

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination* ¹

about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

Summary of chapter 15 on Spain

by Ruth Rubio-Marin ²

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² Prof. R. Rubio-Marin (rrubio@us.es) teaches constitutional law at the University of Sevilla, Spain, and is a member of the Global Faculty Program at New York University. This document has benefited from the cooperation of Ms. Sandra Paola Moreno Flórez, PhD candidate in constitutional law at the University of Sevilla, Spain, at earlier stages of this project. I want to express gratitude for this cooperation.

Introduction

On 30 December 2003 Spain finally enacted the first statutory measure to implement both Directives 2000/43 and 2000/78 in a law that deals with very different topics, including fiscal, administrative and social measures (Ley 62/2003, de medidas fiscales, administrativas y de orden social) and that formally presents itself as a supplement to the 2004 General Budget Statute and its economic policy objectives. The legislation came into force as of 1 January 2004. Statute 62/2003 explicitly states that it aims at implementing the Directives 2000/78 and 43/2000 and to this purpose it introduces concrete changes to existing legislation.

Before this legislation was passed the only other important piece of legislation prohibiting sexual orientation discrimination in employment was art. 314 of Spain's 1995 Criminal Code (under Title XV on crimes against the rights of employees). The provision criminalises severe forms of discrimination on the basis of sexual orientation, including employment discrimination in the public and private domain. The crime is committed only when a serious form of employment discrimination takes place and the person who engages in such discriminatory conduct refuses to re-establish equality before the law after being called upon to do so or being sanctioned by the administrative authorities for not doing so, and does not compensate the worker for the economic loss entailed by the conduct. The sanction in this case consists in imprisonment from six months to two years, completed with an economic sanction regardless of the civil responsibility that may derive from the criminal conduct.

Because the legislation that has been specifically passed to implement Directive 78/2000 is Statute 62/2003, and because it contains has a wider scope than the criminal provision this summary focuses almost exclusively on it.

The prohibition of discrimination

Statute 62/2003 does not *define sexual orientation*, neither does art. 314 of the Criminal Code.

Art. 28 in Statute 62/2003 incorporates for the first time a definition of direct and indirect discrimination into the Spanish legal order. Before that, those definitions had been judicially constructed. Art. 28(1)(b) defines *direct discrimination* as follows: direct discrimination is taken to occur where a person *is treated* less favourably than another in a comparable situation on the grounds racial or ethnic origin, religion or belief, disability, age or sexual orientation. Note that art. 2(a) of the Directive refers to 'when a person *has been or would be treated*' and the Spanish version of the Directive also refers to both possibilities (*haya sido o pudiera ser tratada*) so that for some reason the hypothetical comparator has been removed.

Statute 62/2003 also contains a definition of *indirect discrimination* (art. 28(1)(c)). According to it, indirect discrimination is taken to occur where an apparently neutral statutory or administrative provision, a conventional or contractual clause, a single agreement or a unilateral decision would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared

with other persons unless they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Note that the Directive refers to a 'provision, criterion or practice' (as does the Spanish version of the Directive) whereas the Spanish legislation refers in more inclusive terms to 'a statutory or administrative provision, a conventional or contractual clause, a single agreement or a unilateral decision.'

Art. 28(2) in Statute 63/2003 also conceptualises *harassment* as a form of discrimination and literally reproduces the harassment concept endorsed in the Directive amending the Spanish Workers' Statute accordingly (new art. 4(2)(e)).

Also, Art. 28(2) of Statute 62/2003, in strict application of art. 2.4 of the Directive, provides that any *instruction to discriminate* also amounts to discrimination.

As far as the *material scope of applicability of the prohibition* is concerned, art. 34 in Statute 62/2003 defines the scope of application of the measures dealing with equal treatment and non discrimination in employment contained in it. According to art. 34, these 'measures are aimed at the real and effective accomplishment of the principle of equal treatment and non discrimination in relation to access to employment, membership of or involvement in an organisation of workers or employers, working conditions, work promotions and continuous professional training and retraining, access to self-employment or to occupation and membership of and involvement in any organisation whose members carry on a particular profession'. The most significant difference between the text of the Spanish legislation and the Directive is that the latter is a little more explicit in that it contains specifications that are absent in the Spanish text. Thus, art. 3(1)(a) in the Directive specifies that conditions for access to employment, to self-employment or to occupation includes selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy (this specification is missing in the Spanish statute). Also, art. 3(1)(c) in the Directive specifies that it applies to employment and working conditions, including dismissals and pay (and again, this specification is missing in the Spanish statute). As the Spanish legislation is intended as a transposition of the Directive it will most likely be interpreted in its light so that the absence of those specifications is not deemed to be very relevant. The Spanish provision mentions 'continuous professional training and retraining' but the Directive is more explicit in its mention to 'access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining including practical work experience' (art. 3(1)(b)). It is also worth noting that the Workers' Statute, which now explicitly refers to the prohibition of sexual orientation discrimination, already recognised that discrimination is prohibited both as regards access to employment and employment itself (art. 4(2)(c)) and as regards to *pay, work hours, and other work conditions* (art. 17). To better comply with the Directive it would have been desirable to make an explicit reference to dismissal as well.

As for the *personal scope of applicability*, in strict application of art. 3(1) of the Directive, art. 27(2) of Statute 62/2003 provides that the measures for the application of the principle of equal treatment under it apply to every person, both in the public and the private sector.

Exceptions

Literally reproducing the exception defined in art. 2(2)(b)(i) in the Directive, art. 28(1)(c) of Statute 62/2003, reproduces the ‘objective justification’ exception in the definition of indirect discrimination.

On the other hand, the Spanish legislation does not reproduce the exceptions mentioned in the Directive 2(5) regarding measures necessary for the maintenance of public order and the prevention of criminal offences, for the protection of health and the rights of freedoms of others.

As for exceptions related to *occupational requirements*, art. 34(2)(2) in Statute 62/2003 literally reproduces art. 4(1) of the Directive. Also, art.16(2) of the Workers’ Statute refers to the prohibition of hiring agencies to discriminate on several grounds and has now been modified by Statute 62/2003 (art. 37). It now makes reference to sexual orientation as well as all the other grounds under the two Directives. The provision has also been modified to add the proviso ‘as long as workers are apt to perform the work or employment.’

As far as exceptions related to the duty of *loyalty to an organisation’s ethos based on religion or belief* (art. 4(2) Directive), neither Statute 62/2003 nor any other piece of legislation addresses this issue at all. However, according to general constitutional doctrine, since the principle of good faith that has to rule in work relations (art. 5(a) of the Workers’ Statute), employees in ideological or ‘tendency’ organisations can be asked to conform to a minimal extent with the organisation’s ethos.³ Both doctrine and courts have made it explicit that even within ideological institutions one has to distinguish between ‘ideological’ and ‘neutral positions’ within the organisation. Only the former are about transmitting the ideology of the institution and thus those in which ideological affinity can be expected.⁴

As for *positive action*, art. 35 in Statute 62/2003 provides that ‘with a view to ensuring full equality on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, the principle of equality shall not prevent maintaining or adopting specific measures in favour of certain groups in order to prevent or compensate for disadvantages that they may encounter in those matters that fall within the scope of this section’. Also, art. 42 in the same Statute provides that ‘collective agreements may include measures directed to fight against every form of employment discrimination, to encourage equality of opportunities and to prevent harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

Enforcement

In Spain, there are already judicial, administrative and conciliation *procedures* for the defence of the rights covered by the Directive. Nevertheless Statute 62/2003 has added some enforcement measures. Art. 40 of the Statute has modified art. 181 of the Statute on Labour Procedure which contemplates a special proceeding for claims dealing with the violation of fundamental rights,

³ See *Sentencia del Tribunal Constitucional* [Constitutional Court Decision], 27 March 1985, 47/1985.

⁴ *Sentencia del Tribunal Constitucional* [Constitutional Court Decision], 12 June 1996, 106/1996.

including the right to equal treatment, to include also harassment complaints. The main characteristic of that proceeding is that these cases are given priority over others and placed in a fast track procedure before the judiciary.

In terms of sanctions, the law in Spain provides economic sanctions for the legal, contractual, and conventional infractions of the private employer (*Real Decreto Legislativo* [Royal Legislative Decree] 5/2000 of 4 August 2000 on infractions and sanctions related to the social domain (art. 5)). These sanctions are imposed by the competent Labour and Social Security Inspection and range from light, to serious, and very serious, and discrimination was already covered. Statute 62/2003 (art. 41) has modified Statute 5/2000 to better comply with the Directive in ways that are relevant to discrimination on the grounds of sexual orientation mostly to make more evident that such discrimination, including harassment and victimisation, amounts to a very serious *infraction*. Thus, the legislation has been changed to incorporate an explicit reference to both direct and indirect discrimination and discrimination specifically on the grounds of sexual orientation has been added to the list of very serious infractions. Until then the provision made reference to those unilateral decisions of the employer that amount to discrimination related to pay, work schedule, training and promotion on several grounds which did not include sexual orientation. Another amendment has gone in the direction of considering harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation a very serious infraction when it takes place within the realm of prerogatives of the management, whoever the agent may be, as long as, when known by the employer, the latter does not undertake the necessary measures to prevent such infractions. Finally, art. 16(2), in the section about infractions in the area of hiring and under the list of those infractions that are considered very serious has been modified. It now provides that it is a very serious infraction of the employer or hiring agencies to establish employment conditions, be it through publicity or in any other way that amounts to discrimination on several grounds to which sexual orientation has been added. Finally, Statute 62/2003 has also modified art. 54(2) of the Workers' Statute, adding subparagraph g). The provision lists the grounds of disciplinary dismissals. It now adds, among the reasons of contractual misbehaviour, 'harassment of the employer or other employees in the undertaking on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

As for the *standing*, apart from workers who can act in defence of their rights and legitimate interests, the legal order grants standing to workers' unions which may act in the name and interest of their affiliated members (art. 16 and 17 of the Labour Procedure Law) if the person directly concerned grants his or her authorisation (arts. 19, 20 and 175(2)). Moreover, the courts have recognised the collective dimension of art. 14's anti-discrimination provision and, linked to it, standing for interest groups when the discriminatory treatment affects an unnamed group of workers that are not individually identified but can be identified through a group characteristic.⁵ To better comply with the Directive (art. 9.2) it would have been preferable to recognise in the law the standing of associations and organisations with a legitimate interest in the subject.

⁵ See *Sentencia del Tribunal Supremo* [Supreme Court Decision] of 18 February 1994 (1994/1091) and of 2 February 2000 (2000/1438).

As far as the *burden of proof* is concerned there have been changes to implement the Directive. Art. 36 in Statute 62/2003 now provides that ‘in those civil and administrative procedures in which from the facts alleged by the plaintiff one may conclude the existence of well founded indicators of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation with respect to matters falling within the scope of this section, it shall be for the respondent to give an objective and reasonable and sufficiently proved justification of the measures adopted and their proportionality’. Note that the Directive provides that ‘it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’ (art. 10). In this regard, the wording of the Spanish legislation seems to grant more protection to the alleged victim of discrimination in that it spells out the criteria that the proof has to meet to qualify as sufficient. The Labour Procedure Statute also contemplates the shift of the burden of proof, and after the reform introduced by Statute 62/2003 (art. 40) it now mentions not only discrimination on the ground of sex but also on the ground of sexual orientation (art. 96 and art. 179(2) in connection to art. 181).

Regarding *victimisation*, art. 37 in Statute 62/2003 introduces a change into the Workers’ Statute (art. 17). Art.17(1) sanctions the nullity of those administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions of the employer which discriminate on several grounds, including now sexual orientation. A new paragraph, art. 17(2), has been added. This paragraph declares ‘the nullity of the decisions of the employer that amounts to an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination.’ Similarly, Statute 62/2003 has introduced modifications of the Statute 5/2000 on infractions and remedies in social domain (art. 41). As mentioned above, art. 8 of the Statute 5/2000 contains a list of what are to be considered very serious infractions in the area of labour relations. With the reform of Statute 62/2003, art. 8(12) now adds to those decisions that amount to discrimination reference to those that ‘amount to an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination.’

Concluding remarks

For the most part, after the reform of Statute 62/2003 the most crucial aspects of the Directive have been incorporated into the Spanish legal order. Unfortunately, the occasion has been misused to pass a more coherent, comprehensive and visible piece of legislation regarding employment discrimination than this, as the law in which the reforms are contained deals with very different topics, including fiscal, administrative and social measures and formally presents itself as a supplement to the 2004 General Budget Statute and its economic policy objectives.

Other than this, the most relevant shortcomings of the new legislation have to do with the insufficient degree of explicitness and concreteness of the material scope of application of the prohibition of discrimination. Some other differences regarding the wording of the Spanish legislation regarding the definition of

indirect discrimination or of harassment may be of more or less significance depending on the concrete application. It has been a missed opportunity to recognise in the law the procedural standing of associations and organisations with a legitimate interest in the application of the Directive.

For the most part, though, Spain has correctly transposed the Directive. Progress in ensuring equal employment opportunities and conditions for gays and lesbians requires social change that makes coming out easier and addressing employment benefits linked to marital status, to the possibility of adoption or to social security legislation. Only the interpretation of the scope of the Directive by the ECJ will determine how much of this progress is mandatory law already.

