Discrimination Law Association

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DISCRIMINATION LAW ASSOCIATION

JANUARY 1998

BRIEFING No. 60 REASONING REAFFIRMED IN KING V GREAT BRITAIN CHINA CENTRE

The Opinions of the House of Lords in Zafar reaffirm the importance of the guidance given in King v Great Britain China Centre [1991] IRLR 513 CA and focus on the need for appropriate comparators in discrimination cases.

In Zafar the Applicant, a social worker, had been dismissed by the Respondents for allegedly sexually harassing clients. The Industrial Tribunal found the dismissal unfair (within the meaning of Section 57(3) of the EPCA 1978[1] for a number of reasons arising out of the manner in which the Respondents conducted the disciplinary process (e.g. delay, failure to investigate at the appropriate time etc).

The Tribunal went on to conclude that the dismissal amounted to less favourable treatment on racial grounds and thus unlawful direct discrimination within the meaning of Section 1(1) (a) of the Race Relations Act 1976. The reason for the Tribunal's decision that the dismissal was discriminatory was that, according to the Tribunal, treatment "which falls far below the standards of the reasonable employer gives rise to a presumption that person has been treated in a way different from the way in which others have been, or would be, treated" and thus constitutes less favourable treatment. The Tribunal went on to conclude that having found such less favourable treatment and having found that the Applicant was a member of a minority racial group then, in the absence of an innocent explanation from the Respondents, they were bound to conclude that the treatment was on racial grounds.

Lord Browne-Wilkinson, giving the judgment of the House of Lords, analysed the elements of direct discrimination. Firstly, his Lordship considered the approach to identifying "less favourable treatment". Establishing "less favourable treatment" requires it to be shown that the Respondent employer has treated the Applicant less favourably than that Respondent treats or would have treated another. Thus the actions of a hypothetical reasonable employer, according to the Lords, are irrelevant, "the alleged discriminator may, or may not be a reasonable employer". This much is clear from a careful reading of the wording of section 1(1)(a).

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[1] Now, of course, superseded by the Employment Rights Act 1996.

The House of Lords further knocked on the head the argument that, in the absence of a satisfactory explanation, a Tribunal is bound to draw an inference that less favourable treatment was on the grounds of the Appellant's race. In so doing their Lordships re affirmed the guidance in King - i.e. that they may draw an inference, but they are not bound to do so.

For the practitioner Zafar will probably not have a terribly significant impact. Firstly, Tribunals will generally take account of all background matters in deciding whether an inference of race discrimination is appropriate, even where there is, on the face of it, an absence of a satisfactory explanation from an employer. Secondly, Tribunals are generally aware (and sometimes too inclined to conclude) that an unreasonable employer is not always an unlawfully discriminatory employer. Indeed it is a common defence that treatment was unreasonable but not discriminatory because the respondent treats (or would treat) all his staff unreasonably. There is no doubt that the case highlights the difficulties where there are no direct comparators. However practitioners can take comfort from the fact that nothing in the judgment prevents an Applicant from pointing to a particular Respondents' procedures, cross examining on the significance of those procedures (and whether they might normally be followed) and inviting a Tribunal to infer that a departure from those procedures in a particular case amounts to less favourable treatment than that which would have been afforded a person of a different racial group. Though one cannot rely on the hypothetical employer one can still, of course (by the wording of Section 1) rely on the hypothetical (comparable) employee.

Karon Monaghan
Barrister

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 61 DISABILITY DISCRIMINATION ACT: UPDATE

According to the March issue of *Disability Now*, at December 1997 there were nearly 1,200 DDA cases that had been registered with industrial tribunals. Of these, 14 were successful, 52 were unsuccessful and 466 settled or withdrawn. Meanwhile, as far as I am aware, there has been few County Court judgments in actions taken under Part III (the most notable being £8,000 awarded to 10 adults with learning disabilities who were refused service in a pub). As at June 1997, according to the court service, only 25 cases had been lodged.

Meanwhile, following manifesto commitments, the new government has commenced three initiatives to strengthen anti-discrimination legislation for disabled people:

- The establishment of a Ministerial Task Force, charged with investigating and making recommendations to the government on new legislation.

- The establishment of a Commission to enforce anti-discrimination provisions for disabled people.

- The bringing into force of those aspects of the DDA which are not currently in force. To that end, the government are consulting on proposed regulations requiring taxis and public service vehicles to be accessible and are proposing to accelerate the timetable for bringing into force those aspects of Part III of the DDA requiring service providers to make adjustments.

Meanwhile, the amounts of compensation awarded for injury to feelings in those successful cases taken to the Industrial Tribunal appear to broadly reflect sums in race and sex discrimination cases, ranging between a few hundred and around five thousand pounds.

Below are examples of some cases that may impact materially on the rights of disabled people:

1. *Auger -v- AC Fabrications Limited*. Currently, the Act only applies to employers who have at least twenty staff (although the government is currently consulting on reducing this figure). This decision confirmed that when undertaking the "head count", the relevant time is that of the alleged incident of discrimination.

2. *Gradwell -v- Council for Voluntary Services, Blackpool, Wyre and Fylde*. This case affirmed the Race Relations Act decision in *Armitage -v- Relate* and others in that, when determining whether a volunteer counts as an employee for the purposes of legislation, a Tribunal should consider, in effect, whether or not there is a relationship of an employer/employee.

3. In *Samuels -v- Weslian Assurance Society (Liverpool IT [1997] 2100703/97)*, the Applicant had been off sick for a period of time arising from a neurological problem which suggested multiple sclerosis. The Applicant had indicated that he considered he would be able to return to work in January 1997, but on 17th December 1996 he was dismissed. The Tribunal found that the Respondent had unlawfully discriminated against the Applicant by failing to have regard to his likely ability to return to work properly in January 1997.

4. In *Sandy -v- Hampshire Constabulary (Southampton IT ref: 3101118/97)*, the Applicant had obtained a temporary post as a station enquiry officer in a Police Station which, following several renewals, lasted between 27th November 1995 and 31st December 1996. During this period, he had been absent on sick leave for a total of five working days: one day's absence as a result of a stomach problem and the remaining four for an ear operation. The Applicant then applied for a permanent job as a station enquiry officer but was eventually refused on the grounds that his disability would be likely to result in him having to take a substantial amount of time off sick. In trenchant terms, the Tribunal found that the Respondent had acted unlawfully as their views about the amount of sickness that the Applicant would be likely to have to take was arbitrary and speculative; particularly as they had never even bothered to check. Further, the Tribunal paid particular attention to the fact that the Respondent appeared to have an equal opportunities policy which ought to have prevented this sort of discrimination arising in the first place.

5. In *Schanz -v- Hereford and Community National Health Services Trust*, the Applicant, who had ME, had been off sick for ten months but was about to return to work when she was sacked. Again, the Tribunal found in her favour.

6. In *Tarling -v- Wisdom Toothbrushes Ltd (Bury St. Edmunds IT ref: 1500148/97)* the Applicant required a particular stool to be able to do her job, arising from a progressive impairment of her bone structure. The Respondent appeared to accept the need for a stool but bought the wrong (cheaper) one. The Respondent was held liable for failing to make a reasonable adjustment in purchasing the correct stool.

7. Finally, in *Williams -v- Channel 5 Engineering Ltd*., the Applicant, a deaf man, complained of discrimination arising from his appointment as a retuner with Channel 5. He alleged that the employer had refused or failed to provide him with any work, or to provide him with equipment (a portable minicom) to enable him to work, so that he was not in fact paid. The Tribunal found that he had been discriminated against because of the Respondent's failure to take necessary steps at the outset to enable him to do his job.

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DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 62 AGE DISCRIMINATION: HISTORIC RULING?
Nash v Mash/Roe Group. London South IT 1.2.98

In a potentially historic ruling, an Industrial Tribunal has held that workers over 65 years old have the right to claim unfair dismissal and redundancy pay. The reserved decision was issued on February 10th 1998, following a preliminary hearing on August 18th 1997 at the London South Office of the Industrial Tribunals in Croydon.

The decision states:-

> *" The unanimous decision of the Tribunal is that the provisions of sections 109(1) and 156(1) of the Employment Rights Act 1996 are incompatible with Article 119 of the Treaty of Rome and consequently do not prevent the Applicant from making a complaint of unfair dismissal against, and/or claiming a redundancy payment from, the Respondent."*

Mr. James Nash was 69 years old when he was dismissed from his job as a Warehouse Manager with the Mash/Roe Group Ltd., after over 25 years service. Mr. Nash believed he had been unfairly dismissed but because of his age had no right of legal redress. There may also have been a redundancy situation, so Mr. Nash made a claim in the alternative for redundancy pay.

It was successfully argued before the Tribunal that because more men than women continue working past the age of 65, men are indirectly discriminated against by being prevented from claiming unfair dismissal, and by being denied redundancy payments.

On the question of objective justification, given the absence of any form of justification from the appropriate government minister, the Tribunal held that they "...cannot find that the legislative provisions are objectively justified by factors unrelated to discrimination based on sex."

The tribunal further held, following the relevant authorities, that it is bound to find that both redundancy pay and unfair dismissal compensation are "pay" for the purposes of Article 119. The Tribunal was of the view that it would be inappropriate to delay a decision on this preliminary issue pending the outcome of the ECJ decision in the case of *Seymour Smith*, which would only relate to the unfair dismissal claim in any event.

It remains to be seen what the government's response will be to this decision, the timing of which is particularly significant given the current level of debate around the whole issue of age discrimination.

The Respondents have stated that they will appeal. Whilst not setting legal precedent at this stage, this remains a landmark decision. Other employees, male or female, in a similar situation should be advised to make an application to the Industrial Tribunal.

Isabel Facer, Camden Rights and Tribunal Unit

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 63 EVIDENCE OF PROFESSED LACK OF PREJUDICE: "some of my best friends are …". Robson v Commissioner of Inland Revenue EAT 298/97

The complaint to the IT was that one of the respondents, Mrs Hodgson, when giving instructions from the computer, had referred to the fact that the Appellant was Irish "and thick". Another of the respondents was also alleged to have made similar remarks. The tribunal noted that there was no corroborative evidence. It also added that both of these respondents "*were related by marriage to people from ethnic minorities and the second respondent had a Black wife. In those circumstances one would not have expected them to be associated with such remarks*." The tribunal concluded that they preferred evidence of the respondents to that of the applicant.

The EAT pointed out that it was right for the tribunal to take into consideration the fact that there was no corroborative evidence and that the applicant had not raised the matter when she made her written complaint. The EAT then said:

> *"…it is a very human reaction to an accusation of racial or other bias, to react by saying, however might be appropriate, for example, "some of my best friends are Jews" or "some of my best friends are Roman Catholics", or "What do you mean I am prejudiced, my mother is French", or "My sister is married to a Mason" or whatever it happens to be. But equally one must be aware that, although that is a human reaction as a defence to an accusation of some form of bias or prejudice, it is not necessarily logically probative of the absence of prejudice."*

Evidence of a defendant's general reputation of good character may be relevant where it is applicable to the particular allegation. Even then it is more relevant to the defendant's credibility. In this case, the evidence is not analogous to general reputation of good character. It could have been very relevant that in an office in which many Irish persons were engaged, a particular respondent had over a long period shown no prejudice whatsoever and made no abusive remarks to Irish colleagues as that would have been material general good character evidence.

The EAT stated the fact that the respondents were related by marriage to persons from some other ethnic minority was *not a factor relevant to their credibility*. Indeed the other questions that the EAT thought were similar*, and also irrelevant*, were as follows:

a) A is less prejudiced against the Irish because his sister has married one, for example.
b) A is less prejudiced against the Irish because his uncle or aunt has married someone who is Irish.
c) Persons generally with black wives are habitually less prejudiced against the Irish
d) A white man with a black wife is less likely to be prejudiced against the Irish.

The EAT also commented that *in general conversation* it is, no doubt, harmless to suppose that a man or a woman has demonstrated his freedom from some particular prejudice by indicating that he is seen to be free of racial prejudice in general. But even in

that context, one has to contemplate the possibility of attitudes such as “I got on fine with foreigners and Indians and Jews but it is blacks that I cannot stand”. In any event, the EAT emphasises that *they were dealing with evidence which was relied upon at a serious tribunal and not matters of general conversation*.

As the EAT was unsure as to how much weight has been given to these inappropriate matters it remitted the whole case to a fresh hearing before a different Tribunal.

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 64 **TIME LIMITS FOR REPEATED ACTS, Ewane v Department of Education & Employment EAT 1447/96; TIME LIMITS & PRELIMINARY HEARINGS/ CONTINUING DISCRIMINATION IN RECRUITMENT CASES, Mensah v Whittington Hospitals NHS Trust & others EAT 831/96**

EWANE V DEPARTMENT OF EDUCATION & EMPLOYMENT

The appellant was appealed against an IT decision where her complaint of unlawful racial discrimination was dismissed because it was time-barred.

The appellant, who was educated at a teacher training college in Cameroon and who held a BA degree from the University of Sierra Leone, applied in March 1989 for relocation as a qualified teacher. The respondent wrote to her in January 1990 explaining that it was a statutory requirement for employment in a maintained school that a person has qualified teacher status (QPS). This may be acquired either by successfully completing an approved teacher training course in England and Wales or a comparable overseas qualification. It stated that, as her qualifications did not meet the requirement of comparability, her application for QTS was rejected.

Although the appellant did not receive the letter until a further copy was sent by the respondent in October 1994, the industrial tribunal found as a fact that by December 1993 she was aware that she had been denied QTS, as she took up a teaching post with lower salary (than a qualified teacher) in September 1993. However, after the National Academic Recognition Information Centre (NARIC) informed her that her Cameroon teaching qualification ought to entitle her to QTS, the appellant contacted the Commission for Racial Equality who wrote on her behalf to the respondent on 20 April 1995. The respondent replied to the CRE on 6 July 1995 and confirmed that it did not accept the NARIC opinion and maintained its refusal to accord QTS to the appellant. The appellant then presented her originating application complaining of racial discrimination on 11 October 1995.

The industrial tribunal concluded that a decision to refuse the appellant QTS was taken in

January 1990 and, although she was unaware of this decision until December 1993, the three-month time limit ran from this latter date. The respondent's letter of 6 July 1995 simply confirmed to the appellant what she already knew and was not a new decision giving rise to a fresh cause for complaint. The tribunal therefore held that the application was out of time and decided further that it would not be just and equitable to extend the time limit.

In examining the case, the EAT stated that the case law on whether or not an act is continuing fell broadly into two categories. The first category which was signified by the cases of *Barclays Bank plc v Kapur* [1991] 2AC 355 (HL) and *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574 related to complaints where there was a continuing policy or practice amounting to an act extending over a period. The second category which can be seen in the cases of *Sougrin v Haringey Health Authority* [1992] ICR 650 (CA), *Amies v Inner London Education Authority* [1977] ICR 308 and *Cast v Croydon College* [1997] IRLR 14 related to those cases where the complaint was one of a single act with continuing consequences.

The EAT, however, noted that the Court of Appeal case of *Rovenska v General Medical Council* [1997] IRLR 367 straddled these two categories and showed that, where there were repeated applications which were turned down, the time limit ran from the date of each single act.

Following *Rovenska*, the EAT held that the appellant's complaint did not relate to an act extending over a period and that the respondent's refusal to accord her QTS was a single act of refusal at each time. This was based on the concession by the respondent that it adopted a continuing policy of refusing to recognise the appellant's overseas qualifications and each refusal constituted a fresh act of potentially unlawful discrimination. The appellant was therefore entitled to rely upon the last refusal that was contained in the letter of 6 July 1995. The appellant contended the respondent's July 1995 letter was not received until 16 July 1995 and as the industrial tribunal made no finding of fact on this point, the case was remitted to a fresh tribunal for rehearing on this limitation issue.

Both this case and *Rovenska* show that where an applicant is relying on repeated acts of discrimination, the last one of which is out of time, it might be prudent to seek a fresh decision from the respondent rather than relying solely on an argument for continuing discrimination on the basis of the existence of a practice or policy which may or may not succeed. The difficulties of showing the operation of a practice or policy, especially in recruitment cases, can be seen in the following EAT case of *Mensah v Whittington Hospitals NHS Trust.*

MENSAH V WHITTINGTON HOSPITALS NHS TRUST.

Preliminary hearing on time limits
At a preliminary hearing the IT ruled out some of the events relied on by the applicant as out of time. The appellant (relying on *Lindsay v Ironsides Ray & Vials* [1994] ICR 384) argued that the industrial tribunal should not have made this decision in a preliminary hearing but at the substantive hearing.
The EAT reiterated that a tribunal had jurisdiction to rule on the question of the time limit at a preliminary hearing in order to decide what issues were to be litigated. It would be quite unreasonable for the parties to spend time and money investigating events which were out of time at the substantive hearing.

The EAT pointed out that when an applicant completes box 12 of the IT1 (which asks for details of the complaint) and there are dates and events which are beyond the specific date mentioned in box 10 (relating to when the act took place) then the tribunal has to "look beyond the sheer form of the complaint and to look, to some extent, at the substance of the complaint".
The EAT distinguished the case of *Lindsay* on the basis that in that case, the applicant did not specify a single date and the complaint related to continuing discrimination. On the particular facts of *Lindsay*, the EAT were thus able to take the view that it would be better that matters were left over to a subsequent interlocutory hearing. Therefore "*The Lindsay case is not an authority that no interlocutory hearing can properly go into subject related to time barred... There is nothing about the Lindsay case which bars an Industrial Tribunal from looking at time bar points when they are duly raised*".

Continuing Discrimination
The EAT also considered whether there was continuing discrimination following the case of *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574. In *Owusu,* a series of incidents of failure to re-grade and allow an employee to "act up" showed a practice, but allegations of failure to promote, shortlist and appoint were held to be specific one-off acts.

The EAT pointed out (referring to the *Owusu* case): "*failure to promote, shortlist and appoint can, even during one continuous employment, be "undoubtedly specific instances", than a fortiori one would think, so could turnings-down of a prospective employee be, as was what happened to Mrs Mensah, because there is not the nexus of there being one continuous employment*".

The difficulty, however, in recruitment cases, as in Mrs Mensah's case, is that one has to show that there was a practice or a policy in respect of the rejection of the job applications. The EAT pointed out that there was no indication that the employers in Mrs Mensah's case had any notion that she would apply again, let alone that she would apply again in circumstances in which they would feel it necessary to turn her down as a matter of practice or policy.

EAT pointed out that it was not enough for Mrs Mensah to say that her name was in the prospective employer's records:
"*one would need to go the extra step of showing that not only was Mrs Mensah's name on the records, or on the computer, but that it was put there for some discriminatory purpose, that there was some note or record that suggested, as a matter of discrimination, she should be declined or have her applications made less easy to succeed in the future*."

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 65 COMPENSATION IN DISCRIMINATION CASES, Khan v Morgan Collins group Ltd EAT 389/97

The EAT considered an appeal against a decision by Bedford Industrial Tribunal to award the applicant £1000 for loss of opportunity in the job market and injury to feelings.

The appellant was not invited for an interview for the job of a sales engineer. There were 19 applicants and 4 were selected for interview. The industrial tribunal concluded that of the 4 only 1 of them had qualifications that compared to those of the appellant. The tribunal found the appellant was discriminated against in the arrangements made for determining who should be offered employment (under s.4 (1) of the RRA 1976), but did not find that the appellant was not offered the job because of racial discrimination. He was therefore not entitled to compensation for future loss of earnings.

In awarding the appellant £1000 for loss of opportunity of an interview and for injured feelings, the tribunal made no assessment of his lost chance of being appointed. It was argued for the appellant that the tribunal should have assessed the lost chance of not being appointed. This, it was said, was often best done by assessing a percentage chance that he had. It was also argued that the £1000 compensation for injury to feelings was too low in the light of the case of *Sharifi v Strathclyde Regional Council* [1992] IRLR 259 - where the Employment Appeal Tribunal said £750 was too low, and doubled the amount to £1500, in a case where the claimant was found to have had no prospect of being appointed to the job for which he applied.

The EAT agreed the industrial tribunal should have assessed the lost chance of the appellant being appointed. It suggested that this may have happened because the appellant was unrepresented at the tribunal hearing.

The EAT concluded that the tribunal must first make a finding about who was appointed and then make a comparison between his qualification and the appellant's qualifications. The tribunal must then assess the chance the appellant would have had of succeeding discounting all racial elements.

Finally, when the tribunal assesses compensation for injury to feelings, and makes its assessment of the lost opportunity of securing his appointment, it must add the figures it would award under each heading and then stand back to see whether there is any element of overlap in the composite figure. If there is should be adjusted accordingly.

The EAT also agreed that it was arguable that this award of £1000 was too low having regard to the case of *Sharifi*.

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 66 THE PHANTOM FAXED TRIBUNAL FORM, Ducille-Horton v Eastbourne Hospitals Trust, Brighton IT 3102228/97

This decision illustrates both the risks of faxing originating application to an industrial tribunal and the evidence needed to seek the tribunal's exercise of its discretion of extending the time limit.

In this preliminary hearing, the applicant contended that she was dismissed from her job as a staff nurse on 16 January 1997. The last day for presenting her claim for unfair dismissal and racial discrimination was 15 April 1997. On that date, an originating application (IT1) was faxed on behalf of the applicant by Unison to the Southampton Industrial Tribunal. In mid July 1997, having heard nothing from the Southampton Industrial Tribunal a representative of Unison contacted the tribunal to enquire about the progress of the claim and he was informed that the application had not been received. By a letter dated 25 July 1997, Unison then sent a copy of the originating application and a faxed document to the tribunal that was received it on 28 July 1997.

In a preliminary hearing, the applicant's representative produced to the tribunal:

1. A copy of a "fax transmission report" showing that a document comprising 3 pages was faxed to the correct fax number of Southampton Industrial Tribunal. The report was timed 12.11 and lasted for the duration of 1 minute 39 seconds on 15 April 1997. The result of the fax transmission was shown as "OK" thereby indicating to the sender that the tribunal had received it.

2. A copy of the fax cover sheet and IT1 that comprised 3 pages of the fax sent by the Union.

3. A copy of the "activity report (transmission)" produced by the fax machine detailing a list of 50 faxed transmissions and indicating the fax sent to the industrial tribunal with the correct date/time and confirming the details contained in the fax transmission report.

4. A copy of a fax received journal produced by the Southampton Industrial Tribunal that showed there was no reference to the receipt of the above-mentioned fax from Unison.

Having considered the documents, the tribunal concluded the originating application was "electronically presented to the Southampton Industrial Tribunal" when the union's fax machine confirmed on its transmission report that it had been answered by a fax machine bearing the number of the Southampton Industrial Tribunal and showing the result as OK.

In the alternative, the tribunal also concluded that it would be right in all the circumstances of this case to extend the time for presentation of the second application to 28 July 1997 as it was just and equitable to do so in a race claim. As for the unfair dismissal claim, the tribunal also reached the conclusion that, as the applicant had good reason to believe that her claim had been properly presented to a tribunal within the three-month time limit (by her representative), it was not reasonably practicable to expect her to present her claim "in another format between the time of the faxed presentation and the expiry of the primary period".

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 67 INDIRECT DISCRIMINATION AGAINST A SIKH EMPLOYEE. Kaur v Butcher & Baker Foods Ltd, Birmingham IT 1304563/97

Successful indirect discrimination race cases are always worth examining because of their potential effect on others. In this successful case concerning a Sikh, the tribunal held that Mrs Kaur, was discriminated against indirectly when she was suspended from her job after she was discovered by a supervisor to have been carrying a dagger (Kirpan) covered by two jumpers and an overall.

The respondents, who manufacture food, prohibit the wearing of all jewellery with the exception of wedding rings which cannot be physically removed; these have to be covered by a blue tape with a magnetic strip so that if anything fell into the food it would be picked up by the company's metal detectors. The respondents initially stated that the dagger was an offensive weapon, but after the applicant explained that it was part of her religious faith, they pointed out that it was jewellery and was strictly prohibited on the production line. The respondents sought to find out if other arrangements could be made, but as they could not, the applicant was dismissed immediately for wearing jewellery on the production line.

The tribunal noted that the Sikh code of conduct (The Reht Maryda) enjoined all Sikhs to observe the five K's; the Kesh (unshorn hair), the Kirpan (sheathed sword), the Kacha or Kacchera (drawers-like garment), the Kangha (comb), and the Kara (steel bracelet). The applicant followed this injunction.

In the light of the House of Lords case of *Mandla v Dowell Lee* [1983] IRLR 20 that established that Sikhs were an ethnic group, the tribunal concluded that the applicant was discriminated against indirectly by being dismissed. The tribunal also decided that they could not see that the Kirpan under the clothing effected food hygiene and concluded that there was no justification for the respondents' action.

The tribunal adjourned the case to deal with compensation. It indicated, however, that the issue of compensation may be affected by other of the five K's in particular the Kara (the steel bracelet). The Tribunal indicated that it is possible that if the applicant insisted on wearing the Kara whilst working, the issue of hygiene may have to be re-considered and this may have a bearing on the amount of compensation that it may order.

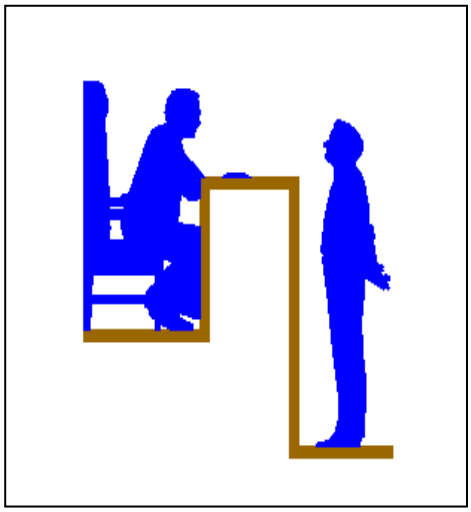
The tribunal noted in its conclusions that the respondents had not intended to discriminate against the applicant because of her ethnic origin. This would mean that no compensation could be awarded.

If this case goes to a remedy hearing, a further DLA briefing will be produced at that time.

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 68 QUESTIONS NOT TO ASK IN COURT



Q: *Was that the same nose you broke as a child*?

Q: Now, doctor, isn't it true that when a person dies in his sleep, in most cases he just passes quietly away and doesn't know anything about it until the next morning?

Q: What happened then?
A: He told me "I have to kill you because you can identify me."
Q: Did he kill you?

Q: Was it you or your brother that was killed in the war?

Q: Were you alone or by yourself?

Q: Can you describe the individual?
A: He was about medium height and had a beard.
Q: Was this a male or female?

Q: How far apart were the vehicles at the time of collision?

Q: Mr. Clark, you went on a rather elaborate honeymoon, didn't you*?*
A: I went to Europe, sir.
Q: And did you take your new wife?

Q: I show you Exhibit 3. Do you recognise that picture?*.*
A: That's me.
Q: Were you present when that picture was taken?

Q: Were you present in court this morning when you were sworn in?

Q: How many times have you committed suicide?

Q: She had three children, right?
A: Yes.
Q: How many were boys?
A: None.
Q: Were they girls?

We would welcome further contributions from DLA members to this new area of DLA briefings. Please send or fax your contributions to:

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DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 69 STATISTICS - Tribunal decisions in race discrimination case received by the CRE during 1997

The figures in the table (overleaf) relate only to those tribunal decisions that have been sent to the Commission for Racial Equality by industrial tribunals. Care must be taken when looking at the success rates. The final (other) column includes interlocutory decisions. If that column is disregarded, and those columns relating to withdrawn and settled cases, then the success rate overall is 17% (73 out of 417 cases). The published tribunal statistics (Labour Market Trends) for 1995/96 indicated that 109 cases were successful after IT hearing and 453 were dismissed at I.T hearing (a percentage of 19%). The comparable percentage for 1994/95 was 15% (72 out of 462).

Looking at the percentage of successful cases by IT office and disregarding statistically insignificant numbers below 10 hearings, Leeds I.T leads the way. Their 45% success rate is followed by: Stratford 26%, Bristol 21%, Nottingham 20%, Birmingham, Bedford and Manchester draw at 18%, London South 12%, London North 11%, Reading 6% and Southampton 4%. These figures should be treated with caution, however, as it is by no means certain that all the written decisions of race cases are sent to the CRE, as they should be.

STATISTICS - CRE LEGAL DATABASE

INDUSTRIAL TRIBUNAL RACE DISCRIMINATION DECISIONS RECEIVED BY CRE: I.T. LOCATION AND OUTCOME 1 JANUARY 1997 TO 31 DECEMBER 1997

TRIBUNAL	TOTAL	SUCCESS	DISMISS	WITHDRAW	SETTLE	OTHER
Aberdeen	2	-	1	-	-	1
Ashford	20	2	9	3	5	1
Bedford	70	5	23	18	17	7
Birmingham	154	10	46	34	50	14
Brighton	6	1	1	1	-	3
Bristol	29	3	11	7	7	1
Bury St Edmunds	18	2	5	6	5	-
Cambridge	2	-	1	-	1	-
Cardiff	9	-	3	2	4	-
Dundee	3	-	3	-	-	-
Edinburgh	2	-	-	-	-	2
Exeter	4	-	1	1	-	2
Glasgow	12	3	6	-	1	2
Hull	3	-	1	1	-	1
Leeds	70	10	22	13	22	3
Leicester	7	1	2	1	2	1
Liverpool	22	2	9	6	3	2
London (North)	70	4	33	13	10	10
London (South)	154	9	63	30	39	13
Manchester	51	5	23	8	13	2
Middles-brough	2	-	2	-	-	-
Newcastle	11	-	4	3	3	1
Norwich	1	-	1	-	-	-
Nottingham	32	3	12	10	6	1
Plymouth	2	1	-	-	1	-
Reading	29	1	14	2	11	1
Scotland (?)	7	1	2	1	3	-
Sheffield	14	2	2	4	5	1
Shrewsbury	10	1	1	4	4	-
Southampton	54	1	22	20	9	2
Stratford	32	5	14	5	5	3
Not Known	55	1	7	8	37	2
TOTAL	957	73	344	201	263	76
%	100%	8%	36%	21%	27%	8%

(Source: CRE Decisions Database)

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 70 COMPENSATION FOR INJURY TO FEELINGS – Disability Discrimination Act. O'Connor v Spankers Ltd, Leeds IT 1804372/97

The above case was heard in the Leeds Industrial Tribunal on 5 December 1997 and is reported by way of information to DLA members concerning the level of compensation for injury to feelings in DDA claims.

The Applicant was disabled from birth with curvature of the spine. She applied for a job as machinist that was advertised as paying an hourly rate. At interview she made it clear to the Respondents that she could not work on piece rate due to the nature of her disability. She was hired by them to be paid at an hourly rate.

After several months the Respondents complained about the output of the Applicant and three other workers, none of whom were disabled. The Respondents offered alternative work to one of the other workers and told the Applicant and the remaining two workers they would have to do piece work. This was contrary to what had been agreed between them and the Applicant. She was given a trial period to adjust to working piece rate. During this time the Applicant tried to increase her speed of work to enable her to work on piecework and as a result became ill with an illness related to her disability. After she became ill she was dismissed from service by reason of poor work performance, even though the trial period had not come to an end.

On her behalf it was submitted that the requirement to undertake piecework was less favourable treatment on account of disability and had led to her becoming ill. Failure to offer her alternative employment, as had been done with one of the other women, was a failure to make a reasonable adjustment. The dismissal was less favourable treatment on account of disability and had in reality been caused by her taking time off sick, and not by poor performance.

In his decision the Chairman, Mr Simpson, awarded the applicant £2,500 compensation in respect of injury to feelings as well as the sum of £103 damages for breach of contract.

In respect of the disability discrimination he stated that he was:

> *"Satisfied that the Applicant worked hard and that she did her best and that when she was told her employment was no longer required and*

that this was clearly on the basis of her disability this must have caused considerable injury to her feelings".

He went on to state that

"Not only did the Respondents dismiss her by reason of her disability, but they singularly failed to take such steps as they could have taken to make life for the Applicant much easier".

If readers require any further information concerning this case they can contact me: 0113 249 1100.

Pauline Hughes
Harehills & Chapletown Law Centre

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 71 GOOD NEWS FOR WOMEN RETURNING FROM MATERNITY ABSENCE, Crees v London Mutual Insurance Society Ltd and Greaves v Kwik Save Stores Ltd

Time after time, judges, lawyers, the Maternity Alliance and others have echoed the criticism by one Law Lord (Lord Browne Wilkinson) that maternity provisions are of

> 'inordinate complexity exceeding the worst excess of a taxing statute' and that this is especially regrettable bearing in mind that they regulate the everyday rights of ordinary employers and employees'. (*Lavery v Plessey Telecommunications Ltd [1983] IRLR 202, CA)*

At last the Court of Appeal have cut through the complexity and delivered a simple, fair and common sense judgment. The issues were relatively simple. The question was whether a woman, who had given notice of her intention to return to work after her maternity absence, lost her right to her job if, as a result of temporary illness, she is unable to work on the date she said she would return. (Note: extended Maternity leave allows a woman to return to work up to 29 weeks after the beginning of the week the baby was born).

The EAT found in both cases that if the woman did not return to work physically her employment came to an end. The idea that the contract of employment disappears 'in a puff of smoke' because on one particular day a woman is unable to work due to sickness is nonsense - and so found the Court of Appeal.

The Court of Appeal quoted from *Brown v Stockton-on-Tees Borough Council ([1989] AC 20*) saying that the legislation provided 'special protection for the security of employment of pregnant women' and the provisions must be seen

> '...as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable inconvenience for an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace'.

The CA, in *Crees* and *Greaves* said that the provisions 'should be construed in the context of the statutory purpose' as identified above 'both as to the result to be achieved and the means by which it is to be achieved.

The CA held that:

1. the employees gave all the necessary notices;

2. the employees were entitled to the right to return to work and to exercise it whether a contract of employment actually continued to exist during their absence or whether it had been terminated prior to giving notice;

3. a woman should be ready and willing to work on the notified day of return, unless she has a good reason; absence without good reason can amount to conduct which constitutes a potentially fair reason for dismissal;

4. a woman effectively exercises the right to return to work when she gives notice that she intends to return; nothing more is required to be done for the right to be exercised. Both women therefore had a right to claim they had been unfairly dismissed if they were not allowed to return because they were sick;

5. The critical point is that the process of exercising the right to return to work is complete before the notified date of return actually arrives. It is complete once the appropriate notices have been given for the notified day of return (21 days written notice of return is required).

6. The contract of employment was deemed to continue because the women had exercised their right to return. Thus, both women were dismissed for the reason that the employer had failed to allow them to return to work. The CA also held that the decision *in Kelly v Liverpool Maritime Terminals Ltd* did not bind the court.

Note

- In order for there to be a dismissal, there must be a contract of employment;

- A woman, like any employee, should give the employer notice that she is ill and cannot return to work on the notified day;

CONCLUSION

An important point is that, in maternity cases, tribunals and courts should look to the purpose of the statute - which is to protect pregnant women. The reference to *Brown* and its adoption by the CA will be important for all maternity claims.

Camilla Palmer
Bindman & Partners

BRIEFING No. 72 MATERNITY RIGHTS UPDATE

There have recently been a number of important decisions on maternity rights including one Court of Appeal decision (see *Crees* and *Greaves* - which is the subject of a separate briefing no: 71), one EAT decision and three opinions from the Advocate General on maternity issues.

1. Protection from dismissal for pregnancy related sickness

After the ECJ decision in *Hertz* it has been commonly accepted that a woman who was dismissed as a result of a pregnancy related sickness absence which occurred after her return to work would have no discrimination claim **unless** a man in a similar situation would have been dismissed. This may no longer be the case.

In *Caledonia Bureau Investment & Property v Caffrey*[2] a woman was unable to return to work because of postnatal depression. She was dismissed after giving her employer three sick notes.

The Scottish EAT held that if a pregnancy-related illness arises during the period of maternity leave or absence and this is the direct cause of dismissal, the Employment Rights Act (s99 (1)(a) makes a dismissal - because of that pregnancy related illness - automatically unfair. It was, in addition, discrimination because the illness was one from which a man could not suffer.

This decision extends protection to women who are dismissed for pregnancy related sickness, even if the dismissal takes place after the end of maternity leave/absence.

ADVOCATE GENERAL'S OPINIONS:

The following questions have been addressed by the Advocate General

2. Can a woman be sacked because she has pregnancy-related sickness?

In *Brown v Rentokil Initial UK Limited*[3] Mary Brown was sick, for pregnancy related reasons, from 16 August 1990 until her baby was born on 22 March 1991. The contract provided that an employee who was off work for more than 26 weeks would be dismissed. She was dismissed one and a half months before she gave birth.

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2 EAT/1127/97; 13.1.98.

3 Opinion of AG Colomer delivered on 5.2.98; Case C-394/96.

The AG said that the dismissal of a woman whilst she is pregnant, on account of unfitness for work caused by her pregnancy, by taking into consideration a situation in which only women can find themselves, is direct discrimination contrary to the Equal Treatment Directive. This applies even if the contract provides for dismissal.

The Advocate General says that he does not consider the *Larsson* judgment to be a sufficient basis for the view that the ECJ wished to make a U-turn on its case law

IMPLICATIONS:

If followed by the ECJ, it will mean that an employer cannot take into account pregnancy related sickness that occurs from the beginning of the pregnancy until the date the woman returns to work. If she is ill after her return, this may not be discrimination under EC law, but it may be automatically unfair to dismiss her under the Employment Rights Act.

GOOD QUOTES:

> 'What is involved here, ultimately, is the duty incumbent upon us all of progressively removing all traces of the discrimination which women have suffered over the centuries, a duty to which the institutions of the European Union are so deeply committed'.
>
> *'The fact that women bear children and men do not has been the major impediment to women becoming fully integrated into the public world of the workplace'.* [4]

3. Is it unlawful to pay a woman less because her sickness is pregnancy related?

In *Pedersen*[5] the AG said that a woman must be paid the same contractual pay whether her absence is due to pregnancy related sickness or non-pregnancy related sickness.

A contractual provision whereby a woman only receives half her salary during the period three months before and three months after the birth was a breach of Article 119, where an employee off work for any other reason would receive the whole of her/his salary.

4. Can an employer force a woman to start maternity leave if she has a pregnancy-related absence in the 6 weeks before the expected week of childbirth?

The Employment Rights Act provides that where a woman is absent wholly or partly because of her pregnancy (because, for example, she is sick) the employer may

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4 Lucinda M. Finley, Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate, Columbia Law Review, Vol. 86:1118, p. 1119.

5 *Pederson v Dansk Tandlaegeforening* ECJ Employment Law Watch No 5 Spring 1998.

insist that she starts her maternity leave immediately[6]. In *Boyle*[7] the Advocate General said that if the woman is unfit for work on account of pregnancy immediately before the date she is due to start her maternity leave, then, if the birth occurs whilst she is off, the commencement of her maternity leave may be backdated to the later of either:

- the beginning of the period of sick leave, or
- the start of the 6th week prior to the EWC.

What is not clear is whether, if the woman has a pregnancy-related absence (such as sickness) but recovers before her leave is due to start, she can be triggered on to maternity leave. In other words does the trigger rule apply where the pregnancy-related sick absence is not immediately followed by the birth?

5. Return to work after sickness during maternity leave/absence

Where a woman is sick while she is on maternity leave or absence, and she chooses to return to work and claim paid sick leave, she must return to work when she is well; she cannot then go back on to maternity leave/absence. This is the view of the Advocate General in *Boyle* (see above).

6. Repayment of contractual maternity pay if no return to work

Many employers require a woman to repay contractual maternity pay if she does not return to work for a specified period. In *Boyle* the Advocate General did not consider this was a breach of EC law.

Note that a woman cannot be required to repay statutory maternity pay. This amount is not recoverable.

If, however, a woman returns to work, but only to an inferior job and then resigns and claims constructive dismissal, it is strongly arguable that her contractual maternity pay is not repayable. She has shown herself willing to return but her employer has denied her the right to return; this is a breach of contract and a deemed dismissal.

7. Is a woman on extended maternity absence entitled to holiday and pension?

The Advocate General's view in *Boyle* is that:

a. a woman is not entitled to pro rata holiday for the period she is on extended maternity absence. Note that she is entitled to pro rata holiday during the 14 weeks maternity leave period

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6 ERA s72(1). Her SMP will start immediately.

7 *Boyle and others* **v EOC** Opinion of AG Colomer delivered on 19.2.98; Case C-411/96.

b. a woman is not entitled to receive the employer's contribution to her pension during the unpaid part of extended maternity absence.

8. What is the effect of unpaid maternity leave on pensionable service and entitlement to voluntary redundancy?

The issue of the effect on unpaid leave on accrual of pensionable service and entitlement to voluntary redundancy payment is to be decided in *Davies v Girobank.*[8]

9. Is a woman on maternity leave entitled to a Christmas bonus?

This is a question to be decided in *Lewen v Denda*[9]

10 Does the contract of employment continue during extended maternity absence?

This important question is to be decided by the Court of Appeal in *Halfpenny v IGE Medical Systems Ltd 10* which is being supported by the EOC.

Camilla Palmer
Bindman & Partners

8 C-197/97.
9 C-333/97.
10 [1998] IRLR 10.

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 73 IGNORE TERRITORIAL LIMITATIONS OF DISCRIMINATION LAWS FOR EU. Bossa v Nordstree Ltd & Hall, Times Law Report 13.3.98

The decision of the EAT given on March 2nd 1998 in this case was that the Industrial Tribunal should ignore the territorial limitations of the Race Relations Act 1976 when contrary to EC law. The case concerned an allegation of discrimination against an Italian national living in Britain who applied for a job to work out of Rome as cabin crew with an airline. The EAT allowed the appeal holding that Article 48 trumped the more limited provisions of the Race Relations Act 1976.

Mr Bossa had seen an advertisement in the national press for cabin crew with a company named in their advertisement as "Ansett Worldwide". They were seeking The decision of the EAT given on March 2nd 1998 was that the Industrial Tribunal should ignore the territorial limitations of the Race Relations Act 1976 when contrary to EC law. The case concerned an allegation of discrimination against an Italian national living in Britain who applied for a job to work out of Rome. The EAT allowed the appeal holding that Article 48 trumped the more limited provisions of the Race relations Act 1976.

Mr Bossa had seen an advertisement in the national press employees as cabin crew who had a passport from the European Union. He went for an interview at Gatwick but on arrival was rejected by Ms Hall who said "the Italian authorities do not allow us to take employees of Italian nationality back to Italy". This was repeated in correspondence with Mr Bossa. The EAT commented that when his case came before the IT "there can be no doubt … that Section 8 of the Race relations Act 1976 deprived Mr Bossa of any remedy in relation to the Respondent's refusal to offer him employment on the grounds of his nationality". Although Mr Bossa invoked Article 48 of the EC Treaty before the tribunal it concluded that Section 4 of the Race Relations Act 1976 taken with Section 8 limited the scope of the act to employment in Great Britain.

Article 48 of the EC Treaty says:

> "1. Freedom of movement for workers shall be secured within the community by the end of the transitional period at the latest.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work an employment."

The EAT held that it had a direct effect and could be relied upon by an individual. In this respect they relied on *Van Duyn v The Home Office [1975] Ch 358.* There had been some doubt in the past whether Article 48 could be relied upon only against the State or could be relied by an employee against an employer. In *Walgrave [1974] ECR 1405* Advocate General Warner said at page 1424:

> "No one doubts that Article 48 has a direct effect in the legal system of the member states. The Court has so decided in *Commission v France* nor does anyone doubt that the Article is binding not only the Member State but also on private persons within the community."

Article 48 was also relied on in the recent football transfer case, *Bosman [1995]ECR I-4921* (para.83) where it held:

> "The Court has held that the abolition as between Member States of obstacles to free movement of persons and for freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations not governed by public law."

Having considered these and other cases the EAT concluded:

> "…the fact that the Court in *Bosman* said that the Article extended to rules aimed at regulating gainful employment in a collective manner does not lead to the conclusion that the Article must be read as so confined. The court was *including* within Article 48 the collective rules regulating transfer fees, rather than *excluding* individuals from relying on the Article. The Court reiterated in paragraph 93 the fact that freedom of movement for workers is one of the fundamental principles of community law."

The EAT also rejected a submission in writing on behalf of the employer that Article 48 could not apply because Mr Bossa was seeking to return to work in Italy, his home country.

Accordingly the EAT held that:

> "It will be the duty of the Industrial Tribunal to override any provision in the race discrimination legislation which is in conflict with…Article 48…It is possible to give effect to the supremacy of European law by simply disapplying in this case Section 8. That means the Industrial Tribunal will consider the complain in the normal way and if appropriate make such orders with regard to remedy as lies within their competence under the Act."

This decision may have a similar effect on the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995 in similar circumstances.

Robin Allen QC

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 74 **INDIRECT DISCRIMINATION - EITHER SEX CAN CLAIM PROVISION IS UNLAWFUL AND SHOULD BE SET ASIDE,**
Jesuthasan v London Borough of Hammersmith and Fulham
Court of Appeal, Times Law Report 5.3.98

Mr Jesuthasan was employed as a Maths teacher at Wormwood Scrubs Prison on a fixed term contract that expired on July 30th 1993. He worked 8 hours per week. After his dismissal he complained to the IT of racial discrimination but following an amendment he claimed additionally that he had been unfairly dismissed and/or was entitled to a redundancy payment. He made his application to amend on April 18th 1995. This was after the Employment Protection (Part-Time Employees) Regulations 1995 came into force. Those Regulations amended the Employment Protection (Consolidation) Act 1978 in consequence of the decision of the House of Lords in the part-time workers case *R v Secretary of State for Employment ex parte Equal Opportunities Commission [1995]1 AC 1*.

It will be recalled that in *ex parte EOC*, the House of Lords declared that the part-time workers exclusion from the protection contained within the EP(C)A 1978 was contrary to Article 119 of the EU Treaty and Directive 76/207, because they were indirectly discriminatory against women.

The Court of Appeal decided that the amendment regulations were of no relevance because his dismissal took place before they came into effect. His employer contended that he could not take the benefit of the declarations in ex parte EOC because he was a man. So the question raised by Mr Jesuthasan's amendment was whether he could take the benefit of the declaration of the House of Lords although he was a man.

The Court of Appeal held that if a provision is indirectly discriminatory on grounds of sex against one sex, and thereby contrary to community law, either sex can claim that the provision is unlawful and should be set aside.

The case before the Court of Appeal benefited from the general declaration of law by the House of Lords in *ex parte EOC*. Mr Jesuthasan only complained of unfair dismissal, and sought a redundancy payment. In effect what he was saying was that the part-time workers exclusion in the1998 Act had been declared as inapplicable. For the employer to seek to rely on them was an attempt to reintroduce the provisions contrary to the declaration of the House of Lords.

This decision brings coherence to the law of indirect discrimination. However, it also raises important questions as to how far this obviously logical approach can be pushed. For instance, in a case where there is an indirectly discriminatory selection procedure for redundancy, affecting more women than men, can a man claim unlawful sex discrimination contrary to the Sex Discrimination Act 1975? In logic it might be said that if the provision is an act of sex discrimination against women it would be discriminatory to allow only women who have been penalised by the provision (but not men so penalised) to complain.

This case will help those male employees who have joined in the pension cases in which compensation has been sought because of differential treatment of part-time workers, and those male employees who have worked for less than 2 years and have brought *Seymour-Smith* type claims.

Robin Allen QC

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 75 TIME LIMITS RUN FROM EACH AND EVERY DECISION MADE BY EMPLOYER; approach in Owusu to acts "extending over a period" also approved.
Cast v Croydon College,
Court of Appeal, March 19th 1998;
Times Law Report 26.3.98

Mrs Cast was employed as the Manager of the Information Centre at Croydon College. In early 1992 she asked whether she would be able to work part-time / job share after her return from maternity leave. Her line manager refused her request on March 26th 1992.

In July Mrs Cast went on maternity leave and in August gave birth to a son. On Mach 1st 1993 she returned to work and for a while was able to comply with her contractual commitment to work full time, but in practice worked less than 5 days a week by utilising accrued leave. On March 16th and May 10th 1990 she again asked her line manager whether she could work part-time and he again refused. On May 14th he wrote to her giving reasons for the refusal.

On June 7th 1993 Mrs cast gave notice terminating her contract of employment on the basis that she felt that she could not continue to work full-time. She presented her application to the Industrial Tribunal alleging sex discrimination and constructive dismissal on August 13th 1993.

The IT, and subsequently the EAT, held that the time limit ran from the first date when her request to work part-time had been refused - i.e. from March 26th 1992 and that, accordingly, her complaint of sex discrimination had been presented over 13 months out of time. The IT held that the later refusals were repetitions of the earlier one and did not trigger time to run again. Further, they held that the act complained of was not one that extended over a period (within the meaning of section 76(6)(b) of the Act). They went on to hold that it was not just and equitable to extend time in the circumstances, given, in particular, that the complaint was so many months out of time. The EAT upheld the decision and determined that it disclosed no error of law (reported at *[1988] ICR 77*).

The Court of Appeal (Lord Justice Otton, Auld and Robert Walker) allowed the appeal. They found in Mrs Cast's favour on two bases.
Firstly, and following the authority in *Rovenska v General Medical Council [1998] ICR 85*, the Court of Appeal held that the three months time limit ran again from each decision to refuse Mrs Cast's request to work part-time. The Court helpfully clarified that the principle laid down in the *Rovenska* case did not require an applicant to show that there was a material change of circumstances or that new information had been presented before the further

decision. Time ran again provided there was a further consideration of the issue - whether or not this was based on the same facts as before - as distinct from merely a reference back to the earlier refusal. On the facts found by the IT Mrs Cast's line manager had reconsidered the issue each time he gave his refusal. Thus time ran from the latest refusal, being May 10th 1992.

On the basis of this conclusion the claim was presented a few days out of time, as opposed to 13 and half months late. The Court of Appeal therefore indicated that they would have remitted the case to the IT to exercise their just and equitable discretion afresh, were it not for the fact that the Appellant also succeeded on the second limb of her argument.

This was that Mrs Cast's complaint of sex discrimination entailed a complaint of an underlying policy or practice that her post was not suitable for part-time working or job sharing and thus related to an act extending over a period. The Court of Appeal approved the broad definition of an act extending over a period given by the EAT in *Owusu v London Fire Brigade & Civil Defence Authority [1995] IRLR 574.* They emphasised that there may be a policy or practice for this purpose even though it is not of a formal nature or expressed in writing; further, it may be confined to a particular post or role. If the complaint encompassed such a policy then the discriminatory act extended over the period of the employment and so was treated as being done at the end of the employment.

Although the College had a general written policy of receptiveness to job sharing at all levels of post, there was a policy or practice as alleged in respect of Mrs Cast's position. This was evidenced by the reasons given in the letter of March 14th 1993, which indicated that the College did not regard the position of Information Centre Manager as suitable for job-sharing. Accordingly, time had not started to run against Mrs Cast until the end of her employment and her claim was presented in time.

The Court of Appeal decision is a very helpful one for employees. Mrs Cast did not want to commence tribunal proceedings when her manager first refused her request to job-share. At that stage it was early day - her baby had not even been born - and she was hopeful that over the months continued negotiation with her employer on the issue would lead to a more flexible response. However, if the EAT decision had stood she, and any other employee in a comparable position, would have been forced to take the confrontational step of issuing tribunal proceedings within three months of the first time that they received an adverse decision on their request. The issue is not confined to requests to work part-time, but could arise in relation to any situation where an existing employee seeks a change in their terms and conditions of employment. The Court of Appeal's decision indicates a much more flexible approach for employees. A request may be made on a number of occasions before proceedings are issued. On each occasion their employer reconsiders the issue and makes a fresh decision time will run again. This will also be of assistance to advisors who are frequently approached by clients more than three months after an adverse decision has been made. It should now be relatively easy to trigger a further decision and thus a further time period in which to present the claim.

The Court of Appeal's decision is also helpful in terms of the broad approach that it took to what amounts to an act extending over a period. Any decision that is not based on considerations that are by their nature transitory or "one-off" (e.g. the office is short-staffed at the moment / X does not have enough experience) has the potential of being based on an underlying policy or practice (e.g. decisions based on the nature of the business, the nature of the post, the way the business is organised etc,). In Mrs Cast's case the relevant policy was simply that her post was too fundamental to the smooth running of the organisation to be shared. Advisors will need to consider carefully the way that complaints of discrimination are framed so that the underlying policy or practice is identified and encompassed within the complaint of discrimination if there is a potential time limit problem.

Heather Williams
Barrister
Doughty Street Chambers

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No. 76 REMOVAL FROM TRAINING FOLLOWING PREGNANCY UNLAWFUL.
Tapp v Chief Constable of Suffolk Constabulary, Bury St. Edmunds IT 1501546/97

The Applicant commenced the 31-week police probationer training course on October 21st 1996. On informing the Force on January 6th 1997 that she was pregnant, the Applicant was immediately removed from the training course and placed on light clerical duties at her local police station. Having obtained advice from her GP that she could safely pursue her training, the Applicant asked if she could continue the course at her own risk as was provided for in the Respondent's personnel policy. Her request was refused. Furthermore, she was informed that when she returned from maternity leave she would have to restart the entire training course.

The Tribunal found unanimously that the Applicant was discriminated against because of her sex.

It rejected the Respondent's submission that it was entitled to rely on section 51 of the Sex Discrimination Act 1975. That section provides that no act shall be unlawful if done in order to comply with requirement of an existing statutory provision concerning the protection of women. The tribunal found that while the defence afforded under that section would be available to a police force prior to the Police (Health and Safety) Act 1997 coming into force, essentially via the EU

Pregnant Workers Directive, it was not possible to rely on the section simply by purporting to have made the decision under it. The relevant health and safety code (in this case, as set out in the Pregnant Workers Directive) would have to be followed. As no risk assessment had been carried out nor any medical advice sought prior to coming to its decision, the Respondents could not now rely on the section.

The Tribunal also rejected the Respondent's submission that, as the course was designed to render any absence impossible, the Applicant would have to re-do the entire course on her return from maternity leave. The Tribunal accepted the Applicant's evidence that some of her colleagues had been permitted absences from all or some parts of the course, for example, when suffering from injury. The Tribunal also found that the Force's policy permitting women officers to continue with full duties at their own risk applied equally to the Applicant even though she was a probationer constable.

The decision in this case, whilst not binding, stresses the importance of properly assessing the risks and complying with the legislative code when making decisions concerning the type of work which a pregnant worker is capable of undertaking.

Emma Hawkesworth
Russell Jones and Walker