



Volunteers' status under anti-discrimination law: where to now?

A personal view from Declan O'Dempsey and Olivia Faith Dobbie, Cloisters

Judgment in the case of *X v Mid Sussex CAB* was handed down by the Supreme Court 12th December 2012, in which it was held that volunteers (unpaid workers) do not qualify for protection from discrimination under the employment provisions of European or domestic anti-discrimination law. The principal disagreement between the parties (a volunteer legal advisor and a CAB) was about the proper interpretation of Article 3 of the Framework Directive,¹ which underlies the relevant legislation. The Appellant had argued that certain volunteers in certain situations do fall within scope – namely those whose volunteer activities closely resemble paid work. The CAB argued that no volunteers fall within the legislation, irrespective of the nature of the work that they do. In dismissing the appeal, the Court held that the law in this area was sufficiently free from doubt, such that there was no need to refer any questions to the CJEU.

What the judgment does

The judgment reaffirms the principle that in order to fall within the employment provisions of anti-discrimination legislation, the person must be a 'worker'. That requires him or her to operate under a contract (with remuneration being highly relevant to that issue).² Without a contract, there is no protection, regardless of the nature of the work; the hours undertaken; the commitment demonstrated; the

¹ Directive 2000/78/EEC

² Paragraphs 16 and 17 of the Judgment demonstrate that the Court drew assistance from the concept of "worker" under EC jurisprudence and focused on remuneration.

volunteer's integration into the organisation; or the degree of control they submit to. An employee and a volunteer may work side by side, carry the same responsibilities and duties and do, in all material respects, exactly the same work - but only the former is protected.

The Supreme Court's general statement is clear enough. However, it was also acknowledged that the domestic employment provisions protect some unpaid workers in certain situations. Barristers are protected from discrimination under s.47(6) of the Equality Act 2010 irrespective of whether they are engaged on a paid or unpaid brief. Similarly, the protection afforded to office holders does not specify that such offices must be paid. Accordingly, it would seem that persons falling into these categories are entitled to claim under the employment provisions of the Equality Act 2010, even if they receive no remuneration.

Lord Mance, giving the only judgment in *X*, stated: "Volunteers also come in many forms, including the cheerful guide at the London Olympics, the charity shop attendant, the intern hoping to learn and impress and the present appellant who provided specialist legal services. The intern might well fall within article 3(1)(b) [of the Framework Directive]"

Article 3(1)(b) applies to those seeking access to "vocational training" and "practical work experience". Hence interns appear to be protected under European Law, even though there is no domestic legislation implementing any such protection.

What the judgment does not do

The judgment does not give any guidance as to what sort of internships will fall within the scope of the Directive. Would *all* internships amount to "vocational training" and/or "practical work experience"? Clearly, there is a need for some guidance on this issue.

Further, the decision fails to consider whether there is *any* protection for volunteers against discrimination outside of the employment provisions. This matter arose during the legislative passage of the Equality Act 2010 and featured in the earlier stages of the proceedings in *X*.

Which volunteers can go to the county court?

During the passage of the Equality Act 2010 through Parliament, the Solicitor General stated:

"Volunteers are currently protected from discrimination, victimisation and harassment in respect of the provision of goods, facilities and services to the public. As recipients of services—for instance, from an agency that arranges placements—

there would be protection, which has been extended to cover age. Such discrimination might be highly relevant. Changing the laws proposed would provide a remedy in an employment tribunal instead of a county court, but there is a remedy already. ...".³

Conceptualising volunteers as 'service-users' of the organisation they volunteer for seems rather artificial and counterintuitive. However, the logic of the argument is that volunteers are a section of the public; and they are given the opportunity to work by the organisation. If the organisation is a service provider, the claim can be brought in the County Court by *any type* of volunteer - it is not necessary for the volunteer to demonstrate that they undertook duties which were substitute employment or akin to those of an employee (which was the case advanced by the Appellant in X).

However, requiring volunteers to rely on the goods and services provisions of the Equality Act 2010 may also lead to some rather odd results such as different tiers of protection for unpaid workers (as "service users") compared with paid workers (as "employees"). The most notable peculiarity is that the protection against discrimination in goods and services does not extend to discrimination because of marriage or civil partnership. Moreover, notwithstanding that age is now covered under the goods and services provisions,⁴ there are numerous exceptions which do not apply to the employment provisions of the Equality Act 2010. For example, those under the age of 18 have no rights whatsoever to protection against age discrimination in the realm of goods and services. Hence, a volunteer under 18 years who is denigrated by the organisation they volunteer for, because of their age, is outside the scope of the Equality Act 2010 altogether.

Volunteers who do fall within the goods and services provisions will be required to go to a County Court to enforce their rights whereas an employee is entitled to go to an Employment Tribunal. Tribunals are more accustomed to determining discrimination claims and are familiar with the dynamics of the workplace. In light of this, it seems curious (and arguably less favourable) for volunteers to be precluded from bringing their claims for discrimination arising *in the workplace*, to an Employment Tribunal – purely because they are not a "worker" within that workplace.

³ Equality Bill Committee (Day Six) Tue, 23 June 2009 | House of Commons - General Committee Activity, Amendment 243, Ironically moved by Lynne Featherstone MP who went on to become one of the Coalition's equality ministers, and opposed extended protection for volunteers.

⁴ Prior to 1 October 2012, age discrimination was excluded, but is now within scope.

Imagine an employee who volunteers to undertake certain activities (for their employer) which fall entirely outside of their paid duties. As an example - a maths teacher who agrees to coach the school football team at weekends. If that employee was discriminated against by the employer during the course of the unpaid activities would they be able to sue under the employment provisions of the Act or must they sue in the County Court? What if they suffered separate acts of discrimination during their normal duties and during their unpaid volunteering duties? Would they have to run concurrent claims in the Tribunal and the County Court in order to fully enforce their rights?

Summary

The decision in *X* is clear that without a contract, a volunteer cannot fall within the employment provisions of domestic or European anti-discrimination law – irrespective of the other features of their relationship.⁵ A contract is an irreducible minimum.

Whilst the judgment seems to focus heavily on remuneration being necessary to establish the requisite contract, it does not expressly state that to be the case. Therefore, it would seem that the door to the Employment Tribunal might be open to an unpaid worker if they can show that a contract exists between themselves and the organisation (the consideration for which is non monetary).

Unpaid workers who cannot show any form of contract, and who are not able to argue that their activities amount to “vocational training” and/or “practical work experience” will have to seek redress in the County Court, under the goods and services provisions of the Equality Act 2010.

Interns now have the green (or at least amber) light to seek to advance their rights in the Employment Tribunal, but clarity on the scope of this is much needed. In the New Year, a private member’s bill promoted by Hazel Blears MP will seek to prohibit the advertising of long-term unpaid internships and to regulate conditions of employment for paid internships. It is hoped that through the passage of this Bill, the government will address the position of interns in terms of anti-discrimination legislation also, so as to provide the requisite clarity.

Conclusion

In policy terms, it is clear that the present legislation covers the requisite areas of human activity like an old patchwork quilt – with various holes and mismatched sections. Whilst this ruling of the Supreme Court gives clarity as to the status of most

⁵ Unless they fall within one of the limited specific exceptions contained in the Equality Act 2010, such as pro bono barristers and unpaid office holders.

volunteer workers, it shines a spotlight on the legislative lacunas and demonstrates that there is no underlying principled basis to explain such differences.

In closing, we draw attention to the opening statement by Lord Mance, which refers to the moral imperative of combatting discrimination suffered by volunteers. It is hoped that such statement will encourage the government to resolve the issues raised by this case and ensure adequate protections for those in need of it.