

**A European Litigation strategy:
the Case of the Equal Opportunities Commission**

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"(interest group litigation) is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for the redress of grievances" - Justice Brennan in *NAACP v Button* ¹

Interest groups have long played an important role in policy making at national level. A growing number of diverse interest groups have an important input into policy making in the European Community. Interests might be represented through Brussels based Euro-groups² or national associations lobbying independently on particular issues. Although Eurolobbying is dominated by commercial interests,³ interest groups concerned with social matters have also begun to make their presence felt as the Community has moved to develop its own social policy.

¹ [1963] 371 US 415, 429-30

² Euro-groups are federations officially recognised by the Commission, such as UNICE and the ETUC

³ For example, industrial and commercial employers' interests account for almost 50% of the Euro-groups, 25% are connected with agriculture, 20% with the service sector and just 5% represent trade union, consumer and environmental interests (Mazey and Richardson, 1993: 7)

Establishing equality of treatment between men and women in the workplace has formed one of the key pillars of European social policy,⁴ prompted in part by the inclusion of Article 119 on equal pay for equal work in the Treaty of Rome. Article 119 and the subsequent Directives, notably Directive 75/117/EEC on equal pay, Directive 76/207/EEC on equal treatment and Directive 79/7/EEC on social security, have been invested with considerable significance in a series of judgments by the European Court of Justice. A prime mover in the litigation before the European Court has been the British Equal Opportunities Commission (EOC) and its sister organisation in Northern Ireland EOC (NI). Between them the two organisations have funded fifteen references to the European Court of Justice, including highly significant cases such as *Marshall (No 1)*⁵ and *(No 2)*⁶, *Johnston*⁷, *Barber*⁸ and *Enderby*⁹. This represents about one third of all references heard by the European Court of Justice on matters relating to equal pay and equal treatment at work.

The use of the European Court as a weapon in a litigation armoury has received relatively little attention both from litigators and commentators. This contrasts markedly with the United States where the courts, particularly the Supreme Court, have long been an important forum for interest groups. It may be that the European Court of Justice is only gradually

⁴ See, for example, the Social Action Programme, EC Bull. 10/1972, the Social Charter Action Programme COM(89)568 final, Brussels and the Commission Social Policy White Paper COM(94)333.

⁵ Case 152/84 [1986] ECR 723.

⁶ Case C-271/91 [1993] 3 CMLR 293.

⁷ Case 222/84 [1986] ECR 1651.

⁸ Case C-262/88 [1990] ECR I-1889.

⁹ Case C-127/92 [1993] IRLR 591. One further reference in *Rudling* is currently pending.

developing something of the policy making function possessed by the United States Supreme Court but that, as presently constituted, it is not a particularly friendly environment for interest group representation (Harlow and Rawlings, 1992 279) However, it can be said that the EOC has pioneered the use of a European litigation strategy, taking advantage of the supremacy and direct effect of Community law This strategy has involved references to the European Court of Justice, raising points of EC law in the national courts and, to a limited extent, lobbying the other institutions of the European Union This chapter therefore considers the EOC's objects as a litigator and its litigation strategy in order to assess whether its courage, investment and persistence have been rewarded

1. The powers and functions of the EOC

The EOC, modelled on the American Equal Employment Opportunities Commission, was created by the Sex Discrimination Act (SDA) 1975 as a quango, a quasi-autonomous non-governmental organisation (Barker, ed, 1982, Coote 1978 734) It is constitutionally separate from central government and is funded by an annual grant-in-aid, originally paid by the Home Office and now by the Department of Employment¹⁰ The grant for 1993-94 was £5,794,000 (£5,282,000 for 1992-3) In addition, the minister responsible can also appoint the Commissioners who head the EOC The EOC's semi-official status¹¹

¹⁰ The EOC is now under the Sex Equality branch in the Department of Employment. Although the EOC probably has more contact with the Department of Employment they are concerned that they would be seen as an agency interested only in employment and women The CRE remains under the auspices of the Home Office

¹¹ According to one commentator "The designation of official is the sign manifest that the bearer is authorised by social understanding to exercise against all groups and individuals certain powers which they may not exercise against him" (Latham, 1965. 35).

distinguishes it from other interest groups. However, in common with other non-statutory groups it tries "to influence the policy of public bodies in (its) chosen direction" (Finer, 1966: 3) and must fight to make its views heard and to exert pressure in the face, at times, of government resistance. Consequently it has been described as a statutory pressure group (Harlow and Rawlings 1992: 285).

The EOC is under a duty¹²

- "(a) to work towards the elimination of discrimination
- (b) to promote equality of opportunity between men and women generally, and
- (c) to keep under review the working of the SDA 1975 and the Equal Pay Act 1970 and, when they are so required by the Secretary of State or otherwise think necessary, draw up and submit proposals for amending them "

To help fulfil these objectives the EOC has a wide variety of powers in respect of research, education and publicity.¹³ However, perhaps most importantly, the EOC is permitted by s 75 to grant "assistance"¹⁴ to complainants under both the Equal Pay Act 1970 and the Sex Discrimination Act 1975 either because the case raises a question of principle or because it is unreasonable to expect the applicant to deal with the case unaided, due to the complexity

¹² s 53(1) SDA 1975

¹³ ss54 and 56A SDA 1975 respectively. It can also issue codes of practice, review discriminatory statutory provisions particularly in the field of health and safety at work, and more generally keep the anti-discrimination legislation under review (ss 55 and 53(1)(c) SDA 1975 respectively)

¹⁴ This can include offering advice, trying to procure a settlement, arranging for advice to be given by a solicitor or arranging legal representation - s 75(2). S 75(3) provides that the expenses incurred by the EOC in providing financial assistance constitute a first charge for the benefit of the EOC on any costs or expenses obtained by the applicant. In 1993 s 75 assistance was requested in 302 cases and was granted in 195 cases, including to the 78 applicants in the case of *Smith v Avdel Systems*

of issues involved, the applicant's position in respect of the respondent or by reason of any other special consideration. This last heading includes clarification of the law. Its legal budget for 1993-94 was £306,571,¹⁵ about 5% of its total budget compared to £657,016 (about 12% of its total budget) in 1992-3. This reduction in expenditure can be attributed in part to a change in accounting methods and in part to a large increase in funding in 1992 to support the Alison Halford litigation. Nevertheless, the trend is very much downwards.

In order to perform its broader strategic role, the EOC also has the power to conduct formal investigations¹⁶ into an organisation where it suspects that the discrimination is so widespread, covert or institutionalised that providing assistance in an individual case would not be sufficient to reveal the full scope of the discrimination. Nevertheless, hostile public reaction,¹⁷ fear of judicial review¹⁸ and a cumbersome procedure, largely due to judicial

¹⁵ This figure does not include staff salaries. If the EOC wins a case any money which is recovered in costs in the following financial year must be returned to the government. The EOC therefore must budget as if they are going to lose any case that they bring.

¹⁶ s 57(1). See generally Appleby and Ellis, 1984. 236

¹⁷ For example, Ian Gilmour MP accused the EOC of playing "policewoman, prosecutor, judge, jury and even probation and after-care officer for those caught in this particular brand of sexual delinquency" - HC debates, vol 889, col 534. Unfavourable media and academic comment was not confined to formal investigations. See, for example, "The EOC ought to be quietly or perhaps ceremoniously dismantled" Leeds Evening Post 26 November 1976, "MPs demand equal rights waste enquiry" Sunday Telegraph, 19 September 1976 "The EOC seems determined to keep the enemies of liberation supplied with material" Sheffield Morning Telegraph 19 September 1976. See also Byrne and Lovenduski (1978), Appleby and Ellis, (1984), Meehan (1983), Sacks (1986)

¹⁸ The EOC's sister organisation the Commission for Racial Equality (CRE) also has powers to conduct formal investigations. Its investigation procedures were regularly challenged in respect of breaches of natural justice. In the *Science Research Council v Nasse* [1979] 1 QB 144 Lord Denning described the formal investigation powers as "inquisitorial" of a kind never before known to the law. You might think that we

demands, has meant that formal investigations are no longer considered the primary means of law enforcement. Consequently, faced by increasing demands for financial assistance from individuals the EOC decided to allocate more resources to individual cases in the hope of achieving more highly visible success.

However, by 1979 it was also becoming clear that the initial impact of the British Sex Discrimination legislation had begun to wane¹⁹ and the British government was disinterested in actively pursuing equal opportunities policies.²⁰ The potential offered by Community law as a vehicle for challenging discriminatory national legislation and practices was highlighted by the test case strategy pioneered by the Belgian lawyer Elaine Vogel-Polsky, who had been responsible for drafting the Equal Pay Directive 75/117/EEC (Harlow 1992: 348), in the three *Defrenne* cases²¹. Previously, Community law had scarcely been considered. The Sex Discrimination Act 1975, whose content was heavily influenced by the Title VII of the

were back in the days of the inquisition". See also *R v CRE, ex parte London Borough of Hillingdon* [1982] 3 WLR 159, *R v CRE, ex parte Amari Plastics* [1982] 2 All ER 499, *R v CRE, ex parte Prestige* [1984] IRLR 335. See further Sachs and Maxwell, 1984: 334.

¹⁹ Progress towards equality in measurable respects, for example, in terms of earnings had come to a halt. Women's average gross hourly earnings reached a peak of 75.5% of those of men in 1977 and declined steadily as a proportion in subsequent years. In 1978, the figure fell to 73.9% and in 1979 the figure stood at 73% (Department of Employment (1979)).

²⁰ The EOC found that government departments were not cooperative in developing equal opportunities policies, nor did the TUC or CBI recognise their responsibilities under the new Act (EOC, 1979: 4). Government policies, including proposals to change the immigration rules, often ran contrary to the principle of non-discrimination (EOC 1980: 1-2).

²¹ Case 80/70 *Defrenne (No 1)* [1971] ER 445, Case 43/75 *Defrenne (No 2)* [1976] ECR 455 and Case 149/77 *Defrenne (No 3)* [1978] ECR 1365.

American Civil Rights Act 1964, had been drawn up without any knowledge of the contemporaneous drafting of the Equal Pay and Equal Treatment Directives

2. The EOC as a litigator

In America, interest groups have since the turn of the century used litigation as a weapon in their campaigning armoury.²² The NAACP, the largest and most effective civil rights organisation in America, began its litigation strategy in 1909. Limited success, coupled with its failure to win support from Congress, led the NAACP to make litigation fundamental to its programme during the 1930s²³ In this respect the EOC differs markedly from other such interest groups since it was the clear intention of both the drafters of the legislation and Parliament that the primary role of the EOC was to act and to be seen as acting as a strategic law enforcement agency.

Whatever the reason for turning to the courts, any litigation begins with the assumption that judicial interpretation will lean in favour of worthy claimants and that administrative bodies will automatically implement court rulings. Interest groups tend to seek out test cases - cases judged to be significant in legal or factual terms - which are deliberately designed to procure

²² For example, the National Consumers League (NCL) organised a Committee on Legislation and Legal Defense of Labour Laws in 1908. Their principal tactic in cases was to supply additional counsel and other assistance. The first NCL victory was in *Muller v Oregon* 208 US 412 (1908). The NCL was responsible for providing distinguished outside counsel, including Louis Brandeis and Felix Frankfurter, as well as preparing sociological material.

²³ A separate organisation, the NAACP Legal Defense and Educational fund was incorporated for this purpose (Vose, 1955). The NAACP shepherded through the courts the major cases leading up to the landmark decision in *Brown v Board of Education* 347 US 483 (1954). See also Olsen, 1993 132.

change (Galanter 1986 32-3) by eliciting a favourable interpretation of legislative provisions in order to establish precedents from which a class of claimants will subsequently benefit

Bringing a series of test cases may form part of a litigation strategy.

Bringing an issue successfully before the courts means that plaintiffs secure a declaration of their rights and/or some other form of remedy It also means that a favourable precedent may be established which might procure longer term social change Even where test cases are lost it is hoped that the proceedings will convince the legislature of the error of its ways and that statutory reform will follow

Successful litigation is also believed to have other beneficial consequences It is thought to give legitimacy to the goals and aspirations of an organisation as well as to increase the respectability of the organisation itself Litigation is also considered to be an important method of consciousness raising, both in making the victims aware of their rights and the violators aware of their duties Publicity generated by a case is a valuable means of communicating this information, in an accessible form, to those most affected

Nevertheless some commentators have cast doubt on the validity of these assumptions Scheingold (1974) questions whether courts are the guardians of fundamental rights and liberties He doubts whether litigation can secure a declaration of rights from the court, that this declaration is sufficient to assure the realisation of those rights, and that realisation is tantamount to meaningful social change Rosenberg (1991 2-3) is also critical of the view of "the dynamic court", which sees courts as powerful, vigorous, and potent proponents of change He develops the model the "Constrained Court" which views courts as weak,

ineffective and powerless. In the context of women's rights in America he argues that precedent-setting decisions in women's rights have produced little because courts lack all the essential tools required of any institution hoping to implement change. He concludes (1991:227): "Without the presence of non-court actors offering incentives, or imposing costs, without a market mechanism for change, and without willing actors, court-ordered change in women's rights has changed little."

Despite these concerns, interest groups continue to invest considerable effort into developing a litigation strategy and a considerable body of literature has developed identifying factors necessary to improve the organisation's chances of success. For example O'Connor (1980) says that interest group longevity is critical if an organisation wishes to use litigation to establish favourable precedent, regular salaried staff allow interest group litigants to keep abreast of potential test cases and monitor ongoing cases, a network of affiliates can enable the central office to learn of good cases, issue focus allows an organisation to concentrate all of its efforts in one area - as its lawyers bring a series of cases, their competence increases. Repeated intervention at Supreme Court level also allows the Court to become familiar with the interest group's expertise. Well-financed litigation is critical since the costs of litigation are high, especially if the group has been involved from trial level. Finally, the use of technical, non-legal or statistical data and the generation of well-timed publicity in the media and in law journals is also considered important. Consequently, where possible, litigation is also linked to other forms of action in the political arena, such as lobbying, media contact and grass roots organisation.

Compared to the precarious financial position experienced by most interest groups, the EOC enjoys a privileged position. A guaranteed income, albeit less than the EOC would hope for, enables it to employ a full time, capable and dedicated legal staff who are able to work together as a team at the EOC's headquarters in Manchester.²⁴ They can monitor recent legal developments and apply these in later cases. This provides the continuity necessary to bring a large number of cases to the court. The EOC has also benefited greatly from the advice and support of leading academic lawyers and practitioners.²⁵

Its stable structure and financing have enabled it to become, in Galanter's terminology, a "Repeat Player" (RP) litigant (Galanter 1974-95). Because, relatively speaking, the stakes involved are smaller for the EOC than for the individual, "One Shot" (OS) litigant, it is able to adopt strategies calculated to maximise gains over a long series of cases. It is also in the fortunate position of being able to play the long game, lobbying the British government and the European Commission for eventual changes in legislation. In addition, the EOC has the resources and, to a limited extent, the contacts to secure penetration of favourable rules through to field level. A network of supportive women's groups would assist the EOC further in this objective.²⁶ The EOC is therefore able to lend its advantages as a repeat

²⁴ In Manchester there are six qualified lawyers and six support staff. EOC (NI) has been able to support every litigated case of discrimination in the province. Complex cases used to be dealt with in-house, with the remaining cases being sent to outside solicitors. The EOC provides the solicitors with information packs and advises on the choice of counsel. However, by 1992, EOC assistance to pay for a solicitor became the exception rather than the rule (EOC 1993: 30).

²⁵ For example, Anthony Lester QC has taken an active interest in the legal work of the EOC since he returned to practice from the Home Office in 1976 where he was responsible for drafting the Sex Discrimination Bill.

²⁶ Hoskyns (1985: 36) is critical of the women's movement for failing to network. This contrasts with the NAACP which relies heavily on its vast network of supporters.

player to the legally impoverished one shot litigant. Their priorities, however, may be different and tension may develop between the two. Individual involvement and control is effectively supplanted for the good of the whole organisation.

The EOC can therefore be classified as both an outcome-oriented constitutional litigant,²⁷ bringing test cases before the European Court of Justice in the hope of securing a favourable judicial decision, and as a publicity-oriented litigant, litigating to create publicity both for itself and the issues it supports. A favourable decision raises the EOC's own profile as a respected, effective organisation and provides it with a platform on which to campaign for changes in domestic law (Harlow 1986: 122). For example, the decision of the European Court of Justice in *Barber*,²⁸ that a contracted out occupational pension scheme could constitute pay within the meaning of Article 119, provided the EOC with grounds to fight for the early introduction of flexible retirement or equal pension ages in both state and occupational schemes. Similarly, the recent decision of the European Court in *Enderby*, that difference rates of pay for men and women arising from separate collective bargaining had

It also enjoys easy access to the black press and has secured the full cooperation of the black churches. Interviews with the members of the EOC suggest that while the EOC is able to identify the issues needing to be tested before the courts, with the exception of pensions where the EOC is inundated with requests, it does not have an effective grass-roots network to help it find the appropriate cases.

²⁷ The National Consumers' League (NCL) is a further example of an outcome-oriented litigant. Its major goal was to improve working conditions through the enactment or enforcement of protective legislation. The NCL moved into litigation to protect legislation that it had successfully lobbied for in the past. *Sorauf (1976: 94)* terms these litigants "constitutional" - the ultimate guiding consideration in litigation is the long range precedent, not the immediate remedy or organisational publicity that is the goal.

²⁸ Case C-262/89 [1990] ECR I-1889

to be objectively justified by the employer, has made it easier for the EOC and others to challenge indirect discrimination in pay systems (EOC 1994 26)

In Europe the EOC is considered a "respectable" organisation due to its statutory status and the experience it has gained in the field of gender discrimination during the last 20 years. By virtue of being the largest and most important organisation in this field it can go to the Court of Justice knowing that it represents a unified constituency²⁹ which does not have to fight against an effective organised opposition. This gives added weight both to the cases it supports and to its submissions in Court.

Nevertheless, it is rare for any litigation strategy to come as neatly packaged as the American literature would suggest. More often interest group litigation is conducted according to a tight budget and any strategy is influenced by the cases that are brought to the group's attention. Factors such as the personal preferences of the present staff and external pressures, such as the need to be seen to be effective, can influence a strategy as much as any planning.

²⁹ The presence of only one major organisation in the field has been noted as critical to the NAACP (LDF)'s victories in several areas (Westin, 1975 104-128). The Women's Rights Project of the American Civil Liberties Union (ACLU(WRP)), by contrast, was unable to control the flow of cases to the court in the same way, given the plethora of women's and public interest groups that were established in the 1970s (Rosenberg, 1991 224). In the Netherlands a women's group has also brought test cases such as Case 30/85 *Teuling-Worms* [1987] ECR 2497 in respect of equal treatment in social security (Atkins and Luckhaus 1987 117) and in Germany a single lawyer, Dr Klaus Bertelsmann, was responsible for finding and taking Case 79/83 *Harz* [1984] ECR 1921, Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047, Case C-33/89 *Kowalska* [1990] ECR I-2591 and Case C-184/89 *Nimz* [1991] ECR I-297.

3. The EOC's litigation strategy

The EOC's litigation strategy has developed over the last 15 years. At first, it aimed to make Article 177 references to the European Court of Justice since it was thought that in the light of the ruling in *Defrenne (No 2)*, the Court was determined to achieve equality in the workplace, and that the litigant would enjoy the benefits of the Court's creative and teleological approach to decision-making. Cases such as *Macarthy's v Smith*³⁰ and *Barber*³¹ tended to support this view. The Article 177 reference procedure also allowed the EOC to rely on the benefits of the European Court's policy-oriented approach while using the medium of the national court to implement its decisions. This extended the national habit of obedience to a judicial ruling to decisions of the Court of Justice.

From interviews it is clear that the EOC never had a clear litigation strategy which it planned during its first year and followed subsequently.³² Suitable cases, such as *Macarthy's v Smith*,³³ and *Jenkins v Kingsgate*³⁴, emerged on ad hoc basis, lawyers recognised their

³⁰ Case 129/79 [1980] ECR 1275

³¹ Case C-262/89 [1990] ECR I-1889. The Court was prepared to recognise that contracted-out occupational pensions were pay within the meaning of Article 119 and that the ages at which they were paid had to be equalised with respect to benefits payable after 17 May 1990, despite provisions to the contrary in Directive 86/378/EEC (OJ No L235/40)

³² The EOC was created by a government in haste and started to operate with only a skeleton staff seconded from the civil service. A dispute with the Home Office about the grading of the post of chief legal officer took three years to resolve and effectively delayed the establishment of the legal department. The commission was also deluged with individual enquiries which diverted its attention from the task of evolving a general strategy.

³³ Case 129/79 [1980] ECR 1275

potential and they were then pursued. This situation was not unique to the EOC. Prosser says that in the Child Poverty Action Group "justifications for the different types of activity were often retrospective rather than representing a clear initial aim. . . it would be a mistake to suppose that there was a clear set of aims for the test cases. . . indeed the phrase "test case strategy" was applied only later" (Prosser, 1983: 21).

Some of the earliest references funded by the EOC - *Garland*³⁵ (travel facilities granted after retirement), *Worringham*³⁶ (payments made by an employer to cover the costs of a male employee's contributions to an occupational pensions scheme) and *Burton*³⁷ (discriminatory ages in a voluntary redundancy scheme) - were loosely related to retirement and pensions. Consequently, by the mid-1980s the EOC started to develop a "litigation strategy" on the consequences of the discriminatory state pension age. It funded two complementary cases, *Marshall (No 1)*³⁸ and *Roberts*,³⁹ in order to establish the appropriate comparator in respect of discriminatory retirement age. It also funded references in *Newstead*,⁴⁰ challenging the legality of requiring all male civil servants to make contributions to a widow's pension fund, *Barber*⁴¹ concerning contracted-out occupational pensions, redundancy pay and ex gratia payments, *R v Secretary of State for Social Security*,

³⁴ Case 96/80 [1981] ECR 911

³⁵ Case 12/81 [1982] ECR 359

³⁶ Case 69/80 [1981] ECR 767

³⁷ Case 19/81 [1982] ECR 555

³⁸ Case 152/84 [1986] ECR 723

³⁹ Case 151/84 [1986] ECR 703

⁴⁰ Case 192/85 [1987] ECR 4753

⁴¹ Case C-262/89 [1990] ECR I-1889.

*ex parte EOC*⁴² testing the compatibility of discriminatory National Insurance contributions with Directive 79/7/EEC, and *Neath*⁴³ concerning sex-based actuarial factors. It also funded the reference in *Marshall (No 2)*⁴⁴ to secure an effective remedy for Miss Marshall who had been forced to retire before her male colleagues.

Having funded these test references the EOC and other organisations have then supported cases before the national courts relying on the European Court's decision, this time without the need to make a reference. For example, service women unlawfully dismissed from the armed forces on the grounds of their pregnancy, have been relying on *Marshall (No 2)* to secure an effective remedy.⁴⁵ The EOCs also funded *Duke v GEC Reliance*⁴⁶ before the English courts and *Finnegan v Clowney Youth Training Scheme*⁴⁷ before the Northern Irish Courts in an effort to extend the decision in *Marshall (No 1)* to non-state bodies. On this occasion the House of Lords were not prepared to interpret national law consistently with European Community law.

In 1990 the EOC's legal section announced that it would pursue a two-fold strategy for the future.⁴⁸ firstly, it would continue to test European Community law by making references

⁴² Case C-9/91 [1992] 3 All ER 577

⁴³ Case C-152/91 [1994] IRLR 91

⁴⁴ Case C-271/91 [1993] 3 CMLR 293

⁴⁵ See, for example, *Ministry of Defence v Cannock* [1994] IRLR 509

⁴⁶ [1988] 2 WLR 359

⁴⁷ [1990] 2 WLR 1305

⁴⁸ Alan Lakin, The EOC's Chief Legal Officer, Equality Lawyers' Network Meeting, 24 April 1990

to the ECJ, especially concerning pensions, and secondly, it wanted to place more emphasis on litigating in the public interest in judicial review proceedings, using Community law directly to strike down national law⁴⁹ Judicial review offers several advantages It enables the EOC to select precisely the issue it wishes to challenge and to tackle the source of the problem directly - the offending statute and the relevant government department Since the challenge is on a point of law, the facts are usually not in dispute. In addition, the case is heard at first instance by senior judges in the Queen's Bench Division rather than by an Industrial Tribunal There is also no need to put an individual litigant through the stress of litigation against her own employer The EOC can have full control over the case, without the risk of the applicant withdrawing at any stage or the case being settled without any publicity

Judicial review proceedings have the potential to benefit a very large number of women For example, as a direct consequence of the House of Lords' ruling in *R v Secretary of State for Employment, ex parte EOC*⁵⁰ that the provisions of the Employment Protection (Consolidation) Act 1978 unlawfully discriminated against women who worked part-time, the government has now changed the law⁵¹ This is estimated to have benefited 5 million women

⁴⁹ The EOC has sufficient locus standi to bring an action in its own name by virtue of its statutory functions. The High Court and the Court of Appeal cast doubt on this position in *R v Secretary of State for Employment, ex parte EOC* [1992] 1 All ER 545 and [1993] 1 All ER 1022 respectively but the House of Lords confirmed that the EOC does have sufficient standing [1994] 1 All ER 910

⁵⁰ [1994] 1 All ER 910

⁵¹ SI 1995/31 The Employment Protection (Part-time Employees) Regulations 1995

In earlier judicial review proceedings funded by the EOC, *R v Ministry of Defence ex parte Leale and Lane*,⁵² the MOD settled the case, admitting that its policy of dismissing pregnant women from the armed forces contravened the Equal treatment Directive. This has led to a large volume of claims from ex-service women. The government has admitted⁵³ that it has paid £30 million to over 2,700 women. A further 2,000 cases still have to be resolved (EOR 1994 5). The EOC liaises with the Armed Forces Pregnancy Dismissal Advisory Group and has issued a series of newsletters and information packs to advise the women of their rights.

The EOC has also appeared as a quasi-amicus curiae in *R v Secretary of State for Social Security, ex parte Thomas*,⁵⁴ a social security case which raised issues of the compatibility of national law with a Community directive. The EOC was deemed to have sufficient interest in the case by reason of "its statutory duty to work towards the elimination of discrimination. It has a legitimate interest in the proper interpretation, application and implementation of Community law in that field". The Master of the Rolls, however, emphasised the unusual facts of the case and underlined his reluctance to allow third parties to intervene generally. The EOC is not, however, permitted to submit amicus briefs to the European Court in cases with which it has no involvement. It can only pass on its views to the European Commission.

⁵² , not reported (EOC 1993 25)

⁵³ Hansard HC, 18 October 1994, col 181

⁵⁴ *Thomas v Adjudication Officer* [1991] 3 AllER 257 (Court of Appeal). On 5 July 1990 5 July 1990 the court made an order pursuant to RCS Ord 15 r 6 joining the Equal Opportunities Commission as party to the proceedings. The House of Lords referred the case to the European Court of Justice whose decision can be found in Case C-328/91 *Secretary of State for Social Security v Thomas* [1993] 3 CMLR 880. The EOC has also appeared as an amicus curiae in *Shields v Coomes Holdings Ltd* [1978] 1 WLR 1408.

which is under a duty to represent the views of the Community in each case in which it appears. This procedure is inefficient for two reasons: firstly, it seems that communication between the Women's Bureau in DG V and the legal service is poor, and secondly, there is often a lack of awareness of the cases currently before the Court. Attempts are being made to remedy this situation through the establishment of an information network funded by DG V and operated by the EOC.

Complementary Tactics

Although the EOC's strategy has a strong legal bias, as American practice indicates, a litigation strategy does not occur in isolation: it is often accompanied by other forms of action in the political arena. At Community level, interest groups devote a considerable amount of energy to lobbying the institutions, in particular the Commission which has proved highly receptive to input from non-governmental sources (Greenwood and Ronit 1994: 33, Butt-Philip (1980), Kirchner and Schwaiger (1980) and (1981)). A symbiotic relationship exists between interest groups and the Commission.⁵⁵ From the Commission's perspective interest groups fulfil a valuable function as providers of independent or corroborative information to the Commission's officials against which official data and explanations from national governments can be checked. They also express the views of a constituency of interests at a level below that of national government.

⁵⁵ See further the Commission's White Paper on Social policy COM(94) 333 encouraging the involvement of voluntary groups.

To interest groups, the Commission, as a relatively open bureaucracy, represents a source of information about current policies, operations and future plans. Access to the Commission represents a mark of recognition, serving to legitimise the group itself as well as the interests it is trying to represent. Most important of all, by opening bilateral relations, interest groups hope to be able to influence firstly, the attitudes and behaviour of the relevant Commission officials and secondly, the content of new legislation proposed by the Commission.

The EOC has not ignored this potential source of influence. It has worked to develop relations with DG V (Social Affairs) and in particular the Women's Bureau in DG V. Its position is probably helped by its official status which means that the Commission is dealing with a respected, representative agency rather than with just another interest group. It could even be argued that parallels exist between the situation of the EOC and the Commission - both are administrative agencies, burdened with broad duties and high expectations. The empathy existing between the two can only strengthen their relationship.

The EOC has played a particularly influential role in the evolution of a European Community policy on equality, not least because it is the only independent, specialist equality agency in Europe which can provide considered and reliable information. Consequently, it has contributed far more than its size would suggest. Arising from its early contacts with the Commission the EOC organised a conference entitled "Equality for Women - progress, problems and European perspectives", sponsored by the Commission and the European Parliament but held in Manchester at the end of May 1980. The value of this conference lay in the opportunity it provided for experts to meet and talk. The conference resulted in the

establishment of an Advisory Committee on Equal Opportunities, chaired during its first year by Baroness Lockwood, then Chair of the EOC ⁵⁶

The EOC is also actively involved in the EC's network of other committees. The Chair continues to sit on the Employment Advisory Committee (EOC(NI) enjoys only observer status), EOC representatives have also participated in the Equality Lawyers' Network, the Women's Rights committee of the European Parliament and the Economic and Social Committee. The Women's Bureau is in regular contact with the EOC's research department and relies heavily upon it for information. In addition, the EOC provides the coordinator for the network on positive action and a national coordinator for the IRIS Working group on vocational training for womenis participating in the IRIS training programme.

In September 1993 the EOC, in conjunction with the TUC, took the unusual step of formally notifying the European Commission that it considered national legislation on equal pay to be incompatible with European law (EOC 1993 25). This follows from the Article 169 enforcement proceedings brought against the UK concerning equal value ⁵⁷. They have

⁵⁶ The EOC's seventh Annual Report states that "The Chair of the Advisory Committee was held, by unanimous election, by the Chairman (sic) of this Commission, and we have noted this fact as a token of the regard in which the (EOC) Commission is held by within the European Community." The EOC continues to attach great importance to its membership of this committee (EOC 1994. 15). The EOC continues to organise conferences and seminars with a European theme. For example, in December 1993 the EOC organised a seminar for UK representatives of the European Commission's Equality Networks to discuss women's information needs (EOC 1994 15).

⁵⁷ Case 61/81 *Commission v UK* [1982] ECR 2601

also complained to the Commission about the abolition of the Wages Councils which, they argue, has had a discriminatory impact on women

4. Is a Community litigation strategy worthwhile?

The EOC's pioneering use of references to the Court of Justice has paved the way for an alternative point of access to the decision-making process. Although the EOC has primarily used EC law to strike at the heart of British law and practice, the consequence of European Court decisions has been to precipitate a change in Community - ultimately national - legislation. For example, the derogations to Directive 86/378⁵⁸ may now be *ultra vires* Article 119, in the light of the pension cases⁵⁹. The Commission has now proposed amendments to this Directive. The EOC's litigation has also been influential in shaping the development of Community sex equality law. For example, it was thought from the decision in *Jenkins v Kingsgate* that the European Court of Justice had only a narrow understanding of the concept of indirect discrimination - that an action was only discriminatory when it was intended to be so⁶⁰. The notion of indirect discrimination found in s1(1)(b) of the British Sex Discrimination Act 1975, which is itself based on the decision of the American Supreme Court in *Griggs v Duke Power Company*,⁶¹ is much broader. It covers measures which have a disparate impact on women, whether or not the employer intends to discriminate.

⁵⁸ OJ No L 225, 12 8 86, 40

⁵⁹ For example, Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, Case C-262/88 *Barber* [1990] ECR I-1889 and *Curtin* (1990 475)

⁶⁰ Case 96/80 [1981] ECR 911, para 14

⁶¹ 401 US 424 1971

When *Jenkins* returned to the British EAT the Chair, Browne-Wilkinson J, confessed that the Court's judgment was so unclear that he applied national law. Such criticism seems to have prompted the Court of Justice to reconsider its approach. In the subsequent cases of *Bilka-Kaufhaus*⁶² and *Rinner-Kuhn*⁶³ the Court had moved to adopt the broader approach.

Litigation has also brought some more immediate, tangible success for the EOC. Equality has now been achieved in respect of retirement age⁶⁴ and occupational pension age⁶⁵, men and women must now receive the same redundancy pay and ex gratia payments,⁶⁶ and both men and women must receive a genuine and effective remedy when they have been discriminated against.⁶⁷ These cases are significant successes for the EOC and represent substantial rewards in its determination and persistence. As a direct consequence these cases have served to raise the profile of equality issues and increased the awareness of the importance of Community law in the national system. Community law is now pleaded regularly before national courts and tribunals and judges are showing themselves more at ease with deciding cases on this basis.

Yet reliance on the Court to deliver a favourable judgment can also be a risky strategy. As the EOC has discovered, the expense and risks of taking a case to the European Court of

⁶² Case 170/84 [1986] ECR 1607

⁶³ Case 171/88 [198] ECR 2743

⁶⁴ Case 152/84 *Marshall (No 1)* [1993] 3 CMLR 293

⁶⁵ Case C-262/88 *Barber* [1990] ECR I-1889

⁶⁶ Case C-262/88 *Barber* [1990] ECR I-1889

⁶⁷ Case C-271/91 *Marshall (No 2)* [1993] 3 CMLR 293

Justice are not always rewarded. The Court has been criticised for the judgments it delivered in *Burton*,⁶⁸ *Worringham*⁶⁹ and *Newstead*⁷⁰ on the grounds that it did not answer the questions referred, that it misunderstood the points at issue and that its understanding of the law was incorrect. In *Barber* the Court was notoriously unclear as to the meaning of the temporal limitation imposed on the application of the principle of equality. It took an amendment to the Treaty on European Union⁷¹ and four subsequent references to the European Court⁷² to clarify the scope of the *Barber* principle. Perhaps more seriously, for many thousands of women, the Court has strived so hard to achieve equality for men that the long-term interests of women has suffered. In *Smith v Avdel Systems*⁷³ the Court said that it was compatible with Community law for pension schemes to raise women's pensions age from 60 to 65 to the same age as men in order to achieve equality. As a result women must then pay contributions for an extra five years to attain the same level of pension.

⁶⁸ Case 19/81 [1982] ECR 555

⁶⁹ Case 69/80 [1981] ECR 767

⁷⁰ Case 192/85 [1987] ECR 4753

⁷¹ Protocol No. 2 was added to the Treaty on European Union which clarified the temporal limitation of *Barber*. This provides

"For the purposes of Article 119 of the Treaty establishing the European Community, benefits under occupational social security schemes shall not be considered as remuneration in and insofar as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law."

⁷² Case C-109/91 *Ten Oever* [1993] IRLR 601, Case C-152/91 *Neath* [1994] IRLR 91, Case C-200/91 *Coloroll* [1994] ECR 4389, and Case C-110/91 *Moroni* [1994] IRLR 130

⁷³ Case C-408/92 [1994] ECR I-4435

Consequently, undertaking a European litigation strategy by no means guarantees success, even for the EOC which it appears to have the odds stacked in its favour for success. The EOC has been fortunate in being able to rely on a fundamental Treaty provision and a substantial and established body of legislation. However, it must now contend with factors largely beyond its control - a changing political climate, increasingly hostile to European Community matters and a less enthusiastic Court. The EOC does, however, intend to continue to make references and to test the right of part-time workers to claim access to occupational pension schemes. However, given the recent success that the EOC has enjoyed taking judicial review proceedings before the national court it may continue to focus, where possible, on constitutional challenges to national law and wait until after the Intergovernmental Conference in 1996 to see if the Court of Justice will reconsider its approach.

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