Discrimination Law Association

Briefings 129-140

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DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 129 COMPENSATION FOR UNLAWFUL DISCRIMINATION: Injury to feelings awards

"Discrimination in the workplace is an evil practice. Its victims have suffered an infringement of a fundamental human right. The importance of the role of employment tribunals and county courts in adjudicating upon such complaints cannot be exaggerated. … The calculation of compensation in these cases is not always easy … Justice at least requires that a judicial decision can be seen to be both fair in itself and proportionate to other decisions of a like nature."

Morison J, Foreward in "Discrimination: Remedies & Quantum"

Eady, Mayhew & Smith, Sweet & Maxwell 1998

Employment tribunals have the power to award an applicant compensation equivalent to the level of damages they could have been awarded in a County Court or Sheriff Court in civil proceedings for any other claim in tort or for breach of statutory duty: the applicant is to be put into the financial position she would have been in but for the unlawful conduct of the employer, see ***Sex Discrimination Act 1975 s 65(1), Race Relations Act 1976 s 56, Fair Employment Treatment (NI) Order 1998 art 39, Disability Discrimination Act s 8***. In each case, it is expressly provided that such compensation may include compensation for injury to feelings.

In *Marshall (No 2)* the European Court of Justice made clear that, whilst the choice of remedy would be for the Member State, the sanction to be imposed for unlawful discrimination must be *fully effective* and have *a real deterrent effect*.

The *Marshall* decision led to the removal of the statutory limits on compensation for unlawful discrimination which has undoubtedly seen a very real change in the way in which Tribunals approach the issue of damages in such cases.

In the guideline case of *HM Prison Service and ors v Johnson* 1997 IRLR 162, the EAT (Smith J, Presiding) upheld an award for injury to feelings of £21,000, leading to a total award of £28,000 (including aggravated damages) in favour of a black prison officer subjected to a campaign of humiliation, ostracism, ridicule and contempt at work. Smith J held that the award was not grossly or obviously out of line with the general range of personal injury awards or with the injury to reputation award in *John v MGN Ltd* 1996 3 WLR 593 (the Elton John libel case) and offered the following guidelines on the question of compensation in race discrimination cases:

- awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the respondent. Feelings of indignation at the respondent's conduct should not be allowed to inflate the award.

- awards should not be too low as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

- awards should bear some broad general similarity to the range of awards in personal injury cases; not by reference to any particular type of personal injury award, rather to the whole range of such awards.

- in exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

- Finally, tribunals should bear in mind the need for public respect for the level of awards made.

Whilst not automatic (*MoD v Cannock and ors* 1994 ICR 918 EAT) it is *almost inevitable in … discrimination cases that a claim for hurt feelings be made*, see *Michelle Murray v Powertech (Scotland) Ltd* 1992 IRLR 257 EAT.

From time to time, there have been attempts to set minimum level for awards for injury to feelings. In *Alexander v The Home Office* 1988 ICR 685, a "nominal"

award of £50 was overturned by the Court of Appeal and an award of £500 for injury to feelings substituted. At the same time, the Court warned that *"To award sums which are generally felt to be excessive does almost as much harm to the policy and results which it seeks to achieve as do nominal awards."*

In *Ahmed v Derby Pride Ltd,* (November 1996) having found for the applicant in her claim of racial discrimination over a significant period of time, the Nottingham Employment Tribunal felt £5,000 to be an appropriate sum for injury to feelings in the circumstances. In that case the Chairman remarked that a suggested "conventional range" of £3,000 to £5,000 would now be rather low in a serious case of discrimination.

A similar willingness to move the base point for injury to feelings awards upwards was shown by the EAT in *Khan v Morgan Collins Group Ltd* EAT/389/97 (11 November 1997) when it was held that an award of £1,000 for injury to feelings was arguably too low. This may be contrasted with the approach of the EAT in *Orlando v Didcot Power Station Sports & Social Club* 1996 IRLR 262, which did not feel an award of only £750 for injury to feelings was unduly low. It certainly must, however, be near the lower end, see *Tullett v The Page Group and ors* EAT/792/97, in which an award of £50 was increased to £750.

Furthermore, the EAT's decision in *Cleveland Ambulance NHS Trust v Blane* 1997 IRLR 332 makes clear that this head of damage should not be forgotten in cases of discrimination on trade union grounds. Nor should it be assumed that victims of trade union discrimination will only obtain awards at the lower end of the "range", see the 1998 Newcastle ET decision in *Bakhsh v Newcastle City Health NHS Trust* Case No.25097/97, where an award of £9,000 for injury to feelings was made in an action short of dismissal case.

Is the injury to feelings in a case of discrimination on grounds of nationality any the less than on the grounds of colour? Are there any assumptions that can be made as to which groups might suffer most as a result of unlawful discrimination or as to which form of unlawful discrimination might cause greater injury?

In *Sage and Pearce v Labplas (UK) Ltd* the London North ET found that two (white) British employees had been subjected to unlawful discrimination on the grounds of their nationality by their employer which was part of a group of companies based in New Zealand and employed a pre-dominantly (white) New Zealand workforce (the "New Zealand mafia"). Both applicants had lost their jobs. The awards for injury to feelings were, however, low (£750 and £500). The ET considered that injury to feelings must be in a very different category when based

on racial discrimination between people of the same colour compared to that between people of different colour and background and in particular people who have formerly been colonial persons subjected to the dominance of the white race.

The former ceilings on damages for unlawful discrimination also demonstrated the distinction that was drawn between different forms of discrimination. The "unique sensitivities"[1] attaching to the issue of religious discrimination in Northern Ireland were previously considered to justify a higher ceiling (£30,000) than that applicable to cases of unlawful sex or race discrimination.

However, in *McConnell v Police Authority for Northern Ireland* 1997 IRLR 625 the Northern Ireland Court of Appeal (McCollum LJ dissenting in part) considered that the Fair Employment Tribunal's award of £10,000 for injury to feelings was excessive by comparison with awards made under this head in race and sex discrimination cases in Great Britain.

> *"Discrimination is equally pernicious, whether it is on religious grounds, sexual grounds or racial grounds, and those who suffer from it on any of these grounds must feel equally distressed and hurt. I can discern no basis for saying that the distress and hurt caused by it varies with the type of discrimination rather than with the treatment of the victim."*
> Per Carswell LCJ

Do Tribunals have the power to award compensation for personal injuries suffered as a result of unlawful discrimination in the workplace? How wide is the range of hurt covered by *"injury to feelings"*?

The language of the statute is wide and apparently all-encompassing, the Tribunal has the power to order that a respondent to pay "*compensation of an amount corresponding to any damages he could have been ordered by a County Court … to pay … as in any other claim in tort"*. That power is expressly stated to include *compensation for injury to feelings* – it is not limited thereto.

Undoubtedly, Tribunals do award sums that, in the County Court, would be considered to represent damages for pain, suffering and loss of amenity – i.e. damages for personal injury. In ***B M Hutchinson v Edward Lloyd t/a Marriots*** Case No. 64461/94, the London South ET awarded £1,550.00 damages for *personal injury* (cuts and bruising) awarded in race/sex discrimination case and in *S. D'Silva v (1) Hambleton and (2) Nurdin & Peacock* Case No 60990/94

[1] *Duffy v Eastern Health & Social Services Board* 1992 IRLR 251 FET

(20/5/96), £5,000.00 compensation for *psychiatric damage* was awarded in race discrimination case.

There appears to be some support for this inclusive approach from EAT decisions such as *REC of Cleveland v Widlinski* EAT/619/97, where a £15,000 award for injury to feelings and aggravated damages was upheld, taking into account the fact that the applicant was subsequently treated for depression and his asthma had recurred, and in *Kudawoo v LB Southward* EAT/736/97, awards of £5,000 and £10,000 for injury to feelings were upheld, taking into account the fact that the applicant's health had been seriously affected.

Such an interpretation is not, however, without difficulty. Many such awards are made with little explanation and (apparently) with little evidence being given to justify the fact or level of award. Those who are critical of such awards would argue that ETs would do well to heed the view of the EAT in *LFCD v Betty* 1994 IRLR 384 (albeit in a different context), i.e. that an Employment Tribunal is not properly equipped to deal with claims for damages for personal injuries.

On the other hand, why should an ET not have the power to award damages in respect of all the consequences of the discriminatory act? A County Court hearing a non-employment claim under the same Act would undoubtedly be able to do so.

If Employment Tribunals really do have such powers, however, an applicant who compromises an ET discrimination complaint may well (unintentionally) have compromised valuable personal injury claims at the same time, see *Sheriff v Klyne Tugs (Lowestoft) Ltd* Norwich County Court (23/10/98) (Recorder Croome).

Furthermore, whilst such all-encompassing power might not be so objectionable, awards for personal injury should not be confused with damages awarded under the heading *injury to feelings*, which is a separate and distinct head of loss. The express inclusion of this head of loss recognises the fact that it is not addressed by damages for personal injury: *"Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages", Alcock v Chief Constable of the South Yorkshire Police* 1992 1AC 310, per Lord Ackner.

Is it the length of the discrimination or the length of the suffering that is relevant? Many decisions stress the time over which the discrimination took place, see, e.g. *LB Hackney v Chan* EAT/121/97 where the ET had taken into account that the applicant had been subjected to humiliating treatment by his manager over a 16-month period. Also see *Johnson*, the tribunal had taken into account the fact that the discrimination had gone on over a period of more than 18 months.

In *Mustafa v (1) Ancon Clark Ltd and (2) McNally* Case No 2800894/96, however, the Sheffield ET awarded £21,500[2] damages for injury to feelings in respect of discrimination that had taken place over a period of "about a month". The effect of that discrimination on the applicant was *devastating* and *profound*, resulting in the applicant being *severely traumatised*.

Is the identity of the respondent a relevant factor or should tribunals ignore this in assessing the injury suffered by the applicant?

It was undoubtedly seen as highly relevant by the Fair Employment Tribunal in *Duffy v Eastern Health & Social Services Board*. In *McConnell v Police Authority for Northern Ireland* 1997 IRLR 625, however, the Northern Ireland Court of Appeal ruled that the FET had erred in law by regarding the identity of the employer as a ground for increasing the compensation for injury to feelings.

McConnell is probably correct, as to hold otherwise would be confusing compensation with punitive damages. On the other hand, the fact that a large employer has compounded the discrimination by ignoring its own procedures may aggravate the injury suffered. Moreover, tribunals do take into account the practical implications of a respondent's inability to pay a large award, hence the far smaller sums awarded against individual, rather than employer, respondents.

Credit should be given for an admission or apology on the part of an employer or individual respondent. Certainly there are some signs of encouragement for this in the awards made, see ***Orlando*** and *Johnson*. But an admission of liability will be of little avail if the Respondent then proceeds to raise matters that might be considered to be *unseemly and non-productive*[3] at the compensation hearing.

Damages paid to an employee on account of injury are not taxable (s 188 ICTA 1988). Awards made for injury to feelings are arguably analogous and should therefore not be taxable. The approach of the Inland Revenue is, however, unclear. There is some suggestion that where (and to the extent that) the injury to feelings is caused by a discriminatory termination of employment, the damages may be treated as arising from the termination of employment and therefore taxable (subject to s 188 ICTA).

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[2] £20,000 against the First Respondent, £1,500 against the Second.

[3] See *Cannock* per Morison J.

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 130 **SEX DISCRIMINATION (GENDER REASSIGNMENT) REGULATIONS 1999 AND UNFAIR DISMISSAL AND STATEMENT OF REASONS FOR DISMISSAL (VARIATION OF QUALIFYING PERIOD)ORDER 1999**

The Gender Reassignment Regulations came into force on May 1st 1999. They have been implemented following the ECJ case of *P v S and Cornwall County Council.* They extend the provisions of the SDA to include discrimination on grounds of gender re-assignment in employment and vocational training.

A new section 2A of the Sex Discrimination Act provides that a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons and he does so on the grounds that B intends to undergo, is undergoing, or has undergone gender re-assignment.

Gender re-assignment is defined as meaning "a process which is undertaken under medical supervision for the purpose of re-assigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process,"

There are exceptions for genuine occupational qualifications and Ministers of Religion. The Equal Opportunities Commission duties are extended to cover gender re-assignment.

This long awaited regulation reduces the qualification period for both cases of unfair dismissal and claims for statements of reasons for dismissal to one year with effect for all dismissals where the effective date of dismissal is on or after June 1st 1999.

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 131 **"WORD OF MOUTH" RECRUITMENT UNLAWFUL DISCRIMINATION: Jane Coker & Martha Osamor – v – Lord Chancellor & Lord Chancellor's Office, Croydon ET Nos: 2300435/98, 2300810/98, 230080/98**

An ET has criticised the way Government ministers select their special advisors. It concluded that there had been indirect sex discrimination by the Lord Chancellor, Lord Irvine, and his office.

In an 18 page determination the Croydon ET set out its reasons for finding that the conventional method amongst ministers of selecting special advisors from a circle of close friends discriminated against women and ethnic minorities. The tribunal found that the employment of Garry Hart (a City solicitor, friend of Lord Irvine and godfather to the Prime Minister's daughter) as a special advisor indirectly discriminated against one of the applicants, Jane Coker. The post was not advertised and she was denied the opportunity to apply, the tribunal held.

The tribunal said, *"We accept… that 'word of mouth' recruitment tends to perpetuate discriminatory situations and is therefore undesirable." "A Minister should take account of the imbalance of gender and race in the circles in which he is minded to find someone for an appointment. There is no evidence that the cabinet's circle of friends are evenly balanced in terms of women and black people. The opposite appears to be true. The evidence is that the cabinet reproduces itself in terms of race and gender."* The tribunal said it was not declaring that all such posts should be brought within normal civil service standards, but that *"the particular Minister should ensure that his selection is free from discrimination."*

The tribunal rejected a sex and race discrimination claim by Martha Osamor on the grounds that she was not properly qualified for the post.

Lord Irvine intends to appeal the decision to EAT.

This case may have much wider implications for all informal recruitment methods, including "word-of mouth" recruitment, "headhunting", special appointments to the judiciary, etc.

In a separate, but related case, a settlement was reached with the Attorney General, John Morris, in a case brought by solicitor, Jo Haynes. She alleged that the informal “secret soundings” for the appointment of Government barristers discriminated against women. She claimed that appointments to the Treasury panel were drawn from an “old boy” network. She pointed out that of 116 barristers on the panel, 103 were men.

As part of the settlement deal, the Attorney General agreed to make a donation of £5000 to the Fawcett Society, a charity devoted to promoting women in public life. In a statement issued by the Attorney General it was conceded that the “secret soundings” system tended to result in the recommendation of people already known to the people who were consulted and that this system may have contributed to the under-representation of women on the panel.

This case was reported in **The Times on June 12th 1999**

These cases have been reported from **“Link News”,** the on-line service for lawyers. For further information about Link, please telephone 0171-396-9292

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 132 **"EMPLOYERS NEED TO TAKE INTO ACCOUNT PREGNANT WORKERS NEEDS: Abbey National PLC – v – Formosa EAT [1999] IRLR 222**

THE FACTS

Elvira Formosa was employed as a team leader at Abbey National from September 1994. In October 1995 she was offered a job with BT after her former manager had left to work with BT. Her new manager met her for a drink at a pub and persuaded her not to take the job with BT. Subsequently rumours circulated that she had said that the meeting had not been limited to a drink but they had had a meal together and then her manager had suggested that they spend the night together. She denied involvement with the rumours and was upset by them. On the same day she discovered that she was pregnant. The next day her doctor certified her unfit for work due to anxiety and pregnancy. While she was off sick her new manager opened an investigation into the rumours and took statements from those involved.

When Ms Formosa returned to work on March 18th she was immediately suspended on grounds of an allegation of gross misconduct. She was again certified sick, she later served notice of the date on which she intended to commence her maternity leave and the fact that she wished to return to work after her maternity leave. The employers decided to take disciplinary proceedings against her and thought that these would be better resolved prior to her maternity leave and that it was necessary for operational reasons to resolve the matter. They notified her of this but she refused to attend on the grounds that both she and her doctor felt that she was emotionally unfit to attend until after her baby had been born.

The employers then held an disciplinary hearing in her absence and she was dismissed for gross misconduct. An internal appeal, again in her absence, was unsuccessful.

EMPLOYMENT TRIBUNAL DECISION.

The ET upheld her sex discrimination claim. They concluded that her sickness at the date of the disciplinary hearing was related to her pregnancy and that she had therefore suffered a detriment when her employers had proceeded with the disciplinary hearing despite the fact that she could not attend because of her illness.

They awarded her £17,043 compensation including £5,000 for injury to her feelings. They calculated her loss of earnings on the basis that a "reasonable employer" would have waited until she had returned from maternity leave, when she would have had two years service, further that a "reasonable employer" following proper procedures would have given her the benefit of the doubt and it would be unlikely that a "reasonable employer" would have dismissed her at the end of these procedures.

EMPLOYMENT APPEAL TRIBUNAL.

The EAT concluded that she had suffered a detriment when she was dismissed following a disciplinary hearing that she was unable to attend for a pregnancy related reason. The ET were entitled to take the view that the pregnancy was the *effective* cause of the disciplinary hearing leading to the dismissal, it did not have to be the *sole* cause.

However, the ET was wrong to assess her loss of earnings on the basis of what a "reasonable employer" would have done. The question that they should have asked was – what were the chances that she would have been dismissed had a fair procedure been followed ? This chance should be expressed as a percentage which should then be applied to the loss of earnings figure. The case should be remitted to a new ET for them to assess the loss of the chance of her retaining her employment if there had been no sex discrimination.

COMMENT.

This case re-states and re-enforces the importance of employers need to consult with and take into consideration their pregnant employees need. The employers "business convenience" is not more important that their pregnant employees needs.

Gay Moon,

Solicitor

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 133 **CONTINUING DISCRIMINATION: Ford Motor Company Ltd – v – Shah & others EAT/530/95 and Photay – v – Department of Social Security & Others, Birmingham ET, 1303554/98 & 1304701/98**

FORD MOTOR COMPANY -V- SHAH & OTHERS

THE FACTS

IT1s were presented to the Birmingham IT in May 1992, based on race discrimination, which was alleged to have occurred on 24th February 1992. The Applicants were HGV truck drivers who applied for a transfer and promotion to the Ford Truck Fleet in May 1990. The Applicants failed the selection process and lodged a grievance, which was rejected, and the internal grievance procedure was exhausted on 24th February 1992. The IT1s were lodged within three months of the outcome of the grievance but were clearly well out of time in relation to their failure to be transferred which had taken place in May 1990.

For three years as the parties sought to resolve the dispute by negotiation. The negotiations broke down and the case became active in 1995, when the Applicants made an interlocutory application to amend the grounds of complaint. The IT granted leave for the amendment and Ford appealed to the EAT on the grounds that the amendment went wider than the original grounds complained of which they said was limited (because of the three month time limit) to issues surrounding the conduct of the grievance and not the substance of the grievance itself.

The IT found that the racial discrimination complained of in the original IT1 was both the treatment received by the Applicants in their rejection for the jobs sought, and the whole grievance procedure culminating in the final decision on 24th February 1992 and the amendment was allowed.

They considered whether the substance of the grievance was in time and in particular whether the ongoing grievance procedure had the effect of continuing the racial discrimination so as to bring it within the definition of continuing discrimination as set out in section 68(7)(b) of the Race Relations Act: "Any act extending over a period shall be treated as done at the end of that period."

They held that the original IT1s, properly understood, related both to the rejection made in the recruitment exercise in 1990 and to the conduct of the grievance procedure following that rejection. They concluded that: *"While there was an extant grievance procedure there was, in our view, an act extending over a period for the purposes of section 68(7)(b) of the 1976 Act" and commented that "the distinction drawn by Ford between the rejection in 1990 and the termination of the grievance procedure in February 1992 is artificial. If Ford were right, the Industrial Tribunal would have jurisdiction to consider a complaint of discrimination in relation to the conduct of the grievance procedure but not in relation to its substance, even though the substance of the grievance was at all time acknowledged to concern allegations of race discrimination in the selection and assessment process."*

PHOTAY -V- THE DEPARTMENT OF SOCIAL SECURITY & OTHERS

THE FACTS

The Applicant had brought a grievance against her Line Manager under the equal opportunities complaints procedure alleging discrimination and victimisation. The Applicant was concerned about detrimental treatment from her Line Manager from November 1995 culminating in a negative appraisal in June 1997. The investigation was conducted, with the agreement of all parties, under the informal equal opportunities complaints procedure and the outcome of the investigation was that the Applicant's complaint was rejected. The Applicant was told of the outcome in October 1997.

The Applicant then consulted with her Union for advice to pursue her grievance further, there being a formal complaints procedure available to employees. There was correspondence between the Applicant's Union representative and the Respondent concerning the investigation and the Applicant's dissatisfaction with the outcome. The Applicant's case was passed to a different Union representative towards the end of 1997 who took little or no action to further the Applicant's internal complaint. The Applicant by this time had been off on sick leave since July 1997. A third Union representative took over the Applicant's case and eventually in June 1998 on behalf of the Applicant, this representative lodged a grievance under the formal equal opportunities complaints procedure. The complaint covered both

the treatment by her Line Manager from November 1995 until she went on sick leave in July 1997, and the conduct of the informal grievance investigation.

The formal investigation began and was under way. The Applicant was frustrated with the delay in progress and consulted the Commission for Racial Equality in July 1998 whereupon an IT1 was presented to the Employment Tribunal on 13th August concerning the less favourable treatment from the Line Manager from November 1995 to July 1997 and the conduct of the grievance. A second IT1 was lodged on 19th October repeating the allegations of less favourable treatment and identifying further concerns about the conduct of the grievance.

A preliminary hearing was held to determine what if any of the treatment was within the Tribunals jurisdiction to consider bearing in mind the three-month time limit. At the time of this hearing the formal grievance was still ongoing.

EMPLOYMENT TRIBUNAL DECISION – PRELIMINARY HEARING

They ruled that the first IT1 included allegations in respect of the treatment of the Applicant up to and until she went on sick leave, the investigation of her complaints and various incidents of alleged less favourable treatment whilst she was on sick leave. The employer had conceded for the purposes of the preliminary hearing only that the alleged discrimination would be regarded as continuing from November 1995 until the Applicant went on sick leave in July 1997. The Tribunal therefore focused on the delay from the beginning of the informal stage of the grievance in June 1997 to the presentation of the two IT1s in August and October 1998.

The Employment Tribunal accepted that the Applicant's understanding was that the grievance procedure was one continuing process and found as follows: *"So far as the grievance itself is concerned, the Tribunal is satisfied that the First Respondents handling of the grievance at both the informal and formal stages constituted an act extending over a period for the purposes of section 68 of the Race Relations Act and sections 76 of the Sex Discrimination Act and that the act was continuing at the date of the Tribunal."*

The Tribunal went onto consider whether or not it was appropriate to treat the substance of the grievance and the conduct of the grievance procedure as separate matters. In this regard the Tribunal commented: *"There is no doubt the Applicant regards the handling of her grievances and the substance of the grievances themselves as all part of one issue. The first application and the second application do relate to the complaints as to the First Respondent's conduct and the grievance procedure following them. The First Respondent cannot have been in any doubt that the Applicant's complaint concerned the whole process from*

the alleged and unlawful conduct, up to, and including, the grievance procedure..... Taking into account the Applicant's allegation is of a racist and/or sexist culture at the office where she worked and the allegations of harassment, the handling of the informal grievance, her treatment whilst away sick and the handling of the formal grievance were merely facets of that culture, the Tribunal finds that the Applicant's claims related to one continuing act of the First Respondent, extending over a period and which was continuing at the time the applications were presented to the Tribunal" and accordingly found that the claims had been presented in time. The Tribunal also helpfully indicated that they would have exercised their jurisdiction to extend time in any event on the basis that it would be just and equitable to do so.

INDIVIDUALLY NAMED RESPONDENTS

These included the alleged harasser and a number of the Applicant's managers. The IT found that the grievance procedure did not have the effect of continuing the discrimination as they had found in relation to the employer itself. However, in all the circumstances found that it was just and equitable to extend the time period in order to bring the claims against these named Respondents within time.

This decision has been appealed.

PRACTICE POINTS

The *Ford* decision is an extremely helpful one when seeking to bring within time the substance of a grievance for a continuing employee, which took place outside the three months time limit. Advisors should ensure that the IT1 is presented within three months of the conclusion of the grievance (when the continuing act as against the employer can be said to have ended) and that it refers both to the substance of the grievance and any complaint that the Applicant may have in relation to the conduct of the grievance procedure.

Refer also to **DLA Briefing 124**, the *Aniagwu* case, where the EAT found that delay in lodging a claim at Tribunal, caused by pursuit of a grievance procedure, would be grounds for a just and equitable extension of time.

Ms Siân Hughes
Commission for Racial Equality

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 134 **FREE MOVEMENT OF WORKERS: ARTICLE 48 OF THE EC TREATY. Judicial Review by Michael O'Boyle and Suzanne Plunkett, Northern Ireland Court of Appeal 19.2.99**

THE FACTS

Mr O'Boyle, an Irish national and former Assistant Chief Fire Officer for Dublin, applied for the post of Chief Fire Officer in the Northern Ireland Fire Brigade to the Fire Authority for Northern Ireland. He was not shortlisted for the job on the grounds that he was not a UK national.

Ms Plunkett, an Irish national, was employed as an administrative assistant at the Driver Vehicle Test Agency in Belfast. She applied to the Inland Revenue in Belfast for a post as a "recurring temporary appointment Revenue Officer". Her application was not considered because she was not a UK national.

They both applied for a Judicial Review of the refusal of their applications for employment on the grounds that the requirement that they be UK Nationals in order to be considered for either of the jobs infringed their right to freedom of movement under Article 48 of the EC Treaty.

The Fire Authority for Northern Ireland and the Inland Revenue both put in a defence claiming that the posts in question constituted employment in the public service and therefore came under the exception in article 48(4) –"*the provisions of this article shall not apply to employment in the public service."*

The applicants claimed that this exception should be construed narrowly and that their cases should have been given individual attention in order to decide whether an exception to the general policy should be made in either case and that the decisions not to accept their applications were unreasonable and lacked proportionality. They also claimed that the relevant Civil Service nationality Rules adopted in 1996 were unlawful.

DECISION

Both the Northern Ireland High Court and the Northern Ireland Court of appeal rejected these arguments and re-affirmed the freedom of the state to discriminate on grounds of nationality in any public service employment.

IMPLICATIONS

The state is necessarily one of the largest employers in any country. Hence its monopoly position should not be abused. A blanket exclusion is the nature encountered in these cases provides a dangerous precedent and does not build up the freedom of movement between member states of the EC.

Gay Moon,

Solicitor

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 135 **PUBLIC INTEREST DISCLOSURE ACT 1998: Implications for discrimination complainants and witnesses**

The Public Interest Disclosure Act 1998 comes into force on July 2nd 1999. This Act renders it unlawful to subject any worker who makes a 'qualifying disclosure' to a detriment. If such a worker is dismissed, it will automatically be unfair. There is no limit on the compensation award.

The worker is only protected, however, if the disclosure is made to:

- their employer (or a Government Minister, if they are a Civil servant)
- a legal advisor
- any person nominated by the employer
- or any suitable person if the worker believes that disclosure to the employer would result in the evidence being concealed or destroyed

This list is a paraphrase of the categories set out in the legislation.

The information disclosed must fall within one of six categories. These include the commission (or likely commission) of a criminal offence, a failure (or likely failure) to comply with a ***legal obligation*** and the endangering (or likely endangering) of an individual's health and safety (in the case of harassment?). There are also strict requirements on the worker they must:

- act in good faith
- not act for personal gain, and
- reasonably believe the information to be true

Any attempt to avoid the provisions of the Act (e.g. by a “gagging” clause in a contract) will be void.

This new law could provide an additional means of seeking redress, or an additional line of argument, for victimisation in discrimination cases, particularly if a witness is “blowing the whistle” on discrimination. This could apply in respect of individual complaints or for breaches of a Statutory Duty (e.g. Section 71 of the Race Relations Act - which applies to local authorities – the duty to promote equality of opportunity and not to discriminate). ***Please keep DLA informed of any interesting developments.***

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 136 CONCEPT OF DISCRIMINATION UNDER THE DDA EXPLAINED: Clark – v – TDG Ltd, t/a Novacold [1999] IRLR 318

FACTS

Mr Clark suffered an accident at work which caused him to be off work with soft tissue injury. It was not known when he would return to work. When he was dismissed by his employers he complained that there was a breach of the Disability Discrimination Act because he might have been allowed to remain on the sick without drawing any pay until such time as his injury resolved.

The ET rejected his claim on the grounds that it was necessary for him to show that the employers would have treated a person who was equally off work for a long period of time differently. They also held that it was necessary for him to show that there had been a breach of both sections 5(1) and (2) of the DDA to succeed. The ET decision was appealed and was recently heard by the Court of Appeal.

COURT OF APPEAL DECISION

The CA remitted the matter to the ET, allowing appeals by both the employee and employer. They held that the ET had incorrectly decided who was the comparator. The true comparator was any person who did not suffer the same disability as the applicant. It did not have to be a person who was equally unable to work for the employer for a long period of time. It was simply a case of identifying others for whom the reason for the treatment did not apply and it was not a “like for like” comparison. In this respect the comparison under the DDA was radically different to the comparator under the Race Relations Act or Sex Discrimination Act.

The ET was equally incorrect to require a breach of sections 5(1) *and* (2) to be proved in order to establish a claim. Those two sections were alternative methods of establishing discrimination.

Finally they held that section 5(2) did not apply to a dismissal. The duty under section 6 of the DDA applied only to situations pre-dismissal. Once a dismissal took place it could only be discriminatory if it was contrary to section 5(1).

COMMENT

This is the first time that the CA have had to consider the DDA. They have very carefully construed the Act and have reached a workable conclusion. The DDA is radically different from the previous discrimination Acts because the comparison is necessarily different. It starts from the proposition that only the disabled can take advantage of the Act. The heart of the concept is that disabled people should be integrated into the workforce. Once it is proved that someone is disabled then the employer will have to justify any failure to treat a disabled person less favourably (section 5(1)). The principal question in the test of discrimination is therefore whether the treatment was unjustified.

Moreover disabled persons are entitled to have reasonable adjustments made to enable them to be integrated (section 5(2) and 6). However, these sections only apply pre-dismissal. It will therefore be important for advisers to remember that they should plead discrimination under *both sections* in any dismissal situation. The judgment in this case should make it easier for disabled persons to take advantage of the Act.

Robin Allen QC

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 137 RESTRICTED REPORTING ORDERS: NO PROTECTION FOR EMPLOYERS: University of Leicester – v – A; EAT [1999] IRLR 352

THE FACTS

Ms A sued her former employers for unlawful sex discrimination alleging persistent sexual harassment and assault from a male colleague in a more senior position. She alleged that despite her complaints her employers had taken no action to prevent the harassment continuing.

The employers applied for a restricted reporting order. The first ET granted a restricted reporting order covering the applicant, her children, the alleged harasser, his wife and children, the university and a number of named individuals. This amounted to 40 people. At a later hearing the second ET revoked that part of the order that related to the university and it's employees. The order remained for apart from the applicant and her family and the alleged harasser and his family. The university appealed against the new order.

THE LAW

The *Employment Tribunals Act 1996, s11* defines a restricted reporting order as

"an order prohibiting the publication in Great Britain of *identifying matter* in a written publication…" *Identifying matter* is defined as "any matter likely to lead members of the public to identify **him** as **a person** affected by, or as the person making, the allegation."

EMPLOYMENT APPEAL TRIBUNAL DECISION

The EAT confirmed that the ET had correctly decided to exclude the employer from taking the benefit of a restricted reporting order. The word *'person'* only relates to an individual not to a corporate body. It was not the intention of parliament to provide the protection of anonymity to corporate respondents who may be vicariously liable for acts of sexual misconduct in order to protect their commercial reputation.

COMMENT

Both this decision and the decision in *Associated Newspapers Ltd – v - London (North) Industrial Tribunal* [1998] IRLR 569, High Court, make it clear that the purpose of making restricted reporting orders is only to protect the individuals directly involved with the allegations during the hearing of the case. It should be borne in mind that these orders only stay in force until the tribunal's decision is promulgated when the newspapers can publish full details of those involved.

Gay Moon,

Solicitor

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 138 BETTER REGULATION TASK FORCE: REVIEW OF ANTI-DISCRIMINATION LEGISLATION

The Cabinet Office Better Regulation Task Force has just published its review of the anti-discrimination legislation. Unfortunately they have concluded that even though our discrimination legislation is about to reach it's twenty fifth birthday and is looking distinctly worn and patched there is no need for a 'major legislative overhaul' at the moment.

There are nevertheless a number of changes that they are recommending that are very welcome.

They are recommending changing the law to:

- Extend the coverage of the SDA, RRA and DDA to the public sector (in particular to the Police, Immigration and Prison services),
- Extend the provisions of the EC Burden of Proof Directive to cover race and disability (when this is implemented for sex discrimination in 2001),
- Clarify the situation regarding discrimination on the grounds of sexual orientation or transsexuality,
- Repeal section 8 of the Asylum and Immigration Act 1996 (employers duty to check their employees immigration status),
- Extend legal aid to discrimination cases,
- Extend the time limit for making a formal complaint to six months (subject to an impact assessment and consultation with business),
- Improve the operation of tribunals in equal pay cases,

- Extend the Employment Rights (Dispute Resolution) Act 1998 to cover discrimination cases,
- Re-examine and, where possible, remove legal barriers to joint working between the Commissions, and
- Clarify Commissions' power to initiate investigations.

The rest of the report is concerned with using persuasion to achieve equal opportunities and non-discrimination. They recommend:

- mainstreaming equality,
- a public sector duty to promote equal opportunities (backed up by legislation if necessary),
- the use of public sector finance to encourage equal opportunity policies among suppliers and contractors (contract compliance),
- provision of clear and simple advice to individuals and businesses through 'one Improve the operation of tribunals in equal pay cases,
- Clarify the Commissions' power to initiate investigations, and
- stop' advice services,
- building equality into organisational quality systems (e.g. Investors in People and Business Excellence Model),
- making real progress in equal opportunities in the Civil Service and public appointments , and
- encouraging the private sector to adopt best practice policies on equality.

They also want the Commissions and their sponsor Government Departments to work together to adopt a more strategic, joined-up and targeted approach.

Copies of the report are available from: Morwen Dyer, telephone 0171-270-6601

Feed back and comments on the report must be sent within 60 days to Andrew Limb, Room 66a/3, Task Force Support Team, Cabinet Office, Horse Guards Road, London SW1P 3AL or e-mail: alimb@cabinet-office.gov.uk

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 139 **HUMAN RIGHTS ACT: A FREE-STANDING RIGHT TO FREEDOM FROM DISCRIMINATION? Proposed additional Protocol to Article 14 of the European Convention on Human Rights**

The major defect of the European Convention of Human Rights (ECHR), which will be directly enforceable in the UK from October 2000, is that it does not contain a clear free standing right to equality and protection from discrimination.

Article 14 of the Convention only provides:-

- *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground 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.*

This means that the right to protection from discrimination under the ECHR is limited to the enforcement of the ECHR rights. It is not an independent right.

In March 1998 the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to draft a protocol to the ECHR on equality and non-discrimination and to prepare a draft explanatory report to set out it's precise nature and scope which could be put to the Committee of Ministers in December 1999. Additionally, in December 1998 the Committee of Ministers adopted a declaration in which the governments of member states expressed their agreement to finalise the text of a legally binding instrument providing for a general prohibition of discrimination in all its forms.

The CDDH asked the Committee of Experts for the Development of Human Rights(DH-DEV) to propose a variant or variants for an additional protocol on equality and non-discrimination.

They considered possible drafts for this additional protocol between May 18th and 21st. Unfortunately they were not able to agree to either of the proposed Variants. As a compromise position they agreed to support the following compromise Variant:-

- *Preamble : "Having regard to the fundamental principle of equality before the law and equal protection of the law;*

- *Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the protection of Human Rights and Fundamental freedoms signed at Rome on 4 November 1950"*

- *Article 1 :*

    1. *The enjoyment of any right set forth by law shall be secured without discrimination on any ground 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.*

    2. *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."*

Those representing the UK government did not vote in favour of any of these Variants despite the Government's Manifesto commitment that it was: - *"committed to ending unjustified discrimination wherever it exists."*

The proposed additional protocol will offer an excellent opportunity for the government to honour their manifesto commitment and prevent unjustified discrimination amongst the signatories of the European Convention of Human Rights.

The Steering Committee on Human Rights (CDDH) is meeting from June 22nd to 25th 1999 to consider the proposals of the Committee of Experts.

A free standing right to equality is an important, necessary and effective tool in the fight against unjustified discrimination and it is important to ensure both that such principles are at the heart of the chosen variant and that the UK government signs up to its provisions supporting this.

If you feel that this is an important issue you could write to your MP and to Jack Straw to express your views.

DISCRIMINATION LAW ASSOCIATION

JUNE 1999

BRIEFING No 140 INDEPENDENT REVIEW OF THE ENFORCEMENT OF UK ANTI-DISCRIMINATION LEGISLATION

The University of Cambridge Law School, under the direction of Professor Bob Hepple, is undertaking an independent review of the effectiveness of the UK's anti-discrimination legislation. The aims of the research, which is funded by the Joseph Rowntree Charitable Trust, are:

- To develop a simple, accessible and cost-effective legislative framework for ensuring equality of opportunity, and
- To propose other measures which will promote equ8al opportunity policies and spur compliance with those policies

Written contributions are invited (by *July 31st*) on experiences of current anti-discrimination legislation and how legislation and other measures could be improved. It is expected that the Government will give serious consideration to the findings of the review.

A series of consultation events are also planned around the UK. The first is being held on *July 19th* from 5 to 7 p.m. at the Faculty of Laws UCL, Bentham House, Endsleigh Gardens, London WC1. Other meeting are being held in Birmingham (13 September), Bristol (28 September), Cardiff (29 September), Glasgow (19 October), Manchester (1 November) and Belfast (17 November).

If you wish to attend any of the above meetings, please contact (for the London meeting please reply by *July15th*):

Mr. Tufyal Choudhury
Centre for Public Law
10 West Road
Cambridge CB3 9DZ
Tel/fax: 01223-330062
e-mail: discrim@law.cam.ac.uk

Towards the end of 1999 a Discussion paper will be sent to all those who have contributed to the initial consultation, setting out options for reform and inviting further views on specific questions. There will also be a conference in Cambridge early in 2000. A final report will then be produced by April 2000.