NICEM briefing on "Bayanhihan!: The Filipino community in Northern Ireland Research Report" and other related black and minority ethnic issues

Key issues:

- 1. 41.5% of respondents experienced racial harassment in workplace (44.4% by customers/service users; 48.1% by colleagues and 33.3% by boss).
- 2. Under the work permit regime, an employee's immigration status is dependant on their job status, therefore victims of harassment are fearful of reporting abuse.
- 3. Agency workers have less protection from discrimination and are therefore more vulnerable than directly employed workers, 27.5% of respondents were hired through an employment agency (73.7% Philippines based and 26.3% NI based), including those working in the health care sector and the fishing industry.
- 4. Nearly half of the family households who responded received Child Tax Credit (46.6%) and 63.2% lived in the 50% most deprived outputs areas in NI. The current inflation rate, the size of the household (54.6% has more than 2 children) and the devaluation of Pound Sterling reducing remittances sent home has left many Filipino families with less to live on.

Agency Workers

- 1. Despite legal protection on employment rights and the anti-discrimination regime the exact positioning of agency worker remains a grey area. They experience minimal protection in terms of employment and equality rights. Migrants working under agency contracts are more vulnerable than the local population (including both EU and non-EU) due to language barriers, lack of familiarity with local legal protection, the need to send money home for family members or to pay debts incurred through immigration, they also experience additional stress though fearing that their work permit will not be renewed by their employer.
- 2. Under the current Race Relations law, agency workers whose agency is based outside of the UK are not covered by discrimination law provisions in Northern Ireland¹. In England, Wales and Scotland there have been important changes which have repealed such restrictions.², such changes or equivalent provisions do not apply to NI.

 The GB changes remove the entire Section 8(2) of the RRA. Section 8(2) provides that;

^{1 1}(Article 9 and 10 of the Race Relations (NI) Order 1997)

² Section 8(2) of the Race Relations Act 1976 (RRA) in which was repealed by the Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999, SI 1999/3163, reg 3(1), (3)

- "(2) Paragraph (1) does not apply to -
- (a) employment on board a ship registered at a port of registry in Great Britain; or
- (b) employment on an aircraft or hovercraft registered in the United Kingdom and operated by a person who has his principal place of business, or is ordinarily resident, in Northern Ireland other than an aircraft or hovercraft while so operated in pursuance of a contract with a person who has his principal place of business or is ordinarily resident, outside the United Kingdom,

Section 8(2) is equivalent to Article 10(2) in of the Race Relations Northern Ireland Order 1997.

- 3. In our experience of providing support to agency workers we have become aware of many instances of mistreatment and abuse of Filipino seafarers in the fishing industry. We presented such evidence to the UN Committee on Economic, Social and Cultural Rights in 2009. In its Conclusion Observations it was stated that; "The Committee is concerned about the unsafe working conditions and low wages of some groups of migrant workers whose employers are registered outside the State party, in particular those employed in fishing industry who enter the State party on transit visas. (art. 7) The Committee encourages that State party to ensure that the conditions of work of all migrant workers comply with the provision of article 7 of the Covenant and calls upon the State party to take all necessary measures to investigate the activities of companies employing migrant workers and to ensure that employers contravening the law in this regard are prosecuted and sanctioned."
- 4. Whilst this research was about targeting the entire Filipino community due to research resource restrictions we were unable to survey any Filipino seafarers. From experience we know that all the Filipino seafarers are all employed under agencies in the Philippines. The research did incorporate a significant number of health care workers, the majority of which are employed by agencies in the Philippines. Of respondents working in private nursing homes. 27.5% were agency workers, within this percentage 26.3% are employed by agencies based in Northern Ireland. The protection afforded to such workers is now in jeopardy as a result of the recent judgment of the Bohill⁴ case in the Court of Appeal (discussed below).

 $^{^3}$ Conclusion Observations of the Committee on Economic, Social and Cultural Rights on the $4^{\rm th}$ and $5^{\rm th}$ Periodic Report of the United Kingdom on the implementation of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5 22 may 2009, para. 22.

⁴ Bohill -v- Police Service of Northern Ireland (PSNI) [2011] NICA2

- 5. In viewing the recent case law developments regarding agency workers, it can be concluded that agency workers have limited employment and anti-discrimination rights. As discussed below gaps in legislative protection under the equality law for certain categories of agency workers as highlighted by the cases of Bohill v PSNI⁵ and Muschett v HM Prison Service (HMPS)⁶.
- 6. In the Bohill case, Mr. Bohill was a former police officer who applied to Grafton Recruitment Service to work as an investigator with the PSNI. His name was included in lists of potential temporary workers complied by Grafton and forwarded to the PSNI on some 13 occasions, but upon none of these occasions was Mr. Bohill recruited as a temporary worker. Mr. Bohill lodged a discrimination complaint against the PSNI alleging that his failure to secure such employment was as a result of unlawful discrimination on the grounds of religious belief/perceived political opinion. The tribunal was of the view that it did not have the jurisdiction to hear his substantive claim. Mr. Bohill appealed his decision to the Court of Appeal in Northern Ireland.
- 7. The Court of Appeal confirmed that, in the absence of a contract with either Grafton or the PSNI, the Tribunal did not have the jurisdiction to hear his case. It stated that 'in our view the inability of the appellant to establish that he is seeking an employment relationship with PSNI or that he is in such a relationship with Grafton and to bring himself within the definition 'employee' contained within Article of the 1998 Order is fatal to this appeal.' The Court of Appeal concluded that the case 'does seem to illustrate how an agency arrangement may deprive potential employees of important protections against discrimination.' (I would suggest that such quotations would benefit from paragraph citations)
- 8. It indicated that 'Northern Ireland enjoys a well deserved reputation for the early development and quality of its anti-discrimination laws and this is an area that might well benefit from the attention of the section of the office of OFMDFM concerned with legislative reform.' The Court of Appeal further indicated that 'there is no doubt that this type of agency arrangement has become much more prevalent over recent years and it would appear that the UK economy uses agency provided workers to a much greater extent than those of most other EU States.'
- 9. Importantly, whilst the Bohill case concerned an allegation of unlawful discrimination on the grounds of religious belief and/or perceived political opinion, such gaps in protection similarly exist in relation to other equality grounds, including racial ground.

⁵ Bohill -v- Police Service of Northern Ireland (PSNI) [2011] NICA2

⁶ Muschett -v- HM Prision Services (HMPS) [2010] ESCA Civ 25

- 10. In the Muschett case, Mr. Muschett had signed a contract with the Brooke Street Employment Agency who had placed him as an agency worker with HMPS. Mr. Muschett claimed compensation from HMPS for unfair dismissal, wrongful dismissal, as well as sex, race and religious discrimination. The Employment Appeal Tribunal (EAT) agreed with the employment judge's findings that he was not a contract worker as he was not employed by the agency; and therefore was not covered by the race equality legislation and like provisions in the other discrimination legislation.
- 11. Mr. Muschett was given leave to appeal to the Court of Appeal on the EAT's finding that he was not employed by the agency. The Court of Appeal held that, as he was not an employee under a contract of service nor was he under a contract for services with HMPS, he had no protection under the equality legislation. In addition, whilst the Muschett case concerned sex, race and religious discrimination, it is clear that, like the Bohill case, gaps in legislative protection exist for temporary agency workers alleging discrimination on other equality grounds. Migrant workers employed by agencies will be vulnerable to such discrepancie, they may perceive that they are employed by the agency and only when something goes wrong will they discover this is not the case.
- 12. The Equality and Human Rights Commission (EHRC) in Great Britain, in its inquiry into recruitment and employment in the meat and poultry processing sector in 2010,⁷ also raised concerns about the legislative gap in Great Britain as regards the protection against discrimination of some agency workers. The EHRC referred, in particular, to the Muschett case. In viewing the situation in Northern Ireland, the meat and poultry industry is the largest industry to provide jobs for the former A8 and A2 country nationals.⁸ The gaps in NI are more acute than in GB as the former A8 and A2 constitute 80% of the black and minority ethnic population in Northern Ireland.
- 13. On 5 December 2011 the Agency Workers Regulations (NI) Order 2011 (new Regulations) came into force in Northern Ireland. The new Regulations give agency workers additional protection in relation to equal treatment in respect to pay and basic work conditions dependant on if they worked in the same job for 12 weeks. The Regulations also provide for a limited number of rights which agency workers accrue on the first day of their assignment.

⁷ "Inquiry into the recruitment and employment in the meat and poultry processing sector: report of findings and recommendations" EHRC, March 2010, www.equalityhumanrights.com

⁸ people from the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia are otherwise known as the '**A8**' nationals and Bulgarian and Romanian **nationals** are the '**A2**' nations..

- 14. In our submission to DEL on the proposed new Regulations we raised concerns that the new Regulations excluded those agency workers whose agencies are based outside UK, including those agencies in the EU Member States. The Regulations also do not address the gaps in legislative protection as highlighted in the Bohill and Muschett cases. Both cases were decided before the new Regulations had come into force, neither Mr. Bohill or Mr. Muschett were considered by the courts/tribunals to have had a contract with the temporary work agency.
- 15. In addition, the new Regulations have given additional rights to pregnant workers and new mothers. However, in light of the decision in the Bohill and Muschett case, it would appear that pregnant workers and new mothers seeking employment with hirers, in circumstances similar to Mr. Bohill (where no contract with the temporary worker agency exists) or Mr. Muschett (where no contract with the principal and subject to termination of assignment at any time without notice) have no protection under the Sex Discrimination (NI) Order 1976.
- 16. In addition, the gaps in protection highlighted by the cases of Bohill and Muschett, have the potential to have a particular impact on migrant workers working in Northern Ireland. Many such workers have entered into arrangements with agencies similar to Mr. Bohill or Mr. Muschett, in particular the meat and poultry processing industry and the health care sector, including locum doctors and nurses, etc.
- 17. Therefore we recommend to the Committee of OFMDFM that the current Race Relations law should be amended⁹ in order to fill the current gaps and disparities between NI and GB legislation. Such reform was endorsed with unanimous cross party support in May 2009 during the Motion Debate entitled "That this Assembly calls on the First Minister and deputy First Minister to review the current Race Relations (Northern Ireland) Order 1997, in view of the fact that the current law does not offer the same levels of protection as in other parts of the United Kingdom and the Republic of Ireland, and also given the deficiencies in the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003." As the Single Equality Legislation process has stalled over the past ten years the most vulnerable members of NI society have suffered. Justice delayed is justice denial.

 $^{^{9}}$ (including the Race Relations (NI) Order 1997 and the related Regulations in 2003 and 2010)

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APPENDIX 1

Race Relations (NI) Order 1997

Interpretation

2.—(1) The Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following

provisions of this Order as it applies to a Measure of the Northern Ireland Assembly. (2) In this Order—

"employment" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

"employment agency" means a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers;

Discrimination against contract workers

- 9.—(1) This Article applies to any work for a person ("the principal") which is available for doing by individuals ("contract workers") who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.
- (2) It is unlawful for the principal, in relation to work to which this Article applies, to discriminate against a contract worker—
- (a) in the terms on which he allows him to do that work; or
- (b) by not allowing him to do it or continue to do it; or

- (c) in the way he affords him access to any benefits, facilities or services or by refusing or deliberately omitting to afford him access to them; or
- (d) by subjecting him to any other detriment.
- (3) The principal does not contravene paragraph (2)(b) by doing any act in relation to a person not of a particular racial group[F14, or not of a particular race or particular ethnic or national origins,] at a time when, if the work were to be done by a person taken into the principal's employment, being of that racial group[F14 or of that race or those origins] would be a genuine occupational qualification[F14 or, as the case may be, that act would be lawful by virtue of Article 7A] for the job.
- [F14(3A) It is unlawful for the principal, in relation to work to which this Article applies, to subject a contract worker to harassment.]
- (4) Nothing in this Article shall render unlawful any act done by the principal[F14 on grounds other than those of race or ethnic or national origins,] for the benefit of a contract worker not ordinarily resident in Northern Ireland in or in connection with allowing him to do work to which this Article applies, where the purpose of his being allowed to do that work is to provide him with training in skills which he appears to the principal to intend to exercise wholly outside Northern Ireland.
- (5) Paragraph (2)(c) does not apply to benefits, facilities or services of any description if the principal is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public to which the contract worker in question belongs, unless that provision differs in a material respect from the provision of the benefits, facilities or services by the principal to his contract workers.
- (6) This Article applies only in relation to work done at an establishment in Northern Ireland; and Article 10 applies for the purposes of this paragraph with appropriate modifications.

Meaning of employment at establishment in Northern Ireland

- 10.—(1) For the purposes of this Part, employment is to be regarded as being at an establishment in Northern Ireland[F15 if the employee—
- (a) does his work wholly or partly in Northern Ireland; or
- (b) does his work wholly outside Northern Ireland and paragraph (1A) applies.]
- [F15(1A) This paragraph applies if, in a case involving discrimination on grounds of race or ethnic or national origins, or harassment—
- (a) the employer has a place of business at an establishment in Northern Ireland:
- (b) the work is for the purposes of the business carried on at that establishment; and
- (c) the employee is ordinarily resident in Northern Ireland—
 - (i) at the time when he applies for or is offered the employment, or

(ii) at any time during the course of the employment.]

[F16(2) The reference to "employment" in paragraph (1) includes—

- (a) employment on board a ship registered at a port of registry in Northern Ireland; and
- (b) employment on aircraft or hovercraft registered in the United Kingdom and operated by a person who has his principal place of business, or is ordinarily resident, in Northern Ireland.]

Para.3 rep. by SR 2000/8

- (4) Where work is not done at an establishment it shall be treated for the purposes of this Part as done at the establishment from which it is done or (where it is not done from any establishment) at the establishment with which it has the closest connection.
- (5) In relation to employment concerned with exploration of the sea bed or subsoil or the exploitation of their natural resources, the Department may by order provide that [F16 paragraphs (1) and (2) shall each have effect as if the last reference to Northern Ireland in paragraph (1)] included any area for the time being designated under section 1(7) of the Continental Shelf Act 1964 in which the law of Northern Ireland applies.
- (6) An order under paragraph (5) may provide that, in relation to employment to which the order applies, this Part is to have effect with such modifications as are specified in the order.
- (7) The Department shall not make an order under paragraph (5) unless a draft of the order has been laid before and approved by resolution of the Assembly.

Exception for seamen recruited abroad

- 11.—(1) Nothing in Article 6 shall render unlawful any act done by an employer in or in connection with employment by him on any ship in the case of a person who applied or was engaged for that employment outside Northern Ireland[F17 to the extent that the act—
- (a) relates to the pay the person receives in respect of his employment, and (b) amounts to discrimination against the person on the basis of his nationality.]
- (2) Nothing in Article 9 shall, as regards work to which that Article applies, render unlawful any act done by the principal in or in connection with such work on any ship in the case of a contract worker who was engaged outside Northern Ireland by the person by whom he is supplied [F17 to the extent that the act—
 - (a) relates to the pay the person receives in respect of the work, and
- (b) amounts to discrimination against the person on the basis of his nationality.]
- (3) Paragraphs (1) and (2) do not apply to employment or work concerned with exploration of the sea bed or subsoil or the exploitation of their natural

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resources in any area for the time being designated under section 1(7) of the Continental Shelf Act 1964 in which the law of Northern Ireland applies.

(4) For the purposes of paragraph (1) a person brought to Northern Ireland with a view to his entering into an agreement in Northern Ireland to be employed on any ship shall be treated as having applied for the employment outside Northern Ireland.

[F17(5) In this Article—

"pay" includes retirement or death benefit;

"retirement or death benefit" means a pension, annuity, lump sum, gratuity or other similar benefit which will be paid or given to the employee or contract worker or a member of his family or household in the event of his retirement or death.]

Annotations: F14 SR 2003/341

8Document Generated: 2012-04-02 Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to The Race Relations (Northern Ireland) Order 1997. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

Annotations: F15 SR 2003/341 F16 SR 2000/8

9Document Generated: 2012-04-02 Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to The Race Relations (Northern Ireland) Order 1997. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

Annotations: F17 SR 2003/318

APPENDIX 2

Race Relations Act 1976 as amended by the Single Equality Act 2010

7 F12...contract workers.

- (1) This section applies to any work for a person ("the principal") which is available for doing by individuals ("contract workers") who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.
- (2) It is unlawful for the principal, in relation to work to which this section applies, to discriminate against a contract worker—
- (a) in the terms on which he allows him to do that work; or
- (b) by not allowing him to do it or continue to do it; or
- (c) in the way he affords him access to any benefits, facilities or services or by refusing or deliberately omitting to afford him access to them; or
- (d) by subjecting him to any other detriment.
- (3) The principal does not contravene subsection (2)(b) by doing any act in relation to a person not of a particular racial group **[F13**, or not of a particular race or particular ethnic or national origins,**]** at a time when, if the work were to be done by a person taken into the principal's employment, being of that racial group **[F14**or of that race or those origins**]** would be a genuine occupational qualification **[F15**or, as the case may be, that act would be lawful by virtue of section 4A**]** for the job.

[F16(3A)It is unlawful for the principal, in relation to work to which this section applies, to subject a contract worker to harassment.]

- (4) Nothing in this section shall render unlawful any act done by the principal **[F17**on grounds other than those of race or ethnic or national origins,] for the benefit of a contract worker not ordinarily resident in Great Britain in or in connection with allowing him to do work to which this section applies, where the purpose of his being allowed to do that work is to provide him with training in skills which he appears to the principal to intend to exercise wholly outside Great Britain.
- (5) Subsection (2)(c) does not apply to benefits, facilities or services of any description if the principal is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public to which the contract worker in question belongs, unless that provision differs in a material respect from the provision of the benefits, facilities or services by the principal to his contract workers.

8 Meaning of employment at establishment in Great Britain.

- (1) For the purposes of this Part ("the relevant purposes"), employment is to be regarded as being at an establishment in Great Britain **[F18** if the employee—
 - (a) does his work wholly or partly in Great Britain; or
 - (b) does his work wholly outside Great Britain and subsection (1A)

applies]

- **[F19**(1A) This subsection applies if, in a case involving discrimination on grounds of race or ethnic or national origins, or harassment—
 - (a) the employer has a place of business at an establishment in Great Britain;
 - (b) the work is for the purposes of the business carried on at that establishment; and
 - (c) the employee is ordinarily resident in Great Britain—
 - (i) at the time when he applies for or is offered the employment, or
 - (ii) at any time during the course of the employment.]

F20 (2)																								

- (3) In the case of employment on board a ship registered at a port of registry in Great Britain (except where the employee does his work wholly outside Great Britain) the ship shall for the relevant purposes be deemed to be the establishment.
- (4) Where work is not done at an establishment it shall be treated for the relevant purposes as done at the establishment from which it is done or (where it is not done from any establishment) at the establishment with which it has the closest connection.
- (5) In relation to employment concerned with exploration of the sea bed or subsoil or the exploitation of their natural resources, Her Majesty may by Order in Council provide that subsections (1) to (3) shall have effect as if in both subsection (1) and subsection (3) the last reference to Great Britain included any area for the time being designated under section 1(7) of the **M1**Continental Shelf Act 1964, except an area or part of an area in which the law of Northern Ireland applies.
- (6) An Order in Council under subsection (5) may provide that, in relation to employment to which the Order applies, this Part is to have effect with such modifications as are specified in the Order.
- (7) An Order in Council under subsection (5) shall be of no effect unless a draft of the Order has been laid before and approved by resolution of each House of Parliament.

9 Exception for seamen recruited abroad.

- (1) Nothing in section 4 shall render unlawful any act done by an employer in or in connection with employment by him on any ship in the case of a person who applied or was engaged for that employment outside Great Britain **[F21**to the extent that the act—
 - (a)mrelates to the pay the person receives in respect of his employment, and
 - (b) amounts to discrimination against the person on the basis of his

nationality.

(2)

Nothing in section 7 shall, as regards work to which that section applies, render unlawful any act done by the principal in or in connection with such work on any ship in the case of a contract worker who was engaged outside Great Britain by the person by whom he is supplied **[F22**to the extent that the act—

- (a) relates to the pay the person receives in respect of the work, and
- (b) amounts to discrimination against the person on the basis of his nationality.]
- (3) Subsections (1) and (2) do not apply to employment or work concerned with exploration of the sea bed or subsoil or the exploitation of their natural resources in any area for the time being designated under section 1(7) of the **M2**Continental Shelf Act 1964, not being an area or part of an area in which the law of Northern Ireland applies.
- (4) For the purposes of subsection (1) a person brought to Great Britain with a view to his entering into an agreement in Great Britain to be employed on any ship shall be treated as having applied for the employment outside Great Britain.

[F23(5) In this section—

"pay" includes retirement or death benefit;

"retirement or death benefit" means a pension, annuity, lump sum, gratuity or other similar benefit which will be paid or given to the employee or contract worker or a member of his family or household in the event of his retirement or death.]

Annotations:

Amendments (Textual)

F12

S. 7: words in heading omitted (19.7.2003) by virtue of The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), **reg. 10(1) F13**

Words in s. 7(3) inserted (19.7.2003) by The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 10(2)(a)(i) F14

Words in s. 7(3) inserted (19.7.2003) by The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 10(2)(a)(ii) F15

Words in s. 7(3) inserted (19.7.2003) by The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 10(2)(a)(iii) F16

S. 7(3A) inserted (19.7.2003) by The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 10(2)(b) F17

Words in s. 7(4) inserted (19.7.2003) by The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 10(2)(c)

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F18
Words in s. 8(1) substituted (19.7.2003) by The Race Relations Act 1976
(Amendment) Regulations 2003 (S.I. 2003/1626), reg. 11(1)
F19
S. 8(1A) inserted (19.7.2003) by The Race Relations Act 1976 (Amendment)
Regulations 2003 (S.I. 2003/1626), reg. 11(2)
F20
S. 8(2) omitted (16.12.1999) by virtue of S.I. 1999/3163, reg. 3
F21
Words in s. 9(1) added (19.7.2003) by The Race Relations Act 1976 (Seamen
Recruited Abroad) Order 2003 (S.I. 2003/1651), art. 2(2)
F22
Words in s. 9(2) added (19.7.2003) by The Race Relations Act 1976 (Seamen
Recruited Abroad) Order 2003 (S.I. 2003/1651), art. 2(3)
F23
S. 9(5) added (19.7.2003) by The Race Relations Act 1976 (Seamen Recruited
Abroad) Order 2003 (S.I. 2003/1651), art. 2(4)
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Modifications etc. (not altering text)

C10

S. 8(1)-(3) extended by S.I. 1987/929, art. 2

C11

S. 8(5) extended by Employment (Continental Shelf) Act 1978 (c. 46), s. 1(2)

Marginal Citations

M1

1964 c. 29.

Marginal Citations

M2

1964 c. 29.