

Tess Gill: Intervention – A success story

The role of the intervener in court proceedings is a very useful and important way to bring matters of general principle to the attention of the court and has been used with great effect by the DRC and the other statutory equality commissions.

Whereas a party to proceedings will inevitably be seen as partisan and this can limit effectiveness when seeking to persuade the court to take a wide and principled view, the intervener who is tied to neither parties position is in an ideal position to raise the general issues of principle with the court and put the particular facts of the case in a wider historical, factual and theoretical context.

The benefits of the commissions intervening were recently vividly illustrated in the case of *Derbyshire v. St Helens Metropolitan Council*, 2007, ICR 841, a case concerned with alleged victimisation of equal pay claimants arising from letters from the Council seeking the abandonment of their claims by threats that pursuing their claims would result in severe cut backs in the school meals service where they worked and large scale redundancies.

On appeal to the House of Lords from the majority decision of the Court of Appeal overturning the finding of the employment tribunal in favour of the claimants, the Equal Opportunities Commission, Commission for Racial Equality and Disability Rights Commission intervened to assist the House of Lords in explaining the complex legal background under domestic and European law. The decision to intervene was amply justified by the unanimous judgments which not only found for the claimants but gave much needed guidance on the correct approach to determining victimisation claims, in particular where there are live court proceedings but also more generally. It was emphasised that the same approach should be taken to all strands of discrimination.

Some of the main points to emerge were:

- Contrary to the previous Lords' judgments in *Khan*, a case of victimisation under the Race Relations Act, it was not sufficient to defeat a claim that the employer has acted honestly and reasonably.

- The right answer will be found by focusing on the word “detriment” rather than on the words “by reason that”.
- it is primarily the perspective of the alleged victim which is important in deciding whether or not any “detriment” has been suffered.

The essence of the interveners point was made cogently by Baroness Hale who found that this was “a classic case of blaming the victims” and the actions of the Council were “no ordinary attempts to settle” and “the victims of long standing and deep-seated injustice should not be made to feel guilty if they pursue their claims for justice”.

Other important cases where intervention has been proved to be of value are:

- ***Igen v. Wong*** 2005 IRLR 258, CA– again all three commissions intervened in conjoined appeals on the important issue of how to construe the statutory provisions on the shift in the burden of proof in discrimination cases. The view of commissions resulted in the court issuing guidelines which are now applied generally across the discrimination strands.
- ***Essa v. Laing Ltd*** 2004 IRLR 313, CA– the intervention by all three commissions was to give guidance on the issue of whether it was necessary in a discrimination case to prove that the loss claimed was reasonably foreseeable as is the case with claims for personal injury and other claims in tort. The view of the commissions that it was sufficient to establish that the discriminatory act caused the particular type of loss including personal injury and it was not necessary to show that such consequence was reasonably foreseeable was accepted.

All these cases amply illustrate why interventions are an appropriate use by the commissions of their powers and can be of great assistance to the courts in reaching policy decisions which advance a purposive approach to discrimination law.