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77. DEALING WITH DISCRIMINATION CASES – EAT GUIDANCE TO INDUSTRIAL TRIBUNALS. *Tchoula v Netto Foodstores Ltd,* EAT 1378/96, 16.3.98

78. COMPENSATION ISSUES – various cases

79. INDIRECT DISCRIMINATION: PROHIBITION OF WEARING HIJAAB INDIRECT RACE DISCRIMINATION. *Bi v J &G Mantle t/a Elderthorpe Residential Home.* Leeds IT 1804366/97, 10.2.98

80. LANGUAGE TESTS INDIRECT RACE DISCRIMINATION . *Sunner & others v Air Canada and Alpha Catering Services.* London south IT 2303121/97, 20.2.98

81. STATUTORY APPOINTMENTS AND DISCRIMINATION LAW – NHS EXECUTIVE DIRECTORS APPOINTMENTS. *Ogunlokun v Secretary of State for Health & others.* Ashford IT 1102261/97. 16.2.98

82. OVERHEARING RACIAL INSULTS CAN AMOUNT TO A DETRIMENT: EAT UPHOLDS TRIBUNAL DECISION *The Post Office v Chin,* EAT/162/97, 2.3.98

83. VICTIMISATION: TRIBUNAL SHOWED "COMPLETE LACK OF UNDERSTANDING OF THE REQUIREMENTS OF THE LEGISLATION…". *Sadiq v Royal Mail, EAT/927/97, 5.3.97*

84. JUDICIAL REVIEWS AND TRIBUNAL CLAIMS IN DISCRIMINATION CASES. *Ebuzoeme & Ayanwu v South bank Students Union , South Bank University and others.*EAT/648/97 and EAT/606/97, 16.2.98

85. COMPLAINTS OF DISCRIMINATION IN LICENSED PREMISES AND REGISTERED CLUBS: REVIEW OF AN ARTICLE.

86.	TRIBUNAL PRACTICE & PROCEDURE: *SEYMOUR-SMITH* CASES SHOULD BE ADJOURNED NOT DISMISSED. *Davidson v City Electrical Factors, [1998]IRLR 108, Scottish EAT*	
87.	LEGISLATION – EMPLOYMENT RIGHTS (DISPUTES RESOLUTION) ACT 1998: A role for ACAS arbitration in discrimination cases?	
88.	DISTRIBUTION OF TRIBUNAL COMPENSATION AWARDS IN SUCCESSFUL RACE DISCRIMINATION CASE (1997)	CRE
89.	GOVERNMENT WHITE PAPER: "FAIRNESS AT WORK" – summary of main proposals	
90.	HARASSMENT IN THE PROVISION OF SERVICES TO THE PUBLIC. *Kelly v Tate & Swift transport Training (NI) Ltd*	Mark Jackson
91.	DISCIPLINARY ACTION AMOUNTS TO UNLAWFUL VICTIMISATION. *Fleming v Chief Constable of Lincolnshire Constabulary,* Nottingham IT 72935/95, 8940/96,4671/96, 18.2.98	Andrew Cook
92.	LEGISLATION BRIEFING: THE HUMAN RIGHTS BILL 1998	Karon Monaghan
93.	LINKAGE BETWEEN RACE, RELIGION AND MARITAL DISCRIMINATION. *Mulholland v Wildcroft Manor Ltd,* London South IT 2301295/96	Karon Monaghan
94.	AMENDING ORIGINATING APPLICATION TO INCLUDE NEW CLAIM. *Ahsworth Hospital Authority v Liebling,* EAT/1436/96	Karon Monaghan
95.	CHALLENGING WORKING HOURS THROUGH THE INDIRECT DISCRIMINATION PROVISIONS OF THE SDA: the impact of *London Underground v Edwards*	Gay Moon
96.	CASE UP DATES: *R v Secretary of state for Employment ex parte Seymour-Smith* and *Goodwin v The Patent Office* (is schizophrenia a disability?)	
97.	SEXUAL HARASSMENT BY PRESSURING THE APPLICANT TO HAVE AN ABORTION AND SUBSEQUENTLY DISMISSING HER*. Harrild v England and Wales Cricket Board*, IT 2203994/97	Gay Moon
98.	DDA UPDATE; HIGHEST AWARD YET? *Kirker v British Sugar PLC,* Nottingham IT 2601249/97, 29.12.97 (remedies hearing)	Douglas Silas

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 77 DEALING WITH DISCRIMINATION CASES – EAT GUIDANCE TO INDUSTRIAL TRIBUNALS. *Tchoula v Netto Foodstores Ltd,* EAT 1378/96, 16.3.98

In this unsuccessful EAT appeal the Appellant raised a number of issues, including the conduct of the case by the Industrial Tribunal Chairman. It was alleged (i) the Chairman made a number of remarks which appeared to be displaying a dismissive approach during the hearings, (ii) one of the lay members had her eyes closed during the proceedings and (iii) in its decision the Tribunal referred to the Appellant as "disingenuous" and described him as arrogant and condescending.

The EAT President noted increasing number of appeals where complaints are made about the conduct of the Industrial Tribunals. In this case, although the EAT concluded that "*there were gratuitous and unnecessary comments made in the Industrial Tribunal's decision which would have been better not made*," they dismissed the appeal as the Industrial Tribunal was entitled, on the evidence before it, to come to the conclusion that it did in the end. The EAT pointed out they were well aware of the "*difficulties industrial tribunals encounter as the fact-finding tribunal, and of the fact that it is rare for the EAT to allow an appeal on the ground of misconduct or bias*." Nevertheless they thought that it might be helpful, if they made some general points which tribunals might wish to keep well in mind.

The EAT's lengthy "*general guidance to industrial tribunals when dealing with discrimination cases whether on grounds of race or sex*", is set out in **full** below:

"*(1) Whether justified or not, it is a fact that many people of minority ethnic origin distrust the judicial system and do not believe that they are likely to receive a fair trial of their complaints. Industrial Tribunals should be particularly careful in the way they approach complaints made by people of such background, so as to make sure that they give no grounds for the belief that a case has not been approached in an entirely even-handed manner. It is not enough for tribunals to avoid any kind of pre-judgment of the merits of a complaint; they should refrain from making any comment which, however well intentioned, might be taken by a litigant, who may well be suspicious about getting justice, as confirmation of his worst fears.*

(2) One way that helps to give confidence to the parties is if the tribunal is well prepared for the hearing. The Court of Appeal has recently stressed the desirability of the tribunal holding directions hearing in the more complicated discrimination cases. These hearings will help to identify the real issues; and with the assistance of written witness statements exchanged in advance of the hearing, together with an exchange of documents well before the hearing, the tribunal should be in a good position to see and identify the issues and to take control over the proceedings when the matter comes on before them. Making

sure that the issues are correctly identified at the outset of a case will give confidence to the participants that they are dealing with a well-informed judicial body, which understands what is in issue. It will also help to make sure that the evidence is directed at the matters in issue.

(3) *Often a complainant will feel a sense of injustice arising out of the way he has perceived himself to have been treated by his employer. He/she wants an independent body to hear and adjudicate on his complaint. As a litigant he is entitled to be treated with respect. He is not inviting the tribunal to pass judgment about him as a person. Tribunals should avoid such judgments and confine themselves to describing the relevant actions of the parties. There is an obvious distinction between describing the act of a person as unacceptable behaviour on the one hand and describing the person who did the act as, for example, 'childish', on the other. It seems to us that tribunals should avoid making personal remarks or comments about a person's personality, whatever the nature of the complaint before them.*

(4) *Where one party is unrepresented, but the other is not, it is important that Chairmen and members seek to minimise the natural fear of the unrepresented party that he or she is something of an outsider in the proceedings. This is always difficult, especially when points of law arise. We suggest that, initially, no generalised assumption should be made that the unrepresented party will not be able to give as much help to the tribunal on points of law and procedure as the represented party. It is our experience that lay people take great pains to prepare themselves to deal with legal argument and can feel patronised by a tribunal assuming that they are likely to have something less useful to say than the trained advocate. For example, asking the legal representative to open the case, where the unrepresented party would normally begin, may be taken as a sign that represented parties have an inherent advantage over those who are not. Sometimes it may be desirable to take such a course, but this question should be approached with care.*

(5) *It is obviously important that at all time the whole panel should be and appear to be alert and interested in what is happening in the tribunal. If the proceedings are not making any 'progress' or the tribunal is not being assisted, it is better that that should be said by the tribunal, rather than it assuming an air of bored indifference. Whilst a professional representative might recognise overt signs of boredom as an indication to move on, this is not an appropriate signal to give a party who is unrepresented.*

(6) *It is not satisfactory that tribunal decision should contain a general statement to the effect that wherever the evidence of the applicant was in conflict with that of the respondent the applicant's or respondent's evidence was to be preferred. In the first place, it is inherently improbable that X's evidence will always be preferred to Y's. The likelihood is that what X says about one issue may be inherently more likely than Y's on that issue, but not an a different issue. Secondly, there is always a reason why on person's evidence has been preferred to another's on a particular point of disagreement. It may be because of other oral evidence, or contemporary documents, or what the parties said or did after the event; or it may be just the inherent probabilities. A bald statement saying that X's evidence was preferred to Y's is, we think,*

both implausible and unreasoned and, therefore, unacceptable; and it might appear to have been included simply to try and prevent any appeal. It seems to us likely that there will be a great deal of background material which is non-controversial. There is no need to recite at length in the decision the evidence which has been received. What a tribunal should do is to state their findings of fact in a sensible order (often chronological), indicating in relation to any significant finding, the nature of the conflicting evidence and the reason why one version has been preferred to another.

(7) *It is always unacceptable for a tribunal to assert its conclusion in a decision without giving reasons. Where the reasons are essentially those put forward in the submissions of one of the parties, which have been set out in full in the decision, then at the least the tribunal should make it clear that it has accepted all those reasons in arriving at is conclusion."*

DISCRIMINATION LAW ASSOCIATION

July 1998

BRIEFING No. 78 COMPENSATION ISSUES – various cases

Whelan and another T/A Cheers Off Licence v Richardson
[1998] IRLR 114 (EAT, Clarke J, presiding)

In an unfair dismissal case where an employee obtains a better paid, should the loss of earnings be calculated up to the date the employee started the new job or should it be assessed at the tribunal remedies hearing with deductions for the earnings from the new job?

The employee, Mrs Richardson, was receiving weekly wages of £72.00 until her unfair dismissal on 4 August 1995. She was unemployed for 2 weeks following her dismissal and then she obtained employment, earning £51.60 per week for 18 weeks. On 27 December 1995, she started a new job, which paid an average of £95.82 per week. By the time the Industrial Tribunal remedies hearing was held in November 1996 she was still in that employment.

The question was whether her loss of earnings should be calculated until 27 December 1995, when she obtained the higher paid job (less the money she earned from the first alternative employment), or whether the loss should be calculated up to the date of the remedies hearing (with deductions for all the wages she earned since her dismissal). If the latter formula was adopted, her claim for loss of earnings would be extinguished by the higher pay she had received from 27 December until the date of the remedies hearing. The Tribunal therefore adopted the first approach and made a compensatory award that included the sum of £511.20 for loss of earnings.

On appeal, the EAT held that the Industrial Tribunal was correct in calculating the employee's loss of earnings. Having reviewed the case law in this area, the EAT stated that although they will not seek to fetter the exercise of discretion by industrial tribunals on the facts of an individual case, it might be helpful to reduce their conclusions to a series of propositions. These are:

"*1. The assessment of loss must be judged on the basis of the facts as they appear at the date of the assessment hearing ("the assessment date").*

2. Where the applicant has been unemployed between dismissal and the assessment date then, subject to his duty to mitigate and the operation of the recoupment rules, he will recover his net loss of earnings based on the pre-dismissal rate. Further, the Industrial Tribunal will consider for how long the loss is likely to continue so as to assess future loss.

3. The same principle applies where the applicant has secured permanent alternative employment at a lower level of earnings than he received before his unfair dismissal. He will be compensated on the basis of full loss until the date on which he obtained the new employment, and thereafter for partial

loss, being the difference between the pre-dismissal earnings and those in the new employment. All figures will be based on net earnings.

4. *Where the applicant takes alternative employment on the basis that it will be for a limited duration, he will not then be precluded from claiming a loss down to the assessment date, or the date on which he secures further permanent employment, whichever is the sooner, giving credit for earnings received from the temporary employment.*

5. *As soon as the applicant obtains permanent alternative employment paying the same or more than his pre-dismissal earnings, his loss attributable to the action taken by the respondent employers ceases. It cannot be revised if he then loses that employment either through his own action or that of his new employer. Neither can the respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to his taking the new employment. The chain of causation has been broken."*

Similar considerations would apply in calculating compensation for loss of earnings as a result of dismissal on grounds of race, sex or disability.

Louis v 1) Ms M Bean and 2) Wandsworth Borough Council

Case no. 38599/96, London South IT: Lamb, I., Chair, 3.2.98

The Industrial Tribunal upheld part of the Applicant's complaint that she was subjected to detriment on racial grounds. The Applicant's line-manager told her at a supervision session that she had become too political as a black woman in comparison to what she had been like when they had first met. The supervisor added that the Applicant was not helping her own cause by being identified with race issues. The Tribunal concluded that those comments were unmistakably in the nature of a warning and discouragement and therefore constituted a detriment.

The Tribunal decided that the award in respect of this matter should be at the low end of the scale of awards and stated that their view "*of the current scale is that it begins around £500*." Having commented it considered that there was a significant injury to feelings by what was said, the Tribunal then decided that the appropriate award was £750(!). It added, however, that as the supervisor clearly reflected her understanding of the attitude of the organisation in which she had managerial role, an award for aggravated damages of £750 was appropriate, giving an overall award of £1,500.

Rose v Barraclough t/a P/A Barraclough Construction
Case No. 2672151/97 - Nottingham IT, Thelfell, J, Chair: 17/2/98

The Applicant was not appointed to a post of a joinery trainee because of his colour. The Tribunal considered that the Applicant had established a significant injury to his feelings, by the action taken by the Respondents and awarded him £2,500 for injury to feelings (plus £1440 for loss of income). The Tribunal in this case rejected an argument for an award of aggravated damages and concluded that it has not been able to find any aggravating features over and above what happens to someone not being offered a job because of their race. In fact both the Applicant and Mr Barraclough (the Respondent) accepted that when they met, the conversation was polite and they shook hands.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 79 **INDIRECT DISCRIMINATION: PROHIBITION OF WEARING HIJAAB INDIRECT RACE DISCRIMINATION.**
Bi v J &G Mantle t/a Elderthorpe Residential Home.
Leeds IT 1804366/97, 10.2.98

The Applicant, who was of Pakistani origin and a practising Muslim, wore a hijaab. She initially worked for the Respondents for a two-week period in 1996/97. In the summer of 1997 she applied for a vacancy and at her interview Mrs Mantle, one of the respondents, said there was a uniform requirement. The Applicant agreed to adhere to the uniform code, but said she wished to continue to wear her hijaab. Mrs Mantle said this was not satisfactory and was not prepared to offer her employment. No other explanation was given.

The Applicant wrote to the Respondents on 16 July 1997, pointing out that she had previously worked for them and asked them to specify the reasons for not employing her. In her reply, Mrs Mantle stated she had considered the implications of taking on someone not experienced. She also confirmed she did mention the "scarf" in her discussion and added that anyone wearing the "scarf" gave her concern because of the aggressive behaviour of some of the residents who suffered from dementia. She felt that this would be a risk, which she would prefer to avoid.

The Tribunal noted that, in their replies to the questionnaire, the Respondents gave 11 reasons as to why they did not re-employ the Applicant and these were entirely different from the single matter raised at the interview on 7 July 1997. The Tribunal found this was wholly inconsistent. There was no claim for direct racial discrimination because Muslims did not constitute a racial group for the purposes of the Race Relations Act. The IT held there was indirect race discrimination. The Respondents had failed to show the requirement or condition (not wearing a hijaab), "*which a significantly lower proportion of the company's Asian workers could comply with compared to non-Asian workers",* was justifiable. The applicant could not comply with the requirement because of her religious beliefs.

Following *JH Walker v Hussein* [1996] IRLR 11, the Tribunal concluded that the Respondents could not show they were unaware of the effects of the requirement. They knew the Applicant wore a hijaab. The Tribunal, therefore, awarded the Applicant £1,253 in respect of injury to feelings and her economic loss (agreed between the parties of £105 - five days pay).

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 80 **LANGUAGE TESTS INDIRECT RACE DISCRIMINATION**
Sunner & others v Air Canada and Alpha Catering Services. **London south IT 2303121/97, 20.2.98**

The eight Applicants were of South Asian origin and had all failed in their applications for re-employment with Air Canada after the cleaning and catering section in which they were working was sold to Alpha Catering. Having transferred the undertaking to Alpha Catering, Air Canada identified a number of potential vacancies within their organisation, which they ring-fenced for applications from their former catering and cleaning employees. Many of the employees did not want to go to Alpha Catering because of the attractive pension and travel concessions that Air Canada offered.

There was a simple written test followed by structured interviews. The written test consisted of 20 questions, which had to be completed in 15 minutes. No assistance was offered to persons whose first language was not English. When the tests had been marked, too many people had passed the test so they listed as many candidates as they thought they could comfortably interview.

Air Canada then transferred 40 or so employees to the other positions within their operations and the rest, including all the Applicants, became employees of Alpha Catering. Of the 125 staff who were potential transferees back to Air Canada, 46% were white, 45% Asian and 10% Afro-Caribbean or other. Of those who were finally selected to remain with Air Canada, 71% were white and only 19% Asian. In contrast, those who had to transfer to the new company were 30% white and 63% Asian. Accepting that there was a detriment in transferring to the second Respondents, then it was clear that a far greater percentage of Asians suffered that detriment than whites.

The question that faced the Tribunal then was whether there was any direct or indirect discrimination against the 8 Applicants.

The Tribunal found that 5 of the Applicants had no problem in passing the written test and were interviewed, but 3 of the Applicants failed the written tests. Having addressed itself to the question of indirect discrimination under the Act - s.1 (1) (b) - the Tribunal was satisfied that the requirement of passing a written test was such that the proportion of persons of the Applicants' racial group who could comply with it was considerably smaller than the proportion of persons not of that racial group, and the Applicants could not comply. As to justification, the Tribunal found that it was "instructive" in one case that the Applicant had done the job of aircraft cleaner for four years, but still failed the test. The IT concluded that the Respondents could not show that the test was justifiable.

The Tribunal then went on to consider whether s.57 (3) of the Act (i.e. intention) applied and directed itself to the case of *Walker v Hussein* [1996] IRLR 11.

The Tribunal was impressed by the actions of Air Canada, who clearly had no obligation to make the huge effort to find places for employees. They had spent a great deal of money on protecting transferred employees well beyond the requirements of the law and their contracts, and had devised tests which they genuinely believed would be the best way to select persons from a group whom they knew would all be able to do the job. They had negotiated this method with the union who had agreed to it.

The Tribunal concluded that the requirement for a written exam was not applied with the intention of treating the Applicants less favourably on racial grounds. Air Canada did not want to bring about a state of affair where proportionately more whites than Asians passed the test and they could not know that result would follow from their acts. The indirect discrimination was therefore unintentional and no award of damages was made.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 81 **STATUTORY APPOINTMENTS AND DISCRIMINATION LAW – NHS EXECUTIVE DIRECTORS APPOINTMENTS. *Ogunlokun v Secretary of State for Health & others.* Ashford IT 1102261/97. 16.2.98**

At this appeal against the preliminary hearing decision, the Respondents contended that the appointment of a non-executive director of a NHS Trust was a statutory office. Section 5 (5)(a) of the National Health Service and Community Care Act 1990 indicated that non-executive directors were neither employees of the Trust nor of the Secretary of State. The National Health Service Trusts (Membership and Procedure) Regulations echo s. 5 of the 1990 Act. In addition, Section 75 (2)(a) of the Race Relations Act provides that the employment provisions of the Act apply to services for purposes of a minister of a crown or government department, other than service of a person holding a statutory office. In the circumstances, the post was one established by statute and was not one that involved employment.

The Tribunal decided that it had no jurisdiction to consider the complaint. If the applicant had gained the appointment, he would not have been employed, but would have been holding a statutory office.

It should be noted that under s.76 of the Race Relations Act "any appointment by a minister of the crown or government department to an office or post where s.4 does not apply in relation to that appointment there is an obligation that a minister or the department shall not do an act which would be unlawful under s.4 if the crown were the employer for the purposes of this Act." Whilst this section cannot be enforced under either Part II (employment) or Part III (non-employment) of the Act, any clear evidence of racial discrimination in this type of appointments can be challenged under s.53 (2) of the Act through possible proceedings for judicial review. A legal opinion should be obtained immediately if such (meritorious) complaints are received, as there are time limits for judicial review actions in England and Wales.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 82 OVERHEARING RACIAL INSULTS CAN AMOUNT TO A DETRIMENT: EAT UPHOLDS TRIBUNAL DECISION
***The Post Office v Chin,* EAT/162/97, 2.3.98**

The Bedford Industrial Tribunal held in November 1996 that The Post Office discriminated against Mr Chin on account of his race. Part of the complaint concerned the fact that Mr Chin was upset by "racist remarks" directed at a colleague at work. The Tribunal found that the racial taunts and harassment directed at the colleague were made openly and in the presence of Mr Chin. This was not merely a case of someone overhearing a remark that was not intended to be heard. The Tribunal was satisfied that Mr Chin was subjected to racial abuse and harassment that constituted a detriment within the meaning of the Act. The EAT noted:

"….*it was common ground in this Appeal that a racial insult may amount to harassment of the complainant when it is made about somebody other than the complainant, but made in the complainant's presence or hearing in circumstances that cause him or her genuine detriment. That does, however, involved three factual ingredients - the making of the insult, the presence or hearing of the complainant, and detriment*."

The EAT upheld the Industrial Tribunal's decision.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 83 VICTIMISATION: TRIBUNAL SHOWED "COMPLETE LACK OF UNDERSTANDING OF THE REQUIREMENTS OF THE LEGISLATION…". Sadiq v Royal Mail, EAT/927/97, 5.3.97

This was an appeal against the dismissal of Mr. Sadiq's race discrimination claim including victimisation. The Appellant, employed by Royal Mail as a part-time temporary postman from July 1995 to July 1996, was subjected to foul language and swearing by his Manager, Mr Carvell, and complained in writing about the treatment that he had received. The Respondents disciplined the manager and gave him a warning. The manager then complained about the behaviour of the Appellant, as a result of which the Appellant's employment was terminated.

The Appellant argued at the Industrial Tribunal hearing that the manager's response to his complaint (by complaining to his line manager against the applicant) was racially motivated, as was the employer's response to that complaint (his subsequent dismissal).

The Tribunal had found that there was no acceptable evidence that the manager was "racist" – "foul mouthed yes, but racist no." The complaint the applicant made to the employer was therefore not a protected act under the Race Relations Act, and therefore there was no victimisation when the manager made his complaint. The Tribunal also found that the Appellant's dismissal was not victimisation, because information had come to light during the employer's investigation into the manager's allegations against the Appellant and the manager played no part in the dismissal.

The EAT stated that the Industrial Tribunal adopted a wholly wrong approach to the requirements of the victimisation provisions (s.2) of the Race Relations Act 1976 and added:

> *"(the) protected act relied upon was the making of an allegation against Mr Carvell. It was not the Tribunal's function, for the purposes of his complaint of victimisation, to decided whether there was acceptable evidence that Mr Carvell had committed the acts complained of, because it was to be taken that the allegation was true for the purposes of determining the case and victimisation. There was no suggestion made by Royal Mail that the allegation had not been made in good faith."* (emphasis added)

The EAT also commented that the Tribunal's conclusion, that the Appellant's letter of complaint about his manager did not express racism, seems to be completely unsustainable and showed: "*a complete misunderstanding of the requirements of the*

legislation in a race discrimination case". It was abundantly clear that the letter of complaint showed a difference of treatment on grounds of the Appellants racial origin

quite apart from the fact that it was also a complaint that Mr Carvell used “Racist abuse towards him.” The Tribunal had therefore misdirected themselves in law and in fact.

On the question of the dismissal, EAT concluded that the only inference which the tribunal could have drawn (based on the delay in not raising the counter-complaint until after the Appellant had lodged a racial complaint against him) was that the manager was retaliating because of the Appellants earlier claim of victimisation.

The EAT then ordered that the case be remitted to another Tribunal for a fresh hearing. It also indicated that it would be preferable if the listing of this case could be before a full-time Chairman as “*victimisation cases are serious and can have very serious consequences for the parties where the complaint is made out*.”

This case illustrates the increasing complexity of discrimination and victimisation cases, and underpins proposals for the establishment of specialist Discrimination panels. The EAT in this case was clearly of the opinion that the complexities of the victimisation provisions of the Race Relations Act were not appreciated in full by the Industrial Tribunal and the attention of a full time Tribunal Chairman, assisted by a written summary by the Appellant, was called for.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 84 JUDICIAL REVIEWS AND TRIBUNAL CLAIMS IN DISCRIMINATION CASES. Ebuzoeme & Ayanwu v South bank Students Union , South Bank University and others.EAT/648/97 and EAT/606/97, 16.2.98

In this interlocutory appeal the main issue was whether the Appellants' unsuccessful application for judicial review prevented them from bringing proceedings at an Industrial Tribunal. The second issue was whether the third or fourth Respondents should continue should be cited as Respondents in the light of the University's acceptance that they were both acting in the course of their employment.

The Appellants were student union officers and had been excluded from the university by the fourth respondent, Prof. Watkins. These exclusions had been unsuccessfully challenged by way of Judicial Review (JR). The respondents had then successfully argued at an industrial tribunal hearing that the IT proceedings were frivolous and vexatious, in that they had been unsuccessfully in the Judicial Review and they were effectively renewing proceedings in the IT, having already fully canvassed their allegations of race discrimination in their JR.

On appeal to EAT the Appellants argued that the right not be discriminated against on racial grounds was a fundamental right. The EAT also accepted that the JR would not have been willing to adjudicate on the race discrimination issue. Therefore, "this is not a case where the allegation of race was so clearly part of the subject matter of the judicial review litigation… that it would be an abuse of process of the court to allow new proceedings to be started."

EAT went on to say that even if the race issue had been considered in the JR proceedings, the High Court could not have adjudicated on it "without the Crown Office having usurped the exclusive jurisdiction of those two tribunals. The EAT therefore decided that the case should continue against the first and second respondents (the University).

As to the third and fourth respondents, the EAT commented that in the highly charged atmosphere of this case, it was neither necessary nor desirable for either the Vice Chancellor or the deputy Vice Chancellor to be named as respondents, in the light of the concessions made that they were acting in the course of their employment.

The implications of this case seem to be:

- Sometimes, particularly in non-employment areas, an allegation of unlawful discrimination may be an additional claim to, for example,

negligence, abuse of process, etc. These are then heard under a different judicial or quasi-judicial forum (e.g. JR proceedings, mental health or benefit tribunals) first.

This does not necessarily prevent further litigation under anti-discrimination laws in a different court at some later date or in parallel. This will certainly be the case if the substantive discrimination issue has not been adjudicated on and/or because they could not adjudicate or give a remedy for it.

- The substantive discrimination issue may be heard even if lodged "out of time" (following unsuccessful proceedings elsewhere) if the IT or County Court consider it "just and equitable". It should be remembered that complainants under anti-discrimination laws are entitled to a declaration, as well as financial remedies (see below), and this is often very important to the victim of discrimination. Such a declaration can only be given under anti-discrimination laws.

- EAT was clearly unhappy that individual respondents were cited when the employer has accepted that they were acting "in the course of their employment". It is arguable that this isn't correct, as those complaining of discrimination are entitled to a declaration establishing their rights vis-à-vis all respondents, including individuals as well as the employer. In addition, compensation may be ordered against individuals. This case may be distinguished on the basis of the "highly charged atmosphere".

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 85 COMPLAINTS OF DISCRIMINATION IN LICENSED PREMISES AND REGISTERED CLUBS: REVIEW OF AN ARTICLE.

In a recent article in *Volume 162 Justice of the Peace* (7 February 1998) the potential of using the Licensing Act 1964 in cases where there are allegations of racial and sex discrimination by licensed premises and registered clubs was examined.

Under section 3 (1) of the Act, licensing justices may grant a licence to any person "as they think fit and proper". The power to grant also included renewal, transfer or removal. The same test is also used in respect of registration of clubs under section 43 (2) of the Act. The justices may refuse an application for the issue or renewal of a club registration certificate, "if it is proved that a person who, if the certificate is granted, will or is likely to take any active part in the management of the club..... *is not a fit and proper person*, in view of his known character as proved to the court, to be concerned in the management of a registered club" (emphasis added).

Schedule 7 of the Act also contains further provisions relating to the rules of registered clubs and empowers the licensing justices to enquire whether there are any arrangements or provisions in the rules which allow them to treat the club as one which is not "established and conducted in good faith as a club". The article noted that whilst Schedule 7 is discretionary, it has considerable significance. The provisions of Schedule had been raised in relation to golf clubs, where in some instances, there has been a practice of restricting the rights of women members, but they can also arise in respect of other membership clubs.

The article points out that it might be possible to challenge discrimination in the case of a club by raising the issue when the grant or renewal of the registration certificate is being considered, on the basis that those who are or likely to be active in the management of the club are not fit persons in view of their known character as regards their attitude towards discrimination. Also "intoxicating liquor" is often of crucial importance to the financial security of these clubs and the issue of discrimination therefore becomes relevant when the applications come before the magistrate's court. The issue tends to be more hidden and less controversial when alcohol is not normally supplied, comments the article.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 86 TRIBUNAL PRACTICE & PROCEDURE: SEYMOUR-SMITH CASES SHOULD BE ADJOURNED NOT DISMISSED. Davidson v City Electrical Factors, [1998]IRLR 108, Scottish EAT

The Edinburgh EAT held that an Industrial Tribunal erred in refusing to adjourn an unfair dismissal claim, pending the outcome of the *Seymour-Smith* case. Instead the IT dismissed the complaint because the applicant did not have 2 years continuous service.

The Appellant was dismissed when he had more than one year but less than 2 years' service. He brought an unfair dismissal claim relying on the *Seymour-Smith* case, in which the Order that raised the qualifying period for unfair dismissal from 1 year to 2 years is being challenged. The Appellant asked the Tribunal to adjourn the claim, but following the reasoning of a previous EAT decision in *Thomas v National Training Partnership Ltd* (EAT/1126/95), the Tribunal dismissed the application on the grounds that it did not have jurisdiction to entertain the complaint. It was argued for the Appellant that if the application was not adjourned, and the challenge under *Seymour-Smith* succeeded, the Appellant's right to bring a claim for unfair dismissal would be lost forever since, in accordance with the case of *Biggs v Somerset County Council* [1996] IRLR 203, CA, a further application after the *Seymour-Smith* decision would be out of time.

Lord Johnston pointed out that there is a state of uncertainty as to the law and the Appellant may or may not be provided with a right to proceed with his claim, but if that right is not reserved by an adjournment it will be destroyed forever: *"….The door remains open to the Appellant in this case to proceed with his claim and, although it may be closed by the House of Lords until that happens his position must be protected and can only be protected by the imposition of a sist (adjournment). He has therefore, a right to claim that sist (adjournment) and we (the EAT) will endorse it".* Lord Johnston concluded that a number of cases have raised this issue and they would express the view "*that in any case where the qualifying period for employment is admitted to be between 1 and 2 years in relation to a claim for unfair dismissal, such must be sisted (adjourned) pending the outcome of the Seymour-Smith case*."

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 87 LEGISLATION – EMPLOYMENT RIGHTS (DISPUTES RESOLUTION) ACT 1998: A role for ACAS arbitration in discrimination cases?

The Bill has received its third reading at the House of Commons during the last week of March 1998 and after returning the Lords where it was introduced, will be receiving Royal Ascent shortly.

As reported previously (in *DLA Briefing* No.50) one of the main proposals of the Bill is that ACAS will offer arbitration in disputes between an individual and his/her employer. Conciliation officers will be empowered to draw up binding settlements in which both parties would opt out of the Industrial Tribunal system in favour of resolving the complaint through arbitration. Clause 8 of the Bill confirms that an agreement to submit a dispute to arbitration in accordance with the proposed ACAS scheme will oust the jurisdiction of the Employment Tribunals (previously called Industrial Tribunals) in relation to, among others, disputes under anti-discrimination legislation.

The Bill empowers ACAS to draw up a scheme for the Secretary of State's approval. ACAS has indicated that the main elements of such a scheme could be as follows:

1. The scheme will be a genuine alternative to the employment tribunal process and will be relatively informal, free of legalism and confidential. The use of the scheme will be entirely voluntary and will be available only where both parties agree to opt for it. The scheme will be explained in leaflets written in plain language. The scheme will be available where proceedings are underway or where proceedings could be commenced.

2. The parties will be able to opt for the scheme through either a settlement of the complaint under the auspices of a conciliation officer or by means of a compromise agreement. By limiting access to this scheme in this way, any applicant opting for arbitration would have had the process explained to them by either a conciliation officer or would have been in receipt of advice from a professional person. The Agreement to enter into this scheme must be in writing. The parties will then be invited to submit the IT1 and the IT3 to the arbitrator together with any other documentation they might feel to be relevant. All documents submitted by one party will be copied to the other.

3. An arbitrator would be appointed from a panel of arbitrators that would be established by ACAS. Recruitment to the panel would be "transparent, accountable and non-discriminatory", ACAS would draw up a person specification of which the core elements would be that any individuals appointed would need to be seen as impartial, to have wide experience in the world of work and to possess analytical and social skills. Legal experience

will not be considered necessary. The initial training and regular refresher training would be provided. The panel would be supported by an ACAS Secretariat.

4. Once the parties have agreed to put the case to arbitration, the case may not be referred back to a Tribunal, except in limited circumstances (i.e. where the case falls outside the jurisdiction of the scheme, such as where a valid compromise agreement has not been signed or conciliation officer has not taken action resulting in a written agreement referring the case to arbitration).

5. Both the arbitration hearing and the issue of the award would be arranged as soon as practicable. The arbitrator will have regard to the ACAS Codes of Practice. Any compensation awarded would be subject to the same limits as Tribunal awards. The Award would be legally enforceable. If an award of employment is not complied with, the case would be referred to an Employment Tribunal for remedy in the form currently adopted when re-instatement or re-engagement is ordered by a Tribunal.

6. There would be no appeal on a point of law.

We have still yet to see what the actual scheme would look like after the Bill has been enacted. For more details of the provisions of the Bill, please see *DLA Briefing* No.50

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 88 DISTRIBUTION OF TRIBUNAL COMPENSATION AWARDS IN SUCCESSFUL RACE DISCRIMINATION CASE (1997)

Award Range (£)	Total Award	Injury To Feeling
0 – 499	-	-
500 – 999	2	1
1,000 - 1,499	2	5
1,500 - 1,999	6	1
2,000 - 2,499	3	2
2,500 - 2,999	4	4
3,000 - 3,499	1	2
3,500 - 3,999	3	1
4,000 - 4,999	4	4
5,000 - 7,499	5	6
7,500 - 9,999	4	2
10,000 - 14,999	4	1
15,000 - 19,999	2	1
20,000 - 29,999	3	1
30,000 - 39,999	2	-
40,000+	7	-
TOTAL	52	31

** The above figures may contain a few settlements reached by the parties after the successful IT decisions*

Source: *CRE Legal Database*: There were 95 successful IT cases received by the CRE in 1997, 0f which 52 have compensation awards recorded

Examples of Cases where the total award exceeded £20,000:

23329/93	Mrs Elmi v Harrods Ltd	£22,531
49201/93	Mr Thomas v London Borough of Hackney	£23,250
000782/93	Mr Sequeira v Save & Prosper Group	£32,500
53375/94	Mr Genc v Mountbatten Hotels Ltd	£37,166
42186/95	Mr Felix v London Borough of Newham	£40,711
35543/96	Griffith v Brigend County Council	£41,655
13917/96	Mr Stewart & Mr Hawkins v HM Prison Service	£42,024
01359/93	Dr Quereshi v University of Manchester	£44,880
49582/95	Mr Hawkins v HM Prison Service	£54,807
45521/95	Mr Odusina & Mr Simpson v BT	£92,870
2300935/95	Mr Hanif v BTU (Heating) Ltd	£216,650

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 89 GOVERNMENT WHITE PAPER: "FAIRNESS AT WORK" – summary of main proposals

The Government has recently published its White Paper *"Fairness at Work"*, setting out a new array of individual, collective and family-orientated rights for employees. The main proposals include:

Individual rights:

- the two year qualifying period of employment for claiming unfair dismissal will be reduced to one year (a victory for Seymour-Smith?)
- the ceiling on compensation awards for unfair dismissal will be abolished and employees will be able to recover their full losses
- legislation will be introduced to index link limits on statutory awards and payments, subject to a maximum rate
- promises to review: employment contract bonuses, including "zero hours contracts", where workers have to be available for work without any guarantee of work; waive clauses, where employees are made to sign away employment rights; and employment agencies which are used to as a way round legal obligations

Collective Rights:

- employers (employing 20 or more workers) must recognise a trade union where ***either*** the majority of the workforce voting in a ballot, and at least 40% of those eligible to vote, are in favour of recognition, ***or*** if more than 50% of a particular "bargaining unit" or group of workers are union members recognition will be automatic
- employees who are dismissed for taking part in lawfully recognised official industrial action will have the right to claim unfair dismissal
- it will be unlawful to discriminate against an employee because of his or her trade union membership, non-membership or activities
- the law on industrial action ballots will be amended so that trade unions do not have to give employees the names of those they intend to consult
- employees will have a legal right to be accompanied by a fellow employee or trade union representative during grievance or disciplinary procedure

Family-friendly policies:

- These measures are intended to implement the ***EC Parental Leave Directive*** as agreed under the Social Chapter

- all employees with at least one year of service will be guaranteed three months unpaid parental leave when they have a baby or adopt. The leave can be taken at any time up to the child's eight birthday
- maternity leave will be extended from 14 weeks to 18 weeks
- the contract of employment will continue during the extended maternity absence period
- all employees will have the right to reasonable time off for family emergencies
- employees will be given legal protection against dismissal or detriment for exercising their rights to parental leave and time off for urgent family reasons

If DLA members would like to send us their views and comment on the government's proposals we would be please to receive them. DLA may make comments on the proposals.

This summary has been prepared with assistance from an article in the **'Guardian'** on 22.5.98 and from the Daily News service produced by **'Link'** (the Legal Information Network), Europe's largest on-line service for lawyers. Call 0171.396.9292 for further information.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 90 HARASSMENT IN THE PROVISION OF SERVICES TO THE PUBLIC. Kelly v Tate & Swift transport Training (NI) Ltd

This case marks a landmark decision in relation to sexual harassment arising out of the provision of services to the general public. The case was brought under a lesser-used provision of the Sex Discrimination (Northern Ireland) Order 1976. Under Article 30 of that Order it is unlawful to discriminate in the provision of goods, facilities and services to the public either by refusing them altogether or by providing them on less favourable terms than would be applied to members of the opposite sex (the equivalent provision to Section 29 of the Sex Discrimination Act 1975).

In *Porcelli -v- Strathclyde Regional Council* (1986) IRLR 134. In that case the Court described sexual harassment as "... a particularly degrading and unacceptable form of treatment which it must be taken to have been the intention of Parliament to restrain". The Court went on to hold that if the form of the unfavourable treatment includes a significant element of a sexual nature to which a man would not be vulnerable, the treatment is on grounds of the woman's sex within the meaning of Section 1(1)(i) of the Sex Discrimination Act 1975 (the equivalent of Article 3(1)(i) of the Sex Discrimination (NI) Order 1976). Accordingly it is now well established that sexual harassment can amount to direct sex discrimination.

The European Commission's Code of Practice defines sexual harassment as "unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work". There is however no reason why sexual harassment has to be confined to an employment relationship.

In the present case Miss Kelly, assisted by the EOC(NI), brought proceedings in the County Court in Belfast under Articles 3 and 30 of the Sex Discrimination (NI) Order 1976 (the equivalent provisions of Sections 1 and 29 of the Sex Discrimination Act 1975). Miss Kelly had taken four driving lessons with the First Defendant, Mr Tate, a driving instructor with the Second Defendant, Swift Transport Training (NI) Limited. Miss Kelly alleged that during the lessons Mr Tate had sexually harassed her by making lewd comments of a sexual nature and by staring at her legs on a frequent basis. She argued that by sexually harassing her Mr Tate was not providing her with facilities or services "in the like manner" as he would have provided to a man. There were three main issues involved:

1. Whether the treatment of Miss Kelly was unlawful discrimination under Articles 3 and 30 of the 1976 Order.

2. Whether Miss Kelly could prove her case on the balance of probabilities.

3. Whether Mr Tate was an employee or agent of Swift Transport Training (NI) Limited. It was argued initially that Mr Tate was not an

employee as he had been placed with Swift Transport Training (NI) Limited through an agency on a 'Jobskills' programme.

The Judge found against the applicant on the evidence. The case was appealed to the High Court. At the appeal the parties accepted that the driving instruction provided by Mr Tate and Swift Transport Training (NI) Limited constituted services within the meaning of Article 30. If not an employee, Mr Tate was at least an agent of Swift Transport Training (NI) Limited and that, if substantiated in evidence, Miss Kelly's allegations of sexual harassment could constitute discrimination within the definition of Article 3 of the Sex Discrimination (NI) Order 1976.

Giving judgment Mr Justice Coghlin concluded that on the balance of probabilities Mr Tate had made a number of references and remarks of a sexual nature to Miss Kelly during the driving lessons and that he had also made remarks relating to her legs. The Judge further held that in making these remarks Mr Tate had subjected Miss Kelly to a detriment to which he would not have subjected a male pupil and, accordingly, that he had discriminated against her contrary to the provisions of Articles 30 and 3 of the 1976 Order.

The Judge found against Swift Transport, finding Mr Tate had acted as an agent and they failed to take such steps as were reasonably practicable to prevent Mr Tate from discriminating against Miss Kelly. It was therefore liable for Mr Tate's acts (the statutory defence not applying).

IMPLICATIONS

This case should provide a reliable precedent for persons who wish to bring a claim under Article 30 of the Sex Discrimination (NI) Order 1976 for sexual harassment arising out of the provision of goods, facilities and services to the public; and similarly under Section 29 of the Sex Discrimination Act 1975 in England and Wales. The case is also relevant in respect of racial harassment under the Race Relations Order (NI) and the Race Relations Act 1976

Mark Jackson,

Solicitor for Miss Kelly (Plaintiff/Appellant),

Thompsons Solicitors, Newtownards, Northern Ireland

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 91 DISCIPLINARY ACTION AMOUNTS TO UNLAWFUL VICTIMISATION. Fleming v Chief Constable of Lincolnshire Constabulary, Nottingham IT 72935/95, 8940/96,4671/96, 18.2.98

The Applicant was a uniformed Inspector in the Lincolnshire Police Force. In August and September 1995 she complained of a campaign against her by sergeants and inspectors at her station, but these complaints were not properly considered. Out of desperation, the Applicant placed a tape-recorder in her locker with a view to gathering evidence of this campaign against her. That tape-recorder was discovered and the Applicant was sent home on enforced leave and then transferred from the station she was serving at. A disciplinary enquiry into her conduct began.

After the discovery of the tape-recorder the Applicant submitted a detailed grievance outlining her concerns which the Force again failed to properly consider. The disciplinary enquiry continued and a number of her supporters were also subjected to investigation, on the basis that they had improperly disclosed information to the Applicant. As the investigation continued, the Applicant's pocket books and personal diaries were scrutinised and her marriage and private life were investigated. She was formally suspended from duty in February 1996 and in May 1996 the Applicant was charged with four disciplinary offences.

FINDINGS

The Tribunal made the following findings:-

(1) That while there was a campaign against the Applicant carried out by fellow sergeants and inspectors which would have amounted to direct sex discrimination, the Force's subsequent failure to properly address the issues raised in her grievance did not amount to direct sex discrimination.

The actions taken by the Force were open to severe criticism in that they failed to deal with the issues effectively. However, the Tribunal concluded that if a male Inspector had complained of similar antagonism and offensive behaviour, the Force would have acted in a similar way. Thus the Tribunal found that while the Force's response was poor management, it was not direct sex discrimination.

(2) That the Force's treatment of the Applicant, once she tried to raise her concerns, amounted to victimisation.

The Tribunal considered that the filing of the first IT1 form on the 19th December 1995 was a protected act within section 4(1)(a) of the SDA. The Tribunal also found that the formal written grievances, and her verbal discussions with supervisory officers, in which she made allegations of discrimination, were protected acts under Section 4(1)(d). Finally, and perhaps most interestingly, the Tribunal also accepted the Applicant's contention that the placing of the tape-recorder in her locker, insofar as it was placed there for the purpose of recording conversations concerning the Applicant to support her allegations of Sex Discrimination, amounted to a protected act within section 4(1)(c), i.e. doing something by reference to the SDA. The Tribunal relied upon *Aziz v Trinity Street Taxis* [1988] IRLR 204.

Having found that the Applicant had carried out relevant protected acts, the Tribunal then considered whether or not she had been subjected to less favourable treatment.

The Tribunal concluded that the Applicant had suffered extensive unfavourable treatment. They found that the disciplinary investigation carried out by the Force went far beyond that to be ordinarily expected in a case of this nature and those allegations had been pursued against her more relentlessly than any other grievance or disciplinary allegations of which they were aware. Further, the Tribunal found that the decision to suspend the Applicant was a "set-up" and that the attempts by the Force to intimidate her supporters of itself amounted to less favourable treatment of the Applicant.

The Tribunal then asked itself whether or not the less favourable treatment suffered by the Applicant could be said to be "by reason" of the Applicant carrying out the protected acts.

The Tribunal found:

- that the explanation put forward by the Force in relation to each of the incidents of less favourable treatment was unconvincing.
- the denial by the Force's Senior Officers, that gender was ever an issue, was given in "parrot fashion" and was unreliable.
- the Superintendent tasked with carrying out the disciplinary investigation into the Applicant and to investigate her complaints of sex discrimination had made little effort to investigate the discrimination and focused entirely on the disciplinary allegations against her.

In the Tribunal's view:-

> "Ultimately, our conclusion is that the disciplinary action against [the Applicant] and the other unfavourable treatment against her was pursued deliberately and in a way designed to prevent her allegations being given the consideration they deserved. That was because the Senior Management appreciated the damaging nature of her allegations of discrimination, which they wished to suppress."

The Tribunal also found that the decision to prevent the Applicant from proceeding to stage 3 of her grievance unless she agreed to stay her Tribunal proceedings amounted to victimisation.

SIGNIFICANCE AND IMPLICATIONS

This case is significant for three main reasons:-

(1) The Tribunal have confirmed that a conscious decision to intimidate supporters of an Applicant can amount not only to unlawful victimisation of the supporters themselves, but can of itself amount to less favourable treatment of the Applicant.

(2) This is also the first Tribunal decision of which we are aware where the most senior officers of a Police Force have been found deliberately to have victimised an Applicant, including in particular the Chief Constable, the Deputy Chief Constable and a number of Superintendents.

(3) However, perhaps the point of greatest significance is the view taken by the Tribunal of the equal opportunities policies and training in Lincolnshire Police.

The Tribunal considered that according to a recent report by Her Majesty's Inspectorate of Constabulary, Lincolnshire Police was neither “significantly better nor significantly worse than the average.” Nevertheless, the Tribunal described the attitude shown by the Chief Constable to equal opportunities as "deplorable" and one which “set the tone for his Force.” In particular, the Tribunal drew a comparison between the Force's attitude to overt sexual harassment (where the Force had in the past responded quickly), to its attitude to the more covert types of discrimination with which this case was concerned. The Tribunal found that the Force's approach to the latter was wholly inadequate.

This of course has a potentially significant impact in relation to the ability of Lincolnshire Police, and arguably similar Forces, to rely upon the statutory defence. On the basis of the Tribunal’s approach to the position in Lincolnshire Police, any Police Force will have difficulty succeeding with this defence unless it can establish that it has made significant strides in terms of its’ policies and training within the last two or three years.

Of course, this Tribunal’s decision is not binding on other Tribunals, nor does it relate to any Force other than Lincolnshire. Furthermore, in this case, the Force did not plead the statutory defence. However, it is nevertheless a helpful example of the approach which Tribunals can, and arguably should, take when considering a Force’s position on equal opportunities in the light of a pleading that it had taken all steps that were reasonably practicable to prevent the alleged acts of discrimination from occurring.

Andrew Cook,
Solicitor
Russell Jones & Walker, Leeds

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 92 LEGISLATION BRIEFING: THE HUMAN RIGHTS BILL 1998

The Human Rights Bill is now at the committee stage in the House Of Commons. The Bill is designed to "incorporate" the rights guaranteed by European Convention on Human Rights. The main provisions of the Bill provide that

- The Bill offers an opportunity to secure the protection of fundamental human rights without the need to travel the tremendous journey in cost, time and distance to Strasbourg. However, for the discrimination practitioner it may come as a bit of a disappointment.

- a court or Tribunal determining a question in connection with a convention right must take account of relevant judgments, decisions, declarations and opinions made or given by the European Commission and Court of Human Rights and the Committee of Ministers of the Council of Europe;

- primary and subordinate legislation whenever enacted must be read as far as possible be read and given effect in a way which is compatible with the Convention rights (though this does not affect the validity of the legislation concerned);

- a court may make a declaration of "incompatibility" where they are satisfied that a legislative provision is incompatible with the Convention rights (though this does not affect the validity of the legislation concerned);

- it is unlawful for a public authority to act in a way which is incompatible with the Convention rights, unless that would be inconsistent with the effect of primary legislation;

- a person (who must be a victim or potential victim of the unlawful act) complaining that a public authority has acted in a way which is incompatible with Convention rights and thus unlawfully, may bring proceedings against that authority under the Bill, or may rely on the Convention rights in any legal proceedings. Remedies are provided for (including, in certain circumstances, damages).

The Convention rights (Articles 2 - 12 and 14) in summary are:

- the right to life[1]
- the right not to be subjected to torture or to inhuman or degrading treatment or punishment;
- the right not to be held in slavery, servitude or forced or compulsory labour;
- the right to liberty and security of the persons;
- the right to a fair trial;
- the right not to be subject to retroactive criminal offences and punishment;
- the right to respect for private and family life, home and correspondence etc
- the right to freedom of thought, conscience and religion and worship;
- the right to freedom of expression;
- the right to freedom of peaceful assembly and to freedom of association including the right to form and join Trade Unions.
- the right to freedom from discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status in the enjoyment of the rights and freedoms set out above.

The Government in its White Paper *"Rights Brought Home: The Human Rights Bill"* stated that:

> "The rights and freedoms which are guaranteed under the Convention are ones with which the people of this country are plainly comfortable. They therefore afford an excellent basis for the Human Rights Bill which we are now introducing".

The Convention rights do not include as a human right, the right not to be discriminated against on stated or arbitrary grounds. It affords protection only against discrimination in the enjoyment of the other substantive human rights. This will be a serious disappointment to anyone expecting that the Bill might offer comprehensive protection against discrimination. This is inevitable from a Bill which incorporates only the rights already contained in the Convention, a Treaty developed and agreed by those countries comprising the Council of Europe and containing rights "the people of this country are plainly comfortable" with. Certainly, as far as Race is concerned, Britain's legislation defective as it clearly is, is more progressive than enjoyed by most other European countries and incorporation is therefore unlikely to deliberately "progress" that protection.

Nor does the Bill does not provide a blanket of fundamental human rights enforceable by all against all. It prohibits unlawful acts by public bodies only and provides for remedies against them. It also provides a mechanism for challenging legislation that is inconsistent with those rights. It will not allow a victim to bring a

[1] In May the House of Commons voted by a significant majority to insert the as yet unratified 6th protocol - which abolishes the death penalty in civil law - into the Bill. Despite earlier indications suggesting the government had no intention to do so , it appears the government may now be forced into ratifying the protocol making future free votes in Parliament on the death penalty unlikely: for commentary see NLJ, Vol.148, 810.

case against a private body; it will not allow an interest group to bring a case against an abuser of those rights.

It now appears that it may not even provide for full incorporation. On 20 May, during the first day of the committee stage of the Bill in the House of Commons, the government made concessions to the religious lobby. The government inserted a new Clause 9 which states that if a court's determination of any question arising under the Act might affect the exercise by a religious organisation (or its members) of the convention right to freedom of thought, conscience or religion, the court must have "particular regard" to the importance of that right. This is otiose - if it is not and it is to truly limit the effect of the other provisions then it will leave the disgruntled victim with the right to go to Strasbourg to have her rights properly enforced[2].

Nevertheless it provides us with a great opportunity to progress rights and, with imagination, the Bill provides an opportunity for expanding the remedies available to victims of discrimination. There is some authority for the proposition that discrimination on race grounds by the state might itself be "degrading treatment" contained in Article 3 (containing a substantive right) and thus a victim might have a remedy under the new Bill when enacted[3].

So with imagination and will, there is something to be optimistic about.

Karon Monaghan
Barrister

[2] See commentary and criticism, D Pannick QC Times "Law" 2/6/98.
[3] East African Asians cases, 3 EHRR 76 [193] Com Rep; Abdulaziz, Cabales and Balkandali v UK, A 94 [1985] Com Rep para. 113.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 93 LINKAGE BETWEEN RACE, RELIGION AND MARITAL DISCRIMINATION. Mulholland v Wildcroft Manor Ltd, London South IT 2301295/96

This case provides an illustration of the overlap in practice between race and religion. It demonstrates that the Race Relations Act 1976 can extend to discrimination that seems principally to be based on religion where there is a race component to that discrimination.

In this case the Applicant applied for the post of gardener with the Respondent company (in an upmarket block of flats). The Applicant was born and resided in Northern Ireland and was a Catholic. He was married to a PhD student.

The Applicant was interviewed for the position of gardener and during the course of the interview he was asked by one of the interviewers "what foot do you kick with?" The Tribunal found that the Applicant "immediately recognised that this was a colloquial and, to him, offensive way of asking about his religion". There was no hostility on the part of the interviewers but merely a failure to appreciate the considerable offence that might be taken by the asking of such a question.

The Applicant complained that he had been directly discriminated against by the asking of the question itself because it amounted to offensive and thus less favourable treatment in the arrangements made for determining who to offer appointment (Sections 1(1)(a) and 4(1)(a) of the RRA 1976). But for his Irish origins he would not have been asked the question. The interest in his religion arose because of the circumstances peculiar to Northern Ireland.

The Tribunal accepted that the Irish were a racial group by reason of their distinct national origins and concluded that the asking of the question was indeed unlawful discrimination under the RRA 1976. The Tribunal found that the question was offensive to the Applicant and the fact that it was not accompanied by an intention to be insulting was irrelevant.

Interestingly, the Respondents had informed the Applicant that the reason he was unsuccessful was because the Respondents believed his wife's eventual PhD qualification was likely to mean that she would not want to live on the premises with her gardener husband. He would therefore not stay long in the job (Sections 3(1)(a) read together with Section 6(1)(c) of the SDA 1975). Accordingly, the Applicant complained that in refusing to appoint him, the Respondents had discriminated against him on grounds of his race (relying on the question asked at interview) and/or marital status (in that adverse assumptions were made about him because of his marital status, namely that he would want to live with his wife and would leave his job to be with her).

The Tribunal concluded that the *true* reason for not appointing the Applicant was the generalised assumptions made about him living apart from his wife and that was an assumption based on his marital status.

The Applicant therefore succeeded in his complaint of race discrimination, in respect of the question asked at interview and in his complaint of discrimination on the ground of marital status, in respect of the refusal to offer him appointment. The parties agreed compensation at £7,000.

Karon Monaghan

Barrister

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 94 AMENDING ORIGINATING APPLICATION TO INCLUDE NEW CLAIM. Ashworth Hospital Authority v Liebling, EAT/1436/96

This case reaffirms earlier guidance on when it will be appropriate for a Tribunal to grant leave to amend the Originating Application to include a new claim.

The Applicant, Ms Liebling**,** stated in Box 1 - "type of complaint you want the Tribunal to decide" - that she was making a complaint of "unfair constructive dismissal". In Box 10 - "details of your complaint" - she alleged that she had been suspended for reasons which did not warrant it and had not been allowed to put her case. She compared the treatment she had endured with that given to a psychiatrist. She stated that she had been "treated differently compared to the consultant psychiatrist" and that this different treatment was contrary to the disciplinary procedure. She claimed that as a result of her treatment she was forced to resign.

The Applicant later applied to amend Box 1 to include a claim of sex discrimination arguing that the claim of discrimination was already set out in Box 10. The Respondents objected to the proposed amendment and relied on the case of *Cocking v Sandhurst* [1974] ICR 650**.** In *Cocking v Sandhurst* the NIRC gave guidance on amending Originating Applications by the adding of new Respondents or new claims outside the applicable time limits. In summary, Sir John Donaldson stated that the Tribunal had discretion to allow an amendment where the *original* IT1 was presented within the time limit applicable to the claim put forward in the amended application. In deciding whether to allow an amendment, where it involved adding a new party, the Tribunal should have regard to whether there had been a genuine mistake which would not be misleading as to the identity of the person against whom the claim was intended to be made and, in the case of an amendment adding a new claim, the Tribunal should have regard to whether any injustice or hardship might be caused to any of the parties.

In this case, the Tribunal found (properly according to EAT) that Ms Liebling 's claim as originally drafted did not include a claim of sex discrimination. They went on to consider whether there had been deliberate delay in making the claim of sex discrimination - and concluded there had not been - and addressed the question of the respective hardship to each party which might flow from their decision on the application to amend. The Tribunal then allowed the amendment so that Ms Liebling could claim sex discrimination.

At the EAT (Morison J presiding) the Respondent employers argued that the Tribunal failed to address themselves properly on the fact that the new claim was "out of time" being included more than three months after the acts complained of and the Tribunal should have asked whether it would be "just and equitable" to extend time. Further they argued that the Tribunal did not properly take account of the hardship (in costs) and inconvenience caused to them by the addition of this claim. The Respondents referred to the Industrial Tribunal decision of *Coker v Diocese of Southwark* [1995] ICR 563.

Morison J concluded that *Coker* was not good law and confirmed that the applicable test was that set out in *Cocking* as updated in *Selkent Bus Co v Moore* [1996] ICR 836, and this was essentially one of justice; "the tribunal should take account of *all* the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it" (*Selkent*, @ 843 F). Morison J added that where it is a sex discrimination claim that sought to be added out of time, then the Tribunal has a wide discretion to permit the application to be heard on the grounds that it would be just and equitable to do so. He said it would be "difficult to imagine circumstances in which it would not be just and equitable to grant an extension of time in a case in which it was otherwise thought to be consistent with the interests of justice that an amendment should be made".

This test clearly gives the Tribunal a very wide discretion to do justice by an amendment in an appropriate case. Worth noting is Morison J's comment towards the end of his judgment in Ms Liebling's case, that "it is clear that what was said about difference in treatment between her case and that of a man, must have sounded warning bells even if solely in the context of the application of the disciplinary procedure". Thus, the fact that Ms Liebling was making a comparison between her treatment and that of another - who happened to be a man - might have at least sounded an alert to an employer about the possibility of a sex discrimination complaint. Morison J also expressed regret that "the wide discretion which is given to Industrial Tribunals in considering whether or not to grant an amendment, should become encrusted by authority".

Karon Monaghan
Barrister

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 95 CHALLENGING WORKING HOURS THROUGH THE INDIRECT DISCRIMINATION PROVISIONS OF THE SDA: the impact of London Underground v Edwards

London Underground v Edwards has already been to the EAT twice and has now reached the Court of Appeal (see DLA Briefings 9 & 34). Ms. Edwards was single mother and shift pattern and overtime payments were such that she was always able to swap her shifts to a shift from 8am to 4pm or from 8.30am to 4.30pm. In 1992, after extensive consultation with the union (the vast majority of whom are men) London Underground decided to introduce a new rota scheme. The new rota scheme involved all the drivers working over a seven-day period, an average of 38.5 hour per week over a four-week period for a fixed salary. This made exchanging shifts to achieve a daytime pattern almost impossible.

During the course of negotiations London Underground had considered introducing some special shifts for single parents to be called the "Single Parent Link". However, this was rejected by the union in favour of a crèche which would be of little benefit to parents of school aged children.

Ms. Edwards made it clear that she would not and could not agree to the new terms unless she was assured that she would not have to work the new rosters as proposed. As a compromise she left after receiving a voluntary severance payment. She then took action against London underground alleging indirect sex discrimination in the imposition of the new roster system.

The Court of Appeal dealt with the requirements of the Sex Discrimination Act section 1(1)(b) in turn:

1. **Requirement or condition**

   This was: "to enter into a new contract and work new rostering arrangements"

2. **Could she comply with it?**

   The IT found that she had raised the question of her ability to work the new shift pattern with her employers and had been given no reassurance by them; that she would not have been able to swap her shifts in order to achieve a satisfactory working pattern that would fit in with her needs as a

single parent and that consequently she could not comply with this requirement or condition.

3. **If not,** was it one which "a considerable smaller proportion of female train operators than male train operators could comply"?

   There were 2023 male train drivers all of whom could comply with the new roster arrangements. There were 21 female train drivers of who one, Ms. Edward positively asserted that she could not comply with the requirement. 100% of male drivers could comply, compared to 95.2% of women; alternatively, none of the men were disadvantaged whereas 5% of the women were disadvantaged. The court of Appeal held that:

   (i) the purpose of the SDA is to set out a "threshold for intervention" (by the courts) where there exists a substantial and not merely marginal discriminatory effect. Once the threshold is past the employer must justify the requirement in question.

   (ii) an IT must decide whether the disparate impact is inherent in the application of the requirement or condition or whether it is simply a chance result.

   (iii) as this question will need to be resolved ion a wide variety of circumstances there is no particular percentage to be regarded as "substantially smaller" in any given case. The IT will apply different criteria to a requirement of condition applied on a national scale where there are reliable and consistent statistics compared to the situation of a small and unbalanced workforce where figures are less reliable.

   (iv) the "pool" was those employees to whom the new rostering arrangements applied. However, the IT was entitled to look at the wider picture and they were entitled to take note of the high numbers of single mothers having care of children compared to the number of single fathers (a ratio of 10:1).

   (v) IT members are selected for their knowledge and expertise in the industrial field generally and thus are entitled to take account of their knowledge and expertise and not expected to sit in blinkers

   (vi) the IT was right to notice the large discrepancy in numbers between male and female staff making the pool. The CA felt that the comparative small size of the numbers of female employees indicated, without the need for specific evidence, that it was either difficult or unattractive for women to work as train drivers and hence the figure of 95.2% should be regarded as a minimum rather than a maximum.

4. **If so, was the requirement or condition justifiable?**

> The IT concluded that London Underground "could have easily, without losing the objectives of their plan and reorganisation, have accommodated the Applicant who was a long serving employee". This conclusion was not appealed to the CA.

The respondents are applying to the House of Lords for leave to appeal.

Conclusion.

This case is important because it takes account of the broader context within which discrimination law operates. It recognises the importance of the IT members knowledge and experience of the preponderance of single mothers amongst single parents. It also emphasised that courts must not lose sight of the purpose for which anti-discrimination acts were passed by adopting an inflexible approach. It should also act as a warning to employers to adopt family-friendly policies and working arrangements.

Gay Moon
Solicitor

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 96 CASE UPDATES: R v Secretary of state for Employment ex parte Seymour-Smith and Goodwin v The Patent Office (is schizophrenia a disability?)

The case of *R v Secretary of State for Employment ex p Seymour Smith & anor* was heard by the European Court of Justice on May 12th. The Advocate General will deliver his opinion on July 14th. This should be available on the internet at **http://europa.eu.int/cj/en/index.htm** (case reference C-167/97). The decision of the ECJ is likely to appear towards the end of the year.

The EAT will consider the question of whether schizophrenia is a disability within the DDA in the case of *Goodwin v the Patent Office* on October 7th & 8th.

DISCRIMINATION LAW ASSOCIATION

JULY 1998

BRIEFING No. 97 SEXUAL HARASSMENT BY PRESSURING THE APPLICANT TO HAVE AN ABORTION AND SUBSEQUENTLY DISMISSING HER. Harrild v England and Wales Cricket Board, IT 2203994/97

The Applicant was a receptionist at Lords Cricket Ground who hoped to make a career in sports administration or journalism. She became pregnant by another employee who the Respondents were "grooming for the top". When the Respondents found out about this they put pressure on her to undergo an abortion which she did. Subsequently she became depressed and unwell but continued to work for three months until she collapsed at work and took an overdose. While she was off work being treated for depression the Respondents initially encouraged her to stay at home until she was 100% better and reassured her that her job was safe. Six weeks later the Respondent's Deputy Chief Executive visited the Applicant at her home to deliver a letter of dismissal. He told her that the father had been given a "mini bollocking" and told not to have a relationship with someone at work again. He told her that the father had a career whereas she only had a job. He continued
to harass her until he was asked to leave.

Three weeks before the case was due to be heard the Respondents notified the IT and the Applicant that it did not intend to defend the proceedings.

The IT found that the Respondents had discriminated against the Applicant on grounds of her sex. They awarded her £11,408 compensatory award, £15,000 for injury to her feelings together with interest of £1,325 on this. The IT also ordered that within a week of the decision being sent to the parties a copy of it should be displayed on a notice board available to the Respondents staff and members and that a reference in terms specified by the IT should be placed on the Applicants personnel file. The IT ordered that the Respondent should pay two thirds of the Applicants taxed costs of preparation up until the Respondents notified their intention not to defend it.

Gay Moon
Solicitor

BRIEFING No. 98 DDA UPDATE; HIGHEST AWARD YET? Kirker v British Sugar PLC, Nottingham IT 2601249/97, 29.12.97 (remedies hearing)

This case documents, as far as we know, the highest compensatory award made so far in a Disability Discrimination Act claim. The total awarded by the Tribunal to Mr Kirker was £103,146.49. Details of the award are given at the end of this summary.

FACTS AND DECISION

The Applicant had been born with dislocated lenses in both eyes and although he wore glasses these did not correct them enough to prevent his impairment from having a substantial and long-term effect on his ability to carry out normal day to day activities, i.e. his ability to see. This point was conceded by the Respondent and endorsed by the Tribunal. He was registered as partially sighted since March 1995 and his level of correct vision was below the level considered necessary to perform any work for which eyesight was essential making him eligible for full blind registration.

The Applicant was employed as a shift chemist working at one of their sugar refineries. He was dismissed due to the fact that the Respondent's undertaking for employees to do work of a particular kind at the refinery had diminished. In a selection process for retention of the employees conducted by managers, the Applicant failed to achieve a sufficiently high score. He argued that the Respondent's decision lacked objectivity and was reached for a reason relating to his disability and argued that he had therefore been unfairly dismissed and discriminated against on the grounds of his disability. The Respondent, however, argued that they had taken particular care not to let his disability affect the assessment and that their procedure for selection and retention had been fair following consultation with the Trade Union.

The Tribunal found that poor eyesight had been an issue for his managers during the full term of his employment. The concluded that the scoring criteria contained a subjective element and was perverse and decided that the Respondent had acted unreasonably in treating redundancy as a sufficient reason for dismissing the Applicant by failing to mark him objectively. They said this was a substantial matter and not merely a procedural flaw in the selection process and therefore the Applicant was unfairly dismissed and discriminated against on the grounds of his disability. The Respondent had denied discrimination and not attempted to show that it was justified. The Tribunal therefore did not consider this point further.

COMPENSATION

In assessing the Applicant's compensation, the Tribunal gave extremely detailed reasoning and noted firstly that on a balance of probabilities, if the redundancy selection exercise had been carried out properly, the Applicant would have retained his job. They further found that the Applicant had taken reasonable steps to mitigate his loss by applying for 45 jobs since his dismissal. After considering a report from the Royal National Institute for the Blind, which highlighted the barriers that visually impaired people faced in securing and retaining paid work, and after referring to their experience with sex and race discrimination legislation where it has taken time to change society's attitude and practices in order to accommodate the requirements of such legislation, the Tribunal felt that the Applicant was likely to be forced to seek lower paid work and his prospects of future employment gloomy.

After taking into account his likely retirement age and the possibility of risk that the Applicant may have needed to take ill-health retirement if his eyesight deteriorated further, the Tribunal compensated The Applicant an amount of £7,166.56 for past loss of earnings (after taking into account money in lieu of notice and redundancy payments). They further awarded him £100,476.80 for estimated future loss of earnings, £200 for loss of statutory industrial rights, £6,168.28 for loss of enhancement and £6,250 for loss of the chance of ill-health retirement. They took into account £21,044.40 as payments made to him since the time of his dismissal but further awarded £3,500 for injury to feelings and £429.25 for interest making a total award of £103,146.49.

DOUGLAS SILAS
DAVID LEVENE & CO SOLICITORS
Ashley House
235-239 High Road
Wood Green
LONDON N22 4HF

DX: 35658 WOOD GREEN 1
Tel: 0181 881 7777
Fax: 0181 829 9747
Minicom: 0181 881 6764
DIRECT FAX: 0181 829 9747