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FAIR EMPLOYMENT (NI) BILL, 1988

General

1. The Bill gives the overall impression of a very real effort to come to grips with the issue of discrimination in employment in Northern Ireland. The present fair employment watchdog, the Fair Employment Agency (FEA), will be strengthened and expanded to become the Fair Employment Commission. A new Fair Employment Tribunal will be set up with the ability to impose heavy penalties. Employers will be required to monitor the religious composition of their workforces and to submit monitoring returns to the Commission, which will have powers to oblige employers to eliminate discriminatory practices.

2. However, a closer reading of the Bill reveals a hesitancy about the implementation of some of the provisions. The procedures of the Tribunal may leave a certain scope for difficult employers to exploit the system. The detail of what must be provided in the monitoring return is left to the Department of Economic Development to decide. The contract compliance provisions leave room for a degree of discretion. The definition of affirmative action is less forthcoming than that given in the White Paper. The content of the Code of Practice, which has been allocated an important role in the implementation of the legislation, is still to be decided. The fate of these and other aspects of the Bill will be of particular interest during its passage at Westminster. We understand that the second reading is likely to take place some time in January.

3. The following paragraphs attempt to evaluate the provisions of the Bill.

Tribunal (sections 2 - 6)

4. The Bill provides for the establishement of a new Fair Employment Tribunal within the Industrial Tribunal system. The Tribunal will have far-reaching powers to summon witnesses, to obtain evidence and to impose penalties, including a fine of up to £30,000 in cases where its decisions have not been observed.

The Department of Economic Development (DED) is empowered to provide regulations for proceedings before the Tribunal. (Section 5 of the Bill gives the general headings for these regulations). Our general impression is that, if care is taken with the appointment of the President of the Tribunal and with the selection and training of the lay assessors (two sit alongside the head of the Tribunal), the new Tribunal can be expected to work reasonably well.

Code of Practice (sections 7 - 9)

5. The Commission is empowered to publish a Code of Practice to replace the present Guide to Effective Practice (brought out under the 1976 legislation). In carrying out this function, the Commission is obliged to have regard to the Code; the Tribunal is required to take account of any provisions of the Code which it considers relevant to particular cases. Although at first sight the Commission's freedom to draw up a new Code may seem extensive, this power is subject to various conditions. A draft of any new Code must be published and account taken of relevant comments; the Head of the DED, or in the event of the office being vacant the Secretary of State, is empowered not to approve the code; the code must be laid before Parliament which may also not approve it. A draft which has fulfilled the above conditions comes into effect on a day appointed by the DED.

6. The DED will publish a new Guide shortly which will operate as the first Code until such time as the Commission might wish to revise it. Clearly we should be given (and if necessary insist on having) an opportunity to comment on any draft Guide (as happened in the past). We will, presumably, be able to make our views known on any draft Code that might be published by the Commission subsequently.

Pattern and Practice cases (sections 10 - 14)

7. The powers of the new Commission as regards investigations into pattern and practice cases are almost identical to those of the present Agency. Following an investigation, the Commission is to use its best endeavours to ensure that the persons concerned take action to promote equality of opportunity and,

where appropriate, to secure a satisfactory written undertaking to this effect. In the event of an undertaking not being forthcoming or of its having been given but not observed, the Commission is empowered to issue a direction to the persons concerned about neccessary changes in their employment practices.

8. Specific provision is made for voluntary undertakings by employers who have been investigated by the Commission. The undertaking is binding in the sense that if the employer fails to observe it, the procedure described in the last paragraph can be invoked to enforce it. We had understood that perhaps a stronger automatic enforcement provision might apply.

Appeals and legal proceedings (sections 15 - 18)

9. The Bill provides that all initial appeals are now made to the Tribunal. (Previously they were made to the County Court or to the Fair Employment Appeals Board; the latter has now been abolished). The Tribunal is empowered to make an order specifying steps to be taken by an employer who has not observed an undertaking, together with a time scale for implementation of these steps and may require him to report back to the Tribunal at a specified time to give an account of his actions. In the event of an employer failing to comply with any terms of an order or not reporting back to the Tribunal as required, the Tribunal may impose a fine of £30,000 or refer the case to the High Court (where unlimited fines and/or imprisonment could be imposed). These powers of the Tribunal are unusual for a Court of that order and would seem to indicate a serious effort to equip it with forceful weapons to implement its decisions.

10. Provision is made for appeals to the Court of Appeal on points of law.

Confidentiality and Equality of Opportunity (sections 19 -21)

11. Section 19 of the Bill provides for the confidentiality of information in the possession of the Commission. Except in certain defined circumstances, the Commission is forbidden to disclose a person's religious belief without the written consent of the person concerned. Nonetheless, subject to the above

provisions, the Commission is given a certain discretion in disclosing other information in its possession to employers, which does not seem to be matched by a corresponding provision on the side of the employee. In addition, the Commission is obliged to furnish DED with such information as it requests, the exception of a person's religious belief remaining.

12. The definition of equality of opportunity given in the 1976 Act (Section 3) is repeated in Section 20 of the Bill.

Registration of Employers (Section 22 - 26)

13. Employers with more than 10 employees (for the first two years of the legislation those employers with more than 25 employees) will be obliged to register with the Commission. The obligation to register must be carried out within one month of the coming into force of the legislation or within one month of an employer first reaching the quota. Failure of an employer to register is an offence for which a fine can be imposed on summary conviction.

14. Those public authorities to which this section of the Bill applies will be specified in an order made by DED. We have been told that this provision was necessary to meet difficulties in defining in legal fashion the public sector. Clearly, however, the application of such a provision would need to be closely observed.

Monitoring (section 27 - 34)

15. Registered employers will be obliged to submit monitoring returns to the Commission within four months of their registration in the first year and within fourteen days of the anniversary of their registration in each subsequent year. The precise content of the monitoring return, which in principle is to determine the religious composition of the workforce, will be determined by regulations of the DED. We understand that one of the reasons for this procedure is to enable the DED to make adjustments to the monitoring return without having to pass further legislation. It also means that, at this stage, we do not have full information on the content of the return (the

powers allocated to DED in this area by the Bill appear quite broad). Provision is made, however, for the Commission to require the employer to furnish it with information supplementing that given in the return. Failure to make a monitoring return is subject to a fine of up to £10,000 on summary conviction. The furnishing of false information on a return is also subject to a fine, though on a lower scale.

16. Section 29 of the Bill makes provision for the general confidentiality (except under certain specified circumstances) of monitoring information which could indicate to which community an individual belongs. No reference appears to be made to the confidentiality of the monitoring return after it has passed to the Commission itself. (We have been pressing for access to this information, at a minimum by bona fide inquirers).

Review by employers of their practices

17. Provision is made for a review by registered employers, at least every three years, of their recruitment, training and promotion practices. No provision is made, however, for regular checking on this review. Nonetheless, the Commission is given wide powers to require the employer to give it information about the review. It may also make "recommendations" to the employer about the affirmative action it thinks should be taken on foot of the review. The power to make recommendations only in this area seems somewhat tentative but, presumably, the Commission could always initiate an investigation into the practices of a difficult employer and could, if necessary, subsequently invoke the force of the Tribunal to enforce its directions.

18. The Commission is also given wide powers to require an employer to submit satisfactory monitoring returns and can compel him to do so through directions enforceable through the Tribunal.

Contract Compliance (sections 35 - 40)

19. The contract compliance provisions appear to be more or less as we had been told but are not as tightly phrased as we would wish. An employer in default as regards registration or monitoring returns "may" be deprived of access to government

contracts and grants. The hesitancy about the enforcement of these provisions has a weakening effect on their impact.

20. In the case of contracts, an employer in default "may" be served notice by the Commission that he does not qualify for contracts of public authorities. (Employers removed from the register on foot of infringements as regards registration or monitoring returns may not apply for re-registration for six months). The notice may be appealed to the Tribunal and, subsequently, to the Court of Appeal on a point of law. A certain amount of care seems to be taken to close off loopholes through use of associated companies and sub-contractors. However, contracts entered into with employers who are in default, remain valid. The Commission is empowered to apply to the High Court for an injunction preventing public authorities from contravening a notice of non-access to contracts.

21. Northern Ireland Departments "may" refuse grants to unqualified employers. Clearly the implementation of this provision, (if not amended) which is to be at the discretion of the Departments, will need to be carefully watched. We have been stressing the need for a forceful use of the grants system as an instrument of pressure.

Additional Commission Powers and reports on Public Authorities (sections 41 - 45)

22. There are two main provisions in this part of the Bill. Firstly, the Commission is given power to obtain information regarding registration of an employer, regarding an employer's associations with other bodies and regarding contracts entered into by public authorities. Those who fail to give such information or who knowingly give false information are subject to a fine on summary conviction.

23. Secondly, in the event of infringements by a public authority against its obligations under the Bill, the Commission is required to send a report either to the Secretary of State for Northern Ireland or to the Head of the relevant Northern Ireland Department (depending on their functions in relation to the

authority). Any such report sent to the Secretary of State must be laid before Parliament. (DED have argued throughout our discussions that adequate powers exist for the enforcement of the Commission's findings on public authorities and that the new regulations for the conduct of public bodies will reinforce these controls. Clearly, implementation of this aspect will need careful scrutiny).

Discrimination and Individual Complaints (sections 46 - 50)

24. The definition of discrimination (which is to replace that given in Section 16 of the 1976 Act) now includes a reference to indirect discrimination. Indirect discrimination is described as the imposition of a condition, such that the proportion of persons of one religious or political belief who can comply with it is considerably smaller than those of the other religious or political belief who can do so. In addition the condition must be shown to be to the detriment of the persons in the lesser group. The employer must be able to show the condition to be justifiable. We had pressed for the use of the word "necessary" or "essential" instead of "justifiable", since case law in Britain seemed to interpret justifiable in a manner which favoured the employer (in race and sex cases). The DED have resisted this point on grounds of the need to maintain a conformity in the definition of indirect discrimination in the areas of sex, race and, now, religious or political discrimination. It remains to be seen how strongly the courts will interpret this provision.

Individual Complaints

25. Whereas under the 1976 Act, individual complaints were dealt with by the Fair Employment Agency which was obliged to reach a finding on them and try to bring about a settlement, the individuals will now have the responsibility for bringing their own cases to the Tribunal. The Commission "may" help the individual by giving advice, by attempting to procure a settlement, by arranging a solicitor or counsel or generally by arranging for representation with a view to providing the type of help that a solicitor or counsel would give at various stages of a case. It is not clear if this includes an amicus curiae role

(which we have been arguing for).

26. The Bill introduces an element of a conciliation procedure in that, if a complaint is brought before the Tribunal, the Tribunal is obliged to send a copy of the complaint to the Labour Relations Agency (LRA) - a statutory body charged with the task of improving industrial relations. The LRA has the duty to try to bring about a settlement, under certain circumstances. We had argued against the inclusion of the LRA in the complaint process, on the grounds that the threat of legal action should be sufficient to encourage a settlement and that the involvement of the LRA would introduce a complicating factor into the procedure which could be exploited by the employer.

27. In cases of individual complaints, the Tribunal is empowered to make an order setting out the rights of the complainant and the respondent. It is also empowered to award damages of up to £8,500. This may include an award for damages to feelings. The Tribunal may also make a "recommendation" that the respondent take action to rectify his anomalous situation. In the event of the respondent failing to do so, the Tribunal "may" impose further fines but always within the limit of £8,500. The decisions of the Tribunal may be appealed to the Court of Appeal on a point of law.

28. We pressed throughout the negotiations with the other side for the raising of the limit of £8,500 in awards to individuals but DED argued that they were unable to do so owing to the read-across with the areas of race and sex discrimination (where this limit is at present in force). It would in theory always be possible for the Commission to initiate an investigation into an employer who showed reluctance to mend his ways and thus open up the possibility of imposition of the larger fines which are provided for in pattern and practice cases (although clearly at some considerable delay).

Training

29. Section 49 of the Bill makes specific provision for the protection of employers who engage in training of persons in high

unemployment areas or of those who are long-term unemployed. DED have resisted the arguments in favour of religion-specific (or community-specific) training on the basis that to provide such training could be judged discriminatory on religious or political grounds (despite provision for race-specific training in the area of racial discrimination). They say that the above provision will achieve the same result.

30. Section 50 of the Bill gives the Commission power to apply to the High Court for a restraining order to prevent discriminatory advertisements. A similiar power was given to the FEA in the 1976 Act but the application had to be made to the county court. The new provision appears to be a welcome increase in the powers of the Commission.

Affirmative Action and Miscellaneous (sections 51 - 55)

31. While the inclusion of the notion of affirmative action in the Bill has to be welcomed, the definition of the concept (in Section 53) is disappointing. It is less forthcoming than that given in the White Paper and the phrasing appears imprecise. Whereas the definition given in the Bill might, arguably, be more forceful concerning the elimination of discriminatory practices, its description of the positive side of affirmative action appears more vague and has no specific reference to employment. This aspect of the Bill will almost certainly be subject to serious criticism by opposition parties during its discussion at Westminster.

Schedules

32. Attached to the Bill are a number of schedules, the most important of which describes the procedures to be employed by the Commission in carrying out investigations. It also gives the Commission power to certify to the High Court obstruction by any persons of the Commission in the performance of its duties.

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