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DISCRIMINATION LAW ASSOCIATION

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BRIEFING No 163 RECENT DEVELOPMENTS IN THE LAW OF INDIRECT DISCRIMINATION

In June 1996 DLA published briefing No 9**, entitled *"Indirect Discrimination – Problems of Proof."* This note will remind readers of the basic structure and importance of indirect discrimination, and will highlight legal developments in the last few years.**

Indirect discrimination is known in America as "adverse impact". It is concerned with practices which have the effect of disadvantaging women or racial groups as compared with men or white people. Indirect discrimination law recognises that social conditions and traditions may continue to operate to the disadvantage of those who have historically been the victims of direct or intentional discrimination even if there is today no continued intention to discriminate.

Definition

The definitions, which are virtually identical, are contained in section 1(1)(b) of the *Sex Discrimination Act 1975* and the *Race Relations Act 1976*. In order to establish a **prima facie** case of indirect discrimination the applicant has to establish:

(i) that the employer applied a requirement or condition equally to women and men, or equally to people of the same racial group as the applicant and white people;

(ii) the proportion of women (or members of the applicant's racial group) who can comply with the requirement or condition is considerably smaller than the proportion of men or white people who can do so; and

(iii) the applicant suffers a detriment because she or he cannot comply with it.

If the applicant is successful up to this point, the employer has a defence if the requirement or condition is **justifiable** irrespective of the sex or ethnic group of those to whom it is applies.

Explanations

a) In indirect discrimination the requirement or condition is applied to all relevant employees equally. If men and women are treated differently it

is a case of direct rather than indirect discrimination. At the time when a claim is commenced it may not be clear to the applicant or her advisers into which category the claim should be fitted. For example, *Hurley v Mustoe* [1981] IRLR 208 concerned a single mother who was denied employment on the ground that she had responsibility for three young children. She successfully pleaded direct discrimination on the basis that the same job requirement would not have been applied to male applicants. However, if the employers **had** applied the same requirement to **all** applicants equally, the case would have had to be pleaded as one of indirect discrimination. It is very likely that the requirement would have been held to affect disproportionately more women than men, and unlikely that the employer would have been able successfully to justify its use;

b) indirect discrimination is concerned with the effect on women or black people as groups. It follows that some reference to numbers is always needed. One of the most difficult legal questions is to know which groups of women should be compared with which groups of men, and which groups defined by race, ethnicity, etc should be compared with which other groups;

c) an individual applicant can only bring a case of indirect discrimination if she or he is unable to comply with the requirement in question. However, if the effect is very wide-ranging it may be possible for the Equal Opportunities Commission or the Commission for Racial Equality to bring a case by way of judicial review. This may be especially appropriate where it is alleged that the impact of a statute or statutory instrument is indirectly discriminatory. In *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1994] IRLR 176 the Commission successfully obtained a declaration that the law of unfair dismissal, which at the time was limited to employees who normally worked for at least 16 hours per week, was indirectly discriminatory against women;

d) justification is central to indirect discrimination. If employees were not allowed this defence, whenever there was a disproportionate number of men or white people doing a particular job, the employer would be vulnerable to a claim. The only way to be certain of avoiding such a claim would be to utilise quotas.

THE CASE-LAW

REQUIREMENT OR CONDITION

Home Office v Holmes [1984] IRLR 299 instructs tribunals that the concept of requirement or condition should be interpreted widely. Examples include anything to do with working arrangements, such as a requirement to work full-time (which thereby denies the opportunity to work in the job part-time or on a job-share basis); a requirement to work overtime or to work particular days such as religious holidays; a requirement for specific educational qualifications or experience; seniority requirements; age requirements; dress requirements, etc.

To show that a requirement or condition has been applied it is not necessary to show that it is written down or is part of a job description or contract of employment. It may be more difficult to prove, but it is sufficient that the applicant can establish an implicit requirement by looking at what happens in practice.

There are two interconnected ways in which the concept of requirement or condition has been interpreted by British courts which have substantially limited the potential effectiveness of indirect discrimination law. Both of these interpretations will cease to be authoritative when the *EU Burden of Proof Directive* comes into effect in January 2001.

First, it is not enough to show that, on average, fewer women or black people work in a particular position. It has to be shown that the reason for the discrepancy is the application of a particular requirement or condition.

Secondly, it was held in *Perera v Civil Service Commission (No 2)* [1982] IRLR 147 that, to amount to a requirement or condition, the rule which is challenged must amount to an absolute bar, it being insufficient that it merely constitutes a preference in the mind of the employer.

Article 2(2) of the Burden of Proof Directive will apply to "any neutral provision, criterion or practice." This will clearly reverse *Perera*; it is probably also the case that a difference in average achievement or performance will be sufficient to allow the applicant's case to proceed.

ESTABLISHING ADVERSE IMPACT

It must first be determined which groups should be compared with one other and, secondly, where there is a significant difference in the statistics on the different groups being compared.

In gender discrimination cases, the comparison is between women and men; in race cases, the appropriate comparison is not so self-evident. The most useful comparison is between members of the applicant's racial group and white people. It must be remembered, though, that a person may belong to more than one racial group: for example, a person may be either non-white, Asian, Indian or Sikh. It must also be remembered that Muslims are not, in themselves, a racial group, and therefore any claim must make it clear which protected group is the alleged victim of the indirect discrimination.

It is not always necessary to produce elaborate (and expensive) statistical information. Especially where the case concerns the impact of a requirement on women with children, the tribunal is very likely to utilise common knowledge, such as the prevalence of part-time work amongst such women and the difficulties of combining full-time work with primary responsibility for childcare.

Where race is concerned, the issue is more problematic. Because black people are not distributed evenly through the community, it may be necessary

to look at local labour markets. Statistics concerning race may be more needed but less easy to come by than those concerning gender. Perhaps as a result, there are relatively few indirect discrimination cases concerning race; the majority of those concern situations where the relevant requirement concerns current employees rather than prospective applicants for a position.

The relevant "pool" – the different groups between compared – should be those otherwise qualified for the post if one were to exclude the discriminatory requirement. For example, in *Pearse v Bradford Metropolitan Council* [1988] IRLR 389 the question concerned a rule which restricted applications for the position of college counsellor to full-time staff at the college, only 21.8% of whom were female. Those figures were irrelevant, as most of the college staff were not qualified for the position in student counselling. The relevant statistics should have compared men and women who were so qualified. Similarly in *Jones v University of Manchester* [1993] IRLR 218 the question was whether an age requirement that a careers adviser be 27-35 was indirectly discriminatory against women mature students – and the 41 year old applicant in particular - on the basis that women mature students tend to be older than their male counterparts. The claim failed on the basis that it was irrelevant that the requirement may have been indirectly discriminatory against female mature students; the correct question was whether it was indirectly discriminatory against women in general.

Selecting – and arguing for - the correct pool is an issue fraught with problems. It raises issues which are difficult to grasp for applicants, their advisers and the tribunal members.

The next question is whether a considerable smaller proportion of the applicant's group are able to comply than the comparator group. This is a question of fact for the tribunal to determine. It is not a question of statistical significance so there is no need for the court to become embroiled in technical mathematical questions. However, it is only common-sense that, the smaller the group, the greater the disparity between the figures which will be necessary for the court to conclude that the case is made out.

However, tribunals may be sensitive to the practical realities of the situation. In *London Underground v Edwards* [1998] IRLR 364 the question was whether a considerably smaller proportion of the female than male train drivers could comply with the new shift system. All the men could do so, but only 20 of the 21 women (the applicant was the exception) could do so. Despite this, the applicant won her case. The tribunal bore in mind that the very small proportion of women doing the job in question was due in part to the difficulties of combining the job with raising a family – even before the new shift system was introduced. The 21 female drivers were unrepresentative of women who were qualified to do the job.

The impact of the recent decision in *R v Secretary of State for Employment ex parte Seymour-Smith and Perez* [2000] IRLR 263 is very problematic. The question concerned the increase in 1985 in the qualifying period for unfair dismissal from one year to two. It was argued that this was indirectly discriminatory against women on the basis that a considerably smaller proportion of women attained the necessary seniority. The case went to the European Court of Justice and was then heard by the House of Lords. The

majority of the House of Lords held that the case was made out on the statistics, but went on to hold that the increase in the qualifying period had at the time been justified, a decision which was perhaps less surprising given that, by the time of the House of Lords' decision, the period had again been reduced to one year.

COMPLIANCE AND DETRIMENT

Under the previous element of the test, attention is focussed on the ability of the groups as a whole to comply with the requirement in question. Here attention shifts to the applicant. It must be shown that the imposition of the requirement in question is to the applicant's detriment because she or he is unable to comply with it. However, it was made clear in the early case of *Price v Civil Service Commission* [1977] IRLR 291 that "can" comply refers to the practical ability to comply. Thus women aged 17-28 are less able to comply with a requirement to be of that age because of childbirth and childcare reasons; any requirement for full-time work will normally have an adverse impact on women for the same reasons; and a requirement to wear a school cap or other headgear will have an adverse impact on Sikhs. That a Sikh is physically able to remove his turban is irrelevant; the question is whether this can be done consistently with the cultural norms and expectations of the Sikh community.

The relevant time at which the issue of the applicant's ability to comply is to be tested is at the time the requirement is applied to her. For example, if the requirement is to work full-time and the applicant currently works part-time, it is irrelevant whether or not she previously worked full-time or might have been intending to return to full-time work in the near future.

JUSTIFICATION

The statutes are almost silent on this key issue. All that is stated is that the application of the requirement must be justified without regard to gender or racial group. As a result it has been left to the courts to determine the appropriate standard.

The key decision is that of the European Court in *Bilka-Kaufhaus v Weber von Hartz* [1986] IRLR 317. It was held that the employer must establish that the application of the requirement in question meets a legitimate aim of the employer, that the means chosen are suitable for attaining that end, and that the means chosen are necessary to meet that end.

a) While the test applied to cases under European sex equality law, it also applies to British race cases, because the wording of the Race Relations Act on this point is effectively identical to that of the Sex Discrimination Act;

b) In theory the test applies whether the challenge is to a requirement imposed by an employer or to a challenge to a statutory provision. It can be summarised as asking whether the requirement in question is "really needed." However, the European Court of Justice in *Seymour-Smith* strongly suggests that the test is to be applied more leniently where the challenge is to employment protection legislation, and other cases have approved an even more lenient test when the challenge is to a provision of social security legislation.

c) Because justification is a matter of fact for the tribunal, it is often difficult to lay down binding principles of law. All that be done is to give examples from the decisions of employment tribunals, and it is often possible to find decisions on very similar facts which have been decided in different ways.

EXAMPLES OF ISSUES CONCERNING JUSTIFICATION

In this guidance note it is impossible to do more than indicate examples of the types of defences which tribunals have to consider as potential justifications.

a) Social Policy

If the *Bilka* test is applied literally, the defendant must prove, almost in a scientific sense, that the challenged test will actually achieve its intended purpose. This task may be beyond the ability of many employers, and, even more so, may be an impossible task to demonstrate so far as legislation is concerned.
In *Seymour-Smith* the House of Lords held that there was sufficient evidence that the increase in 1985 in the unfair dismissal qualifying period from one year to two would have the effect of increasing employment opportunities. British and European courts are naturally reluctant to hold, perhaps many years later, that legislation is unlawful because of its unjustified indirectly discriminatory impact. This outcome was made easier in *Seymour-Smith* both because it was arguable whether there was any adverse impact in the first place and because the Government had recently reduced the qualifying period to one year.

b) Part-Time Work

The most obvious example here is where a woman wishes to return to work part-time after maternity leave. This may or not be accompanied by a proposed jobshare. There are many recent tribunal cases, which all depend very much on their particular facts. It is, however, tolerably clear that tribunals will now require fairly clear and convincing evidence before denying women such an opportunity.

c) Flexible Working

In *London Underground v Edwards (no 2)* the EAT held that the employers were not justified in imposing the new shift pattern on the applicant. It was

emphasised that she had worked for them for 10 years and that her family difficulties would have merely been temporary. They "could have made arrangements which would not have been damaging to their business plans but which would have accommodated" her reasonable demands. While the size of the employer is clearly significant, in the same way as with jobsharing there is a recognition that employers may be acting unlawfully if they fail to give proper consideration to the specific position in which an individual employee finds herself.

d) Recruitment Practices

Coker and Osamor v Lord Chancellor (case 2300435/98, London South ET) was the well-known case concerning the appointment without advertisement of a Special Adviser to the Lord Chancellor. It was held that there was in practice a requirement that the appointee be personally known to the Lord Chancellor, that such a requirement had an adverse impact on women, and that it was not justifiable effectively to exclude merit from being the primary criterion for appointment. This decision, while being appealed, is a further example of the use of indirect discrimination law to challenge informal recruitment practices.

e) Aptitude Testing

Sumner v Air Canada and Alpha Catering Services (case 2303121/97, London South IT) concerned the imposition of a 15-minute written test in English on catering employees at Heathrow. The test was imposed in order to determine which employees would remain with Air Canada, by and large the preferred option, rather than be transferred to ACS. The applicant – along with two other Asian colleagues – failed the test despite her four years' experience as an aircraft cleaner. The requirement was held to be unjustified despite having been introduced as the least unfair method of selecting amongst employees all of whom would be able to perform the job.

COMPENSATION

Originally the law presumed that no compensation would be awarded in a case of indirect discrimination. The exception was the relatively unlikely situation where the requirement had been imposed with the intention of treating the applicant less favourably.

Since 1993, however, **compensation may be awarded in indirect sex discrimination cases on the same basis as in any other discrimination case**.

So far as race cases are concerned, it remains the case that compensation is only awardable if the employer fails to establish that the requirement or condition was not applied with the **intention** of treating the applicant less favourably on the ground of race. In *Walker v Hussein* [1996] IRLR 11 it was held that, if the employer knows that there will be an indirectly discriminatory effect, compensation may be awarded. It follows that the most commonly recurring examples of indirect discrimination will be likely to attract awards of compensation.

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 164 GYPSIES AND THE RACE RELATIONS ACT (S.20,21 AND 33) Smith & Smith - v - Cheltenham Borough Council & others; Bristol County Court, April 1999

This was an action brought by a Gypsy woman and her daughter against Cheltenham Borough Council for breach of contract and the Race Relations Act (RRA) 1976, sections 20 and 21 (*discrimination in the provision of goods and services*). A case was also taken against individual police officers for breach of the RRA section 33 ('*A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description*').

FACTS

The women had hired the Pittville Pump Rooms for a wedding reception, for around 150 people, and had paid a deposit on the booking. They then went ahead with other wedding arrangements, including catering and the printing of invitations. Based on several allegations of disorder in recent years, and rumours about the wedding, the police became concerned that the Smith wedding celebrations might involve public disorder. The police liased with the Council, including the manager of the venue, to voice these concerns. The Council called the mother to a meeting and attached conditions to her hire of the venue, including a requirement that entry should be by ticket only, and that a further (hefty) deposit should be paid. Both women were very upset and booked an alternative venue (where the event took place without incident).

COUNTY COURT DECISION

The judge at Bristol County Court stated:

> *"I find that there is no foundation for the assertions of the police that the gypsy problems of 1997 were linked to the Smith family. The truth is that as soon as the word "gypsy" appears, assumptions are made that large numbers will descend and cause trouble."*

He commented that the mother had been given no opportunity to comment on allegations, that the council had made up its mind before it spoke to her, and they were in breach of contract as they had no right to impose extra conditions. He awarded damages for breach of contract.

Dealing with the race discrimination claims, he found that the women:-

> *"were treated in an unfair and highhanded manner which seems to be in complete contrast with the way in which, for example, the organisers of the Hunt Ball, an event known to pose serious risks of disorder, were treated."*

He found the Council in breach of sections 20 and 21 RRA, and awarded damages.

In respect of the claims against the individual police officers, the judge held that *"the police did not act well over this wedding",* and that the women had cause for complaint against them. However, as no officer was a party to the decision taken by the Council, the Judge found that the police had not knowingly aided the Council to do an unlawful act. This element of the judgement was appealed to the Court of Appeal.

COURT OF APPEAL DECISION

The Court of Appeal (*Hallam and Avery and Another*, TLR, 7 February 2000) upheld the judge's reasoning and decision. They stressed the importance of the role of 'knowledge' under section 33 of the RRA.

COMMENT

The Commission for Racial Equality will use these decisions to encourage 'good practice' by local authorities and the police towards Gypsies, and are currently engaged in a case in which the question of whether Irish Travellers are a racial group will be considered. The *Smith* and *Hallam* decisions do not alter the law, following on from the decision in *CRE v Dutton* [1989] 2 WLR 17, but this is the first time that section 33 has been considered at this level.

Imaginative practitioners may wish to consider the use of section 33 in appropriate circumstances; and also section 71 (*duty on local authorities to carry out their functions with due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups*).

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 165 LEVEL OF KNOWLEDGE NECESSARY IN DISABILITY DISCRIMINATION CASES Heinz - v - Kenrick; [2000] EAT IRLR 144

FACTS

K had been employed by Heinz since 1979. In May 1996 he became ill and was signed off work. A cause for his illness was not identified. However, he told his employers medical adviser that he believed it was 'chronic fatigue syndrome' (CFS). In February 1997 he was warned that he was at risk of dismissal if he did not give a date for his expected return to work. K's GP said he could not give a date of return although K asked his employers not to make a decision about his employment until after he had seen an immunologist. In April 1997 the company's medical adviser noted that he was still not fit to return to work so he was dismissed. After the dismissal the diagnosis of CFS was confirmed.

K claimed disability discrimination and unfair dismissal. The employers accepted that he had CFS and that this was a disability within the DDA but argued that they were not liable for the disability discrimination because they were not aware at the time of the dismissal that he had this disability.

ET DECISION

K had made his employers aware of his symptoms and this was sufficient to give them knowledge of his disability at the time of dismissal. The employers had not justified the dismissal, nor shown why they could not have waited until the immunologist's report was received before reaching a decision about his employment. The employers had not acted reasonably, because they had not considered alternatives such as part-time work or lighter duties. The ET concluded that he had been unfairly discriminated against on grounds of his disability and consequently unfairly dismissed. The employers appealed.

EAT DECISION

The ET was correct to conclude that the employers had sufficient knowledge of the disability for it to be held that the employers had treated him less favourably on the grounds of his disability within s5(1)(a) DDA. This section requires that an employer is shown to have discriminated "for a reason which relates to the disabled person's disability". It does not require the employer to have knowledge of the disability, or whether the elements of the disability amount to a disability within schedule 1 of the Act. The test is an objective test – whether there is a relationship between the employee's disability and

the treatment s/he received in consequence. Did the employer know of the facts giving rise to the disability and did this knowledge result in the less favourable treatment of the employee?

This judgement casts doubt on the *O'Neill v Symm & Co* judgement and held specifically that comparisons between disability discrimination and other forms of discrimination can be misleading.

The absence of knowledge of the disability may be relevant to the question of whether the employer was justified in his/her actions. The threshold for justification for disability discrimination is fairly low. Section 5(3) provides that treatment will be justified if the reason for it is both material to the circumstances of the particular case and substantial. The Code of Practice says that this means that it should be 'material to the circumstances in question and is not just trivial or minor'. This test is not difficult for an employer to satisfy. This means that applicants will be more likely to succeed if they can show that their employer failed to make reasonable adjustments to accommodate their needs (s6)

A dismissal which is unlawful under the DDA is not automatically also an unfair dismissal under the ERA. Tribunals should consider each action separately although most of the dismissals that are found to be unlawful under the DDA are also likely to be unfair dismissals. The ET's finding that the dismissal was unfair would therefore be set aside.

Gay Moon,
Solicitor

ADDITIONAL NOTES BY PETER WARD:

* A dismissal contrary to the Disability Discrimination Act is not automatically unfair unlike, say, a pregnancy-related dismissal or one falling within the TUPE regulations. Tribunals must still apply the statutory test.

* The justification required under s.5(3) of the DDA is a fairly low threshold. Provided disability discrimination relates both "to the individual circumstances in question and [is] not … trivial or minor" (Code para. 4.6) it will be justified. In comparison where justification is required under the 'section 6 duties' a survey of the wider features is required (s.6(1)&(4)) before an (ex)employer can satisfy the test.

* Accordingly, if an employment tribunal considers a dismissal was justified under s.5(3) it should then go on to consider whether there was a breach of s.6 as it may not be justified under that section. The reverse though is untrue. If a tribunal considers a dismissal was unjustified it need not consider whether there was a breach of section 6 (see s.5(5)).

* The circumstances referred to in s.5(3) are those of both the employer and employee.

* With regard to s.5(1)(a) *O'Neill –v- Symm* is now doubted. "Hair-splitting medical evidence" is not required to put an employer on notice as to the

existence of a person's disability. Moreover, the relationship between the dismissal (or other less favourable treatment) and the disability is an objective one, and should not seen solely through the employer's eyes. For instance, a postman dismissed for slow walking caused by his artificial leg is an act of dismissal even if the employer genuinely thought he was a malingerer. Employers are therefore required to pause and consider whether any dismissal could relate to disability and, if it might, consult the Act and Code before dismissing.

* An employment tribunal that compared a disabled person to a person who possessed his characteristics save the disability as distinct from someone who attended work in the normal way (i.e has not followed the subsequent *Clark v. Novacold)* did nor err at law. The result was the same.

* Although the Code of Practice should be weighed by employment tribunals (*Ridout v. TC Group*) it need not be rigidly followed. Similarly the tribunal need not specifically mention the code in its decisions.

***** Heinz was not a "bad" employer in any moral sense, and its decision to dismiss was not harsh. On the contrary, it responded to Mr. Kenrick's absence with patience, listening to him and consulting his trade union representative. The Disability Discrimination Act however was new and complex, and Mr. Kenrick's disability was nebulous, so Heinzs' failure lay not in giving full consideration to the possibility of disability and discrimination flowing from it, rather it did not change its attitudes to people with disabilities fast enough.

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Peter Ward was Mr. Kenrick's Counsel at the Employment Appeal Tribunal. Alan Lewis of Keogh Ritson represented him at Manchester Employment Tribunal.

DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 166 APPROACH OF TRIBUNALS IN SEX DISCRIMINATION AND SEXUAL HARASSMENT CASE Driskel - v - Peninsular Business Services Ltd & other; EAT [2000] IRLR 151

FACTS

Mrs. Driskel was employed as an advice line consultant. The head of her department, Mr. Huss had "a penchant for sexual banter". There were incidents between them in February (twice), in April and in June 1996. The Industrial Tribunal accepted Mrs. Driskel's and rejected Mr. Huss's account of these incidents. In June 1996 Mrs. Driskel applied to become the senior advice line consultant, effectively the deputy to Mr. Huss. She was the only candidate. On the 11th July there was another incident involving Mr. Huss and Mrs. Driskel. He told her that she had better attend the interview in a short skirt and see-through blouse, showing plenty of cleavage to persuade him to give her the job. Mrs. Driskel did not object to the remark at the time, though she later said she had been very upset by it.

On the 12th July Mr. Huss interviewed Mrs. Driskel for the post. The interview was not completed as Mrs. Driskel left the room and made a complaint of sexual harassment. After some delay her grievance was investigated. She refused to work unless Mr. Huss was moved elsewhere. He refused to move and Peninsula took the view that he could not be made to. On the 20th October 1996 Mrs. Driskel was dismissed for "some other substantial reason".

Mrs. Driskel brought claims alleging sexual discrimination, sexual harassment, victimisation and unfair dismissal. The Industrial Tribunal dismissed all of Mrs. Driskel's claims, placing considerable reliance on the fact that she had not complained about the remarks made to her by Mr. Huss at the time they were made. She appealed to the EAT

THE INDUSTRIAL TRIBUNAL'S REASONS AND THE GENERAL APPROACH TO DISCRIMINATION CASES

The EAT made a number of criticisms of the content and format of the Industrial Tribunal's reasons which ran for 28 pages and reflected "much energy and dictation" by the Tribunal.

There was no recital of the applicable law, which might have been a useful guide to analysis. The Industrial Tribunal dealt with the Mrs. Driskel's individual allegations in 58 sub paragraphs. However in many of them the Tribunal made findings of fact and then immediately subjected the findings to a "sexual discrimination" analysis. Later in its reasons setting out its

conclusions the Tribunal re-visited the individual allegations in another 40 sub paragraphs which again tended to analyse individual incidents in isolation.

The EAT referred to the "surprisingly unreported" race discrimination case of Qureshi - v - Victoria University of Manchester, 21/6/96 EAT/484/95 and the case of Reed and Bull Information Systems -v - Stedman [1999] IRLR 299. In Qureshi the EAT gave guidance as to how allegations of "evidentiary incidents" claimed to support allegations of discrimination set out in an originating application should be dealt with. It was necessary to find the primary facts about these incidents (for example whether they happened at all). However such incidents should not be treated as if they were separately pleaded allegations of discrimination and a Tribunal should not ask whether each were explicable on a discriminatory or some other ground. Having found all the primary facts, including the respondent's explanations the Tribunal should look at the totality of them before considering whether inferences could be drawn to answer the ultimate question - "discrimination or no". A fragmented approach would inevitable reduce the eloquence the cumulative effect of the primary facts might have in the process of deciding whether inferences should be drawn.

In Reed the EAT said that it was particularly important in sexual harassment cases that the case should not be "carved up" into a series of specific incidents and attempts made to measure the harm or detriment of each. It referred to a US Federal Appeal Court decision stressing the importance of the cumulative effect of a series of incidents over time.

In Driskel the EAT adopted these approaches, stating that in sexual discrimination cases a Tribunal should:

a) first hear the evidence and find the facts without judgements as to discriminatory significance;
b) then make a judgement as to whether the facts as found disclose apparently less favourable treatment of the female applicant as compared to an actual or potential man by the respondents as employers under s.6(2)(a) and (b) SDA and;
c) then consider any explanation put forward and decide whether the discrimination so far potentially identified is real or illusory.

GUIDANCE ON SEXUAL HARASSMENT

The EAT gave further guidance relevant to sexual harassment cases, emphasising that it was not defined in the statute and was shorthand for a kind of detriment. The scope of the term was to be defined by reference to the facts of each case and whether or not there was a less favourable treatment amounting to a "detriment" was a matter of fact and degree. However a single act might found a complaint.

The decision "sexual discrimination or no" involves an objective assessment by the Tribunal of all the facts including the applicant's subjective perception and the understanding, motive and perception of the alleged discriminator. An act may be so obviously detrimental by intimidating or undermining the dignity of a woman at work that a lack of contemporaneous complaints is of little significance. (as in Insitu Cleaning Co. Ltd. - v - Heads [1995]IRLR 4 EAT.) If

a complaint is made then this contemporaneous indication of sensitivity on the part of the applicant is material, as is evidence from the alleged discriminator as to his perception. An act which in isolation might not amount to a discriminatory detriment might become so if persisted in despite objection. On the other hand the facts might show hypersensitivity on the part of the applicant to conduct which was reasonably perceived by the alleged discriminator as not being to her detriment. In such a case no finding of discrimination could be made. However Tribunals should not lose sight of the significance of the sex of the alleged discriminator. Sexual badinage of a heterosexual male by another cannot be completely equated with badinage by him of a woman.

The EAT was confident that had the Tribunal properly applied the law it would not have dismissed Mrs. Driskel's complaint. It could not then have failed to notice that it had preferred her account of the incidents complained of and rejected Mr. Huss's. The fact that he had been consistently "in denial" was a highly germane factor. The crucial incident on the 11th July would have been seen in context as one of a line of incidents. It would have been found on the face of it to amount to discrimination of a high order. To negate it by reference to the relative perceptions of Mrs. Driskel and Mr. Huss would need some exceptional explanation. The Tribunal had failed to remind itself that any instinct to complain would have been inhibited by her desire for promotion. Given the nature of the remarks, a failure to complain was of limited significance. It was irrelevant that Mr. Huss never expected Mrs. Driskel to turn up in sexually provocative dress because by this remark he was undermining her dignity as a woman when as a heterosexual he would never have similarly treated a man. The Tribunal misdirected itself in taking accounts sexual vulgarity to men because what he said to them was vulgar without being intimidatory.

COMMENT

The case is of interest both for its return to the rather neglected guidelines in Quereshi, a decision which is still worth reading in its own right, and for its treatment of complaints and the relative perceptions of alleged victim and perpetrators in sexual harassment cases. The House of Lords recently heard argument in the common law personal injury case of Waters - v -.MPC (which of course followed on a failed discrimination IT case) and was referred to a number of US cases in support of a "global" rather than a "fragmented" approach to individual allegations of harassment in a workplace psychiatric injury claim. Judgement is expected in this case in June 2000.

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 167 DEATH OF APPLICANT DOES NOT END DISCRIMINATION CLAIM Lewisham & Guys Hospital NHS Trust - v - Andrews, Times Law Report 28.3.2000

This is a revised briefing, which was previously published in October 1999 (*DLA Briefing146*). The Court of Appeal judgement has now superseded this.

THE FACTS

Marcia Andrews took a race discrimination claim against her employers on April 6th 1998. She was dismissed on June 16th 1998 and she died on August 23rd 1998. Her personal representatives tried to continue the race discrimination claim and to bring an unfair dismissal claim. The employers applied to the ET for the discrimination action to be dismissed because of the applicant's death.

EMPLOYMENT TRIBUNAL RULING

The ET ruled that both the discrimination claim could be continued and that an unfair dismissal claim could be commenced by her personal representatives. The employers appealed claiming that although the Employment Rights Act 1996 section 206 & 207 specifically allowed for rights under this Act (such as unfair dismissal) to be instituted and/or continued by personal representatives there is no equivalent provision in the discrimination acts.

EMPLOYMENT APPEAL TRIBUNAL RULING

The EAT ruled that as there is no provision in either the SDA or the RRA (or the DDA) for a personal representative to continue a discrimination claim, nor is there any provision in the tribunal rules or the Employment Tribunals Act 1996, such a right cannot be constructed. Causes of action under the discrimination legislation are rights of a largely personal nature that Parliament has not passed on to the applicant's estate. The ET had exceeded its powers.

COURT OF APPEAL RULING.

The CA reversed the EAT's decision. They held that section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 preserved all 'causes of action' subsisting against or vested in a deceased person for the benefit of his/her estate. A claim for financial compensation for racial discrimination was a 'cause of action' within the Act. Hence the question for the court was whether there was anything in the RRA which took away the personal representative's

right to pursue the action. Parliament would have to use much clearer language if it is to deprive personal representatives of the right to pursue a discrimination claim after the applicant's death. Consequently it should be assumed to have passed onto the applicant's estate in the same way as an unfair dismissal claim.

COMMENT

It is difficult to see why there should be any distinction between an unfair dismissal claim and a discrimination claim when it comes to the death of a claimant, however, in either case the difficulties of establishing sufficient evidence must be considerable.

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Solicitor

DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 168 **THE RIGHT OF A DISABLED WORKER TO BE TRANSFERRED TO SUITABLE ALTERNATIVE EMPLOYMENT OVERRIDES OTHER POLICY CONSIDERATIONS AND MAY REQUIRE ADJUSTMENTS TO THE JOB Kent County Council - v - Mingo; EAT [2000] IRLR 90**

FACTS

Mr Mingo worked as a cook at a training centre run by Kent County Council until he injured his back and became incapable of heavy work and lifting. When he returnedk to work, the Council's occupational health adviser recommended that he be redeployed. He applied for several vacancies, but with no success. In three cases he was told that the Council's policy required that preference be given to employees who were facing redundancy. In another case the Council failed to consider whether an otherwise unsuitable job could be adapted to make it suitable for him.

Mr Mingo was eventually dismissed by reason of incapacity. He complained to the Employment Tribunal that the Council had discriminated against him unlawfully and had dismissed him unfairly.

EMPLOYMENT TRIBUNAL DECISION

They found that the Council had treated him less favourably because of his disability than they treated other staff who were facing redundancy,

and that they had not justified this. The ET also found that the Council were in breach of the DDA because they had not considered whether reasonable adjustments could be made to any of the vacant posts in order to prevent his dismissal. They found against the Council who appealed to the EAT.

EAT DECISION

The EAT agreed with the Employment Tribunal that the Council's treatment of Mr Mingo should be compared with their treatment of employees facing redundancy (rather than, for instance, their treatment of someone who was incapable of work but not disabled). Clearly, he had not faced a level playing field, as the vacancies for which he was applying were already earmarked for those facing redundancy. This was unjustified and contrary to section 5(1) of the Disability Discrimination Act ("less favourable treatment").

The EAT could not fault the Employment Tribunal's finding that the Council had failed to consider adjusting the duties of a vacant post in order to suit Mr Mingo. This was contrary to section 5(2) of the Act ("failure to comply with the duty to make reasonable adjustments").

The EAT also found no fault with the logic of the Employment Tribunal's finding that the Council's unlawful discrimination rendered Mr Mingo's consequential dismissal unreasonable and therefore unfair.

COMMENT

This decision clearly improves the job security of workers who become disabled. If it becomes necessary to re-deploy such a worker, an employer is not justified in giving preference to someone else who would otherwise be made redundant. (Note : the only group which is entitled to preference over disabled workers in a redundancy situation is pregnant workers.) Employers must also consider whether the requirements of a job can reasonably be adjusted to suit the disabled person. An employer who ignores these duties and in consequence dismisses a disabled worker dismisses him or her unfairly.

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 169 **EQUAL OPPORTUNITIES POLICY PART OF EMPLOYMENT CONTRACT AND GIVES RIGHT NOT TO BE SUBJECT TO DISCRIMINATION Swann - v - Thameslink Rail Ltd, case number 3101378/99; Southampton ET**

FACTS

Mr. Swann is a gay man who was employed by Thameslink as a Ticket Inspector from 13 August 1998. His manager, P found out that he was gay and made a series of inappropriate remarks to colleagues. These included speculation about whether a man who had answered S's telephone was his boyfriend, together with smutty remarks. On one occasion P said to a colleague who was going out on duty with S, 'Be careful, you might come back less a man.' S was disciplined more severely than a colleague who had been with him when they both took the wrong train. P dismissed him on 16 February 1999, allegedly for his sickness record, for lateness and for the incident with the wrong train.

S made claims of sex discrimination (later dismissed) and breach of contract. The breach of contract claim was incorporated into his contract of employment and required S 'to act in the spirit of the Equal Opportunities/Harassment Policies'. These were in a separate document. They included sexual orientation, and made it clear that the standard of behaviour required to comply with them was required of employer as well as employee.

EMPLOYMENT TRIBUNAL

At the Tribunal, Thameslink made a concession that the EOP was incorporated into the contract, but argued that it was contractually binding on the employee only, and not the employer. It appears that Thameslink was so ready to concede that the EOP was incorporated because it believed that it would be easy for them to disprove any discrimination had occurred in the first instance.

When P came to give evidence the Tribunal had already heard from a witness for S that P had made homophobic comments. P then departed from his sworn statement and said that it had not been his decision to dismiss S but that of a senior manager, in order, the Tribunal said, to distance himself from the discriminatory decision to dismiss. The Tribunal made a finding of fact of discrimination on the grounds of sexual orientation, calling it 'boorish and unacceptable'.

ET DECISION

The Tribunal found that the EOP was intended by both parties to be an effective part of the contract between them, and that it gave employees the right not to be subjected to discrimination. It went on to say that, by discriminating, the employer had acted in bad faith. Damages could not therefore be limited to the sum that would have been payable to S on the lawful termination of his contract – i.e. his notice pay. The Tribunal said, 'It cannot have been the intention of the parties that the employer is able to behave in precisely the manner in which he would be contractually entitled to behave if the contract contained no equality clause.'

DAMAGES

The Tribunal awarded damages to put S in the position he would have been had he not been homosexual and not been dismissed for that reason, assessing this at 70% of a year's salary, £4,975.00.

Thameslink asked for a Review, saying that there had been a procedural mishap at the Hearing. At the Review Hearing they sought to rescind their concession that the EOP was incorporated into the contract. Their request was dismissed. They also appealed to EAT but have now withdrawn this.

COMMENT

The way the Tribunal awarded damages was arguably wrong and Thameslink may have won an appeal on this point. However an EAT hearing would have advertised a Tribunal's finding of fact that the EOP was contractually binding, and Thameslink would also have had to argue that they had discriminated but that their contract enabled them to do so with little inconvenience.

This is a very interesting and valuable case, in circumstances where an Equal Opportunities Policy covers a particular ground for discrimination, but it does not have the force of specific legislation. It is also limited, to some extent, by not having the endorsement of an EAT judgement.

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 170 EMPLOYERS ARE LIABLE FOR RACIAL HARASSMENT IF THEY FAIL TO TAKE REASONABLE STEPS TO PREVENT IT Bennett - v - Essex County Council, EAT 1447/98; judgement 5.10.99 [unreported]

The discrimination statutes hold employers liable for harassment of employees by their fellow workers acting in the course of their employment. In *Burton and Rhule - v - De Vere Hotels,* the EAT extended the protection to cover a case in which the harassment was not inflicted by fellow workers but the employers could have taken reasonable action to prevent the harassment. In that case, black waitresses were abused by the guest speaker (Bernard Manning) at a function where they were working. In this case EAT has applied the same reasoning to protect a teacher from racial harassment by her pupils.

FACTS

Mrs Bennett was the only black teacher out of 29 staff at a secondary school in Essex. The school had a number of pupils with behaviour problems. For a period of about four months in 1995 she was subjected to a number of incidents of racial abuse by pupils, which she referred to her head of department. It was these incidents of harassment of which Mrs Bennett complained.

The head of department drafted letters to be sent to the parents of the offending pupils but the headmaster countermanded them. A number of parents of the guilty pupils refused to allow their children to be put in detention. When the racial abuse flared up again the following year, this time the headmaster wrote to the parents of the pupils concerned.

EMPLOYMENT TRIBUNAL DECISION

They found that the school's response to the problems in 1995 was muddled and uncertain, no policy was established and the problem was not taken as seriously as it should have been. The later problem, in 1996, was in the opinion of the ET, dealt with promptly and appropriately. The ET concluded that because the second incident of harassment had been satisfactorily dealt with her complaint about the earlier incident did not give rise to liability. She appealed against this decision.

EAT DECISION

The EAT, however, found that the way in which the later problem was dealt with was irrelevant to the question of whether the school was liable for the events of the previous year. It could not be said that in 1995 the school had taken reasonable steps to prevent Mrs Bennett suffering racial harassment at the hands of her pupils, accordingly the school was liable.

COMMENT

The implication of this is quite clear. If an employee is suffering racial harassment at work, whatever the source of the harassment the employer will be held liable for it if s/he has no policy to deal with it and fails to take reasonable action to prevent it. The same principle must also apply to cases of sexual harassment and harassment of employees with disabilities.

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 171 VICTIMISATION - COURT OF APPEAL EXTENDS PROTECTION Chief Constable of West Yorkshire Police - v - Khan (24/2/00), Court of Appeal [2000] IRLR 324

In *Chief Constable of West Yorkshire Police -v- Khan* (24/2/00) the Court of Appeal have made an important extension to the protection afforded both to those who complain of race or sex discrimination and to those who help them. An employer can no longer avoid liability on the basis that they would treat anyone who made any allegation against them equally unfavourably. The Court of Appeal's judgement confirms that special protection is provided to those raising discrimination complaints.

BACKGROUND

Victimisation of those who raise allegations (or assist others making allegations) of sex and race discrimination (known as "protected acts"), is unlawful under Section 2 of the Race Relations Act 1976, and Section 4 of the Sex Discrimination Act. In essence, these provisions state that to prove a claim of unlawful victimisation an applicant must show:

1. that he or she has received less favourable treatment from the employer in comparison to others; and

2. that the treatment occurs by reason that the applicant has raised a complaint or assisted another to do so.

Until recently the Courts were taking a restrictive view of the scope of victimisation, in contrast to their approach for claims in direct sex or race discrimination. So, in *Aziz - v - Trinity Street Taxes Limited* [1998] ICR 534, the House of Lords held that an applicant must show that it was the very fact that his act had been done under or by reference to the Race Relation legislation that had influenced the decision to unfavourably treat the applicant.

Then, in *Nagarajan - v - London Regional Transport* [1998] IRLR 73, the Court of Appeal held that in order to establish victimisation, the applicant must show that the employer was *"consciously motivated*" by the protected act when affording unfavourable treatment. This contrasts to the position in direct sex or race discrimination where the intention or motivation of the employer is irrelevant (*James -v- Eastleigh Borough Council* [1996] ICR 154, HL).

FACTS

The applicant, Mr Khan was a serving Police Sergeant with the West Yorkshire Police ("the Force"). In 1996 he brought a claim for race discrimination, alleging that his supervisory officers had refused to support his application for promotion to Inspector. In October 1996 Mr Khan applied for transfer to the Norfolk Police, who requested a reference from West Yorkshire. However, West Yorkshire refused to provide a reference, stating that in the light of Mr Khan's "outstanding industrial tribunal application against the Chief Constable for failing to support his application for promotion" it would be inappropriate to comment further. Mr Khan amended his race discrimination claim to include a claim for victimisation.

ET AND EAT DECISIONS

The ET in April 1997 rejected his claim for direct race discrimination, but his claim for victimisation succeeded. The Force unsuccessfully appealed to the EAT in July 1998. They then appealed to the Court of Appeal.

THE FORCE'S ARGUMENT

The main thrust of the Force's argument was that the Tribunal had used incorrect comparators in considering the Force's actions. They asserted that if Mr Khan had any outstanding proceedings (not just discrimination claims) against the Force at the time of his application, they would also have refused a reference. Therefore, the Force argued, Mr Khan had not received "less favourable treatment" in comparison to those individuals, and had not received treatment "by reason that" he had brought a claim under the Race Relations Act.

COURT OF APPEAL DECISION

In a unanimous decision, the Court of Appeal rejected those arguments. They set out the three principles which must be considered in such claims :-

1. the Court stressed that the victimisation provisions must be placed in their statutory context: to prevent those who have taken steps to resist racial or sexual discrimination from being punished.
2. the Court concluded that there can be no difference between the words "on racial grounds" in direct discrimination claims, and the words "by reason that" in the victimisation provisions, following the House of Lords in *Nagarajan -v- London Regional Transport* [1999] ICR 877, the Court of Appeal held that it was not necessary to establish conscious motivation. Thus in this case, if it had not been for the race discrimination claim brought by Mr Khan, a reference would have been provided. The decision to refuse the reference had therefore been "*by reason that*" Mr Khan had brought discrimination proceedings.
3. the Court of Appeal stressed that it was not appropriate to confine the comparison of less favourable treatment only to those who had brought proceedings against the Force. Rather, the question which had to be asked was how officers who requested a reference would normally be treated, and then compare that with how Mr Khan was treated. As officers would normally be given a reference, Mr Khan had suffered less favourable treatment.

IMPLICATIONS

This decision is important because it follows and extends the approach adopted by the House of Lords in *Nagarajan*, and brings the victimisation provisions back into line with the stance taken by the Courts in direct discrimination claims. The Court has confirmed that the restricted approach adopted in previous cases is no longer appropriate.

So the Court of Appeal has prevented employers from raising a potential defence to many victimisation claims. An employer who could show that he would treat all employees who had the temerity to take proceedings against it with equal intolerance would, had the Court of Appeal gone the other way, have had a defence to any refusal to provide references, promotion or indeed any other benefits. This would have undermined the important protection given to those unfortunate enough to have to raise complaints of sex and race discrimination.

The decision therefore significantly strengthens the protection afforded to those taking discrimination complaints or who assist others (whether under the Race Relations Act or Sex Discrimination Act).

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 172 REFUSAL OF TIME OFF TO TAKE ADVICE WAS RACIAL VICTIMISATION TNT Express Worldwide (UK) Ltd - v - Brown, Time Law Report 18.4.2000

FACTS

B asked for short leave of absence in order to seek advice about a claim of race discrimination against his employer. His request was refused and when he left to keep the appointment he was suspended and then summarily dismissed. As a matter of custom and practice employees giving 24 hours notice for short leave of absence for domestic reasons were allowed.

ET DECISION

The ET found that the company had discriminated against him for not allowing him time off to seek advice and by subsequently dismissing him. His dismissal was unfair. The employers appealed to the EAT who dismissed the appeal and then to the Court of Appeal.

COURT OF APPEAL DECISION – WHO WAS THE RIGHT COMPARATOR?

The employers argued that B's position should have been compared to that of another employee seeking advice in order to make a claim against the company, not to the position of someone seeking short leave of absence for a domestic reason. Referring to the case of *Chief Constable of West Yorkshire –v- Khan (see briefing no 171)* the C of A held that:

1. the right comparator was to be identified by looking at *what was requested* (short leave of absence) *not* at the *reason why the request was refused*, *then*
2. asking how that request would normally be treated, *then*
3. comparing that normal treatment with the treatment that the applicant actually received.

The appeal was dismissed, B had been victimised in the refusal to give him time off which would normally have been granted to another employee, and in his subsequent unfair dismissal.

Gay Moon
Solicitor

DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 173 WOMEN, SEX DISCRIMINATION AND THE ARMED FORCES Sirdar - v - Army Board & Secretary of State for Defence, case C-273/97; ECJ [2000] IRLR

FACTS

Mrs. Sirdar had been in the British Army since 1983 and had been a chef in a commando regiment of he Royal Artillery since 1990. She was informed in 1994 that she, along with 500 other chefs was to be made redundant. In July 1994 she was offered a transfer into the Royal Marines. The offer had been made in error because there was a policy that women would not serve in the Royal Marines. The Marines were the "point of the arrow head of the UK armed forces" and operated a policy of "interoperability" under which all marines were first and foremost commando infantry soldiers. When the mistake was realised the offer to Mrs. Sirdar was withdrawn and she was made redundant. She bought a claim before the Norwich Industrial Tribunal alleging sex discrimination.

THE REFERENCE TO THE ECJ

The Industrial Tribunal referred 6 questions on the interpretation of Article 297 (then Article 224) and the Equal Treatment Directive (76/207) to the ECJ.

The first two questions were general:

1. Were policy decisions taken by member state in peacetime or in preparation for war relating to access to employment, vocational training and working conditions in armed forces and their deployment, made for the purpose of the combat effectiveness outside the scope of the EC Treaty of the directive?

2. Were decisions taken in respect of engagement, training and deployment of soldiers in marine commando units designed for close engagement with the enemy in war outside the scope of the Treaty and the directive?

The ECJ held that the principle of the equal treatment of men and women was not subject to any general reservation when the organisation of armed forces was in issue unless the exceptional circumstances covered by Article 297 applied. Access to employment, vocational training and working conditions in the armed forces were not outside the scope of Community law.

The third and fourth questions asked:

3. Whether Article 297 excluded from the ambit of the directive sex discrimination in access to employment, vocational training and working conditions imposed for the purpose of ensuring combat effectiveness?

4. Whether a policy of excluding all women during peacetime and/or in preparation for war from service as interoperable marines was capable of being excluded from the ambit of the directive by operation of Article 297 and if so what guidelines or criteria should be applied ?

The ECJ found it was unnecessary to consider the third and fourth questions given its answers to the fifth and sixth questions.

The fifth and sixth questions asked:

5. Was a policy of excluding all women from service as interoperable marines in peacetime and /or in preparation for war capable of justification under Article 2(2) of the directive?

6. If it is, what is the test to be applied by a national court?

Mrs. Sirdar, the Commission, and governments submitting observations, argued that the justification for the exclusion under article 2(2) should be assessed against the criteria in the case of *Johnston v. Chief Constable of the RUC*, 222/84 [1986] IRLR 263 ECJ. The UK government argued that judicial review of the policy should be limited to the question whether national authorities could reasonably have formed the view that the policy was necessary and appropriate. The ECJ, referring to *Johnston*, noted that as a derogation from an individual right Article 2(2) must be strictly interpreted. It had been recognised, for example, that sex might be a determining factor in access to posts such as prison warders and the police in circumstances of serious internal disturbance.

While member states might restrict such activities and the relevant training to men or women, they had a duty under Article 9(2) of the directive to consider periodically whether the in the light of social developments the derogation should still be maintained. In determining the scope of any derogation the principle of proportionality must be applied. This required that any derogation remained limited to what is necessary and appropriate in order to achieve their aim, national authorities should attempt to reconcile the requirements of public security with the principle of equal treatment. They therefore had a degree of discretion in adopting measure they considered necessary to guarantee public security. The question was whether in the present case the measures taken by the national authorities do have the purpose of guaranteeing national security and were necessary and appropriate to achieve that aim.

In this case the reason was the total exclusion of women from the Royal Marines by reason of the "interoperability rule". It was clear from the documents in the case that the Royal Marines differed significantly from all other units in the British armed forces. They were a small force intended to be the first line of attack. It had been established that all members of the Marines were engaged and trained as commandos, that there were no exceptions to

this rule at the time of recruitment and that chefs were indeed also required to serve as front line commandos.

The ECJ held that in these circumstances the authorities were entitled in the exercise of their discretion as to whether to maintain the exclusion in the light of social developments, and without abusing the principle of proportionality, to come to the view that the requirements of the assault units of the Royal Marines, and in particular the principle of "interoperability" justified the exclusion of women from the corps. The answer to the fifth and sixth questions was that the exclusion of women from service in special commando units such as the Royal Marines may be justified under Article 2(2) of the directive by reason of the nature of the activities in question and the context in which they are carried out.

COMMENT

On different facts, not involving an elite combat unit requiring "interoperability", a different response to a general exclusion of women was given by the ECJ in *Kreil - v - Bundesrepublik Deutschland* (C-285/98)

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 174 CONTINUING DISCRIMINATION: UPDATE Photay - v - Department of Social Security & other, EAT 10.1.2000; Mr. Justice Lindsay (President)

In the case of *Photay –v- DSS* (*see DLA Briefing 133*) it was reported that the Employment Tribunal, had decided at a preliminary hearing on time limits, that the substance of the Applicant's grievance (relating to racial and sexual harassment primarily) and the conduct of the grievance procedure were all part of one continuing act, extending over a period of time. Accordingly, the Tribunal had found that the claims were presented in time so far as the First Respondent (the employer) was concerned. The Tribunal also indicated that they would extend time in any event on the basis that it was just and equitable, both in relation to the claim against the employer and the claims against individual named Respondents.

The Respondents appealed to the Employment Appeal Tribunal both against the finding of continuing discrimination and the exercise of the just and equitable jurisdiction.

The Employment Appeal Tribunal declined to comment in detail on the various arguments put forward by both parties on the continuing discrimination point. The appeal was determined on the just and equitable extension issue. The EAT were unable to find any error of law in the decision of the Birmingham Tribunal that in any event it was just and equitable to extend the period of time so far as the First Respondent (the employer) was concerned.

In relation to the individual named Respondents, the Birmingham Tribunal had found there was no continuing discrimination. In relation to their finding that it was just and equitable to extend time, they said:- "This hearing will involve consideration of the complaints regarding the individual respondents. It is important that they have a full opportunity to answer the allegations to be made against them. This has been considered by the Tribunal as a factor to be weighed by it, in addition to the other arguments and facts adduced to it." The Respondents appealed and the Employment Appeal Tribunal upheld that appeal as they were not satisfied that the Birmingham Tribunal had properly exercised its discretion when considering the individual named Respondents.

The EAT did not accept the Tribunal's reasoning: the individuals could answer the allegations made against them by giving evidence and it was an error of law to say that where a claim involves two Respondents so long as one went ahead out of time the other one should also. The EAT then stated that it's decision to set aside the claims against the individuals was conditional upon the First Respondent offering a written undertaking to Mrs Photay's advisers, that they will call those individuals as witnesses. The undertaking was given and the EAT's decision dismissing the case against the individuals stood.

The case will now proceed to a full hearing in September 2000.

Sian Hughes
Solicitor

DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 175 PROPOSED NEW EUROPEAN DISCRIMINATION DIRECTIVES

The EC has proposed that two new directives and a community action programme should be adopted (see DLA briefing no 161).

The first directive ("the race directive") deals with discrimination on grounds of racial or ethnic origin and will cover not only the field of employment but also "social protection and social security, social advantages, education including grants and scholarships, access and supply of goods and services and cultural activities".

The second directive ("the employment directive") deals with discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation in the field of employment only. This is widely worded and will apply to conditions for access to employment, self employment and occupation, including selection criteria and recruitment conditions, access to vocational guidance and training, employment and working conditions including dismissals, pay, membership of, involvement in, and benefits from, organisations of workers or employers, and professional organisations. The directive provides for some exceptions permitting differences of treatment on these grounds where it is justified because there is a 'genuine occupational qualification'.

The directive provides that in the case of persons with disabilities 'reasonable accommodation' should be made for them unless this causes 'undue hardship'.

It also makes provision for a number of exceptions which could justify differences in treatment on grounds of age. These are potentially wide ranging and include the provision of special working conditions for young people or older workers, the fixing of a minimum age as a condition of eligibility for retirement or invalidity benefits and 'the establishment of age limits which are appropriate and necessary to pursue legitimate labour market objectives'.

Both these two directives cover direct and indirect discrimination as well as harassment as a prohibited form of discrimination. They also provide for the burden of proof to be reversed where evidence is produced from which discrimination may be presumed. These directives are proposed to be without prejudice to the right of Member States to implement positive action measures to prevent or compensate for past disadvantage on any one of the named grounds. Similarly, they may have provisions that are more favourable to those in the directive in relation to the principle of equal treatment.

The proposal for an action programme is to run for six years from January 1st 2001 until December 31st 2006 at a cost of 100 million Euros. The programme will address discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. The programme will aim to improve the understanding of discrimination issues, develop the capacity of Member States to combat discrimination and to promote and disseminate the 'values and practices underlying the fight against discrimination'. It will collect statistics and studies in order to evaluate discrimination legislation, encourage co-operation and good practice and raise awareness of discrimination issues within Europe. Unfortunately it does not make provision for proper monitoring procedures to measure progress throughout the EC.

The EU has consulted on these proposals and they are seeking to progress the race directive very fast. It will be considered in the plenary session in mid-May and in full Council in June. The employment directive is progressing more slowly and is expected to be considered in October.

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DISCRIMINATION LAW ASSOCIATION

May 2000

BRIEFING No 176 **SEYMOUR-SMITH: THE STAYED CASES. R. - v - Secretary of State for Employment ex parte Seymour-Smith; House of Lords, 17.2.2000; [2000] IRLR 263**

THE BACKGROUND

The litigation in *R. v. Secretary of State ex parte Seymour Smith and anor* arose because the Applicants had both worked for more than one but less than two years when they were dismissed in 1991. At that time and ever since 1985 the qualifying period for unfair dismissal had been two years. They therefore sought a judicial review of the qualifying period arguing that this was indirectly discriminatory against women. Many points were taken in the litigation which went twice to the House of Lords and once to the European Court of Justice.

While the case has been continuing the Employment Tribunal have stayed a number of cases. By its decision on the 17 February 2000 the House of Lords dismissed the Applicants application. The basis for that decision differed between the different judges. The majority concluded that though the Applicants had shown that the qualifying period had an adverse impact against women and therefore was indirectly discriminatory and though there was no evidence that the qualifying period had made any impact on the employers so as to increase opportunities for employment nevertheless there had been insufficient time in the period 1985 – 1991 for the Secretary of State to bring forward amending legislation. On that basis they held that adverse impact was justifiable.

The stayed cases are now being re-listed for hearing.

THE OUTSTANDING QUESTIONS

The result in the House of Lords begs two questions that have not yet been resolved for those cases, which were commenced but have been stayed pending the judgment of the House of Lords. These are:

1. Can a person who was dismissed after 1991 allege that the two year qualifying period had an adverse impact on them? and
2. If so at what point does the failure of the government to take remedial action mean that there was no justification?

The answer to neither of these questions is obvious. It remains possible that some of those whose cases have been stayed may be able to take advantage of the judgement to argue that in their case the two-year rule

should not operate. Since these cases are to be argued in the Employment Tribunal the Secretary of State will not normally be represented. Unless the employer is able to persuade him to assist they may find it difficult to provide a justification for the two year period.

PERSONS DISMISSED BETWEEN 1992 AND 31 MAY 1999.

In 1999 the qualifying period was reduced to one year: see S. I. 1999 No. 1436 where the effective date of termination was after 1 June 1999, so it did not help the applicants. However, for those in the period between the date of the dismissals of the applicants and the date of the House of Lords judgment may be helpful. Certainly it is not completely unhelpful.

ADVERSE IMPACT

It is clear from the reasoning of Lord Nicholls, (with whom Lords Goff and Jauncey agreed) that they considered that the Court of Appeal were right to conclude that the persistency and consistency of the pattern of statistics over time was enough to demonstrate a sufficient adverse impact as at 1991 to reverse the burden of proof.

The statistics after 1991 show that there is a continued adverse impact on women. However the gap has diminished in absolute terms. So in the case of a person dismissed after 1991 it will be necessary for the Employment Tribunal to reach its own decision on all the statistics over the relevant period (ie 1985 onwards) up to the date of dismissal.

It will not be correct for the Employment Tribunal to look only at the statistics as at the date of dismissal that would be inconsistent with the judgments of the House of Lords. The statistics that are available are set out in the accompanying table. They show that there has been a continuous disparity. The figures are slightly different from those in the House of Lords judgment since they refer to those who work more than 8 hours a week whereas those in the House of Lords judgment refer to those who work more than 16 hours a week. They are however the relevant statistics.

	Unqualified	Unqualified	Qualified	Qualified
Year	**% Males with less than 2 years**	**% Females with less than 2 years**	**% Males with less than 2 years**	**%Females with less than 2 years**
1985	22.7	32.5	77.3	67.5
1986	23.1	33.7	76.9	66.3
1987	25.2	35.2	74.8	64.8
1988	27.3	36.6	72.6	63.4
1989	28.8	38.4	71.2	61.7
1990	28.3	38.0	71.7	62.0
1991	26.4	35.1	73.7	65.0
1992	22.9	30.2	77.1	69.9
1993	22.4	28.3	77.6	71.7
1994	24.2	28.9	75.8	71.1
1995	26.7	30.8	73.3	69.2
1996	28.7	31.8	71.3	68.2
Average 1985 to 1996	25.56	33.29	74.44	66.73
Average over last 1992 - 6 years	24.98	30	75.02	70.02
- Labour Force Survey -				

The actual figures for 1997 to 1999 may be obtainable from the Labour Force Survey. However it is known that the gap has never completely disappeared.

The key judgement in the House of Lords was that of Lord Nicholls who in finding that there was adverse impact said:

"…..As I see it, the reasoning underlying these paragraphs [in the judgement of the European Court of Justice] is that, in the case of indirect discrimination, the obligation to avoid discrimination does not consist of applying requirements having precisely the same impact on men and women employees. The obligation is to avoid applying unjustifiable requirements having a considerable disparity of impact. In this regard the European Court has adopted an approach similar to that provided in section 1(1)(b) of the Sex Discrimination Act 1975. A considerable disparity can be more readily established if the statistical evidence covers a long period and the figures show a persistent and relatively constant disparity. In such a case a lesser statistical disparity may suffice to show that the disparity is considerable than if the statistics cover only a short period or if they present an uneven picture. …"

Thus it ought to be possible to show that there was still adverse impact all the way up to 1999 since there was a continuous real disparity. In any event it is clear that on the figures before the House of Lords at least up to 1993 there was adverse impact since Lord Nicholls looking at those figures said

"…..The reduction in the disparity, which started in 1991, continued in 1992 and 1993. By 1993 the ratio of men and women qualifiers was about 20:19. But, looking at the overall picture, I do not think the diminished disparity after 1991 is sufficient to displace the message of the figures for the earlier years. Accordingly it is for the government to show that the extension of the qualifying period was justified, to use the accepted nomenclature, by objective factors unrelated to any discrimination based on sex…"

JUSTIFICATION

Lord Nicholls explored the approach to justification thus

"…Objective justification: the continuing operation of the 1985 Order

The requirements of Community law must be complied with at all relevant times. A measure may satisfy Community law when adopted, because at that stage the minister was reasonably entitled to consider the measure was a suitable means for achieving a legitimate aim. But experience of the working of the measure may tell a different story. In course of time the measure may be found to be unsuited for its intended purpose. The benefits hoped for may not materialise. Then the retention in force of a measure having a disparately adverse impact on women may no longer be objectively justifiable. In such a case a measure, lawful when adopted, may become unlawful.

Accordingly, if the government introduces a measure which proves to have a disparately adverse impact on women, the government is under a duty to take reasonable steps to monitor the working of the measure. The government must review the position periodically. The greater the disparity of impact, the greater the diligence which can reasonably be expected of the

government. Depending on the circumstances, the government may become obliged to repeal or replace the unsuccessful measure.
…….In the present case the 1985 Order had been in operation for six years when the two claimants were dismissed from their jobs. The Divisional Court and the Court of Appeal noted there was no evidence that the extension of the qualifying period in 1985 led to an increase in employment opportunities. Ought the government to have taken steps to repeal the 1985 Order before 1991? In other words, had the Order, lawful at its inception, become unlawful by 1991?…"

He answered that question in this way:

"…The benefits of the 1985 Order could not be expected to materialise overnight, or even in a matter of months. The government was entitled to allow a reasonable period to elapse before deciding whether the Order had achieved its objective and, if not, whether the Order should be replaced with some other measure or simply repealed. Time would then be needed to implement any decision. I do not think the government could reasonably be expected to complete all these steps in six years, failing which it was in breach of Community law. The contrary view would impose an unrealistic burden on the government in the present case. Accordingly I consider the Secretary of State discharged the burden of showing that the 1985 Order was still objectively justified in 1991…"

However by the time that the Divisional Court had come to look at the case in 1995 it was made clear that there was no evidence that the two year qualifying period had had any effect at all. The Divisional Court said so and in the next year before the Court of Appeal the Secretary of State admitted as much.

Accordingly it is arguable that by 1996 at the latest and probably as early as 1995 the Government ought to have reduced the qualifying period. This could have been done very quickly with a simple Statutory Instrument just like it was in 1999.

CONCLUSION

Any case that has been stayed that relates to a dismissal before the 1st June 1999 and after 1991 has a chance of success.

Since the ECJ determined that the claim for compensation for unfair dismissal is pay for the purposes of what was Article 119 (now Article 141 after the amendments made by the Amsterdam Treaty) any woman who is claiming unfair dismissal can argue that the two year rule should not apply to her. The same goes for a man since if the rule is unlawfully discriminatory against women it is arguable that it cannot be relied on against a man either.

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