EU Law: Direct And Indirect Effect

EU Law

Part A

Issue One

Anna may be able to bring a claim against Watergate Prison if she can show that they have discriminated against her because of her sex/gender. First Anna would have to show that because of her sex/gender she doesn't receive equal pay or equal treatment.

Anna and John are both C grade employees by Watergate Prison, however, as a prison guard, John receives a gym membership and private healthcare, which Anna as a healthcare worker doesn't enjoy as part of her employment.

Therefore, the two C-grade employees do not receive equal pay. As Article 157(2) TFEU states that 'For the purpose of this Article 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly in respect of his employment, from his employer.' [1: Article 157(2) TFEU]

Under this Article, the gym membership and private health care that John receives as part of his employment would be defined as 'another consideration in cash or kind' (Garland v Rail Engineering Ltd) that Anna does not benefit from. [2: Garland v Rail Engineering Ltd (C-12/81) [1982] ECR 359]

Next, Anna would have to prove that due to her sex/gender she has been either directly or indirectly discriminated against.

At Watergate Prison, John's job as a prison guard is a predominantly male role and Anna's job as a healthcare worker is a predominantly female role, therefore, the discrimination at Watergate Prison would be indirect. As Article 2(1)(b) Equal Treatment Directive defines indirect discrimination as 'An apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. [3: Article 2(1)(b) Equal Treatment Directive 2006/54]

The provision, in this case, appears neutral as prison guards are entitled to private healthcare and gym memberships. However, as most prison officers are men this puts female employees at a disadvantage

Arguably Anna has endured indirect discrimination, as she doesn't receive the same gym membership and private healthcare John does as part of his employment, even though they are both C grade employees.

When making her claim Anna shouldn't have any issues as this case is about equal pay,

therefore it uses Article 157TFEU. Treaty Articles have both vertical and direct effect, meaning that they can be used against both public and private individuals, Therefore Anna should be able to make a claim in the national courts. [4: Article 157TFEU]

Issue Two

Loxley Prison may be able to have a positive discrimination policy which would allow them to recruit Anna rather than Jack.

This is because Article 157 (4) TFEU allows for '…measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.' [5: Article 157 (4)]

Initially, the court was not in favour of 'positive discrimination' policies as seen in Abrahamsson and Anderson v Fogelqvist, as the Swedish legislation had provided for the creation of posts aimed at women since they were under-represented at a senior level in universities. The candidates for such posts were to be selected if they had sufficient qualifications, even if other candidates of the opposite sex would normally have been chosen because of better qualifications. The court ruled that this policy was disproportionate as it meant that women who were less qualified for the job may be hired over more qualified men. Although the court did state that if, however, a candidate presented 'equivalent or substantially equivalent merits', the appointment might be lawful, subject to an objective assessment. [6: Abrahamsson and Anderson v Fogelqvist (C–407/98) [2000] ECR I-05539]

Therefore, the court was more favourable to the national policy in Hellmut v Nordhein-Westfalen that sought to advantage women in certain work situations, since the policy concerned permitted well-qualified men also to be considered. Moreover, it specifically made possible male applicants' success despite the clear bias towards women. To further this in Badeck, the Court held in favour of a policy for an advancement plan for women who were under-represented in posts in the academic service. However, there had to be a guarantee that candidatures were the subject of an objective assessment which took account of the specific personal situations of all candidates. Thus, for a company/business to use a positive discrimination policy, they must be objective and allow the non-favoured gender to say why they would be better qualified/suited to do the job than an applicant from the gender favoured by the policy. [7: Hellmut Marschall v Nordhein-Westfalen (C-409/95) [1997] ECR I-6363] [8: Badeck (C–158/97) [2000] ECR I-01875]

Consequently, Loxley Prison would be able to have a positive discrimination policy to enable them to employ a female healthcare worker over a male healthcare worker to help restore a gender balance in their workforce as they currently have 3 male healthcare workers and only one female healthcare worker. The positive discrimination policy would allow them to employ Anna over Jack as they both have the same qualifications and experience. However, if they were to do this, they would have to look objectively at the two candidates and allow Jack the opportunity to explain why or how he would be a better candidate for the job then Anna.

Part B

Direct effect – action against Watergate Prison

Anna may be able to rely upon the Directive if it has direct effect. Direct effect means that the

Directive will give rights to Anna which she can rely upon in the national courts.

The Directive will only have direct effect if:

- It is clear, precise and unconditional (Van Gend en Loos): and [9: Van Gend en Loos v Nederlandse Administratie der Belastingen (case 26/62) [1963] ECR 1]
- The time limit for implementation has passed without the directive being properly implemented. (Ratti) [10: Pubblico Ministero v Ratti (case 148/78) [1979] ECR 1629]

S.2 (1) European Communities Act 1972 requires UK courts to give effect to directly effective rights arising under EU law.

The Directive does seem to satisfy the Van Gend criteria as it is precise and clearly states that ‘all employees with children aged between 1 and 3 years old should be entitled to a maximum of 5 days paid leave from work per year to care for their children when they are ill’. The directive is also unconditional as it doesn’t state that anything must be done/ put in place before the EU directive comes into effect. [11: See note 1, above]

The deadline for implementation was the end of November 2018. The Directive was implemented on the 6 November 2018, but it was incorrectly implemented. Therefore, the Directive can have direct effect (Ratti.) [12: See note 2, above]

Directives only have vertical direct effect.

Directives only have vertical direct effect against the state or an emanation of the State (Marshall v South West Hampshire Area Health Authority, Faccini Dori). Therefore, Anna will have to show that Watergate Prison is an emanation of the state. [13: Marshall v Southampton & South West Area Health Authority (case 152/84) [1986] ECR 723] [14: Paola Faccini Dori v Recreb Srl (case C-91/92) [1994] ECR I-3325]

Is Watergate Prison an emanation of the state?

Watergate Prison will be an emanation of the state if it fulfils the Foster v Gas criteria, as revised by Farrell. It will have to: [15: Foster v Gas (case C-188/89) [1990] ECR I-3313] [16: Farrell v Whitty and Others (case C-413/15) [2017] EUECJ C-413/15]

- provide a public service under a statutory duty
- be under the control of the state and
- have special powers.

Public service – Watergate Prison is providing a public service as a prison, although, it was privatised two years ago and is now owned by a private security company. Private prison companies usually enter into contractual agreements with governments, but there is no indication Watergate Prison is under a statutory duty to provide prison services. Under Farrell, the state does not appear to have delegated to it a public interest task. [17: Farrell v Whitty and Others (case C-413/15) [2017] EUECJ C-413/15]

State control – Watergate Prison is subject to regular inspections by Her Majesty’s Inspectorate of Prisons for England and Wales, so it seems that the prison is subject to state control.

Special powers – There is no evidence of special powers. It is not stated that Watergate Prison offers additional services that would not normally be offered by state prisons.

Farrell makes it clear that not all three of the Foster criteria need to be met for the body to qualify as an emanation. This was also stated in NUT v Governing Body of St Mary's Church of England School. Nonetheless, as Watergate Prison only meets one of the criteria, being under state control, it is unlikely to be an emancipation of the state. [18: See note 9, above] [19: NUT v Governing Body of St Mary's Church of England (Aided) Junior School [1997] 1 ICR 334 (CA)]

Indirect effect- action against Watergate Prison

If Anna cannot rely on direct effect, she may be able to rely upon indirect effect to bring a claim against Watergate Prison.

Indirect effect means that Anna can ask the national court to interpret the UK Statute to comply with the purpose of the Directive. To further this, the ECJ decided that national courts are required by Article 4(3) TEU to interpret national law to comply with a directive, as far as possible. (von Colson) [20: Von Colson and Kamann v Land Nordrhein-Westfalen (case 14/83)[1984] ECR 1891c]

The ECJ held that the national courts are under a duty to interpret national law to comply with any relevant directive, whether the national law was enacted before or after the date of the directive (Marleasing.) However, where there is a clear conflict between national and European law it is impossible for UK law to comply with the European law (Wagner Miret.) [21: Marleasing SA v La Comercial Internacional de Alimentacion SA (case C106/89) [1990] ECR I-4135] [22: Wagner Miret v Fondo de Garantia Salaria (case 334/92) [1993] ECR I-6911]

The UK Statute was passed to implement the Directive. However, the national law only entitles employees with children between the ages of 1 and 3 to take a maximum of two days paid leave per year from work to care for their ill children. Whereas, the European law states that all employees with children aged between 1 and 3 years old should be entitled to a maximum of 5 days paid leave from work per year to care for their children. The national court may be prepared to adopt a purposive interpretation and extend the period of paid leave to 5 days instead of 2 to allow the parents of 1-3-year olds to look after their children if they are ill. This interpretation would enable Anna to take action against Watergate Prison. Alternatively, the national court may not be prepared to extend the period of paid leave and declare that there is a clear conflict between the wording of the Directive and the wording of the UK Statute.

It is not certain Anna will be successful in bringing an action against Watergate Prison relying on indirect effect.

State Liability – action against the UK government

Anna could bring an action for state liability against the UK Government for incorrectly implementing the Directive

The UK Statute has reduced the amount of paid leave that the parents of children aged 1-3 years old can take from the five days in the directive to just two days. As the Directive has been

incorrectly implemented, the Brasserie du Pêcheur /Factortame test should be used. [23: Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame Ltd (joined cases C-46 & 48/93) [1996] ECR I-1029.]

Anna must show:

- The Directive confers rights on individuals – it does. The Directive intends to confer rights on all employees with children aged between 1 and 3 years old and entitle them to take 5 days paid leave per year to care for their children when they are ill.
- The content of those rights is identifiable from the Directive – the prison should enable employees to have 5 days paid leave to care for their children.
- There is a link between the failure to implement and the loss suffered by Anna. Anna will not receive pay for the three days she was absent from work when her daughter was ill.

AND

- The Member State's breach must be sufficiently serious

As the Member State has incorrectly implemented the Directive, Anna needs to prove that there is a sufficiently serious breach by the State.

R v HM Treasury ex parte BT13] set out guidelines to establish whether the breach is sufficiently serious. [24: R v HM Treasury ex p Telecommunications (case C-392/93) [1996] ECR I-1631]

- Is the relevant directive clear or vague? Clear, all employees with children aged between 1 and 3 years old should be entitled to a maximum of 5 days paid leave from work per year to care for their children when they are ill.
- Has the EU Commission given any guidance on the matter? Non-stated
- Has the ECJ given any guidance in one of its cases? Non-stated
- Have other Member States made the same mistake? Were they equally confused? Non-stated

It is sufficiently serious the directive was clear and the EU Commission and the ECJ have not given guidance

Anna should be able to take any action against the UK Government