguing in favour of a limited form of reverse discrimination. Their arguments are strongly opposed by the representative of the Confederation of British Industry, Alastair McLaughlin. It is possible that SACHR could issue a report calling for the introduction of preferential treatment. The report would not however be unanimous.

The British are unlikely to accept the arguments in favour of the introduction of reverse discrimination. They will continue to stress the primacy of the merit principle and to point to the political consequences of legislation which included reverse discrimination.

It is a matter for political decision whether or not the Irish Government should press the British for the introduction of reverse discrimination. Reverse discrimination, if introduced, would explicitly recognise that the two communities in Northern Ireland were incapable of treating each other fairly in respect of employment. In the words of the Van Straubenzee Report:

"the effect of (reverse discrimination) would not be to reconcile the two communities in Northern Ireland but on the contrary to reinforce and in some measure to perpetuate the divisions between them. The concept is fundamentally at variance with any philosophy which seeks to create an open or mixed society" (p.12)

It is suggested that we tell the British we have examined in detail the advantages and drawbacks of reverse discrimination. While we are not wedded to the merit principle, we do not wish to see reverse discrimination at this stage. However, we are intent on ensuring that any new fair employment legislation is as effective as possible. We therefore want a review clause in the new legislation. If the new legislation is not achieving progress in redressing the imbalance in employment, then we would see the introduction of reverse discrimination as the next step. At the same time we should tell the British that there are a number of elements which we see as central to the achievement of an effective Act. Without the incorporation of these elements into new legislation we would have difficulties in welcoming new legislation. These elements include:

(i) affirmative action including the use of goals and timetables for applications, recruitment and promotion;

(ii) a statutory obligation on employers in both the public and private sectors to monitor the workforce;

(iii) adequate resources for the Fair Employment Agency;

(iv) the British have agreed that the Agency should retain its role of dealing exclusively with discrimination on the basis of religion or political opinion (Mr. Tom King's statement of 15 July before the last meeting of the Conference). The proposed merger of the Agency with the Equal Opportunities Commission to create a new body to deal with discrimination on the grounds of both sex and religion was unacceptable to the Irish Government.

(v) stiff penalties on those public sector bodies which contravene their statutory duty to practise equality of opportunity.

5. Miscellaneous Proposals

A. Judicial Review

"New and more effective fair employment legislation will inevitably lead to increased challenges in Court to the enforcement Agency's activities. We are concerned that judicial review of the Agnecy's powers might lead to a considerable (and unforeseen) dilution of the Agency's role under the new and revised legislation. We suggest, therefore, that the drafting of the new legislation should reduce the scope for court challenges. For example, the Agency's decision to investigate a particular company should not be open to judicial review".

B. Individual Complaints

"Having considered further the role of the Fair Employment Agency in dealing with individual complaints, we have concluded that such complaints could well be dealt with by industrial tribunals. The Agency could then devote all of its resources to pursuing investigations into the employment patterns in selected public and private sector bodies. The Agency could however support particular individual complainants in taking their cases before industrial tribunals when it considers that the complainant's case warrants such assistance".

C. Local Government Appointments Commission

"A Local Government Appointments Commission should be established to undertake recruitment on behalf of the 26 District Councils and other appropriate public bodies. The creation of such a body would assist in overcoming the

political difficulties in enforcing a statutory duty on bodies which would be unwilling to practice equality of opportunity".

Note

(a) Judicial Review

The Race Relations Act 1976 established a Commission for Racial Equality with wide powers to investigate discrimination on the grounds of race in the public and private sectors. However, the role of the Agency has been considerably hampered by Court challenges to its activities. As a result of judicial review of both the conduct and findings of its investigations, the Race Relations Board has not been able to avail of the full powers it was intended the Board should use.

The Race Relations Act provides for a much more cumbersome procedure for investigations of employment patterns than the Fair Employment Act. It is important therefore that a new and revised Fair Employment Act should (i) protect the activities of the Agency against judicial review (or at least limit the possibility of review) and (ii) not impose on the FEA the cumbersome investigation procedure outlined in the Race Relations Act.

(b) Individual Complaints

The Fair Employment Agency has been heavily criticised for its handling of individual complaints of discrimination. The success rate in securing findings of discrimination has been low and it has, in some cases, taken several years to process complaints. In contrast, the Equal Opportunities

Commission (established to deal with sex discrimination) has had a high degree of success in dealing with individual complaints of sex discrimination. In the case of the latter body, the Commission itself does not adjudicate on individual cases but can assist complainants in taking cases before industrial tribunals. The drawback to this procedure is that there is no prior investigation of the case and the industrial tribunal must base its judgement on the facts as presented.

It is likely that the Standing Advisory Commission on Human Rights will recommend the transfer of individual complaints to industrial tribunals.

(c) Local Government Appointments Commission

The establishment of a Local Government Appointments Commission was recommended in the Irish submission "Fair Employment - Preliminary Views" presented in the Secretariat on 4 September 1986.

In its submission on the Consultative Paper, the Fair Employment Agency proposed the creation of a similar body - a Public Service Commission. Such a body would take over the personnel functions of the District Councils (and possibly the Health Boards and the Education and Library Boards). The removal of the personnel functions from these bodies would overcome the political problem associated with placing a statutory duty on public sector bodies to practice equality of opportunity. Those District Councils which have refused to sign the present Declaration of Practice and Intent will probably attempt to defy the new revised Fair Employment Act leading to a showdown between the Government and District Councillors.

(D) Other Proposals already made e.g. in our submission to the British side of 4 September 1987

(a) Civil Service

- widening recruitment net at higher levels to public sector as a whole
- measures to make Civil Service recruitment more welcoming to Catholics and generally providing climate in Civil Service which reflects nationalist as well as unionist tradition.
- resiting of certain Government offices West of the Bann

(b) Acts Done to Safeguard National Security (Section 42 of existing Act

- introduction of a procedure for appeal (e.g. to the Parliamentary Commissioner for Complaints) in cases where reasons of national security have invoked as ground for preventing FEA investigations.

(c) - Fines: increasing the amounts of fines under the existing Act so as to give them a real punitive effect.

(d) - Industrial location: encouraging a spread of jobs between the two communities through provision of additional workplaces and sub-contracting in the case of the private sector and direction of State investment and development grants to deprived areas for instance West of the Ban in the case of Government (e.g. the IDB and LEDU)