



Newsletter No.11

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Planning for the 7th Annual EALCJ Congress — Paris 2003

“Termination of Employment at the Initiative of the Employer: Challenges for Socially Responsible Corporate Re-structuring?”

Following discussions between the EALCJ Secretariat and colleagues in the French Supreme Court, the *Cour de Cassation (Chambre sociale)*, a kind invitation has been extended by our French colleagues to host the next annual congress of the Association in 2003. The planned dates are 26th-28th November 2003, and the event will take place in the splendid surroundings of the *Cour de Cassation* in the heart of Paris.

The timing of this event and its hosting by our French colleagues comes at a particularly significant time, as celebrations take place to mark the 200th anniversary of the French *Code Civil*. We are delighted to be able to work together with our French colleagues in the preparation of this undertaking, which, for the first time, will see judicial colleagues from the EU Accession Countries joining us in our work and deliberations. It is also hoped that experts from the European Commission will be collaborating with us in the development of

the technical working programme and in preparation of an eventual publication to disseminate the results from this Congress.

The preparatory scientific organisation of this event will follow the model adopted for earlier Congresses in Seville, Rome and Dublin, with an extensive questionnaire on national practice being circulated for completion by colleagues from each of the participating States. A formal presentation of the synthesised results from the completed questionnaires will be given by the General Reporter at the outset of the Congress, and initial responses to the trends emerging will be offered by three technical experts. The subsequent open debate amongst participants will be drawn together to provide a final report on key issues and problems identified during the course of the Congress.

A preliminary draft of the technical questionnaire will be circulated during June 2003, and, following completion by October, the responses will be collated and synthesised in advance of the eventual meeting at the end of November.

To coincide with the Paris Congress, the Executive of the EALCJ will hold its annual general meeting on the afternoon of Friday 28th November 2003.

Further details can be obtained by contacting the Convenor of the EALCJ, Professor Alan C. Neal.

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Edited by Alan C. Neal

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Report on the 6th Annual Congress of the EALCJ - Dublin 2001

“Individual Rights in Employment: The Charter of Fundamental Rights of the European Union & Article 13 of the Treaty”

1. Introduction

The 6th Annual Congress of the EALCJ was held in Dublin Castle from 11th to 13th October 2001. It was attended by 37 delegates from 13 countries. The aim of the Congress was to examine the impact of recent European legislation on equal opportunities on national courts and how these new provisions will be implemented in the future. The particular emphasis was on those aspects of discrimination which had not been the subject of European legislation in the past.

National Reports were received from all participating countries setting out the legislative framework and approach on a national basis.

2. Article 13

The first Session, presided over by Mary Faherty, President of EALCJ consisted of a presentation by Noel Dorr, the Irish representative on the negotiating group which prepared the treaty of Amsterdam, which added Article 13,

Article 13 of the European Treaty empowers the Commission to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

Before the Treaty of Amsterdam there was already the provision in the treaty relating to equal pay for men and women and the provision preventing discrimination on the grounds of nationality. There was also the 1976 Directive banning discrimination on the grounds of sex.

The new factors in Article 13, therefore, were to allow for community legislation combating discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Noel Dorr, in an entertaining exposé, described the negotiations about what categories should be included and the nuances of such words as “combat discrimination” in the final version which replaced “prohibit discrimination” in the draft, as well as the removal from the draft of “social origin” as a basis for discrimination.

The core subject of the Congress was the “Race Directive” adopted on 29th June 2000 to be implemented by July 2003. The implementation provisions require governments to ensure that “management and labour introduce the necessary measures by agreement”.

The other main Directive is the Employment Directive which establishes a general framework for combating discrimination in employment on grounds

of religion or belief, disability, age or sexual orientation. This is to be transposed by Member States by December 2003, with an extension to December 2006 in relation to age and disability discrimination.

The other principal area of discussion in the Congress was the “Charter of Fundamental Rights of the European Union”. This has the status of a “Solemn Proclamation” by all the European Institutions on 7 December 2000. It is, therefore, a political declaration rather than a part of the European Treaty.

In respect of discrimination, it contains a wider provision than Article 13 of the European Treaty. Article 21 of the Charter provides:

“Any discrimination based on any ground, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability age or sexual orientation shall be prohibited.”

“Within the scope of application of the Treaty establishing the European Community and of the Treaty of European Union, and without prejudice to the special provisions of these treaties, any discrimination on grounds of nationality shall be prohibited”.

One point emphasized by Mr. Dorr at the end of his talk was that the new rights extend to all persons lawfully within the Union and not just to citizens of the Union. This is an important point, for the most disadvantaged people within the European Union are those entitled to live there without gaining Citizenship.

3. Charter of Fundamental Rights of the European Union

The Second Session under the Presidency of Per Sørensen, Judge of the Danish Supreme Court and President of the Labour Court, was introduced by Professor Alan Neal, Convenor of EALCJ and reported by Jorma Saloheimo, Vice-president of the Labour Court of Finland.

In introducing the session Prof. Neal suggested that the European Court would not accept the Charter until it is incorporated into European Law. Until then it will be no more than a declaration of principles, similar to that in many European constitutions, but without a community-wide court to enforce it. There is already in existence the European Convention of Human Rights, made by the Council of Europe (50 nations instead of 15) and the European Social Charter of 1961.

Specifically in relation to discrimination, there was also discussion about the wide range of discrimination grounds. Does the possibility of a claim of discrimination on, say, grounds of property or birth dilute the force of the prohibition of discrimination on the grounds of race or disability?

Although the focus of the Congress was on discrimination, there was discussion of article 30 which provides:

“Every worker has the right to protection against unjustified dismissal, in accordance with community law and national laws and practices.” This is the proposed subject of our next Congress.

In his Report, Jorma Saloheimo returned to the subject of enforcement. He pointed out that Article 51 states that “The provisions of this Charter are addressed to the institutions and bodies of the Union...and to the Member States only when they are implementing Union law.” They do not, therefore, on the face of it give rise to rights which can be enforced between parties – *i.e.* no horizontal effect”

4. The road to implementation of the equality package – the Irish Experience

This session, presided over by Tor Mehl, the President of the Labour Court of Norway, was introduced by Melanie Pine, the Director of Equality Investigation of the Republic of Ireland and reported by Kate O’Mahoney, Chairman of Employment Appeals Tribunals of Ireland.

Ireland had responded to the Equality Package with a determined and innovative approach. The aim of the new body was to combine investigation and adjudication to try to move away from the rigidity of the court framework. The new body had been in operation for over a year. Over 60% of claims related to sex discrimination. Next was race discrimination (particularly relating to the attitude to travellers, who, though not romanyes were treated as a separate ethnic group) and then age discrimination, especially in relation to promotion and access to insurance. But there are also claims of discrimination on social origin (*e.g.* coming from inner city Dublin) and political opinion (a factor which is central to the Northern Ireland Fair Employment Tribunal, a much more formal body with much wider powers to order compensation)

As discovered in other countries, the creation of a forum for discrimination claims had demonstrated an untapped need. There is a direct correlation between the ease of access to a court or tribunal to resolve discrimination issues and the number of cases. This suggests that countries which have relied on the normal courts to deal with discrimination issues may be covering up injustices.

The key elements of this process are informality and keeping things in proportion. The compensation

awarded is not high. There is a limit of £10,000 and many awards are much lower. This makes acceptance easier.

In her Report, Kate O’Mahoney emphasized the importance of speed and urgency, leapfrogging normal court procedures.

5. The Role of Labour Courts in implementing and enforcing anti-discrimination legislation.

This session was presided over by Pekka Orasmaa, President of the Labour Court of Finland, and facilitated by Colin Sara, secretary-general of EALCJ.

It was clear that there were wide variations in the steps taken to date by national governments to implement the two main discrimination Directives. The **United Kingdom** had had specific laws on sex and racial discrimination for 25 years and on disability discrimination for five years. It also had a tribunal system which dealt with individual employment cases outside the normal courts system and was now hearing many thousand discrimination cases each year. **Ireland** has tried to produce a less formal system which specifically addressed the issues in the two Directives. Other countries were in different positions. **Denmark** has introduced a statute on race discrimination, but has none on age or disability discrimination. The emphasis in Denmark has always been on the role of the social partners and collective agreements. The difficulty related to people who are not union members or subject to collective agreements. In **Finland** there is new specific legislation prohibiting discrimination, but few cases. There is not very much in the way complementary Regulations. There is a new ombudsman for minorities. In **France** the emphasis is on collective agreements and criminal sanctions. In **Germany** there is a large network of labour courts at all levels, a Social Security Code guaranteeing integration of disabled people, a Commission for disabled workers and Commission in relation to sex discrimination, a Part-time Work Act together with strong factory committees and the availability of actions in the courts. Nevertheless the number of cases based specifically on discrimination are few. In **Iceland** there is an Act relating to sex discrimination and giving equal rights to disabled people, together with a wide equality principle in the constitution and an ombudsman. In **Austria** there is a big discussion about new anti-discrimination laws. Should they be general or specific to each type of discrimination? Should claims go to a special tribunal or be before a labour court? Can the municipalities be forced to change their laws, for example of giving housing priority to natives of the area? In the **Netherlands** the emphasis throughout is on the importance of mediation, rather than litigation. In **Luxembourg** there is an Equal Treatment Act of

1994, relating to discrimination of all kinds, together with a Commission, which, though not binding, is in practice accepted by all employers. There is a very large body of non-Luxembourgish employees. In **Norway** (where the EEA has produced similar directives) there is no general law or constitutional provision relating to discrimination, but the European Convention on Human Rights is directly enforceable and there is a Gender Equality Act and a Work Protection Act, the latter giving protection against racial discrimination in respect of recruitment and dismissal. In **Sweden** there are wide discrimination laws relating to ethnic grounds, belief, disability and sexual orientation. There is also an ombudsman in respect of each law. There may, however, need to be amendments to implement the Directive in relation to age discrimination.

6. Conclusions

The final plenary session was presided over by Gustav Maier, President of the Labour Court of Austria and facilitated by Christopher Tickle, Regional Chairman of Employment Tribunals, United Kingdom, both former Presidents of EALCJ.

More than twenty-five years after the two major Directives on Equal Pay and Sex Discrimination, the Commission has finally addressed other forms of discrimination as a community issue. At the same time there has been some loss of confidence in legal remedies as a means of combating discrimination.

The general feeling was that there is still a lack of awareness of the extent of discrimination, coupled with some unwillingness to go down the road followed by the United Kingdom, where there is extensive litigation about discrimination in employment, which does not necessarily have the desired effect of reducing the incidence of discrimination.

The EALCJ is, for obvious reasons, orientated towards judicial remedies, but still supports the role of such areas as awareness training, involvement of

the social partners, mediation and pro-active Commissions and Ombudsmen.

However, the Directive makes it clear that there must be laws and appropriate remedies. This involves, in turn, consideration of such issues as accessibility to justice, the right to legal representation, appropriate remedies and compensation limits, whether the defence of justification is available and the concept of indirect discrimination.

All these issues will have to be addressed by the national courts and the European Court of Justice. The Heading "Big Aspirations, Small Steps" is intended to emphasise the gap between the worthy aspiration of combating and, indeed, prohibiting discrimination of all kinds throughout the European Union and the steps taken by way of Directives which have, to date, had limited impact on the individual national laws and practice.

7. Social Programme

As always, the Congress included a full social programme, with an opening Reception on Thursday evening in the State Apartments of Dublin Castle, given by the Irish Government entertained by the Festive Quartet and attended by Mary Harney the Tánaiste (Deputy Prime Minister), who gave a brilliant unscripted address, a visit by Tom Kitt, the Minister for trade, a formal dinner on Friday evening at Trinity College Dublin, a guided literary walking tour on Saturday afternoon and an informal gathering on Saturday night ending, for some, at the oldest pub in Dublin.

Overriding the whole programme was the warmth, enthusiasm and efficiency of our hosts, of whom we must make special mention of our President Mary Faherty

*Colin Sara
Secretary-General*

Meeting of the Executive Committee of the EALCJ Stockholm, September 2002

The last Annual General Meeting of the EALCJ took place in Stockholm on 1st September 2002 at Ulriksdals Wårdshus. In addition to the Secretariat, national delegates attended from Austria, Finland, Ireland, Italy and Sweden, together with observers from Israel and the United Kingdom.

Judge Michael Koch (*Sweden*), the outgoing President of the Association welcomed Judge Pekka Orasmaa (*Finland*), who had been elected as his successor for the year 2002-2003.

Agreement was reached on the subject-matter for the next EALCJ Technical Seminar (Termination of Employment at the Initiative of the Employer), and consideration was given to the location and organisation of that event. It was agreed that (subject to agreement with our hosts) this would take place in the last week of November 2003.

It was also agreed that active steps should be taken to open membership of the EALCJ to judicial colleagues from the “first wave” of EU Accession Countries, and that Observer status (both in relation to participation in future technical seminars and in relation to meetings of the Executive Committee of the Association) should be accorded to delegates from those countries forthwith.

A report on the past year’s activities was received from the Secretary-General (*Colin Sara*), including details of the successful technical seminar held at Dublin Castle in October 2001 as the guests of our colleagues and the government of the Republic of Ireland.

The Convenor (*Professor Neal*) reported on discussions to complete membership of the Executive Committee with delegates from Greece and Portugal, on recent developments for the Association’s web-site, and on sales of the book *Fundamental Social Rights at Work in the European Community*, royalties from which continue to be received regularly by the EALCJ.

A report on the finances of the Association was received from the Treasurer (*Michael Homfrey-Davies*) and the Accounts for the year ending 30th November 2001 were approved.

It was agreed that the next Annual General Meeting of the Executive Committee will be held during the course of the Association’s Technical Seminar in November 2003.

Extending the Powers of the EALCJ to Welcome Colleagues from EU Accession Countries

Further to the decision taken at the Stockholm meeting of the Executive Committee of the EALCJ, the Secretariat has been holding discussions with judicial colleagues from a number of the countries which will enter full membership of the European Union during the course of 2004.

It is hoped that delegates from each of these countries will join us for the next Technical Seminar in Paris. Under the current terms of the Association’s constitution, these delegates will be granted Observer status for the Paris Seminar. The Secretariat will be bringing forward proposals for amendments to be made to the EALCJ Constitution in order to enable countries which have been accepted into membership of the European Union but who have not yet formally completed the transition to full Member State to nominate delegates to serve on the Executive Committee of the Association.

11th Meeting of the ILO Group of Senior Labour Court Judges, Florence, Italy 2003

The next meeting of the ILO group of senior Labour Court Judges will be taking place in Florence, Italy, on 24 October 2003. Two primary topics will form the subject-matter for reports and discussion during that meeting: (i) Equal treatment in European Directives and their effective application, and (ii) New initiatives to make Labour Court hearings more efficient: Use of alternative disputes methods, collective (class) action.

As is customary for this group, attendance is by invitation only, although the proceedings of the meeting (along with material relating to earlier meetings of the group) will be posted at the ILO’s web-site:

<http://www.ilo.org/public/english/dialogue/ifpdial/II/lc.htm>

Officers of the European Association

President (2002-2003) Judge Pekka Orasmaa (*Finland*)
 Immediate Past-President (2001-2002) Judge Michael Koch (*Sweden*)

Secretariat

Secretary-General (2000-2003) Mr. Colin Sara
 Treasurer (2000-2003) Mr. Michael Homfrey-Davies
 Convenor (2000-2003) Professor Alan C. Neal

EALCJ Web Site

Information about the constitution, activities, and publications of the EALCJ can be obtained from the EALCJ Web Site. This includes all of the Newsletters of the Association, which may be downloaded in .pdf format. The site also facilitates links to the European Court of Justice and the European Court of Human Rights, together with a wide variety of links to web-sites maintained by the Labour Courts of the European countries, and many of the most significant sources of material in the fields of European labour law and social policy. The EALCJ site is accessible at:

<http://www.labourcourtjudges.com>

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