Discrimination Law Association

Briefings 29-59

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DISCRIMINATION LAW ASSOCIATION

JANUARY 1997

BRIEFING No. 29 RESTRICTIONS ON THE EMPLOYMENT OF IMMIGRANTS s.8 of the Asylum and Immigration Act 1996 and Racial Discrimination

Most DLA members will probably already be aware of the new duties on employers to check the immigration entitlement to work of new employees. A brief summary of the provisions is set out here and some issues that may arise are flagged. Section 8 of the Asylum and Immigration Act 1996 introduces a new offence. It makes employers, however small, liable to a level 5 fine (£5000) if they employ a person who is aged 16 or over and is subject to immigration control (i.e. requires leave to enter or remain) and

(a) who has not been granted leave to remain; or

(b) whose leave is not valid or subsisting or is subject to a condition precluding him from taking up the employment.

A defence is provided by s.8(2) where the employers prove that -

(a) before the employment began, there was produced to him a document which appeared to him to relate to the employee and to be of a description specified in an Order made by the Secretary of State; and

(b) either the document was retained by the employer, or a copy or other record of it was made by the employer in a manner specified in the Order. However, the defence is not available where the employer knew that his employment of the employee would constitute an offence under s.8.

The new provisions apply in respect of any new employees as from 27 January 1996, not pre-existing ones (see Commencement Order 1996 SI 2970-C90). The Home Office has recently issued guidance notes for employers on the effect of s.8. As at mid-December no Order had been laid before Parliament so as to specify the documents which an employer is expected to seek. However the draft Order lists a number of documents as follows: a document from specified agencies which contains a national insurance number, a UK birth certificate, a passport showing the holder to be a British citizen or to have the right of abode in the UK, and EEA passport or an identity card from an EEA country describing the holder as a national of that state, a passport or other document showing that the holder has indefinite leave to remain or showing that the holder has current leave to enter or remain with

no prohibition or taking employment, a letter issued by the Department for Education and Employment stating that the person named in it has permission to take the employment, a letter issued by the Department for Education and Employment stating that the person named in it has permission to take the employment in question.

However, many employers will not be able to make sense of immigration documents and stamps, which can often be confusingly arranged in passports or other documents or which are superseded by other stamps. Immigration status is not always easy to determine and many persons with limited leave nevertheless are entitled to work. Despite the availability of a Home Office helpline as from 6 January 1997 and the Home Office guidance, many employers are likely to be hopelessly confused by a variety of documents and stamps which may be held by a job applicant.

Issues will obviously arise as to criminal liability of employers. However, the purpose of this briefing is to draw attention to the potentially discriminatory impact of these new provisions. Concerns have already been expressed by, amongst others, the CRE, and the provisions will lead to acts of racial discrimination and a reduction in equality of opportunity between persons of different racial groups. Criticism has been made of the imposition on employers of a role which should properly belong to the Immigration and Nationality Department. This appears to be part of a general approach by the Government to encourage a wide range of persons in effect to be responsible for immigration control. This approach seems to have become more pervasive since R v. Secretary of State ex p LB of Tower Hamlets where the Court of Appeal endorsed an argument enabling local housing authorities to inquire into the immigration status of homeless persons, see e.g. the provisions in the Asylum and Immigration Appeals Act 1993 and the Asylum and Immigration Act 1996 relating to access to local authority housing and Social Security benefits for certain persons subject to immigration control.

There is obviously a danger that some employers will adopt an approach where some potential employees are subjected to discriminatory treatment e.g. persons with foreign sounding names or a foreign appearance. In debates during the passing of legislation, government ministers emphasized the need for employers to apply **uniform policies** ('Employers will need to check all new employees - if they choose to check any - if they are to comply with the Race Relations Act' Baroness Blatch, HL Third Reading, 1.7.96). The Government's guidance to employers' counsels against checking employees who were employed prior to 27.1.96 as such actions are not required by the new provisions and may well be racially discriminatory if done selectively. Further, such checks as are made by an employer should be made in respect of all applicants at the same stage of the process of employing somebody.

The duty under s.8 only applies in respect of employees and not independent contractors. But since the concept of employment is broader under the Race Relations Act 1976, issues may arise where some independent contractors are discriminated against as compared with other.

The new provisions are likely to have a greater impact on small employers and on employers from the ethnic minorities. It is likely to be such employers who offer jobs to persons subject to immigration control. Indeed, 90% of the companies in the UK employ 5 or fewer employees. The burden on them of carrying out an immigration function may be justifiably said to be disproportionately large. We can expect to see claims against employers arising in respect of the operation of s.8. It is worth noting one recent case under the pre-existing law which is indicative of the sort of situation which may arise. In Shieky v. Argos Distributors Ltd and Stone (noted very briefly at [1996] Business Law Review vol 17(6) pp.129-130) a student, who had permission to work and who had provided his employers with details of that permission (although they were unable to produce it at the IT hearing), was told by a security manager that he was a foreigner and should not be working in the UK. The student was then locked in a room and the police were called as the employers apparently thought he was an illegal entrant. The police detained him for 7 hours and then let him go when the Home Office verified that he did indeed have permission to work. The Industrial Tribunal stated that the employers could have suspended the Applicant on pay whilst they investigated and awarded £4000 damages for injury to feelings. The unfair dismissal claim failed apparently because the employee had tried to carry on working and therefore had not accepted the repudiatory conduct of the employers.

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DISCRIMINATION LAW ASSOCIATION

MARCH1997

BRIEFING No. 30 EQUAL PAY: New Codes from EOC and European Commission

An EOC report on pay (December l996) shows that the overall gender pay gap is still substantial. On average, for full-time workers, women's average hourly earnings are 80% of men's. Women who work part-time have much lower hourly earnings than women who work full-time.

Research by the EOC suggests that women from ethnic minorities may be particularly disadvantaged in their terms and conditions of employment. Race discrimination in pay may be challenged under the Race Relations Act.

A. CODE OF PRACTICE FROM EOC

In January l997 the EOC's Code of Practice on Equal Pay came into force. The Code is admissible in evidence in proceedings under the Sex Discrimination Act and Equal Pay Act.

The Code provides practical guidance and is based on decisions from both the UK and Europe. It starts by setting out the UK and European equal pay legislation.

The Code makes the following important legal points:

a. The burden of proof is on the employer. However, the Code also stresses the importance of transparency so that employees understand how their pay has been worked out.
Where there is a lack of transparency, then the onus is on the employer to show that the pay differential is not discriminatory.

b. The material factor defence is the mechanism by which the employer can explain why the male comparator doing equal work is paid more. This, the EOC points out must be significant and relevant and must not be tainted by sex discrimination.

c. Where a particular pay practice results in an adverse impact on substantially more members of one sex the employer must be able to justify the pay practice. This means showing that the practice:
- corresponds to a business need on the part of the organisation,
- is appropriate with a view to achieving the objective pursued, and
- is necessary to that end.

Sex Discrimination in pay systems

The EOC points out that sex discrimination in pay now occurs primarily because women and men tend to do different jobs or have different work patterns. It is easy to undervalue the demands of work performed by one sex compared with the demands associated with jobs typically done by the other. Discrimination is commonly caused by:

- historical gender segregation which may have been exacerbated by separate collective bargaining;

- traditional values given to 'male' jobs and 'female' jobs which can affect the level of wages;

- past discriminatory assumptions about the value of men's or women's work which may be reflected in grading schemes;

- women's family commitments which may mean women have shorter periods of service and may work part-time;

- indirect discrimination whereby pay rules appear to be neutral but their effect is to disadvantage women.

Review of pay systems for sex bias

The EOC recommends an eight-stage review of pay systems which identifies problems and recommends action.

Finally, the Code suggests an equal pay policy.

B. EUROPEAN CODE OF PRACTICE

This was completed in July l996. It followed the European Commission's Memorandum on Equal Pay for Work of Equal Value which was published in June l994. It should be read in conjunction with the Memorandum.

The European Code also sets out examples of practices which might be discriminatory with guidance on how to address them. It looks at basic pay, bonus/performance pay and piece rates, pay benefits, part-time workers and job classification, grading, evaluation and skills/competency-based systems.

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DISCRIMINATION LAW ASSOCIATION

MARCH1997

BRIEFING No. 31 SEXUAL HARASSMENT NEED NOT BE MOTIVATED SOLELY BY SEXUAL MOTIVE

In Dobbin v Denholm Ship Management (UK) Ltd and McNiven[1] the Applicant was subjected to persistent ridicule and abuse, to chair-bumping, photocopier brushings and staring incidents by Mr McNiven. The IT found that these incidents amounted to sexual harassment even though a sexual consideration may not have been the sole reason. The tribunal was satisfied that the sex of the Applicant was the important critical factor and was the activating, effective and operating cause, prevailing over mere dislike or McNiven's style of supervision.

There was also evidence of a similar pattern of behaviour by Mr McNiven to other women without any evidence of such treatment to men. Nor was there any satisfactory explanation for the treatment.

The test is therefore:

- whether there was less favourable treatment;
- whether there was a satisfactory (non-discriminatory) reason for the treatment;
- whether this would have happened but for the fact that the victim was a woman.

A personality clash alone will not generally be discrimination but bullying may clearly constitute discrimination if it is directed particularly at women or ethnic minority workers.

The Applicant was awarded £3,000 plus interest, two thirds payable by the employer and one third payable by the harasser.

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[1]Cases Nos: S/5309/94 & S/5410/94: Glasgow 12.9.96.

DISCRIMINATION LAW ASSOCIATION

MARCH1997

BRIEFING No. 32 DISCRIMINATORY QUESTIONS AT INTERVIEW MAY LEAD TO INFERENCE OF DISCRIMINATION

In Leveson v North Manchester Golf Club[2] the Applicant was asked questions at interview about her ability to deal with discriminatory behaviour and chauvinistic remarks of male club members. The tribunal found that the atmosphere at the Club was imbued with male chauvinism and had spilled over into appointments. Account was taken of the substantial delay by the respondents in replying to the questionnaire and order for further information.

The tribunal held:

a. it was wrong that the only woman candidate was asked questions about how she would deal with male chauvinism;

b. such questions raised doubts about her fitting into a male-dominated environment and indicated that she, as a woman, had an additional problem in coping with 'reactionary male club members' and would be less suitable for the job;

c. the questions were not justified and were discriminatory.

The Applicant was awarded £750 for injury to feelings plus £4,500 loss of earnings.

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[2]Case No: 38847/96; Manchester IT; 9.12.96.

DISCRIMINATION LAW ASSOCIATION

MARCH1997

BRIEFING No. 33 RECENT DEVELOPMENTS AND FORTHCOMING HEARINGS / DECISIONS

Cast v Croydon College [1997] IRLR 14 (see DLA Briefing 19)

Court of Appeal oral hearing for leave to appeal was held on 25 February l997 and leave was granted.

Crees v The Royal London Mutual Insurance Society [1997] IRLR 85
(see DLA Briefing 18)

Greaves v Kwiksave (unreported)

These cases are to go to the Court of Appeal.

Both cases held that, in order to exercise her statutory right to return to work, the woman must physically return to work after maternity absence. Although, in Greaves v Kwik Save (unreported) the woman actually went into work to deliver her sick note, this was not enough to establish a 'return to work' within the meaning of the statute; it was, in fact, held to be incompatible with returning to work.

Note, that in neither case was sex discrimination argued. If it had been, arguably the result would have been different.

Grant v South West Trains (1996) has been referred to the ECJ under Article 119 and/or the EC Equal Treatment Directive. It concerns the inability of a female worker's partner to claim travel concessions that were available to heterosexual partners.

R v C involved allegations of serious harassment of a male to female transsexual. IT held that ECJ decision in P v S and Cornwall County Council (see DLA Briefing 15) does not apply to employees in private sector who cannot rely directly on the ETD. This will be heard by the EAT in February l997.

COMPENSATION AWARDS

Record £130,000, including £25,000 for injury to feelings and aggravated damages, awarded for race discrimination in Chan v London Borough of Hackney: Case No: 40002/92 (EOR 71); £97,000 was for past and future loss and loss of pension. Applicant was subjected to 'humiliating treatment on a daily basis' by a manager which was in 'stark contrast' to the way she had treated a white comparator.

£81,000 + interest was awarded in Bamber v Fuji International Finance PLC (in April 1996). Out of this, £20,000 was for aggravated damages.

DISCRIMINATION LAW ASSOCIATION

MARCH1997

BRIEFING No. 34 CHALLENGING WORKING HOURS THROUGH THE INDIRECT DISCRIMINATION PROVISIONS OF THE SEX DISCRIMINATION ACT: The impact of London Underground v Edwards

An important recent EAT decision states that:

> 'the more clear it is that the employers unreasonably failed to show flexibility in their employment practices, the more willing the Tribunal should be to make a finding of unlawful discrimination'.

In London Underground Limited v Edwards[3] Mrs Edwards was a train driver who had a shift pattern which involved working from 8am to 4pm or 8.30 am to 4.30 pm and one shift on alternate Sundays. New shifts were introduced whereby Edwards had to work 38 1/2 hours per week, including anti-social hours, and some weekend working. Mrs Edwards, a lone parent, said she could not work these hours. She took voluntary redundancy and brought a claim for indirect sex discrimination.

The case raised a number of important issues around indirect discrimination (see DLA Briefing 9):

1. The requirement or condition

This was found to be the 'new rostering arrangement which was imposed'.

2. Could a considerably smaller proportion of female train drivers than male train drivers comply with the requirement?

It was agreed that the comparison was between male and female train drivers - this was the pool.

There were over 2,000 male train drivers, all of whom worked full time. There were 21 female train drivers and the Applicant was the only one who positively complained that she could not comply with the requirement.
Thus 95.2% of female drivers could comply with the requirement and 100% of male drivers.

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[3]EAT/16/96; unreported.

The EAT held that:

a. when weighing the extent of the disproportionate effect that a condition has upon men and women in the relevant pool, the IT can properly have regard to the number of women train drivers as against the number of male train drivers;

b. the IT was entitled to have regard to the possibility that, where the number of women as against the number of men is, in percentage terms, very slight, some kind of generalised assumption may exist that the particular type of work concerned is “men’s” and not “women’s” work.

c. the IT was entitled to take account of a wider perspective; thus statistics showing the percentage of women in employment who have primary care responsibility for a child, in contrast to the percentage of men, are relevant.

This means that where the figures in the workplace are not sufficiently large to show significant disproportionate impact, the IT should look at the labour market as a whole.

3. **Justification**

The IT found that the Respondents could easily, without losing the objectives of their plan and reorganisation, have accommodated the Applicant who was a long-serving employee.

The EAT also linked the question of justification with disproportionate impact, saying it would be easier to show disproportionate impact where the employer could show little justification.

4. **Could the Applicant comply with the requirement?**

The IT found that as a single parent, Mrs Edwards was torn between the need to do her job and the need to care for her child and the new shift patterns did not satisfy her needs.

Finally, the EAT echoed what the Court of Appeal said in R v Secretary of State for Employment ex parte Seymour Smith and Perez that the purpose of the Equal Treatment Directive was to eliminate all sex discrimination in the employment field. 'Equality of treatment is the paramount consideration'.

Conclusion

Although Edwards was concerned with anti-social hours the same principles would apply to requirements to work full-time, to work long hours or overtime and to work rigid hours. Women with childcare responsibilities can use these indirect sex discrimination provisions to argue for shorter hours, teleworking from home and other forms of flexible working. The key question will generally be whether the employer can justify refusing to allow these forms of flexible working.

Compensation for indirect sex discrimination is now unlimited and women have won substantial awards (£35,000 in one case).

Account should also be taken of the **European Council Recommendation on Childcare** which says that initiates be taken to create a workplace which takes into account the needs of all working parents. Although the Recommendation is not legally binding the ECJ has ruled that domestic courts are bound to take Recommendations into account when deciding disputes. The EOC also recommends that employers should consider part-time working.

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DISCRIMINATION LAW ASSOCIATION

MARCH 1997

BRIEFING No. 35 JUSTIFICATION IN EQUAL PAY

Recent case law has had the effect of modifying the burden of proof and the application of the concept of justification in equal pay cases. Although in principle, the burden of proving the existence of sex discrimination in pay structures lies upon the applicant, the ECJ in *Enderby v Frenchay H.A.* C-127/92 [1992] IRLR 591 held that "the onus may shift when it is necessary to avoid depriving workers who appear to be victims of discrimination of any effective means of enforcing the principle of equal pay". The Court concluded that "where significant statistics disclose an appreciable difference in pay between jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination based on sex." The Court of Justice also concluded that where in such circumstances pay rates were determined by separate collective bargaining processes, which were not in themselves discriminatory, that there was not a sufficient objective justification under Article 119.

In *BRS Ltd v Loughran* [1997] IRLR 92 NICA, a classic situation was considered, namely, the comparison between a predominantly female (75%) clerical staff and all male group of manual workers, whose pay was determined in two separate sets of collective bargaining arrangements. Here the issue was whether the proposition that the existence of separate collective bargaining structures did not constitute an objective justification per *Enderby* was confined to situations where the claimant group were almost exclusively women. Kerr J. held that where a group is predominantly composed of women and is traditionally less well paid, that indicates a "female profession" and raises a presumption of discrimination, which it is for the employer to rebut. The NICA concluded that where the proportions of men and women in each group were sufficient to provide a reliable indicator of unequal treatment, the mere existence of separate collective bargaining structures was not a sufficient justification.

Enderby was a case of alleged indirect discrimination between speech therapists and pharmacists, in which the Court of Justice disposed of the notion that in such circumstances it was necessary for the applicant to point to a requirement or condition which led to the disparity in pay. It was sufficient to raise an inference of discrimination that there was a disparity in pay between two such groups. In *Ratcliffe v North Yorks. C.C.* [1996] IRLR 439 Lord Slynn, giving the judgment of the House of Lords, held that the Equal Pay Act must be interpreted in such circumstances without bringing in the distinction between direct and indirect discrimination. In *British Coal Corporation v Smith* [1996] IRLR 404 HL, Lord Slynn

also held that "the existence of separate pay structures was not in itself a defence. It was necessary to see not just how the difference arises but also why it arose and, if necessary, why it persists."

In *Tydesley v TML Plastics Ltd* [1996] IRLR 395 a man was paid more than a woman on the basis of a misperception by the employer of their relative levels of skill. The EAT held that this was a sufficient explanation of the difference in pay to constitute a defence under s.1(3) of the Equal Pay Act in the absence of any factor "which affects a considerably higher proportion of women than men, so as to be indirectly discriminatory and thus tainted by sex discrimination unless justified." However, this approach seems to be contrary to the dictum of Lord Slynn in *Ratcliffe* (above) that no distinction is to be drawn between direct and indirect discrimination in matters of equal pay. Mummery P. (as he then was) was perhaps on stronger ground in holding that in the absence of a prima facie case which raises the inference of discrimination, as in *Enderby*, objective justification of the difference in pay is not called for. The EAT concluded that:

> "Even if a differential is explained by careless mistake which could not possibly be objectively justified, that would amount to a defence under s.1(3) and for the purposes of Article 119, provided that the tribunal is satisfied that the mistake was either the sole reason for it or of sufficient influence to be significant or relevant. If a genuine mistake suffices, so must a genuine perception, whether reasonable or not, about the need to engage an individual with particular experience, commitment or skills."

Yet why should it be just to refuse a person equal pay by reason of a mistake or a mistaken perception of their skills? Against this, the comment by Mr Justice Mummery could be reiterated, that the Act is about equal pay and not about providing fair wages by correcting anomalies which could equally occur between two women or between two men.

The issue of objective versus subjective justification was further reviewed in *Strathclyde Regional Council v Wallace* [1996] IRLR 670 CS, in which teachers claimed equal pay with those undertaking similar duties in the grade above, from which promotion was precluded by a combination of statutory regulations, collective agreements and financial constraints. Men and women worked in both grades. The Court of Session held that the employer had put forward genuine and material reasons to account for the discrepancies in pay, notwithstanding that these were not capable of being objectively justified, in the sense of being upheld on their merits. In this they adopted the approach of Mummery P. in the *TML Plastics* case. Indeed clarification by the higher courts is needed as to the circumstances in which an inference of discrimination is raised in equal pay cases and when it is that the employer must objectively justify pay differentials between men and women. It seems clear that when justification is required it must be objective. The question is rather, when is it required?

Colin Bourn, Barrister

DISCRIMINATION LAW ASSOCIATION

JUNE 1997

BRIEFING No. 36 WHERE NOW? R-v-Secretary of State for Employment ex parte Seymour Smith and Perez

Introduction

The determination of this application has been massively beset by delay[4]. The appeal to the House of Lords took a long time to come on. When it was first listed for hearing in the summer of 1996 the case was adjourned after one judge was taken ill. The hearing was concluded in late 1996 and the judgment was not finally given[5] until five and a half years after the case was begun. The reference to the ECJ made by the House of Lords ("HL") means that this case is likely to last for at least another 18 months. This timetable provides an opportunity to reflect on the effect of the litigation so far.

One effect of the delay in this case has been confusion. There has been time for different regions of the Industrial Tribunal to take different views as to the way in which to deal with new applications relying on the result in the Court of Appeal. Some have stayed them all and some have listed them for hearing, perhaps to try and keep their statistics up.

Meanwhile prior to the HL judgment two different divisions of the EAT have given differing judgments as to the way in which ITs should deal with these new applications. In one decision the EAT seemed to suggest that IT cases should be decided "on the basis of the law as it is now"[6], in the other the EAT refused to give any guidance but adjoined an appeal until after the judgment of the HL[7].

The HL Judgment

The HL referred five key questions[8] aimed at determining the substantive effect of Article 119 on the employment rights of the Applicants. Although these questions

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4 The original hearing in the Divisional Court was delayed until after the judgment of the HL in the part-time workers case R v Secretary of State for Employment ex parte EOC and Day [1994] IRLR 176

5 On the 13 March 1997

6 Thomas v National Training Partnership Ltd EAT/1126/95 (Holland J., Mrs Chapman and Mrs Springer).

7 Street v Peacock EAT/217/96 (Mummery J. (P), Mr. Scouller and Ms Switzer)

8 The questions were: 1. Does an award of compensation for breach of the right not to be unfairly dismissed under national legislation such as the Employment Protection (Consolidation) Act 1978 constitute "pay" within the meaning of article 119 of the EC Treaty?

remain to be answered, the HL did rule on the Applicant's case under EC Directive 76/207 ("ETD"). They discharged the declaration made by the CA[9] under the ETD holding that in effect an employee could not obtain relief against a private employer relying on the ETD by a two-stage process.

Perhaps this part of their judgment was unsurprising as Lord Slynn who sat in the committee of the HL that heard the appeal had also been the Advocate General in Marshall v Southampton AHA (No1)[10] in which the ECJ so carefully limits its ruling on the direct effect of directives. There has of course been considerable pressure to extend the full direct effect of directives since then but as yet the damn has not burst and the ECJ have resisted that pressure[11].

Although denying the Applicants a right to rely in the ETD to seek indirectly a remedy against their employers, a careful reading of the judgment will show that the HL do not rule out all application by employees for judicial review of statutory provision in the grounds that they are contrary to the ETD or indeed any other provision of EC law. Quite the reverse: the HL accepted that there may be a situation in which an employee who was not seeking thereby to achieve a right against an individual might be granted relied in much the same way the EOC were in the part time workers case.

This part of the judgment of the HL leaves open the intriguing possibility that an application by way of judicial review by unemployed workers looking for work for a declaration that the two year qualifying period was contrary to the ETD might have been admissible.

They also held that ordinarily claims relying on Article 119 to set aside provision of statutory law as indirectly discriminatory should be brought in the IT, reaffirming their earlier decision in the part -time workers case[12]. Fortunately they did not reject this application on the grounds in view of the decision of the CA to allow an amendment and the passage of time. After so much time this was a relief to the Applicants and

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2. If the answer to question 1 is "yes" do the conditions determining whether a worker has the right not to be unfairly dismissed fall within the scope of article 119 or that of the Directive 76/207? 3. What is the legal test for establishing whether a measure adopted by a Member State has such as degree of disparate effect as between men and women as to amount to indirect discrimination for the purposes of article 119 of the EC Treaty unless shown to be based upon objectively justified factors other than sex? 4. When must this test be applied to a measure adopted by a Member State? IN particular at which of the following points in time, or at what other point in time must it be applied to the measure (a) When the measure is adopted(b When the measure is brought into force (c) When the employee is dismissed? 5. What are the legal conditions for establishing the objective justification, for the purposes of indirect discrimination under article 119, of a measure adopted by a Member State in pursuance of its social policy? In particular, what material need the Member State adduce in support of its ground of justification?

9 [1995] IRLR 464

10 [1986] IRLR 140

11 See e.g. the ruling of the ECJ and the A-G's opinion in Faccini Dori [1995] All ER (EC) 1

12 R v Secretary of state for Employment ex parte EOC and Day [1994] IRLR 176

their lawyers alike! However, this part of their judgment does not grapple with the implications for employers or employees of commencing litigation in the IT now.

BEST ADVICE -DISMISS FAIRLY/COMPLAIN TO IT

The reference simply leaves up in the air what is the right way to approach the core legal tests by which to decide whether the two-year time limit is indirectly discriminatory. Accordingly, the best advice to employers is to make sure that before employees who have less than two years' service are dismissed, care is taken to ensure procedural and substantive fairness. If such care is taken it may well avoid any claim of unfair dismissal and is likely to defeat any claim that may be made. If the claim is plainly unmeritorious on its facts, the answer is obvious. However, if the claim may have merit, then the prudent course must be to make a complaint. But what should the IT do?

ITs CANNOT KNOW WHAT IS THE LAW

Paradoxically the reference to the ECJ has removed at least some of the confusion for Its even if it has compounded the delay for parties to this type of litigation. It is now apparent that EC law and its effect on the municipal statutory law of unfair dismissal is not "acte clair" in EC terminology or, quite simply, not clear. If it were otherwise the HL would not have made a reference to the ECJ under EC Article 177.

It would be quite wrong for Its to decide legal issues for which the HL considered it needed assistance from the ECJ, accordingly it is suggested that the usual course for an IT to take would be to adjourn a properly made application pending the outcome of the reference. It is hoped that the EAT will now give such guidance in due course if necessary.

Of course there may be exceptional cases where the claim is hopelessly out of time or there is some other jurisdictional question which is not subject to the requested rulings from the ECJ. There may also be some cases in which evidence from witnesses may not be available or may be available only at great expense after the ECJ's ruling. In those cases, it may be sensible for the IT to hear the evidence and adjourn the case for submissions on the law in the future.

It is important to note that the HL made no ruling on the facts underlying the case save to note that by 1993 the gap between the percentages of men and women who had more than two years service had narrowed. Fresh statistics are now available[13]. At some time in the future these may require careful analysis. At present they show that there is a continuing disproportionate impact.

Whatever view is taken of the current statistics, no IT can now be certain of the right way to approach them. If an IT felt sufficiently confident to decide that the current

13 See below Appendix A

statistics provided proof of adverse impaction it would be unable to deal with the question of justification because the HL referred a question about that as well[14].

APPLICATION MUST BE PROPERLY MADE

Any application in respect of unfair dismissal must be properly made. The question whether there is a free-standing right under Article 119 to complain to the IT was not before the HL. For the moment the decision for the Court of Appeal in Biggs v Staffordshire County Council[15] that there is no such right must be assumed to be right. Accordingly, an application to the IT must not simply rely on Article 119. It must plead a breach of the statutory right not to be unfairly dismissed and claim that the provisions relating to the two-year qualifying period must be set aside as contrary to EC law. It is likely that an IT1 which fails to plead the case in that way will lead to an application to strike out the claim.

It remains unresolved precisely what provision of EC law should be relied upon. The HL referred two questions on this issue. The first was designed to discover to what extent the right not to be unfairly dismissed was covered by Article 119 and the second sought to elicit more particularly whether the qualifying conditions for that right were subject to the Equal Treatment Directive as opposed to Article 119. This difference is crucial for the employee of a private employer but will make no difference to an employee of an emanation of the State. In the case of a dismissal of such an employee the originating application should refer to both provisions in the alternative. If the employer was private, then the employee can only rely directly on Article 119. A suggested draft pro forma application is set out at the end which includes the most up to date statistics for the adverse impact of the two-year qualifying period[16].

FRANCOVICH CLAIMS

Again there is a wrinkle! Although the “private” employee may only rely in Article 119 it is important to bear in mind that the ECJ could rule that the qualifying period for protection from unfair dismissal is covered solely by the ETD and not by Article 119. If the qualifying period was unlawfully indirectly discriminatory, then although the dismissed private employee would have no right to a remedy from the employer, she may have a right to a remedy from the state for failing to comply with the ETD.

This part of the decision has consequences for some of the older cases that have been adjourned. The time limits for commencing such a writ action are no more than 6 years from the date of dismissal. It would be very unwise to wait until after the ECJ has rules if that would be after the 6-year period has expired. The right course is to issue a writ and then to ask for the proceedings to be adjourned generally pending

14 It should be noted that the Secretary of State has not produced any fresh evidence to justify the two-year qualifying period.
15 [1996] IRLR 203
16 See Appendix A below

the ruling by the ECJ. The HL confirmed that such a Francovich[17] claim must be brought in proceedings against the Attorney General as representative of the State[18].

EMPLOYEES WITH LESS THAN ONE YEAR

Some lawyers and Unions with long memories for the qualifying period have wondered how this litigation affects women with less than 1 year's service. In my view they are in the same position as those who have more than 1 year but less than 2 years service. If the IT or a Court rule that Section 108(1) of the Employment Rights Act 1996 is incompatible with Article 119 or the ETD it is not their job to substitute a new qualifying period. Only if (contrary to the HL judgment) the 1985 amendment Order has been struck down would it have been possible to argue that the old qualifying period was resurrected.

MEN

What about men who are dismissed with less than 2 years' service? A number of such complaints have been made.

In Preston v Wolverhampton Healthcare NHS Trust19 the CA were presented with argument as to the rights of men under EC law in respect of a provision which was indirectly discriminatory against women. Unfortunately the CA did not clarify this point. It seems likely that this is an issue that will have to be resolved in due course by the ECJ either by a reference in that case by the HL or in a Seymour Smith type case brought by a man with less than two years. It would be unwise for employers and those advising employees to neglect the position of men. Perhaps an IT will make an additional reference on this point.

THE BUSINESS CYCLE

The HL noted that by 1993 the percentages had narrowed. This is true but it is probably a consequence of the differential impact of the business cycle on men and women as much as it has anything to do with the changing patterns of female employment. There is no evidence to suggest that women have made any substantial change in respect of their historical role as the primary carers within the family. There was substantial research evidence in relation to this that was before the court in Seymour Smith and it has been widely recognised elsewhere. While women retain this role in the long run over the business cycle, they are bound to be more likely to have to interrupt their working lives than men.

In the CA a submission was deployed to show how many women ought to have been protected from unfair dismissal (but were not), had the qualifying period had an equal

17 [1991] ECR I - 5357
18 See section 17 of the Crown Proceedings Act 1947
19 [1997] IRLR 233

impact on men and women[20]. It found that there were 370,000 fewer women than equal treatment would have predicted[21]. The narrowing percentages have lowered this number[22] but there are signs that the minimum has been reached and there is now an increasing divergence in the number of women missing out on protection compared with the number that would be predicted by equal treatment. By 1995 there were almost 100,000 women who ought to have been protected from unfair discrimination if the two-year qualifying period had equal impact on men and women [23], but in 1996 the figure for "missing women" has gone up to nearly 160,000[24]. The difference between the impact on 195 and 1996 is a consequence of the fact that the numbers of women with more than two years' service fell by about 200,000 while the number of men fell by about 100,000.

Between 1995 and 1996 total employment increased by 1.67%: male employment by 161,135 (1.65%) and female employment by 162,557 (1.68%). However the picture is very different when the numbers employed for less than two years are looked at: Male employees with less than 2 years increased by 284,970 (9.74%) and female employees with fewer than two years by 313,201 (13.13%). These figures are taken from Appendix B and C. But there was a drop in the number of female employees with more than 2 years' employment which was twice as large for women as for men. The clear implication is that women are taking relatively short-term jobs compared to men.

THE FUTURE

With the benefit of hindsight, it might be argued that it would have been better to have continued with the applications in the IT rather than have them stayed. However the general view of EC law in the IT was very different in 1991 compared to now. Had Seymour-Smith fought in the IT, it is arguable that this case would have foundered long ago.

This litigation demonstrates just how important it is to have assistance to run indirect discrimination cases. Statistics are hard to find and require expert interpretation. Arguments on the justification of social policy also require expert evidence. Fortunately, because the Applicants were legally aided, they were able to obtain such expert assistance. However had their claim been argued in the IT alone legal aid would not have been available.

Employers will now be faced with having to defend Government social policy in the IT. The government may ask to be joined as a party but there is no obvious mechanism for this under the IT rules. Although argument was deployed on this before the HL they did not deal with it explicitly in their judgment. In some cases the EOC may help the employee but the employer has no equivalent expectation. In my

20 This submission was based on the approach taken in the CA in Jones v Chief Adjudication Officer [1990] IRLR 533
21 See [1995] IRLR 464 at para 101
22 Labour Force Survey
23 See Appendix B at end for calculation
24 See Appendix C at end for calculation

view this effect of the judgment of the HL is likely to be the most problematical in the long run. An amendment to the IT rules to enable or even require the State to be joined as a party to justify any prima facie indirectly discriminatory legislation is essential.

Robin Allen QC ©

APPENDIX A

A Seymour-Smith Pleading

PRO FORMA PLEADING

1. I believe that I have been unfairly dismissed:

PARTICULARS

(Here set out reasons why it is said the dismissal was unfair)

2. Although I have worked for less than two years, I rely on my rights under EC law to ask the Industrial Tribunal to set aside the requirements to Section 108(1) of the Employment Rights Act 1996 that I should have worked for more than 2 years.

PARTICULARS

a. My employer is an emanation of the State. Accordingly I rely on the Equal Treatment Directive
(76/207/EEC) and/or Article 119 EC Treaty

[Alternatively where the employer is not an emanation of the State and therefore no reliance can be placed on the ETC] I rely on Article 119 of the EC Treaty.

b. The requirement that I work for two years is contrary to the principle of equal treatment and equal pay [Alternatively] The requirement that I work for two years is contrary to the principle of equal pay.

c. The requirement indirectly discriminates against women in a way which is not justifiable

d. I rely on the following statistics as evidence of adverse impact both at the time that the requirement was introduced and at the time that it had impact on me.

PARTICULARS

(1) Since 1992 there has been a change in the way that the information has been collected in the Labour Force Survey. Prior to that year respondents to the Labour Force Survey were asked to state how long they had been with their present employer placing the answer into bands such as “less than 6 months”

"6 months to 1 year" etc. The statistics were collected annually in the period April May each year.

(2) In 1992 information was collected on a quarterly basis. Respondents simply gave the start year and start month of their current job.

(3) Figures in relation to those who work less than 8 hours are often disregarded to improve the reliability of the statistical information as they tend to relate to those who are only marginally in employment.

(4) The most up-to-date figures for those persons aged 16-64 working 8 or more hours has been added to the information given in the ex parte Seymour-Smith to create the following table

	Length of time with current employer			
	Total less 2 years		**Total 2 yrs plus**	
	M	**F**	M	**F**
1985	22.7	32.5	77.3	67.5
1986	23.1	33.7	76.9	66.3
1987	25.2	35.2	74.8	64.8
1988	27.3	36.6	72.6	63.4
1989	28.8	38.4	71.2	61.7
1990	28.3	38.0	71.7	62.0
1991	26.4	35.1	73.7	65.9
1992	22.9	30.2	77.1	69.9
1993	22.4	28.3	77.6	71.7
1994	24.2	28.9	75.8	71.1
1995	26.7	30.8	73.3	69.2
1996	28.7	31.8	71.3	68.2
Average 1985 to 1996	25.558	33.292	74.442	66.73
Average over last 5 years	24.98	30	75.02	70.02
-Labour Force Survey-				

(5) If these figures are averaged over the period 1985-1996 it will be seen that 74.4% of males have two or more years service and while only 66/7% of females do so. If these figures are averaged over the last five years (the period 1991-1996) it will be seen that 75% of males have two or more years service and while only 70% of females do so.

APPENDIX B -1995

Total Workforce	Males	Females	Males as % of total	Females as % of total
20,628,936.00	10,963,686.00	9,665,251.00	53.15	47
Total with 2 years or more service	Males with 2 years or more service	Females with 2 years or more service		
14,936,213.00	8,037,446.00	6,898,767.00		
	Males predicted i.e. 53.15 of 14,936,213.00	Females predicted i.e. 46.85% 14,936,213.00		
	7,938,166.73	6,998,045.54		
	Difference between actual Males and predicted Males	Difference between actual Females and predicted Females		
	99,279.27	(99,278.54)		

APPENDIX C -1996

Total Workforce	Males	Females	Males as % of total	Females as % of total
20,972,620	11,144,821.00	9,827,808.00	53.14	46.86
Total with 2 years or more service	Males with 2 years or more service	Females with 2 years or more service		
14,631,734.00	7,933,611.00	6,698,1213.00		
	Males predicted i.e. 53.14% of 14,631,734.00	Females predicted i.e. 46.86% 14,631,734.00		
	7,775,278.32	6,856,453.98		
	Difference between actual Males and predicted Males	Difference between actual Females and predicted Females		
	158,331	(158,330.98)		

DISCRIMINATION LAW ASSOCIATION

JUNE 1997

BRIEFING No. 37 RACE DISCRIMINATION LAW IN NORTHERN IRELAND

The Race Relations (Northern Ireland) Order 1997 was made on 19 March 1997 and will be coming into force, according to the Northern Ireland Office, sometime in the Summer (the date is yet to be set).

The Race Relations (Northern Ireland) Order 1997 was made on 19 March 1997 and will be coming into force, according to the Northern Ireland Office, sometime in the Summer (the date is yet to be set). The Order (1997 No. 8619 N.1.6) is closely modelled on the Race Relations act 1976 (the Act).

The definitions of direct and indirect discrimination and victimisation are identical to those under the Act, but the Order attempts to simplify the wording of the victimisation provision. 'Racial Grounds' and 'Racial Group' are also defined in the same way as the Act, but the Order adds that racial grounds or group include *"the Irish traveller community, that is to say the community of people commonly so called who are identified (both by themselves or by others) as people with assured history, culture and traditions including, historically, a nomadic way of life on the island of Ireland".* The Order also makes it clear that racial grounds and group do not include the grounds or group of persons defined by reference to religious belief or political opinion. These grounds are, of course, covered in Northern Ireland by the Fair Employment (Northern Ireland) Act 1976.

As for discrimination in employment, the Order has a new provision (article 7) which makes it unlawful for a person who is empowered by virtue of a statutory provision to select or nominate another person for employment by a third person to discriminate against a person by refusing to select or nominate him for employment or where candidates are selected or nominated by selecting or nominating him lower in order than any other who is selected or nominated. Otherwise, the provisions relating to employers, contract workers, partnerships, trade unions, qualifying bodies, vocational trading bodies, and employment agencies are similar to those in the Act. As for the application of the Order to the police, again the provision is similar to that in the Act, but unlike the Act, there is no reference to police Cadets.

The non-employment provisions in the Order, relating to education; goods, facilities and services, premises; associations and barristers follow those in the Race Relations Act. However, there is no separate article for planning corresponding to section 19a of the Act. The provisions relating to instructions and pressure to

discriminate, liability of employers and principals and aiding and abetting are again also similar to those in the Act. So are the exemptions under the Order for acts done under statutory authority for safeguarding national security but there is an additional exemption for acts done for 'protecting public safety or public order'.

The Order establishes the Commission for Racial Equality for Northern Ireland [CRE(NI)] consisting of at least five but not more than seven individuals appointed by the head of Department of Economic Development (and not the Secretary of State as in the Act). The duty of the Commission and its powers to fund organisations and issue Codes of Practice in employment and housing and to undertake research are similar to those of the CRE. The Commission also has power to conduct formal investigations and, again, the provisions relating to terms of the formal investigation, power to obtain information, recommendations and report and restrictions on disclosure of information are identical to those in the act.

In terms of the enforcement of the Act, again the employment cases are to be dealt with by industrial tribunals and non-employment cases by the County Court. There are provisions, however, for the tribunal proceedings to be stayed if an issue relating to the Fair Employment (Northern Ireland) Act 1976 for which the Fair Employment Tribunal for Northern Ireland (FET) has jurisdiction arises. In such cases, the race discrimination proceedings shall not proceed further until the FET disposes of the claim.

The CRE (NI) may assist individuals who have been discriminated against under article 64 of the Order and is given the same powers that the CRE has under section 66 of the Act. Similar obligations apply in respect of the consideration of the applications for assistance which are submitted in writing and the time limits for proceedings under the Order are also identical to those in the Act.

Overall as the provisions of the Order are identical to those in the Act, they import all the shortcomings of the Act.

DISCRIMINATION LAW ASSOCIATION

JUNE 1997

BRIEFING No. 38 **VICTIMISATION: TRIBUNAL DISTINGUISHES**
CORNELIUS: Khan -v- Chief Constable of West Yorkshire and Others (Case No. 1800125/95)

The Applicant, a serving Police Sergeant with the Yorkshire Police alleged that he was directly discriminated against with regard to promotion and that he was victimised when he applied to the Norfolk Police for consideration for promotion. The Leeds industrial tribunal ruled that the Applicant had not been directly discriminated against. The tribunal, however, accepted that the Applicant felt that he had a proper claim to bring to the tribunal and noted that they were not satisfied that his claim as such was false or brought in bad faith. The tribunal then upheld the Applicant's claim of victimisation.

The victimisation claim was based on the fact that in October 1996 the Applicant applied for promotion in the Norfolk Police who, in accordance with normal procedure, contacted the West Yorkshire Police for a reference and copies of his assessments. The Applicant was informed by the Respondents that they were only prepared to write one paragraph and that upon advice from their Solicitors that paragraph would read as follows:

> *"Sergeant Khan has an outstanding industrial tribunal application against the Chief Constable for failing to support his application for promotion. In the light of that, the Chief Constable is unable to comment any further for fear of prejudicing his own case before the tribunal".*

The Norfolk Police's request for the Applicant's last two staff appraisals and a copy of any computer printouts from the Personnel system, be sent to them was declined by the Respondents on the advice of their solicitor. The solicitor informed the tribunal that he was conscious of the 'tripartite duties as he saw them, both to the Applicant and to the Norfolk Police, the recipients of any reference, and to the Chief Constable of the West Yorkshire Police'. His evidence to the industrial tribunal was based on his summation of the law as it applied to the responsibilities for statements in references in the cases of *Spring v Guardian Assurance PLC* [1995] 2 AC 29 and *Hedley Byrne and Co Ltd v Heller & Partners Ltd* [1964] AC 465 (relating to misrepresentation).

The industrial tribunal directed itself to the issue as to whether or not the Applicant had been treated less favourably because he had brought proceedings under the Act. The tribunal noted that it was clearly accepted by the Respondents that in

circumstances where a request is made ordinarily, a proper reference and copies of the previous appraisals, as requested, would be provided. The only difference in this case was that the Applicant had commenced proceedings before the industrial tribunal under the Race Relations Act and it was clearly the Respondents' case that and that only gave them good cause to react the way that they did when they made a short statement in the relevant reference form. The Respondents argued that there was no less favourable treatment and relied on *Cornelius v University College of Swansea* [1987] IRLR 141. The Appellant in *Cornelius* complained of sexual harassment by her manager and was transferred to another post. She asked to return to her job and when this was not done, instituted tribunal proceedings. She requested a transfer again whilst she was still pursuing an appeal after her tribunal case was dismissed on the basis of time limits. The College informed her that they would not take any action until the outcome of her appeal. She then issued tribunal proceedings for victimisation and received the same response from the College when she invoked the grievance procedure. The original proceedings brought by the appellant constituted an action under s.4 of the Sex Discrimination Act 1975; (relating to victimisation) but the question was whether the subsequent refusal of transfer and refusal to hear the Appellant's case under the grievance procedure was by reason of the proceedings she brought. The Court of Appeal ruled that was not the case. The Court held that there was no reason on those facts to think that the decision of the College would be different whoever had brought proceedings or whatever their nature if the subject matter was allied. The Respondents in this case, therefore, contended that if similar circumstances had applied, for instance, in a potential road traffic prosecution of a member of the Road Traffic Section of the force or a civilian, a similar course of advice and action would therefore have been taken.

The tribunal, however, distinguished the facts in *Cornelius* on the basis that, in this case, it was not a matter of deferring a grievance or other internal disciplinary or contractual procedure but a failure on the part of the Respondents to provide the appropriate reference and supporting appraisal documentation when they would otherwise <u>normally</u> do so. In considering the specific provisions of section 2 of the Act, the tribunal noted that the reference to 'in those circumstances he treats or would treat other persons' is *"to the circumstances, not of the hypothetical alternative situation but of the practical circumstances that apply, in this case, the request for reference and recommendation. It is undoubtedly the case that if a request is made from another force for reference and supporting appraisals and documentation then ordinarily in <u>those</u> circumstances the reference and the appraisals and other documents are provided. In this case it is only because of the application to the industrial tribunal, made by the Applicant, that the course of action was not followed."*

Cornelius has been criticised by commentators (Harvey L/71) for adding another hurdle for individuals who are claiming victimisation to jump. Its effect was that a person claiming victimisation must be able to show not only victimisation because she brought proceedings but also because the proceedings were brought under the Sex Discrimination Act and that is not something that can be established if the act of 'victimisation' carried out by the respondent would have been the same irrespective of whether the proceedings were brought under the Sex Discrimination Act or not.

According to Harvey, "this appears to do some violence to the spirit and intention" of the victimisation provisions.

This is an important case which indicates that when employers are dealing with individuals who are pursuing complaints of racial discrimination, they should be scrupulously fair in treating them in the same way as they would treat other persons who had not done or would not do the protected act (*Aziz v Trinity Street Taxis Ltd* [1988] IRLR 204). As long as the individual can establish the causal link between the less favourable treatment and the protected act (which in *Cornelius* and *Aziz* the Applicants could not do so because the treatment they received was held to have nothing to do with the conduct in bringing proceedings) then a claim of victimisation could be sustained. But it has been suggested that the legislation can be improved if the treatment referred to in s.2 of the Act is described as "unfavourable" rather than "less favourable treatment" so that there will be no need for comparators. The Commission has proposed that <u>any detriment</u> suffered as a result of the protected act should be covered.

DISCRIMINATION LAW ASSOCIATION

JUNE 1997

BRIEFING No. 39 CAUSATION IN DISCRIMINATION AND DISMISSAL CASES: *Ismail - Eastern Revens Trust Ltd (EAT/680/96)*

In this case, the Middlesbrough industrial tribunal decided that although the Applicant (Ms Ismail) was discriminated against on grounds of her race (and was awarded £750 compensation), her dismissal by the Respondent had not been due to her race as she would have been dismissed in any event. The tribunal's favourable decision was based on the finding that the Respondent failed to make proper enquiries into the allegations of racial discrimination made by the Applicant. They noted that the Respondent had not put forward any satisfactory explanation for the delay and thus found that the Respondent had discriminated against her by subjecting her to any other detriment had been made out. The tribunal however commented that had the appellant been of a different race she would have still been dismissed in any event because of the attitude that she took from the outset of her employment.

On appeal, the Applicant argued that it was important to ask what the reason was for the breakdown of trust and confidence between her and the Respondents. It was accepted that she criticised her employers but it was submitted that that was because her complaints of racial abuse were not being investigated properly and so, in her view, a contributory factor of the breakdown in trust was the way in which she was treated by the Respondent. It was argued therefore that the dismissal was directly linked to her race.

The EAT said that it did not seem that the tribunal had addressed the question of whether the appellant's negative opinions about the Respondent were themselves the result, wholly or largely of the Respondent's own discriminatory acts. The EAT stated that:

> "It seems to us that this was a relevant consideration in at least one of two ways. First of all it could have a bearing on whether the dismissal itself amounted to racial discrimination. That question is not to be determined simply by looking at the dismissal itself in isolation and treating it as if it were something necessarily separate from earlier events, including any earlier discrimination. The immediate reason for dismissal may have been the appellant's negative comments about the Respondent's management, but an industrial tribunal should not refrain from investigating what gave rise to those negative comments themselves. It is right that it is not enough, in order to establish that dismissal was on racial grounds, merely to show that race was one

> factor in the chain of conversation; *Seide v Gillette Industries Limited* [1980] IRLR 427. But the racial factor may be of more importance than that".

Agreeing with their earlier decision of *Din v Carrington Viyella Limited* [1982] IRLR 281, the EAT then concluded that,

> "A dismissal could amount to racial discrimination even though there is an industrial reason for it, if the industrial reason itself was due to racially discriminatory acts on the part of the employer. Thus if the appellant were dismissed because of her negative attitude but that negative attitude was itself the result wholly or partly of the racial discrimination found by this industrial tribunal to have been shown by the Respondent, then the dismissal itself might be racial discrimination".

The EAT also pointed out the second reason why the wider context of the dismissal was relevant. If the dismissal was a consequence of behaviour of the employee's which was the result of discriminatory conduct by the employer, then unless the employee's behaviour was an unreasonable reaction to that discrimination, the loss of employment will form part of the damage suffered by the employee flowing from the earlier discrimination which the tribunal has found to have existed in the failure to investigate her complaints. That damage should be reflected in the award of compensation under section 56 of the 1996 Act. The EAT stated that again, the tribunal below did not seem to have approached the question of compensation on the basis of considering whether such a causal connection existed.

The EAT, however, decided that they could not conclude that the tribunal's decision was perverse in the sense that they were bound to find that the dismissal of the Appellant was racially discriminatory. Nonetheless they allowed the appeal on the ground that the tribunal erred in law in failing to consider the above points and they remitted the matter for re-consideration by the same industrial tribunal.

DISCRIMINATION LAW ASSOCIATION

October 1997

BRIEFING No. 40 USING THE "USUAL JUDICIAL METHOD" IN RACE CASES IS NOT SUFFICIENT: *Badewa v Circle Thirty Three Housing Trust Ltd* (EAT/232/95 - 21.5.97 : Morrison J (President Presiding)

In this appeal the EAT examined the approach that industrial tribunals should follow when addressing themselves to the guidance which was given by Neill L J in *King v Great Britain-China Centre* [1992] ICR 516.

The EAT added to the guidance given in *King* saying:

1. Industrial tribunals *"when considering the explanation put forward by an employer in a case...will not find it sufficient to use the usual judicial tool of deciding where the truth lies, that is by reference to the manner and demeanour of the witnesses. It is not possible to detect discriminatory treatment by the use of such a tool since discrimination may be subconscious or unconscious and may be found to exist even where a respectable witness convincingly denies racial motivation."*

2. Tribunals *"should be wary of finding that there is no discrimination on the basis that the individual who is accused of discriminatory behaviour has not previously shown discriminatory tendencies. It seems to us that it will be a question of digging rather than taking a superficial look at the manner and demeanour of the witnesses."*

In Bodewa the EAT decided that it was a matter of close judgment as to whether there was unlawful discrimination. The EAT therefore decided that they could not interfere with the decision of the majority.

This case was also unusual in that the Respondents cross appealed on the basis that the Chairman of the tribunal (K Menon) who was in favour of the Applicant was biased against them. The EAT noted that

"Bias is not a ground of appeal which arises only if other grounds have failed. Bias effectively if proved will render null the effectiveness of the proceedings below and would have led immediately to us ordering that this case be re-heard before a different tribunal. It is therefore not a topic to be treated as something which can be thrown in on the basis of 'further or alternatively' as was done in this case. In our judgment this is never to happen again."

The EAT made it clear that the allegation of bias was groundless and should not have been made. They noted that the Chairman of the tribunal was 'probably the most experienced industrial tribunal Chairman when dealing with discrimination matters, as it is within the knowledge of this court that prior to taking up those duties he was employed by the Commission as one of its legal officers'. On the application of the Commission who was supporting the Appellant in this case, the EAT agreed to order that the costs of defending and dealing with the allegation of bias should be paid by the Respondents. The costs followed from the unreasonable conduct of the proceedings by the Respondents and their argument that the CRE and the Respondents both received public funds were not accepted by the EAT as a relevant issue. 'The CRE received its own funds for its own purposes and their budget is expended in ways and in accordance with their statutory obligations; the same is true of the Housing Corporation (which funded the Respondents). It seems to us that to treat them as effectively having the same monies would be wrong'.

The significance of this decision lies in the EAT's warning to industrial tribunals about undue emphasis on 'the usual traditional tool' of relying on the manner and demeanour of witnesses so as to arrive at a conclusion as to who is telling the truth. This traditional approach is unlikely to unearth conscious or unconscious discrimination which 'respectable witnesses' may have harboured.

Although this was a race discrimination case, the same principles should apply to other discrimination cases.

DISCRIMINATION LAW ASSOCIATION

October 1997

BRIEFING No. 41 ESTABLISHING THE DEFENCE UNDER S.32(3): *Lewal v Regional Railways North Eastern Limited* (EAT/530/96 - 6.6.97 : Clark J. presiding)

The Appellant in this case was appealing against a decision of the Leeds Industrial Tribunal which dismissed his complaint of racial harassment. The Appellant who was employed at a railway depot complained about the fact that a train driver, Mr Swindon, asked him to take his shoes and socks off so that he could see the colour of the soles of his feet. Mr Swindon also referred to Enoch Powell being his best friend. The Appellant lodged a formal complaint. Mr Swindon agreed that he had made the comment but he held no malicious intent and was told that he must not repeat the remarks or further disciplinary action would be initiated. The Appellant complained to the industrial tribunal about both the offensive 'racist language' which he was subjected to as well as the delay in the investigation and the failure of the Respondents to take any formal disciplinary proceedings against Mr Swindon.

After the Appellant, who was unrepresented, gave his evidence, Counsel for the Respondents asked that the case be dismissed. In its decision, the industrial tribunal found that the acts complained of by Mr Swindon were not done during the course of employment. Mr Swindon was in the mess room when he made the comments. The tribunal relied on *Irving v The Post Office* [1987] IRLR 289 and the EAT decision in *Jones v Tower Boot Co Ltd* [1995] IRLR 529 to reach this conclusion. The Tribunal also decided that the Respondent had, in any case, satisfied the defence in s. 32(3) in that they had taken all steps that were reasonably practicable to prevent Mr Swindon from doing the acts complained of. The tribunal referred to the fact that the Respondents had an Equal Opportunities Policy and that managers knew about such policies and took them seriously.

On appeal, the Appellant argued that the tribunal fell into error by applying the common law of vicarious liability when construing Sections 32(1) of the Act and relied on the Court of Appeal decision of *Jones v Tower Boot Co Ltd* [1997] IRLR 168. Secondly, s. 32(3) of the Act places the onus on the employer to establish that he "took such steps as were reasonably practicable" to avoid vicarious liability. In this case the Respondents did not call any evidence and no advance notice of the intention to plead a s.32(3) defence was given to the Appellant who appeared in person. It was argued, therefore, that there was no evidence to support the tribunal's findings that the Respondents' managers knew about their Equal Opportunities Policy and took them seriously and that the Respondents had taken all reasonably practicable steps to prevent Mr Swindon from acting as he did. In any case, it was argued, that it is only in the rarest cases that an industrial tribunal will decide a discrimination case after hearing only evidence from an applicant's side *(Oxford v DHSS* [1997] ICR 884). As that principle applies to the ordinary race discrimination cases where the onus of proving discrimination lies on the applicants it was therefore expected to apply with even greater force where the Respondents were relying on the statutory defence under section 32(3). Which they must prove.

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1997

BRIEFING No. 42 PROTECTION FROM HARASSMENT ACT 1997

The Protection from Harassment Act (often referred to as the "stalking" Act) came into force on 16 June 1997. The Act creates new criminal offences; potentially more significantly the Act gives new powers to both the criminal and civil courts to make orders to prevent harassment recurring. There are separate provisions for England and Wales (Sections 1 - 7) and for Scotland (Sections 8 - 11).

Section 1 of the Act states that a person must not *pursue a course of conduct which amounts to harassment of another and*

(a) which he knows amounts to harassment of the other, or

(b) which he ought to know amounts to harassment of the other.

The perpetrator *"ought to know"* that the course of conduct amounts to harassment if a reasonable person who had the same information would think that it amounted to harassment. It is not necessary to prove that the perpetrator intended his conduct to amount to harassment. *Harassment is not defined in the Act, other than in Section 7 which states that harassing a person includes alarming them or causing them distress.* Thus complainants will be able to rely on the ordinary dictionary definition (i.e. worry, pester, annoy, distress etc) and the particular facts in individual circumstances. Many factors will be relevant including where and when the conduct occurred, the relationship and previous dealings between the parties.

Under the Act "conduct" includes speech; and "course of conduct" means conduct *on at least two occasions*, although the conduct need not be the same on each occasion. The course of conduct is not prohibited if it is done for the purpose of preventing or detecting crime (for example by police or immigration officers), under statutory authority (for example by bailiffs), to comply with a statutory condition or requirement, or where in the particular circumstances it was reasonable (for example by an investigative journalist, a debt collector etc).

HARASSMENT AS A CRIMINAL OFFENCE

Section 2 makes it an offence to pursue a course of conduct which is prohibited under Section 1. The Act makes the offence "arrestable". A person charged with criminal harassment will be tried in the Magistrates Court, and if convicted could be sentenced to six months' imprisonment or fined up to level 5 (currently £5,000) or both.

CAUSING FEAR OF VIOLENCE

Section 4 creates a more serious offence which carries a maximum sentence of 5 years' imprisonment or a fine or both. This offence is committed if a person's course of conduct causes another person to fear on at least two occasions that violence will be used against him/her. It must be proved that the person knew or ought to have known that his/her course of conduct would cause such fear on each of the occasions. Similar to Section 1, "ought to know" for this purpose means that a reasonable person with the same information would think that the course of conduct would cause such fear on each occasion.

It will be a defence to show that the person's course of conduct was for the prevention or detection of crime or was authorised by statute or that it was reasonable for purposes of protecting him/herself or another person or protecting property.

RESTRAINING ORDER BY THE CRIMINAL COURT

Under Section 5 a criminal court, when sentencing a person for an offence under Sections 2 or 4, can also make a Restraining Order to protect the victim or any other person from further harassment or fear of violence. The Order, which is in addition to any sentence, will specify the conduct which is prohibited. The Order can apply while the defendant serves a prison sentence or while s/he is subject to a probation order or doing community service. If the defendant does anything which is prohibited under a Restraining Order this is a separate further criminal offence which carries a sentence of up to five years' imprisonment and/or a fine.

CIVIL REMEDY - WITH CRIMINAL SANCTIONS

Section 3 enables the person who is or may be the victim of a course of conduct amounting to harassment to bring a civil action. On such a claim the High Court or the County Court can award damages including damages for the anxiety caused and any resulting financial loss. The victim or potential victim can also ask the court to grant an injunction restraining the defendant from any conduct which amounts to harassment. As under existing law, if the defendant does anything which is prohibited by the injunction s/he can be sentenced to imprisonment for contempt of court.

Not in force until later this year is the provision within Section 3 which makes it a criminal offence, punishable with up to 5 years' imprisonment or a fine or both, if, without reasonable excuse, the defendant does anything which is prohibited by the injunction. The police have powers to arrest for this offence, which will be tried in the criminal court. The Act provides that a person shall not be punished both for contempt of court and for the criminal offence of acting in breach of a Section 3 injunction.

SCOTLAND

Section 8 of the Act, which applies only in Scotland, states at the outset, "Every individual has a right to be free from harassment". Section 8 prohibits a course of conduct which amounts to harassment of another which is intended to amount to harassment, or which occurs in circumstances where it would appear to a reasonable person that it would amount to harassment.

Victims or potential victims can bring a civil "action of harassment". The court can award damages and can also grant an interdict or interim interdict, or "Non-Harassment Order" but not both. A Non-Harassment Order requires the defendant to refrain from specified conduct for a specified (or indeterminate) period. Under Section 9 a breach of a Non-Harassment Order is a criminal offence punishable with up to five years' imprisonment and/or a fine. A court will make a Non-Harassment Order to restrain the perpetrator from specified conduct in relation to the victim if the court is satisfied, on the balance of probabilities, that it is appropriate to make such an order in order to protect the victim from further harassment.

The criminal court is also able to make a non-Harassment Order after a person has been convicted for an offence involving harassment. A Non-Harassment Order made by the Criminal Court is treated as part of the sentence.

SOME LEGAL ISSUES

One of the limitations of the existing criminal offences which might be used in situations of harassment has been the need to prove intent. In the new Act there is no requirement to prove that the perpetrator intended his conduct to amount to harassment. Instead the Act provides a more objective test, relying on what actually occurred, to enable a court to determine whether a person has pursued a course of conduct amounting to harassment: The test which is to be applied in both criminal and civil proceedings is whether <u>either</u> the perpetrator knew that his/her course of conduct amounted to harassment or a reasonable person with the same information would think that the course of conduct amounted to harassment. What a "reasonable person in possession of the same information" would think is a matter left to the courts to establish.

There is no requirement that the conduct on each occasion should be the same, merely that the perpetrator and the victim are the same. The Act does not define what interval of time is required either to separate two incidents which are very close in time - are they one incident or two? - or to join two incidents separated by a large gap in time - when are they too distant to constitute a course of conduct?

With regard to possible criminal prosecutions, it will be for the police to decide when the new offence under Section 2, which involves at least two incidents, should be used in circumstances where it would also be open to them to charge the perpetrator with specific criminal offence(s), for example assault or criminal damage, based on one or more of the incidents in question. It is hoped that where the police are aware of a continuing need to protect the victim, they will prosecute under Section 2 so that on conviction the court can make a Restraining Order under this Act.

USING THE ACT TO PUNISH AND TO PREVENT RACIAL HARASSMENT

(a) In the Workplace

Civil injunctions for racial (and sexual) harassment in the workplace may be useful where an employer fails to take effective action to protect his/her employees. The employee who is experiencing racial harassment can bring proceedings against the harasser for damages and, more importantly, an injunction (in Scotland an interdict or a Non-Harassment Order) to prevent further harassment. Normally applications for an injunction are heard very promptly; an injunction could provide protection for the employee while a complaint against the employer under the Race Relations Act is waiting to be heard in the Industrial Tribunal. Lawyers and advisers will need to consider the implications of pursuing a claim for damages under this Act if a claim in the Industrial Tribunal based on the same conduct is also being pursued.

Criminal proceedings under this Act could also be utilised in respect of racial harassment in the workplace; generally, however, civil rather than criminal remedies are preferable where there should also be internal procedures for dealing with harassment, save where the conduct constituting harassment involves injury or significant loss or damage to property.

(b) In the Community

The new offence of criminal harassment could potentially enable earlier intervention by the police in situations of racial harassment. And this offence may, in some circumstances, be easier to prove since there is no need to prove an intention by the perpetrator. A person who has suffered harassment by the words or actions of another on at least two occasions should be able to call upon the police to arrest and prosecute the perpetrator. It is, however, too soon to know with what enthusiasm the police will utilise this new offence in the context of racial harassment.

The more useful of the criminal provisions of the new Act is likely to be the power given to the criminal courts to make a Restraining Order (in Scotland a Non-Harassment Order) following convictions for an offence under the Act. To ensure that such an Order is made the police will need to provide information to the CPS on the continuing vulnerability of the victim. A Restraining Order may be particularly valuable where the perpetrator is a juvenile (against whom civil courts rarely grant an injunction). An Order could require not only that the perpetrator refrain from repeating the harassment but could restrict where s/he may go or regulate when s/he may be out on certain streets if this could be shown as necessary to protect the victim or others.

The fact that a breach of a civil injunction under Section 3 will be an arrestable criminal offence introduces the possibility that such injunctions may be an effective means for the prevention of racial harassment in the community.

For an individual or a family suffering racial harassment seeking damages and an injunction should be a last resort, if neither the police nor the local authority is prepared to act. Civil proceedings can seem complicated and require the victim to bring the matter before the court. The victim will need to know the name and address of the perpetrator. With the support of a law centre, an REC or a legal aid solicitor, seeking an injunction under the Protection from Harassment Act can provide a person with more effective protection than previously because of the criminal sanctions which will arise if the prohibited harassment is repeated. If, however, the local police had been reluctant to bring a prosecution under Section 2 it would be unrealistic to feel confident that they will be keen to arrest and prosecute the perpetrator for breach of a civil injunction.

As suggested in a recent article in *Police Review (23 May 1997)* the civil procedures under the Act could be used very effectively where local authorities and the police have adopted a multi-agency approach to tackling racial harassment. The local authority, using their powers under s.222 of the Local Government Act 1972 (under which local authorities have sought injunctions in respect of a range of unlawful activities) could use Section 3 to apply for an injunction in the names of one or more victims or potential victims of racial harassment. It would then be for the police to ensure prompt action to arrest and prosecute where a defendant did anything prohibited by the injunction.

RECs should take the lead

As suggested above, the new legislation will be most effective where a multi-agency approach to tackling racial harassment has been adopted. The Act gives the police new powers, and it will be important for each REC to liaise with their local police force to discuss how these powers might be used in a positive way to deal with situations of racial harassment and to prevent their recurrence. RECs should also work with the local authority, local law centre, citizens advice bureaux and others, using multi-agency panels where these exist, to develop strategies for utilising the new legislation where mediation or other approaches, such as possession actions, have failed to be effective.

Barbara Cohen

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1997

BRIEFING No. 43 COURT OF APPEAL RE-EMPHASISES THE PURPOSE OF THE RACE DISCRIMINATION LEGISLATION: *Harrods held responsible for the treatment of contract workers Harrods Ltd v Seeley, Remick and Elmi (CA judgment delivered on 17 July 1997).(Sir RIchard Scott, the Vice Chancellor, Wait LJ, and Ward J.)*

In a decision which analysed the purpose of the Race Relations Act 1976, the Court of Appeal adopted a purposive approach to the interpretation of the law.

The Court considered appeals by Harrods Ltd against decisions of the Employment Appeal Tribunal relating to two women who worked for, and a third who sought employment with, companies which held franchise at Harrods. Neither of the women were employed by Harrods, but they were arguing that they were covered by s.7 of the Race Relations Act which makes it unlawful for a person (the principal) who is having work undertaken by individuals who were employed by others to discriminate on racial grounds against these individuals.

The cases arose out of the manner in which Harrods organised the sale of goods at its Knightsbridge store and the control that it exercises over individuals who are employed by companies which have been granted licences by Harrods to sell goods in particular departments. Mrs Remick, who is black, was employed by Shaeffer Pens (UK) Ltd and started working at Harrods in August 1993. In April 1994 Harrods withdrew their approval of her because she was considered to have failed to adhere to the Harrods dress code. As a consequence, Mrs Remick was dismissed by Shaeffer Pens and complained to an industrial tribunal of unlawful discrimination by Harrods. Mrs Seeley, of Asian origin, was employed by Brigade International Limited and started work at the store in April 1992. She wore a nose-ring since the age of seven. In November 1992, Harrods withdrew their approval of her employment because she did not remove her nose-ring. Miss Seeley complained to an industrial tribunal about unlawful discrimination by both Harrods and her employer. In both these cases, the industrial tribunals ruled as a preliminary point that a case against Harrods can be brought under section 7 of the Race Relations Act 1976. Harrods appealed to the Employment Appeal Tribunal (EAT).

The case of Mrs Elmi arose because she applied for a vacancy at Moyses Stevens Limited which traded in Harrods' Florist Department. She was interviewed by the company and was then sent for approval to Harrods who decided to withhold their approval. Mrs Elmi complained about racial discrimination to an industrial tribunal against both Harrods and Moyses Stevens. The tribunal found that in withholding

store approval, Harrods had treated her less favourably on racial grounds. However, the tribunal did not agree that Moyses Stevens were acting as agents for Harrods or that alternatively Harrods were acting as an employment agency, and therefore ruled that Harrods were not responsible. Furthermore, the tribunal decided that the discriminatory conduct of Harrods could not be regarded as tainting the decision taken by Moyses Stevens not to employ Mrs Elmi. Mrs Elmi appealed to the EAT.

The EAT heard all the three cases together and held that section 7 of the Race Relations Act applied in that all the three women were undertaking work for Harrods (the principal) as actual (or, in the case of Mrs Elmi, prospective) contract workers supplied by their employers (*Harrods Ltd v Remick and other* [1997] IRLR 9). Harrods appealed to the Court of Appeal.

The questions that the Court of Appeal asked itself were: was the work done by individuals in the position of Mrs Seeley, Mrs Remick and Mrs Elmi 'work done for Harrods'? And were such individuals persons who were supplied under a contract made with Harrods? The Court examined the terms of the contractual arrangements (licenses) between Harrods and the employers and noted that the licensees had an obligation to operate in the department for the demonstration and sale of goods and to ensure the department was adequately staffed with suitable qualified employees. The workers will be selling goods which did belong to Harrods and the funds received were to be paid over to Harrods. The licenses also entitled Harrods to impose rules and regulations governing the conduct of the staff members in carrying out the work.

The Court concluded that it was plain that the work was available to be done at Harrods by employees of the licensees and was also work for the licensees.

The Court rejected the argument that work done for the principal should be under the managerial power of control of the principal as such a submission would add into section 7(1) of the Act words which were not there. The Court also rejected the submission that the contractual arrangement between Harrods and the licensees was simply an obligation to market goods and not an obligation to supply labour and that the supply of workers should be the primary or dominant purpose of the contract before section 7 can bite. Again, the Court saw no justification for reading into the Section restrictive words that were not, there and emphasised that if, under a contract, there is a contractual obligation to supply individuals to do work that can properly be described as 'work for' the principal, the section applies.

More importantly, the Court thus disapproved of interpretations which would leave a person in the position of the complainants without remedy in the event of discrimination against him or her by the principal. In such a situation, although the unlawful discrimination might be caught under Section 30 or 31 of the Act to which the Commission for Racial Equality have power to enforce, no personal remedy would be available. The Court approved of the statement made by Brown-Wilkinson J in *Showboat Entertainment Centre Limited v Owens* [1984] ICR 65 to the effect that there is no reason why an individual's right to complain of the wrong done to him and the Commission's right to stop unlawful action should not coexist. Sir Richard

Scott V-C also quoted the white paper on racial discrimination legislation 'must be comprehensive in its scope, and its enforcement and provisions must not only be capable of providing redress for the victim of individual injustice but also of detecting and eliminating unfair discriminatory practices'. If the interpretation advanced by Harrods was accepted, the ladies 'will be victims of injustice without redress' and the legislation will have failed to achieve the purpose set for it. Sir Richard Scott V-C also noted the purposive interpretation of the Act in the recent Court of Appeal case of *Jones v Tower Boot Company Ltd* [1997] ICR 254 and concluded that in approaching section 7 of the Act, the Court should give a 'construction to the statutory language that is not only consistent with the actual words used but also would achieve the statutory purpose of providing a remedy for victims of discrimination who would otherwise be without one'.

At a time when the question as to whether agency "temps" are "employees" under the employment rights legalisation is still being debated, as in the latest Court of Appeal case of *McMeehan v The Secretary of State for Employment* [1977] IRLR 353, it is reassuring that the protection accorded to agency workers under the discrimination statutes, even from discriminatory acts by principals whom they are sent to work for, has been reaffirmed by the Court of Appeal. Also, this welcome trend by the Courts to look at Parliament's intentions in introducing social legislation to combat racial discrimination was made possible by the House of Lords decision of *Pepper v Hart* [1993] ICR 593, which gave the green light to courts to refer to parliamentary papers when interpreting the provisions of any law. This purposive approach was seen recently in the re-affirmation of the protection accorded to racial harassment victims in the Court of Appeal case of *Jones v Tower Boot Co Ltd* [1997] ICR 254, and in the EAT case of *Rhule and Burton v De Vere Hotels* [1996] IRLR 596. Long may it continue!

A report of the case appeared in The Times of 22/07/97.

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1997

BRIEFING No. 44 **I.T.'S FAILURE TO CONSIDER CODES OF PRACTICE ERROR OF LAW:** *Ali v Pindersfields Hospital NHS Trust* (EAT/184/87- Morison J (President) 22/5/97)

In a preliminary judgment, Mr Justice Morison ruled that failure on the part of an Industrial Tribunal to refer to the CRE Code of Practice in Employment and its possible breaches may amount to an error in law leading to a successful appeal on a point of law. Under s.47 (10) of the Race Relations Act 1976, a failure on the part of any person to observe any provision of the Code shall be admissible in evidence and if the provision appears to be relevant to any question arising in proceedings, the Tribunal shall take it into account in determining that question. Morison J stated that it seemed to them distinctly arguable "that paragraph 1 (13) of the Code, which is headed, "selection criteria and tests" is of relevance and 1 (14) headed "Treatment of Applicants Short listing, Interviewing and Selection" is also relevant. It is to be observed that nowhere in the Industrial Tribunal's decision has any reference been made, so far as we are concerned, to the Code of Practice or to the fact that there may have been breaches of it". Accordingly the EAT concluded that it is arguable that the Tribunal may have erred in law in failing properly to direct their mind to this very important question, which might have led them to arrive at a different conclusion.

Morison J, addressing the unrepresented appellant in this case, commented that it would be of assistance to the EAT if the appellant were to receive representation for the full hearing and added that he "would respectfully invite you to approach the Commission for Racial Equality to see if they will arrange for representation at the hearing of the appeal and you can indicate to them that the president of the Employment Appeals Tribunal has expressed the view that it would be assistance to the Court were you to be given such representation, assuming that that fell within their discretion".

Should this case proceed to a main hearing, the EAT may give some guidance on the inferences that can be drawn from failure of an employer to observe the provisions of the code.

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1997

BRIEFING No. 45 **TRIBUNAL RECOMMENDS RE-ENGAGEMENT: *Hyatt v IMI Refiners Ltd* (Case No. 1301315/96: Tickle A, Chair: 4/6/97)**

At a hearing in April 1997, a Birmingham Industrial Tribunal held that the Applicant was unfairly dismissed and discriminated against on grounds of race. At the Remedies hearing, the Tribunal awarded the Applicant £3,741 damages (including injury to feelings and interest) and recommended that he be re-engaged by the Respondent by 30th June 1997 on the following terms:

(a) He should be treated as if his employment had not been terminated as to his rate of pay, employers' contributions to his company pension scheme, access to any share option scheme, and in continuity of employment.

(b) The Respondent pay the sum of £4,687 to the Applicant, that sum representing the Applicant's net loss plus interest from the date of termination to .... the date of re-engagement.

In its reasons for making the recommendation, the Tribunal noted the Applicant's wish to be re-engaged as he lived near the workplace, had difficulties in finding another job and was, in any case, prepared to go back and trust the Respondent to treat him fairly. S.56(1)(c) of the Act, which the Tribunal comments is "nowhere expanded" allows the Tribunal if "it considers just equitable", to make a recommendation that "the Respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates".

The Tribunal asked itself whether it has to take into account matters set out in s.116 of the Employment Rights Act 1996. These are: the wishes of the complainant, whether it's practicable for the employer to comply with an order for re-engagement/reinstatement and where the complainant has caused or contributed to some extent to the dismissal, whether it would be just to make the order. The Tribunal decided that the matters set out in s.116 should not govern its approach as the 1976 Act would have said so, if that was the case.

The Tribunal concluded that it was not disputed that its recommendation would have the purpose of obviating the adverse affect of the discrimination and then proceeded to ask whether reinstatement or re-engagement was practicable. Having found that there was a vacancy and given the size of the Respondent's operation and the

flexibility of the workforce and the Applicant's exemplary record, the Tribunal then decided that it was practicable to recommend that the Applicant be re-engaged. The tribunal noted that re-engagement reflected the new contractual working arrangements which were introduced by the Respondents to provide for flexibility of labour. The other recommendations made by the Tribunal were to ensure continuity of employment and for the Applicant to enjoy all the rights that accrue from continued employment.

The Tribunal also warned the Respondents that it had the power to make an award of compensation and increase the amount ordered unless the Respondents had a reasonable justification for not complying with the recommendations. The Tribunal indicated that on the basis of their calculation of compensation, the award to the Applicant was likely to exceed £40,000.

The power of Tribunals to make recommendations under s.56 has been circumscribed by the legislation in that it is limited to "obviating or reducing the adverse affect on the complainant". In *British Gas Plc v Sharma* [1991] IRLR 101 the EAT confirmed that this power does not extend to making a recommendation that the employers promote a successful complainant to the next suitable vacancy as this could be amount to positive discrimination.

A recommendation that a hospital authority seek the authority of the Secretary of the State to dispense with the statutory procedures for appointing consultants by not advertising the next vacancy for a consultant's post in *Noone v North West Thames Regional Health Authority (No.2)* [1988] IRLR 530 was held by the Court of Appeal to be outside the power of the Tribunal. In dismissal cases, as shown in this case, the arguments for making re-engagement or reinstatement recommendations are largely based on the fact that compensation, on its own, may not be an effective remedy for complainants who cannot find alternative employment and wish to re-employed. In such circumstances, a recommendation may be the best way of obviating the adverse effect that the discrimination had on the complainant.

Finally, in this case, the Tribunal went even further and recommended "as strongly as we can" that training in Equal Opportunities for all managers and supervisors concerned with the applicant be undertaken as a matter of urgency. The Tribunal said this was "to obviate the effects of discrimination on this complainant", who, presumably, will be working for the Respondents again, when the recommendation for re-engagement is put into effect.

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 46 RECORD DAMAGES FOR "WORSE CASE" OF RACE DISCRIMINATION: £358,288.73 D'Souza v London Borough of Lambeth (EAT 1206/95 & EAT 274/96 - Morrison, J (president)

This was a case which the EAT described as *"the worst case of unlawful race discrimination that it has ever had to consider"* and commented that *"there is no reported case which shows such persistent discrimination against one individual"*. The EAT also stated that if it was not for the intervention of the Chief Executive of Lambeth Borough Council who provided them with a comprehensive statement, it *"would have requested a formal investigation of Lambeth's policies and practice so as to minimise the risk of a similar occurrence in the future"*.

The case involved Mr D'Souza who is of Asian ethnic origin and who worked for Lambeth Borough Council from March 1986 to January 1991 when he was dismissed by the Council unfairly and unlawfully on grounds of his race.

Mr D'Souza made a series of five complaints of racial discrimination or victimisation to industrial tribunals.

His first complaint of victimisation for complaining about racial discrimination was upheld by an industrial tribunal. His second complaint relating to the Council's failure to shortlist him for an appointment was upheld and he was awarded £500 for injury to feelings. His third complaint was dismissed by a tribunal. His fourth complaint, which also related to victimisation, was upheld and he was awarded £3000 in damages.

His fifth complaint related to his dismissal in January 1990 and the Council relied on written representations in which they accepted that Mr D'Souza was unfairly dismissed but denied discrimination and victimisation. The tribunal noted that there was no evidence supplied to show that reinstatement was impracticable and, in the circumstance, concluded that the right order to make was that Mr D'Souza be reinstated in his former employment as from 16 January 1993 (being the third anniversary of the termination of his employment) and that he should be put in the same position financially as he would have been had he not been dismissed. This would have involved payment of three years back pay. The industrial tribunal also upheld his complaint of racial discrimination and awarded him £5000 including aggravated damages and £2000 for "exemplary damages". This hearing took place in November 1992.

The Council did not comply with the order for reinstatement and a further remedies hearing was held. The Council argued that there was no longer a position for Mr D'Souza. The tribunal then stated that it had "reluctantly concluded" that it was not practicable to reinstate the applicant in the post that he had formerly held and commented that if this problem with re-instatement was known before, re-engagement would have been ordered. The tribunal later examined the compensation due to Mr D'Souza and indicated that the £5000 award made for injury to his feelings would be disregarded when calculating his loss for unfair dismissal and applying the then statutory maximum under the Employment Protection (Consolidation) Act 1978 (EPCA). The Tribunal, at a hearing on 14 September 1995, arrived at a compensatory award totalling £377,546.42 to which it then applied the statutory maximum which resulted at his loss being capped at £8925 and awarded Mr D'Souza the latter amount.

Mr D'Souza then appealed to the EAT. The cap on damages was lifted by the Race Relations (Remedies) Act 1994 which came into force on 3 July 1994. The EAT confirmed that it will follow its earlier decision *Harvey v the Institute of the Motor Industry* [1995] IRLR 416 to the effect that the lifting of the cap in sex discrimination cases applies to awards which were made after the date when the cap was removed regardless of the date of discrimination. The EAT then examined the industrial tribunal's decision to apply the cap (under EPCA78) which was applicable in 1990 (ie £8950). The EAT pointed out that an industrial tribunal should, where the claim is for unlawful dismissal, make the award under the 1976 Act to give the employee his full compensation. In an analogous case where an unfair dismissal occurred which was also unlawful under the Sex Discrimination Act 1975, a tribunal which failed to make an uncapped award to the complainant would thereby fail to give effect to the European Court's decision of *Marshall No.2* which held that compensation must enable the loss actually sustained to be made good in full. Had Mr D'Souza's complaint been under the Sex Discrimination Act 1975 rather than the Race Relations Act 1976, there could be no doubt as to the proper course to be taken by the industrial tribunal and the EAT confirmed that they *"see no good reason for reaching a different conclusion, merely because the complaint in this case is of unlawful race discrimination"*. As the industrial tribunal in November 1992 had not completed its task in relation to the assessment of compensation for loss of employment, whether under the employment legislation or race relations legislation, it was open to the 1995 industrial tribunal to have made an uncapped award of compensation; and therefore, in the EAT's judgment, Mr D'Souza was entitled to an uncapped award.

The EAT then examined the calculations of the compensatory award and concluded that there was no justification for reducing an employee's entitlement to an award for loss of pension rights, merely because a fund might have annual "pensions holiday" and accordingly, it increased the compensation award for loss of pension rights. The total award which the tribunal should make, according to the EAT, was £358,288.73. (That was the net figure taking into account £11,275 which had already been paid to Mr D'Souza).

On the general point on orders for reinstatement or re-engagement, the EAT stated that:

"Industrial tribunals should be wary of making an order for reinstatement in the absence of the respondent. It cannot, we think, be said that by not appearing on the first occasion Lambeth were estopped from denying that it was not practicable to comply with the tribunal's order. In many cases, as a matter of common sense, an Industrial Tribunal will be able to conclude on the material before them that if an employer fails to resist the making of a reinstatement order, it is unlikely that they are going to be able to show in due course that compliance with such an order was not reasonably practicable."

In view of the time that has lapsed, the EAT felt that whatever the merits of Mr D'Souza's position, it did not seem to them that this would now be an appropriate case to consider re-engagement. They, therefore, concluded that a generous and full compensation to Mr D'Souza would adequately provide him with reparation for the undoubted injury which he has sustained.

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 47 COMPENSATION UPDATE

The latest example of a race discrimination case which attracted a high award for injury to feelings which included aggravated damages is *Bhall v M. Firkin Ltd* (case no 130124/96: Williams, S presiding - 7/10/97). The Birmingham Industrial Tribunal awarded an applicant who suffered racial harassment at work £10,000 for injury to feelings together with aggravated damages of £2,500 and costs on appropriate county court scale. The applicant was also awarded by consent £2,500 compensation for unfair dismissal.

The tribunal said that aggravated damages are not awarded to punish the respondent but are to compensate for the aggravation to the applicant's suffering which has been caused by the way in which the respondents have conducted themselves. The tribunal found that the respondents have failed to take the applicant's complaints seriously; failed to reply to his letters; provided no apology; cross-examined him initially on the basis that he was making up the history of complaints without offering any evidence to back that assertion. These were all matters which the tribunal saw as aggravating features.

The tribunal noted in this case that the applicant has suffered further ignominy of being called a liar in the proceedings and felt that there was some whiff of "character assassination" in the manner in which the proceedings had been conducted. The tribunal also concluded that the conduct of the proceedings has been vexatious and unreasonable and made an order for costs (on appropriate county court scale) in the applicant's favour.

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 48 EQUAL OPPORTUNITY POLICIES PART OF CONTRACTUAL RIGHTS: *Secretary of State for Scotland v Taylor* [1998] IRLR 608:EAT

In this case, the Prison Service introduced changes to its retirement policy under which the normal retiring age was set at 55 in order to achieve a younger workforce. It had issued a circular setting out its equal opportunities policy which included an undertaking "to offer opportunities on an equal basis to all staff regardless of gender, race, religion, sexual preference, disability or age".

Mr Taylor was given notice of dismissal when he reached age 55 and he claimed that this amounted to discrimination on grounds of age and was in breach of the equal opportunities provisions in his contract of employment. He then brought industrial tribunal proceedings in respect of this alleged breach of contract. The industrial tribunal upheld his claim and stated that they were satisfied that the equal opportunities policy was "incorporated into the applicant's contract of employment".

On appeal, the EAT (Lord Johnston presiding) held that the industrial tribunal has not erred in finding that the terms of the prison service equal opportunities policy were part of the contractual rights of the applicant as they are incorporated into his contract of employment. The argument for the employers that the policy should be regarded as merely a mission statement was not accepted. The EAT however, held that the tribunal erred in finding that the Applicant's dismissal after he reached the normal retirement age of 55 was discrimination on grounds of age and breach of contract. The parties to the contract would not have contemplated that the provision relating to discrimination on grounds of age would apply once the contractual retirement age had been passed and the continuation of the employment was entirely at the discretion of the employer.

The editor of the IRLR comments that this decision begs to question whether a reduction in retiring age to 55 was itself in breach of the commitment not to discriminate on age grounds. He adds that *"this decision is extremely important, nevertheless, because the EAT expressly finds both that the equal opportunities policy was a contractual term (and not a mission statement as urged by the employer) and that it conferred contractual protection on the employee until he reached normal retirement age. On the reasoning of this case, it would be open to an employee covered by a similar clause to challenge a failure to get a promotion or a premature dismissal on grounds that it was based on age. The lesson is that an employer who issues an equal opportunities policy must be prepared to be bound by its terms."*

DECEMBER 1997

BRIEFING No. 49 TRIBUNAL PRACTICE AND PROCEDURE: The Employment Appeal Tribunal guidance notes on preliminary hearing/directions

These were reported in 1997 IRLR 618. The guidance notes state that as from 1 October 1997 all appeals will be listed for a preliminary hearing/directions (PHD). At that hearing the appellant will be required to satisfy the EAT that it is reasonably arguable that an industrial tribunal made an error in law in their decision.

The notes also include a PHD form which the parties must complete promptly. An appellant who fails to complete the form within time, may not be permitted to pursue the appeal or obtain any directions from the EAT and may be ordered to pay costs. The PHD will take no longer than 30 minutes and the guidance states that it should be quickly apparent in every case whether there is an arguable case of law. If there is not, then the appeal will be dismissed at the PHD.

The guidance also points out that the applications for directions after a PHD will only be entertained in exceptional cases. Examples of the directions that can arise at the PHD are given as being leave to amend the Notice of Appeal, estimate for time for the arguments, listing and production of chairman's notes. The notes make it clear that chairman's notes of evidence will only be ordered if they are considered to be necessary for the purpose of arguing the point of law on the appeal and not for the parties to check the reasoning or finding in the decision.

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 50 LEGISLATION BRIEF: The Employment Rights (Dispute Resolution) Bill

This Bill proposes to amend the law relating to the resolution of individual employment rights disputes and introduces changes to the industrial tribunals and to conciliation. The main changes proposed in the Bill are as follows.

- It renames industrial tribunals as employment tribunals and permits new procedural rules to be introduced to streamline certain procedures of tribunals and extends their jurisdiction.

- It allows the Secretary of State to make regulations to extend the range of proceedings which may be determined without a "full" hearing, and to permit a tribunal to require written answers to questions posed by the tribunal to be given by the parties.

- It also extends the categories of cases where an employment tribunal must consist of the chairman alone and allows for a chairman or a legal officer to do any act required or authorised by the regulations to be done by a tribunal. The Bill provides for the appointment of legal officers. The Government announced, though, that few are likely to be appointed in the near future and their use will be the subject of a pilot study before it is decided whether they are appointed nation-wide.

- A chairman, when hearing a preliminary issue as a tribunal under the procedure regulations, may hear evidence from witnesses.

- A chairman may sit with only one other member where the parties present or represented at the hearing all agree.

- It will enable ACAS to provide a scheme for the arbitration of unfair dismissal disputes. The scheme may be extended by order to other classes of disputes. The Bill also provides that an agreement to submit a dispute to arbitration in accordance with the ACAS scheme will (if made after the intervention of a conciliation officer or in compliance with the requirements about compromise agreements) oust the jurisdiction of employment tribunals in relation to the dispute under the Sex Discrimination Act 1975, the Race Relations Act 1976, the Trade Union and Labour Relations (Consolidation) Act 1992, the Disability Discrimination Act 1995 or the Employment Rights Act 1996. *But an agreement to submit a dispute to arbitration otherwise than in accordance with the ACAS scheme cannot oust that jurisdiction.*

- The Bill relaxes the restrictions on who is qualified to give advice on a compromise agreement if the agreement is to oust the jurisdiction of employment tribunals under any Acts. *Any independent person insured or indemnified as a member of a professional body against the risk of loss arising in consequence of advice will be qualified to give advice on a binding compromise agreement.*

- The Bill amends the law relating to dismissal procedures agreements. Such agreements will either need to provide for arbitration or at least to provide the parties with the right to arbitration on a point of law. An award made under a dismissal procedures agreement is to be enforceable like an arbitration award.

- The Bill includes a Clause which is designed to encourage employers and employees to use internal appeals procedures. When determining unfair dismissal cases, an employment tribunal will have power to reduce the compensatory award if an employee fails to make use of an appeals procedure provided by the employer and the employee has been properly notified of it. A tribunal will also be able to make a supplementary award to an employee where the employer does not allow the employee to use an appeal procedure provided by him.

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 51 THE ENGLISH, SCOTS AND WELSH AS SEPARATE RACIAL GROUPS

The Edinburgh Employment Appeal Tribunal (Lord Johnstone presiding) recently considered two appeals examining the national and ethnic origins of the English and the Scots. In the first appeal, *Northern Joint Police Board v Graham Power* (EAT 535/97 - 27.8.97), the EAT considered the Respondent's appeal against an industrial tribunal decision which held that Mr Power was of English "national" origin. Both the Tribunal and the EAT considered in detail the House of Lords decision of *Ealing London Borough Council v Race Relations Board* [1972] AC 342.

The EAT pointed out that *Ealing* made clear the distinction between "nationality" on the one hand and "national origins" on the other. *"Nationality, when considered, has a juridical basis pointing to citizenship, which, in turn, points to the existence of a recognised state at the material time"*. Within the context of England, Scotland, Northern Ireland and Wales, the proper approach to nationality is to categorise all of them as falling under the umbrella of "British" and to regard the population as citizens of the United Kingdom. Against that background, the EAT then asked itself what context should be given to the phrase "national origins" and what the identified elements, both historically and geographically, which at least at some point in time reveal the existence of a nation are. The EAT then concluded that:

> *"Whatever may be difficult fringe questions to this issue, what cannot be in doubt is that both England and Scotland were once separate nations. That, in our opinion, is effectively sufficient to dispose of the matter, since thereafter we agree with the proposition that it is for each individual to show that his origins are embedded in such a nation, and how he chooses to do so requires scrutiny by the Tribunal hearing the application. In our opinion, whatever factors are put forward to satisfy the relevant criteria will be self-evidently relevant or irrelevant as the case may be"*.

The EAT also made it clear that it was manifest that Parliament's intention was to include *"the constituent races, so called, within the United Kingdom under the umbrella of the legislation. The matter is, therefore, put beyond doubt"*.

The EAT stated that there was no need to use, with regard to "national origin", tests such as those enunciated for "ethnic origin" by Lord Fraser in *Mandla v Lee* [1983] IRLR 209 (HL), because the existence of a nation, whether in the present or the past, is determined by factors quite separate from an individual's origins and those factors are easily established in any given case by reference to history and geography. The same cannot be said in relation to groups based on ethnic origins and hence the need for Lord Fraser's tests (long shared history, culture, common geographical origin, language, etc).

The other decision of the EAT, *Boyce & Others v. British Airways PLC* (EAT/385/97 - 31.7.97: Lord Johnston presiding) concerned an appeal from an industrial tribunal ruling to the effect that the applicants who defined themselves as being of Scots *ethnic origin,* could not have been discriminated against on those grounds as the Scots were not an ethnic group recognised by the Race Relations Act 1976. The tribunal considered in length the tests for ethnic origin set out in *Mandla*. In examining the issue, the EAT pointed out that each of the definitions of "racial group" (ethnic origin, national origin, nationality, race, etc.) must be regarded as separate and alternative and although it is possible for a person to fall under more than one of the heads, the characteristics of one head should not be included in that of another. It was *"plain, however, that within the context of racial group ethnic origins must as the House of Lords have indicated have a racial flavour to it"* (the "racial flavour" test?).

The EAT identified the essential question as being whether or not the group being identified *"has common characteristics within all its members of a racial nature, and not, by contrast, members drawn from various ethnic backgrounds"*. Given the wide variations in origin, background, and race, within Scotland all of whom can be categorised as "Scots", the EAT concluded that it cannot find the common racial element within the group addressed as Scots which meets the (racial flavour) test plainly laid down by the House of Lords in *Mandla* before the individual tests enunciated in the same case by Lord Fraser are considered. It is wrong, the EAT says, to go straight to the latter tests to see whether Scots meet them. As a matter of construction, once race is not being relied upon as such, racial group defined by ethnic origin must be something else easily identifiable as, for example, amongst the Sikh or gypsy communities which share common characteristics and origins. The EAT continued that:

> *"Looking at the question as a matter of construction, whatever may be the general intention of Parliament, in our opinion the Scots, the English and the Welsh do not fall into the definition of a racial group, based on ethnic origins".*

Therefore, discrimination as between the Scots, the English and the Welsh, while plainly discriminatory, cannot be struck down by the legislation in the context of *ethnic origins*.

Following this reasoning, the EAT commented that unlike the EAT decision in *Gwynedd County Council v James* [1986] ICR 833, they would not agree that the Welsh should be regarded as a racial group with different ethnic origins within the meaning of the Act. The decision therefore disapproves of *James* insofar as the latter may be taken to have confirmed that the Welsh were an ethnic group. *James* involved the issue as to whether there was an English-speaking Welsh group as distinct from a Welsh-speaking Welsh group and although the *Mandla* decision was discussed, the EAT stated that they were recognising the obvious to state that the Welsh are a nation and an ethnic group. *Boyce* is therefore likely to be followed, but it should be noted that as recently as 1996, the Reading Industrial Tribunal, in a detailed decision, *Griffiths v Reading University Students Union and another* (Case no: 16476/96, Gorst J, Chair) held that the Welsh were an ethnic group which met the criteria set out in the Fraser test (history, cultural traditions, common geographical origin, language, literature, feeling of a minority, etc.) in *Mandla*. ***Boyce*** now says that the racial flavour test should be looked at first without importing

into "ethnic origin" the characteristics which are in other heads of racial origin, such as "race", "national origin", "colour" or "nationality". This may not be so easy.

In practice *Boyce* will not make that much of a difference to individual cases, so long as advisers are aware that the grounds to pursue cases concerning discrimination against the Scots, English or the Welsh are *national origin* and not ethnic origin.

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 52 RACE DISCRIMINATION SUITS BY SERVING MEMBERS OF THE ARMED FORCES

Serving members of the armed forces can now take their race discrimination complaints to industrial tribunals as from 1 October 1997. The Armed Forces Act 1996 (Commencement No 3 and Transitional Provisions) Order 1977 brings into force on that date s.23 of the Armed Forces Act 1996 which amended s.75(9) of the Race Relations Act 1976 (as well as the similar provisions relating to the Sex Discrimination Act 1975). The Order also makes transitional provisions which make it clear that the amendments made by s.23 "shall not have effect in relation to any complaint of discrimination contrary to Part II or IV of that Act where the act complained of was done before 1st October 1997" (art.2 of the Order).

The Race Relations (Complaints to Industrial Tribunals) (Armed Forces) Regulations 1997 have also been laid before parliament and will come into force on 1 October 1997. The regulations which are issued under the new s.75(9A) of the Race Relations act 1976 state (paragraph 2) that a person may present a complaint to an industrial tribunal where:

a. s/he made a complaint in respect of the same matter to an officer under the service redress procedures; and

b. that complaint has not been withdrawn.

The regulations also add (paragraph 2(2)) that a person "shall be treated as having withdrawn his complaint if, having made the complaint to an officer under the service redress procedures, he fails to submit that complaint to the Defence Council under those procedures".

The service redress procedures, the relevant parts of which will be circulated to officers, set out that complaints must be submitted in writing within three months

beginning with the day on which the matter complained occurred. (As in the Race Relations Act, this means that the incident date is counted towards the three-month period). Complaints which are submitted out of time will be rejected unless the officer judges that it would not have been reasonably practicable for the complaint to have been submitted earlier. As the redress procedures of course apply to all types of complaints, this provision about time limits imports the "reasonable practicability" test under the employment legislation rather than the "justice and equity" test under the discrimination statutes.

Complaints should be submitted to the Commanding Officer unless s/he is the subject of the complaint or is implicated in any way, in which case it is submitted to the next level up in the chain of command. A complainant may seek the help of an officer, senior rating or NCO of his unit, or ship or other independent adviser. *It is essential that the complainant states clearly not only the nature of the complaint but also exactly what redress is being sought*. It is the duty of the officer to whom the complaint is made to investigate the complaint as soon as possible and to grant any redress which appears to him necessary and which is within his power. If the officer refuses to grant the redress asked for, s/he must give a full explanation of the reasons in writing. The complainant may request the officer to refer the matter to a higher authority and the officer must comply with such a request and forward the case together with a recommendation. At each stage, the complainant should be informed to which authority the complaint is being sent.

A complaint cannot be referred to the Defence Council without confirmation from the complainant that he so wishes. *Without this confirmation, the complainant will be deemed to have withdrawn his complaint and consequently will lose the right to pursue a tribunal claim (see paragraph 2(2) of the Regulations, above)*. Any complaint submitted to the Defence Council will be determined by the Admiralty Board, the Army Board or the Air force Board (the Board). Before the complaint is referred to the Board, however, a copy of any submission to the Board must be given to the complainant. Also other than the legal advice to the Board and any documents the disclosure of which would cause serious harm to the public interest, the complainant must be allowed to see all the documents attached to the submission. The complainant should also be informed that he may comment on the submission in writing and is free to seek assistance or advice internally or from an independent adviser.

Before reaching a decision, the Board will decide whether it is necessary to hold an oral hearing (and the complainant may request a hearing). If a hearing is held, both the Board and the complainant will have the opportunity to question any witnesses. The complainant may, at the discretion of the Board, be accompanied by a legal or other adviser, and may take legal advice from a solicitor at any time. Also an officer may require that the Council, through the Secretary of State, make a report to her Majesty for directions.

The time limit for submission of complaints to industrial tribunals is six months. This is to accommodate the requirement that all complaints must be submitted first under the internal redress procedures. The decision as to what stage in the internal process a complainant refers the case to the industrial tribunal is left to the complainant and his advisers. If the internal process has not been completed before the submission of the tribunal claim, the internal investigation will still continue with a view to a decision being made before the tribunal hearing. The Ministry of Defence

(MOD) will normally indicate in the IT3 the likely duration of the procedures and request an adjournment. In order to ensure that the IT1 is considered promptly by the MOD, the procedures recommend that the name and address of the employer in the IT1 should be noted as follows:

Royal Navy cases
The Ministry of Defence
Naval Personnel Secretariat 3a
Room 141
Victory Building
HM Naval Base
Portsmouth
PO1 3LS

Army cases
The Ministry of Defence
APC Litigation
Room 5109
Kentigern House
65 Brown Street
Glasgow G2 8EX

RAF cases
The Ministry of Defence
AMP (Sec) IT
Room F91
HQ Personnel and Training Command
RAF Innsworth
Gloucester GL3 1EZ

Form RR65 questionnaires should also be sent to the above addresses. It is very likely that no replies may be submitted whilst the internal investigations are still being carried out and close liaison with the MOD and the tribunal should ensure that the matter is not left in abeyance for too long.

Although the regulations make it clear now that the tribunal jurisdiction is not retrospective, two cases relating to alleged racial discrimination by serving members of the armed forces were recently taken to industrial tribunals since the Armed Forces Act 1996 received royal assent. In these cases, the claimants were launching speculative claims in industrial tribunals pending the imminent provisions to bring into force s.23 of the Act. In both cases, the claims were dismissed at preliminary hearings for lack of jurisdiction (*Clay v Ministry of Defence* S/100700/97, Littlejohn D, Chair, Glasgow IT; and *Henderson v Ministry of Defence* S/100606/97. Milne C, Chair, Edinburgh IT). The old procedures are still applicable to all cases relating to discrimination which took place prior to 1 October 1997. The complaints have to be made to the Commanding Officer and at the later stages, to the relevant Board, whose decision is final, albeit subject to judicial review, in appropriate cases. The Board is enjoined to adopt procedures which are fair (*R v the Army Defence Council ex parte Anderson* [1991] IRLR 425 HC). The High Court in *Anderson* ruled that the Board must hold a proper hearing of the complaint and must have the

complaint investigated. It must consider all the material gathered and give the complainant an opportunity to respond. The Board, however, was held to have discretion as to whether to hold an oral hearing or to allow cross-examination.

Finally, whilst any acts of discrimination which have occurred prior to 1 October 1997 cannot found a claim to an industrial tribunal and no damages or other relief can be obtained by relying simply on out of time acts, it is established law that such acts can be considered as indicating less favourable treatment when an applicant is pursuing a complaint which is within time (*Din v Carrington Viyella Ltd* [1982] IRLR 281, EAT; *Chattopadhyay v The Headmaster of Holloway School* [1981] IRLR 487, EAT).

The CRE are monitoring the operation of these new procedures. Also the CRE's Legal Strategy Unit (Barbara Cohen/Hazel Baird) is dealing with follow-up work with the MOD and should be informed of any new complaints (Tel. 0171/828/7022). 8/7022).

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 53 SUCCESSFUL INDUSTRIAL TRIBUNAL DECISIONS SENT TO THE COMMISSION FOR RACIAL EQUALITY BETWEEN 1.1.97 AND 30.6.97

There were 32 successful cases during the first six months of 1997 in which 21 had awards made.

RANGE (£)	TOTAL AWARD	INJURY TO FEELING	RANGE (£)	TOTAL AWARD	INJURY TO FEELING
0-500	-	-	6500-6000	-	-
500-1000	5	4	7000-7500	1	-
1000-1500	1	4	7500-8000	-	2
1500-2000	4	3	8000-8500	-	-
2000-2500	1	1	8500-9000	-	-
2500-3000	1	1	9000-9500	-	-
3000-3500	-	-	9500-10000	-	-
3500-4000	1	-	10000-15000	1	1
4000-4500	1	1	15000-20000	2	1
4500-5000	1	-	20000-25000	-	-
5000-5500	1	1	25000-30000	-	-
5500-6000	1	1	30000-35000	1	-
6000-6500	-	-	35000-40000	1	-
(Source: IT Decisions sent to CRE)					

EXAMPLES OF THE HIGH AWARDS

Stewart and Hawkins v HM Prison Service and O'Neil (Case nos 13917/96 & 49582/95) London South Industrial Tribunal, Booth, Chairman

Stewart - Injury to feelings £7500 and interest £2400.

Hawkins - Injury to feelings £3000 and interest £439, loss of earnings £15208, future loss £11484, Total (including interest) £31805

Gene v 1. Mountbatten Hotels 2. Mr O'Doherty

(Case no 53375/94) - Bedford IT Carruthers W, Chairman

Total award of £37166 including £5000 for injury to feelings, £2000 for aggravated damages, £25994 for loss of salary and £12162 for interest.

THE 21 AWARDS BROKEN DOWN BY TYPE OF DISCRIMINATION

RANGE (£)	DISMISSAL	RECRUITMENT	PROMOTION	HARASSMENT	DETRIMENT
0-1000	1	1		1	1
1000-1000		3	1	1	
1000-3000					1
3000-4000				1	1
4000-5000	2	3			
5000-6000	1			1	1
6000-7000					
7000-8000	1				
8000-9000					
9000-10000					
10000-15000					1
15000-20000				2	

Source: IT Decisions sent to CRE

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 54 SETTLEMENT IN SEX DISCRIMINATION CASE AGAINST SOLICITORS: Harrison v Laurence Murphy Solicitors and J. Donigan in the Manchester Industrial tribunals June-October 1997

The above was a sex discrimination claim brought by a trainee solicitor against the firm where she had a training contract. She claimed that she was unable to complete her training due to the effects of sexual harassment and bullying from a legal executive at the firm.

The case was part-heard and adjourned twice before it settled during the third hearing. The settlement was for £50,000 inclusive of costs. The applicant was represented by Salford Law Centre, who obtained funding from the EOC for a barrister to advise on the case and to advocate at hearings. Ms. McCabe appeared for the applicant at all three hearings.

The applicant started her training contract in October 1995. She claimed that her problems started when she moved into the conveyancing department after a few months, where her work was determined directly by a legal executive at the firm. She testified that he had subjected her to relentless bullying and harassment of a sexual nature, giving detailed examples of the abusive conduct that she had endured. She claimed that the senior partner of the firm had witnessed much of this conduct but took no steps to challenge or put a stop to it. She referred to the firm's own records which she claimed indicated a very high turnover of women employees. The applicant claimed to have put up with the situation as long she was able, but the effect it had on her was firstly to erode her confidence and self-esteem, and eventually had made her too ill to continue with the training. After a period of sick leave in the autumn of 1996 she resigned.

Before resigning she made an internal complaint, which did not resolve matters, and then took her complaint to the Industrial Tribunal in October 1996. She had also taken a complaint to the Law Society, which was held in abeyance pending the outcome of the case in the Industrial Tribunal. At a directions hearing in January of 1997 reporting restrictions were agreed for the duration of the case. These were only lifted after the final hearing in October 1997.

At the first hearing in June 1997, the case for the applicant was opened but no evidence was heard. The tribunal decided to adjourn the hearing until September, with an Order by Consent for Directions. This included the provision of a reference for the applicant by the respondents; completion of the accreditation with the Law Society, of the training undertaken; for the respondents to co-operate with the EOC over development and implementation of their equal opportunities policy; and for the respondents to pay for a course of counselling for the applicant. Both parties agreed to attend a meeting to discuss either settling the rest of the applicant's claim, or if unable to do so to produce an agreed Statement of Facts for the adjourned hearing.

By the second hearing in September, most of the directions had been complied with, but the parties had not been able to settle the rest of the claim. At this hearing the tribunal decided that some concessions to liability had been made by the respondents, but these still had to be proven to constitute sex discrimination.

In October the hearing resumed with a "narrowed down" version of the claim, with factual issues limited to the nature, extent and degree of the abuse and harassment that had already been admitted by the respondents. The Tribunal started to hear evidence in the matter, starting with evidence from the Applicant herself. This evidence was part-heard when the Tribunal adjourned for lunch. After lunch the two parties settled the case for a total sum of £50,000 inclusive of costs, to be paid in 7 instalments.

The case settled before all the evidence was heard. If it had continued, the applicant would have offered as witnesses several other female ex-employees to give evidence about conduct at the firm; her mother, her G.P. and a therapist to give evidence about the effects on her health and wellbeing. The expert opinion of a consultant psychologist had also been obtained regarding psychological impact and prognosis. Information and an expert opinion from an Employment Consultant was collected about the employment prospects, and earning potential, of trainee solicitors and newly qualified solicitors, both in general, and specifically when training has been partially completed.

For more information about this case please contact:

Poddy Peerman at Salford Law Centre
Tel: 0161-736-3116
Fax: 0161-745-9257

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 55 INSTRUCTIONS AND PRESSURE TO DISCRIMINATE

The Race Relations Act makes it unlawful to instruct another person to discriminate (section 30) or to induce (pressure) another to discriminate (section 31). Only the Commission for Racial Equality - not individual victims or potential victims - may bring proceedings under ss. 30 or 31. Amongst the facts of an individual discrimination complaint there will often also be evidence of unlawful instructions or pressure to discriminate. This article aims to remind lawyers and advice workers of the Commission for Racial Equality powers in this area, with the intention of maximising the Commission's impact in combatting racial discrimination.

The Law

Under s.30 it is unlawful *to instruct a person* to do any act which is unlawful under Part II or Part III of the Act *or to procure or attempt to procure the doing of such act*. For an instruction to be unlawful, either (a) the instructor must have authority over the person receiving the instructions or (b) the person receiving the instructions must be accustomed to acting in accordance with the instructor's wishes.

In the leading case, *CRE v Imperial Society of Teachers of Dancing*, [1983] ICR473, it was held that the second condition required a pre-existing relationship between the person giving the instructions and the recipient. Thus an employer who attaches discriminatory conditions when notifying a vacancy to a Job Centre or other employment agency will only be caught by the Section if they have had previous dealings with the agency in which it has acted in accordance with their instructions.

Section 31 makes it unlawful *to induce or attempt* a person to do an act which is unlawful under Parts II or III. In *Imperial Society of Teachers of Dancing*, the word "induce" was interpreted to mean "to persuade or put pressure on". Both Sections apply to all "legal persons", i.e. companies and organisations, not only to individuals. Under s63 the CRE can bring s.30/31 cases in the Industrial Tribunal (employment cases) or the County Court or Sheriff Court (other cases). The time limit is six months in all cases.

Examples of unlawful instructions or pressure

Many cases are referred to the Commission for Racial Equality by the Employment Service following the receipt of discriminatory instructions from an employer. Examples include: "no Algerian Muslims", "no Asians", "a white person for the senior post and a black person for the junior post". In some cases there is not an

identifiable victim, since the Employment Service reacts immediately such instructions are received. In others, the discriminatory instruction to the Job Centre will follow the employer's rejection of a job applicant, (e.g., "don't send me any more black applicants"), thus founding two possible causes of action, the first a compliant by the individual rejected, and the second a complaint of pressure/instructions to discriminate by the CRE.

In some cases, discriminatory instructions or pressure are revealed only because of an internal whistle-blower who is not prepared to discriminate on behalf of his/her employer and approaches the CRE for help. The employee will normally wish to bring an individual complaint to an Industrial Tribunal, but his/her statements are also likely to include good evidence of unlawful pressure/instructions on which the CRE can also base proceedings under ss 30/31.

A number of recent cases have been effectively pursued on both fronts: Van & Truck Rentals (pressure/instructions not to hire cars to ethnic minority customers); Black Sheep Studios (not to include black babies as models for catalogue photos); Hi-Tec Securities (not to canvass ethnic minority house-owners to purchase home burglar alarms).

However, the facts of some individual complaints to the Tribunal show that the Commission sometimes misses the opportunity to bring proceedings under ss 30/31. A recent case involved a local manager who was instructed by head office not to recruit staff from a particular ethnic minority group. A greater impact might have been made on the firm's discriminatory practices if proceedings had been brought in parallel with his individual complaint - but the CRE was notified outside the statutory time limits!

The Potential of SS30/31

In the employment context, there may often be a chain of discriminatory instructions. The individual complainant may obtain redress against the institution or company which, as the last link in the chain, actually discriminated against her or him; but the CRE can target the institution which initiated the discrimination, which may be a much more significant player. In the field of services, pressure/instructions cases can lead to the exposure of widespread discriminatory practices, for example, recently in the area of insurance services.

A case which illustrates the potential of this dual approach involved a complaint by a security firm employee, where the discrimination related to the employee's workplace location. The employers' defence was that their client, a major international company, had given them instructions regarding the staff they wanted on duty at their London headquarters. A pressure/instructions case on these facts could have drawn in the client company as well as the security firm.

Action against pressure/instructions have the potential to catalyse significant changes in organisational practice, and thereby benefit not just the individual complainant (if any) but whole classes of people with whom the institutions

concerned may interact. If you are dealing with individual complaints, please be alert to evidence of pressure/ instructions to discriminate, and in any case where this dimension may exist, please refer that aspect of the case immediately to the Law Enforcement Section of the CRE at Elliot House.

Note (1) Re: Sex Discrimination Act 1975

Instruction and Pressure to discriminate are also unlawful under the Sex Discrimination Act 1975, Sections 39/40. The above points, in respect of race discrimination are also relevant in respect of sex discrimination. Similarly, cases can only be brought by the Equal Opportunities Commission, and the time limit is also six months.

Note (2) Re: Disability Discrimination Act 1995

Unfortunately there are no references in the DDA to "instruction" and "pressure" to discriminate!!

Kelly Harvey, Solicitor
Commission for Racial Equality

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 56 UPDATE ON MATERNITY CASES AND THE 'RIGHT TO RETURN'

There are now at least five conflicting EAT decisions as to whether a woman can claim unfair dismissal and/or sex discrimination if, because of sickness, she is unable to return to work at the end of her maternity absence.

Physical return to work necessary under Employment Rights Act

In Crees v Royal London Insurance[25] the EAT held that a woman must return to work physically in order to claim the statutory right to return to work after extended maternity absence. It is not sufficient to send in a sick note certifying that she was ill on the day she was due to return.

A similar decision was reached in Kwik Save Stores Ltd v Greaves[26] where the EAT held that failure to return to work physically meant she lost her right to return. The EAT held that sending or calling into work for the sole purpose of delivering a medical certificate showing inability to work is incompatible with returning to work.

Both these cases are to be heard by the Court of Appeal early in the New Year (19 and 20 January).

In neither of these cases was sex discrimination argued. Surely, it is discriminatory to require a sick woman to attend her workplace after maternity absence in order to keep her job if a man, who is sick at the end of leave (whether holiday or other), could hand in a sick note and claim sick pay and leave.

The question then is whether the woman can rely on protection from dismissal under the ordinary unfair dismissal principles and/or sex discrimination under the SDA. The woman must show that the contract continues during maternity absence and that there has been a dismissal.

Does the contract of employment continue during maternity leave and absence

The Employment Rights Act provides that the contract subsists during the 14-week maternity leave period. The Act is silent about the extended maternity absence period (the '29 weeks') and it will depend on the 'agreement' between the parties. In most cases no thought is given to the situation until a dispute arises.

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[25] [1997] IRLR 85 EAT

[26] [1997] IRLR 268

In the earlier cases (Institute of the Motor Industry v Harvey[27] and Hilton International Hotels (UK) Ltd v Kaissi)[28], the EAT suggested that the presumption should be that the contract of employment continued during maternity absence.

In Crouch v Kidson Impey[29] the EAT held that where a woman failed to comply with the statutory and contractual notice requirements and left work to have a child, there is no presumption that the contract remains in existence. If the employer consents to the employee leaving work and remuneration ceases, the appropriate inference is that there has been an agreed termination.

In Greaves the EAT said that there is no universal rule that a contract of employment cannot survive a failure to return at the end of maternity leave. In Lewis Woolf Griptight Ltd v Corfield[30] the EAT reaffirmed that the critical question in every case where the statutory right to return has been lost is whether the contract of employment ends on expiry of the statutory right to return or whether it continues until determined by either party or by agreement. The answer will depend on its facts. In Corfield the EAT held that the tribunal was entitled to find that the letter with a medical certificate was an assertion that the woman remained an employee who would be absent from work through sickness. The employers did not argue with that contention.

However, the same EAT chairman reached a different decision in Halfpenny v IGE Medical Systems Ltd [31]. The EAT held that without 'any express or implied agreement to continue the contract of employment, as in Kaissi, the contract will continue to subsist after the employee goes on maternity leave, but with the respective obligations thereunder suspended, on the mutual understanding that those obligations will be revived, and the contract will continue, if the employee effectively exercises her right to return. If she fails to exercise that right, the contract comes to an end .... The contract remains on foot solely for the purposes of permitting the employee to revive it when she exercises her statutory right to return. If she does not do so, it comes to an end by implied agreement, not by dismissal'.

The decision was influenced by the fact that an employer would otherwise be liable for complying strictly with their statutory obligations and it would be wrong to circumvent that statutory regime. Yet in Corfield the EAT said that 'the means by which the employer sought to effect the termination of employment, misuse of the statutory maternity leave protection afforded to women, was attributable solely to sex'.

An appeal has been lodged in Halfpenny.

There are four main points:

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[27] [1992] IRLR 343 EAT
[28] [1994] IRLR 270 EAT
[29] [1996] IRLR 79 (see Newsletter April/May 1996)
[30] [1997] IRLR 432
[31] EOC 75, September/October 1997 p47

1. In these cases the employee has assumed that her employment continued whereas the employer has wanted to terminate it. In these circumstances the concept of an 'implied agreement' must be wrong. There is no agreement.

2. In no other employment context is there such a concept as 'implied agreement' that the contract terminate when clearly the parties have a completely different understanding of the situation. Take the case of an employee who is sick at the end of other authorised leave, such as a holiday. The idea that the contract would terminate by 'implied agreement' is fanciful. Indeed, in Igbo v Johnson Matthey Chemicals Ltd[32] the CA held that even if there was an agreement that the contract would automatically terminate if the employee failed to return from concessionary leave, this would be void. A presumption of 'implied agreement' which only applies in the maternity context is based on pregnancy and/or maternity and as such is discriminatory.

3. Refusal to allow a woman to return at the end of maternity absence because she is sick, when an employee who is sick at the end of any other leave would be allowed to hand in a sick note, must be discrimination. The termination of the contract by the employer - for that is what it really is - is a dismissal or a detriment under the SDA.

4. If an employer tries to avoid this uncertainty by stating that the contract will come to an end if the woman fails to comply with the statutory maternity provisions, s/he risks a claim for sex discrimination if this is the only situation which leads to so-called 'automatic termination'.

5. An outstanding reference on Coote v Granada Hospitality should resolve the question of whether the ETD applies after the contract of employment has been terminated.

Conclusion

The law is in a great state of confusion which may eventually need to be clarified by a reference to the ECJ. The lesson for employees is to behave in a way which is consistent with the contract continuing throughout maternity absence. If at all possible a woman should comply with all the notices and return to work physically at the end of her leave or absence, even if it is only for half a day.

Update on other maternity cases

Brown v Rentokil: the Advocate General's opinion is due out in December or January.

Banks v Tesco: this is a challenge to the exclusion of women earning less than the lower earnings limit from entitlement to statutory maternity pay. I have been to a preliminary hearing in the EAT and a date for the full hearing is awaited.

Camilla Palmer, Bindman & Partners

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[32] [1986] IRLR 215 CA

DECEMBER 1997

BRIEFING No. 57 POSITIVE ACTION IN EUROPE

Since the ECJ decision in Kalanke[33] (see briefing 00) it has been thought that positive action at the point of recruitment was in breach of EC law.

In Marschall v Land Nordrhein-Westfalen[34] a male teacher was told that he would not be promoted as it was intended to promote a woman. Local rules for promotion of civil servants provided that where there were fewer women than men in a particular career bracket, women were to be given priority for promotion in the event of equal suitability, competence and professional performance unless reasons specific to an individual male candidate tilt the balance in his favour'.

The ECJ distinguished Kalanke. It held that the Equal Treatment Directive, which allows for the promotion of equal opportunity, 35 authorised national measures which gave a specific advantage to women in order to improve their ability to compete on the labour market and to pursue a career on an equal footing with men where these counteract the prejudices and stereotype concerning the role and capacities of women in working life and thus reduce actual instances of inequality.

However, if it had been an absolute rule giving priority to women and there had been no saving clause, allowing the circumstances of the individual candidates to be considered and enabling the priority to be overridden, the result would probably have been different.

Camilla Palmer, Bindman & Partners

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33 Kalanke v Freie Hansestadt Bremen [1996] All ER EC 66

34 [1997] All ER EC 865 ECJ

35 Art 2(4) allows measures to promote equal opportunity for men and women and to remove existing inequalities which affect women's opportunities in working conditions and in access to employment, promotion and training.

DECEMBER 1997

BRIEFING No. 58 WEATHERSFIELD LTD t/a VAN & TRUCK RENTALS v SARGENT: Refusal to follow instructions to discriminate and constructive dismissal: EAT Appeal No. EAT/1414/96

During her induction the applicant was told not to hire vehicles to 'any coloured or Asians' and it was usually possible to tell them 'by the sound of their voice'. The applicant was stunned. The following day the policy was explained again by a director. After the weekend the applicant resigned, feeling so upset about the inequity and unfairness of the policy, quite apart from its illegality. She claimed constructive dismissal under the RRA.

The tribunal upheld Mrs Sargent's claim and the employers appealed. The EAT upheld the tribunal decision, holding that:

- 'detriment' included subjecting the applicant to an unlawful instruction; the applicant had therefore suffered a detriment
- dismissal under the RRA includes constructive dismissal; the tribunal decided that the applicant was constructively dismissed as a result of the imposition upon her of an unlawful instruction and this was upheld by the EAT;
- the applicant was treated less favourably by comparison with a person who was prepared to accept an instruction to discriminate; she had been put in an intolerable position in her employment relationship.

The EAT concluded by saying that 'It must be made quite clear to employers that policies of this sort are intolerable'.

Comment

The decision in this case is in line with previous decisions which have held that the RRA prohibits discrimination against someone because of another person's race.

It also strengthens the argument that discrimination by an employer is a fundamental breach of contract entitling the employee to resign and claim constructive dismissal.

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DISCRIMINATION LAW ASSOCIATION

DECEMBER 1997

BRIEFING No. 59 **2 Year Limit on Arrears in Equal Pay Claims Breach of Art 119: Mogorrian and Cunningham v Eastern Health & Social Services Board & Department of Heath and Social Services ECJ 11.12.97**

The applicants were retired and received a pension. This was based on their full-time and part-time hours. However, because they both worked part-time when they retired they were not entitled to the additional benefits which were available to full-time workers. They challenged this as a breach of article 119.

A claim under the Equal Pay Act 1970 must be brought within 6 months of the end of employment. If the applicant is successful, s/he is not entitled to any arrears of pay relating to a period earlier than 2 years before the date on which proceedings were issued. Thus, if a claim is lodged on 10.1.98 s/he can only claim for the 2 years previous to this. The applicants challenged this 2-year limitation.

The ECJ held:

1. Periods of service be part-time workers who had suffered indirect discrimination must be taken into account since April 1976 for the purposes of calculating the additional benefits. Following Vroege and Fisscher, the limitation in Barber did not apply. It had been clear, said the ECJ, since the decision in Bilka that discrimination in relation to the right to join an occupational pension scheme was unlawful.

2. The two-year limitation on arrears as a breach of Article 119. Such as rule would render any action by individuals relying on EC law impossible in practice. To restrict arrears of pay to 2 years prior to the issue of proceedings would deprive the applications of the benefits to which they are entitled - since 1976.

Implications

This decision means that the two-year limitation in both the Equal Pay Act and Pensions Act must be a breach of EC law. Any claim under these Acts must allow applicants to recover their full loss (subject to the Barber limitation).

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