

# Systemic Discrimination in Employment and the Promotion of Ethnic Equality

*by*

Ronald Craig

MARTINUS NIJHOFF PUBLISHERS  
LEIDEN / BOSTON

# Contents

|                                                                                                      |    |
|------------------------------------------------------------------------------------------------------|----|
| Chapter One                                                                                          |    |
| Introduction .....                                                                                   | 1  |
| 1.1. Background and Aim of the Study .....                                                           | 1  |
| 1.2. Sources of Law and Method .....                                                                 | 7  |
| 1.3. Barriers for Ethnic Minorities in Employment: Stories, Surveys,<br>Studies and Statistics ..... | 13 |
| a. Introduction .....                                                                                | 13 |
| b. Statistical Data .....                                                                            | 17 |
| c. Discrimination Testing .....                                                                      | 18 |
| d. Laboratory Experiments .....                                                                      | 19 |
| e. Research into Actions of “Gatekeepers” .....                                                      | 20 |
| f. Surveys .....                                                                                     | 21 |
| g. Formal Complaints .....                                                                           | 21 |
| h. Conclusion .....                                                                                  | 21 |

## PART I

|                                                               |    |
|---------------------------------------------------------------|----|
| Chapter 2                                                     |    |
| The Concept of Discrimination .....                           | 25 |
| 2.1. Overview .....                                           | 25 |
| 2.2. Direct Discrimination .....                              | 33 |
| a. Comparable Circumstances .....                             | 33 |
| b. Causal Link to Statutorily-Protected Characteristics ..... | 34 |

|                                                                            |     |
|----------------------------------------------------------------------------|-----|
| c. Justification Defenses and Exceptions .....                             | 34  |
| d. Critique of the Concept of Direct Discrimination .....                  | 38  |
| Finding a comparator .....                                                 | 39  |
| Assimilation: Forcing the complainant to be like the comparator .....      | 39  |
| No minimum content of fairness .....                                       | 40  |
| 2.3. Indirect Discrimination .....                                         | 41  |
| a. Introduction .....                                                      | 41  |
| b. USA .....                                                               | 43  |
| c. Canada – From Bifurcated Analysis to Unified Approach .....             | 47  |
| d. European Union .....                                                    | 53  |
| e. Selected Statutory Definitions of Indirect Discrimination:              |     |
| Great Britain, Northern Ireland and Australia .....                        | 57  |
| f. Norway .....                                                            | 61  |
| g. European Convention on Human Rights .....                               | 64  |
| h. Selected United Nations Human Rights Instruments .....                  | 67  |
| International Covenant on Civil and Political Rights (CCPR) .....          | 67  |
| International Convention on the Elimination of All Forms of                |     |
| Racial Discrimination (ICERD) .....                                        | 67  |
| International Convention on the Elimination of All Forms of                |     |
| Discrimination Against Women (CEDAW) .....                                 | 71  |
| 2.4. Discriminatory Intent and Discriminatory Effect .....                 | 72  |
| 2.5. Ethnic Discrimination .....                                           | 77  |
| a. Introduction .....                                                      | 77  |
| b. Race and Ethnic Origin .....                                            | 78  |
| c. National Origin .....                                                   | 82  |
| d. Color .....                                                             | 84  |
| e. Descent .....                                                           | 85  |
| 2.6. Conclusion .....                                                      | 85  |
| <br>Chapter 3                                                              |     |
| Systemic Discrimination in Employment .....                                | 91  |
| 3.1. Systemic Discrimination in General .....                              | 91  |
| 3.2. The Nature of Systemic Discrimination in an Employment Context .....  | 93  |
| a. Introduction .....                                                      | 93  |
| b. Action Travail des Femmes v. Canadian National Railway .....            | 96  |
| c. National Capital Alliance on Race Relations (NCARR) v. Health           |     |
| Canada .....                                                               | 99  |
| d. Summary of Mechanisms of Systemic Discrimination in the <i>Action</i>   |     |
| <i>Travail des Femmes</i> and <i>National Capital Alliance</i> Cases ..... | 102 |
| e. Harassment and Hostile Work Environment (Poisonous Work                 |     |
| Environment) .....                                                         | 103 |
| f. Use of Recruitment Methods that Perpetuate Underrepresentation .....    | 106 |
| g. Selection Criteria: Employment Tests That Are Not Job-Related .....     | 107 |

|                                                                                                                                    |     |
|------------------------------------------------------------------------------------------------------------------------------------|-----|
| h. Unguided Subjective Criteria, Unstructured Interviews and Differential Questioning .....                                        | 108 |
| i. Unclear Selection Criteria .....                                                                                                | 111 |
| j. Stereotyping in Performance Appraisals and Allocation of Work Assignments .....                                                 | 112 |
| 3.3. Definition and Characteristics of Systemic Discrimination in Employment – And Thoughts on a Proper Response .....             | 115 |
| 3.4. Conclusion .....                                                                                                              | 124 |
| <br>Chapter 4                                                                                                                      |     |
| The Limits of Complaint-Based Approaches in Addressing Systemic Discrimination in Employment .....                                 | 125 |
| 4.1. Introduction .....                                                                                                            | 125 |
| 4.2. The Failure to Capture Discrimination that Does Not Result in a Formal Complaint .....                                        | 128 |
| 4.3. The Individualization of Discrimination in Complaint-Based Approaches .....                                                   | 133 |
| 4.4. The Difficulties in Proving Discrimination in Complaint-Based Approaches .....                                                | 138 |
| 4.5. Complaint-Based Approaches Cannot Bring about Organizational Transformation .....                                             | 151 |
| a. Introduction .....                                                                                                              | 151 |
| b. Traditional Remedies in Complaint-Based Approaches are not Transformative .....                                                 | 152 |
| c. The Remedy of Court-Ordered Employment Equity Programs is an Inadequate Response to Systemic Discrimination in Employment ..... | 155 |
| d. Complaint-Based Approaches Breed Hostility which is Counter-Productive to Organizational Transformation .....                   | 157 |
| 4.6. Conclusion .....                                                                                                              | 158 |
| <br>Chapter 5                                                                                                                      |     |
| Ethnic Equality in Employment .....                                                                                                | 161 |
| 5.1. Introduction: Formal and Substantive Equality .....                                                                           | 161 |
| 5.2. Equality Before the Law and the Equal Protection of the Law .....                                                             | 164 |
| 5.3. Ethnic Equality in Employment .....                                                                                           | 167 |

## PART II

|                                                                                                                                                |     |
|------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Chapter 6                                                                                                                                      |     |
| Proactive Obligations to Promote Equality in Employment: An Introduction                                                                       | 173 |
| 6.1. Introduction                                                                                                                              | 173 |
| 6.2. Terminological Clarification                                                                                                              | 175 |
| Chapter 7                                                                                                                                      |     |
| Statutory-Based Proactive Obligations to Promote Equality in Employment:<br>Five Approaches                                                    | 181 |
| 7.1. Canada                                                                                                                                    | 181 |
| a. Introduction                                                                                                                                | 181 |
| b. Obligations Imposed on Employers Under the Act                                                                                              | 182 |
| c. Enforcement and Sanctions                                                                                                                   | 185 |
| 7.2. Great Britain                                                                                                                             | 187 |
| a. Introduction                                                                                                                                | 187 |
| b. Obligations Imposed on Public-Sector Employers Under the Act and<br>Order                                                                   | 188 |
| c. Enforcement and Sanctions                                                                                                                   | 191 |
| 7.3. Northern Ireland                                                                                                                          | 192 |
| a. Introduction                                                                                                                                | 192 |
| b. Northern Ireland Act 1998                                                                                                                   | 192 |
| c. Obligations Imposed on Public-Sector Employers Under the Act and<br>Schedule 9                                                              | 194 |
| d. Enforcement and Sanctions under the Act and Schedule 9                                                                                      | 196 |
| e. The Fair Employment and Treatment (Northern Ireland) Order 1998<br>(FETO)                                                                   | 197 |
| f. Proactive Obligations Imposed on Public and Private Employers<br>Under FETO                                                                 | 197 |
| g. Enforcement and Sanctions regarding the Employer's Proactive<br>Obligations under FETO                                                      | 200 |
| 7.4. Sweden                                                                                                                                    | 201 |
| a. Proactive Obligations Imposed on Public and Private Employers<br>Under the Act on Measures against Ethnic Discrimination in Working<br>Life | 201 |
| b. Enforcement and Sanctions                                                                                                                   | 203 |
| 7.5. Norway                                                                                                                                    | 205 |
| a. Introduction                                                                                                                                | 205 |
| b. Obligations Imposed on Public- and Private-Sector Employers<br>under the Gender Equality Act                                                | 206 |
| c. Enforcement and Sanctions                                                                                                                   | 208 |

## Chapter 8

|                                                                                                                                                                 |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Contract-Based Proactive Obligations to Promote Equality in Employment:<br>Four Approaches .....                                                                | 209 |
| 8.1. Impact of European Union Treaty Law and Procurement Rules on the<br>Use of Contract Compliance: Background Framework for Great<br>Britain and Sweden ..... | 209 |
| 8.2. Great Britain .....                                                                                                                                        | 214 |
| a. Historical Background .....                                                                                                                                  | 214 |
| b. Initiatives by the Commission for Racial Equality .....                                                                                                      | 217 |
| c. Initiatives by Local Authorities .....                                                                                                                       | 218 |
| d. Future Initiatives from Local Authorities .....                                                                                                              | 222 |
| 8.3. Sweden .....                                                                                                                                               | 223 |
| 8.4. United States .....                                                                                                                                        | 226 |
| a. Introduction .....                                                                                                                                           | 226 |
| b. Contractual Obligations Undertaken by the Contractor Pursuant to<br>the Equal Opportunity Clause .....                                                       | 227 |
| c. Enforcement and Sanctions .....                                                                                                                              | 231 |
| 8.5. Canada .....                                                                                                                                               | 233 |
| a. Introduction .....                                                                                                                                           | 233 |
| b. Contractual Obligations Undertaken by Contractors by the<br>Certificate of Commitment to Implement Employment Equity .....                                   | 233 |
| c. Enforcement and Sanctions .....                                                                                                                              | 235 |

## Chapter 9

|                                                                                                     |     |
|-----------------------------------------------------------------------------------------------------|-----|
| A Rational Government Policy Response to Systemic Ethnic<br>Discrimination in Employment .....      | 237 |
| 9.1. Introduction and Scope .....                                                                   | 237 |
| a. Introduction .....                                                                               | 237 |
| b. Scope of this Chapter .....                                                                      | 241 |
| 9.2. General Overview of the Proactive Obligation Regimes .....                                     | 245 |
| 9.3. Do the Obligations Imposed on Employers Address the Problem in<br>All of its Dimensions? ..... | 248 |
| a. Introduction .....                                                                               | 248 |
| b. Diagnostic Actions: The Identification of Barriers to Ethnic<br>Equality in Employment .....     | 249 |
| c. Remedial Actions .....                                                                           | 254 |
| d. Facilitative Actions .....                                                                       | 257 |
| Management commitment and accountability, communication and<br>consultation .....                   | 257 |
| Preparation and implementation of an equality plan .....                                            | 261 |
| Numerical goals and timetables .....                                                                | 264 |
| Employer monitoring and review of progress; Revision .....                                          | 268 |
| e. A Word on the Remainder of this Chapter .....                                                    | 269 |

|                                                                                   |     |
|-----------------------------------------------------------------------------------|-----|
| 9.4. The Specificity of Obligations and the Ability to Assess Compliance .....    | 269 |
| 9.5. Guidance and Technical Assistance to Employers .....                         | 273 |
| 9.6. The Monitoring of Compliance and Application of Regulatory<br>Pressure ..... | 277 |
| 9.7. Sanctions for Non-Compliance .....                                           | 285 |
| 9.8. A Brief Word on Contract-Based Regimes vs. Statutory-Based<br>Regimes .....  | 289 |
| 9.9. Conclusion .....                                                             | 291 |
| <br>Chapter 10                                                                    |     |
| Conclusion .....                                                                  | 299 |
| <br>Bibliography .....                                                            | 311 |
| <br>Index .....                                                                   | 323 |