

EMPLOYMENT

Words have wings and an employee's discriminatory views may also have claws: Homophobic remarks and the Equal Treatment Directive

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Cian Beecher
Partner
+353 1 920 1193
cian.beecher@arthurcox.com



Shane McCarthy
Associate
+353 1 920 1263
shane.mccarthy@arthurcox.com

OVERVIEW

In the case of *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford (Case C-507/18)*, the Court of Justice of the European Union (CJEU) held that homophobic comments made by a lawyer in an interview given during a radio programme, that he would not wish to recruit homosexual persons to his law firm nor to use the services of such persons in his law firm, could be held to contravene the Equal Treatment Framework Directive (Directive 2000/78), even if the person making the comments was not responsible for recruitment and no recruitment procedure had been opened, nor was planned, at the time the statements were made.

The CJEU relied on previous case law which has established that Directive 2000/78 is capable of applying to public statements made in relation to a particular recruitment policy. It further relied on findings in the same case that even if the statements made that are suggestive of a homophobic recruitment policy do not come from a person who has the necessary legal capacity to define the recruitment policy of the employer or to bind the employer, this is not necessarily a bar to such statements being found to fall within the employer's conditions for access to employment. The fact that the employer did not clearly distance itself from the statements, and the perception of people, are relevant factors a Court may take into account.

In this case, the CJEU added to the above, noting that even if no negotiation with a view to recruitment was under way when the statements were made, this does not preclude the possibility of such statements falling within the scope of Directive 2000/78.

That employers may not discriminate in their hiring practices is uncontroversial. This case highlights the broad scope of anti-discrimination legislation in an employment context, potentially extending the employer's obligations to comments by employees with no involvement in internal recruitment processes or influence over recruiting policies, who may believe they are speaking as private citizens. The case also provides some useful commentary on the balance between discriminatory speech and freedom of expression.

The issue is perhaps well summarised by the Advocate General in the case who said:

“Έπεα πτερόεντα, words have wings. The meaning of that expression, the origins of which can be traced back to Homer is twofold: that words fly away, carried by the wind; but also that words travel fast and spread quickly.

In an increasingly connected world where social media had made us all news sources, the above statement has never rung truer. Aside from the obvious negative publicity that an employee's

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discriminatory views will inevitably have on the company, any senior employee communicating such views in public may be subject to a claim of this kind."

BACKGROUND

During an interview broadcast on an Italian radio programme, NH, stated that he would not wish to recruit homosexual persons to his firm nor to use the services of such persons in his firm.

Having taken the view that that NH's remarks violated Italy's law on anti-discrimination in employment and occupation on the ground of sexual orientation, an Italian association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex persons in Court proceedings (the 'Associazione') brought an employment law claim in the local Italian Courts seeking damages. NH argued that his statements were made purely in his capacity as a private citizen and not as an employer, and that the firm had no current or planned recruitment in place at the time.

The local Italian Court ordered NH to pay €10,000 in damages to the Associazione and ordered extracts from that order to be published in a national daily newspaper. The ruling was upheld on appeal by the appellant Court. NH appealed to the Italian Supreme Court which referred two questions to the CJEU:

1. whether the scope of the Directive 2000/78, which prohibits discrimination in access to employment, extended to generic comments in a radio interview about hypothetically not hiring homosexual applicants; and
2. whether the Associazione had standing to bring a claim against NH under the Directive in circumstances where there was no identifiable victim.

CJEU

The primary legal issue turned on the interpretation of Article 3(1)(a) of the Directive, which addresses "conditions for access to employment . . . or to occupation, including selection criteria and recruitment conditions". The referring court queried whether there was a sufficient link between NH's comments and access to employment in circumstances where NH asserted that the comments represented his personal opinion.

Noting that the concept must be given a uniform and autonomous meaning in EU law, the CJEU adopted a broad interpretation and stated:

"...the non-existence of a current or planned recruitment procedure, are not decisive for the purposes of determining whether statements relate to a particular recruitment policy and, therefore, fall within the concept of 'conditions for access to employment ... or to occupation' ..., it is nevertheless necessary, in order for such statements to fall within the material scope of [the Directive]..., that they be capable in fact of being related to the recruitment policy of a given employer, which means that the link between those statements and the conditions for access to employment and to occupation with that employer must not be hypothetical. Whether such a link exists must be assessed by the national court hearing the case in the context of a comprehensive analysis of the circumstances characterising the statements concerned."

According to the CJEU the relevant criteria in assessing a statement were:

1. The status of the person making the statements and the capacity in which he or she made them, which must establish either that he or she is a potential employer or is, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer, or, at the very least, may be perceived by the public or the social groups concerned as being capable of exerting such influence, even if he or she does not have the legal capacity to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters.
2. The nature and content of the statements concerned. They must relate to the conditions for access to employment or to occupation with the employer concerned and establish the employer's intention to discriminate on the basis of one of the criteria laid down by the Directive.
3. The context in which the statements at issue were made must be taken into consideration — in particular, their public or private character, or the fact that they were broadcast to the public, whether via traditional media or social networks.

The CJEU found that the fact that the speaker does not have the capacity to directly influence recruitment policies is not necessarily a bar to a claim for discrimination. The Court noted that in any recruitment process the principal selection takes place between those who apply and those who do not and held that

discriminatory opinions by a person who is perceived as being capable of exerting a decisive influence on an employer's recruitment policy is likely to deter the individuals targeted from applying for a post.

The CJEU was not swayed from its interpretation by the fact that it involved possible limitations to the exercise of freedom of expression. The Court stating the limitations to the exercise of freedom of expression arising from Directive 2000/78 are necessary to guarantee the rights in matters of employment and occupation of persons who belong to groups of persons characterised by the protected grounds.

"In particular, if, contrary to the interpretation of the concept of 'conditions for access to employment ... or to occupation' ..., statements fell outside the material scope of [the Directive] solely because they were made outwith a recruitment procedure, in particular in the context of an audiovisual entertainment programme, or because they allegedly constitute the expression of a personal opinion of the person who made them, the very essence of the protection afforded by that directive in matters of employment and occupation could become illusory."

On the second question, as to whether the Associazione had standing to bring the claim against NH, the CJEU accepted that while the issue was not expressly addressed by the Directive, the Directive does not prevent Member States from introducing provisions in national law to allow for such a case and deciding on the relevant criteria. The decision as to which associations fit the criteria and the sanction that can be imposed is for each Member State to make, taking into consideration the principles of equivalence and effectiveness.

ASSESSMENT

This case should serve as a further warning to employers of the risks arising from employees' expressing their views in a public.

Not only can the expression of such views (whether broadcast on national radio or on an employee's personal social media) cause damage to the public perception of an employer and its reputation, but liability can also attach in certain circumstances. It is clear from this case that arguing that a view expressed was a personal opinion is no longer an adequate excuse from the employer's perspective.