Briefings 217-228

Volume 14 December 2001

Editorial *Incitement to religious hatred*

The reports of attacks on Muslims in Britain since September 11th should alarm everyone. They range from verbal abuse to physical assaults and arson attacks on mosques. They come from all over the country. At a time of already heightened anxiety for all, such attacks put Muslims in even greater fear for their safety. Protection from religious hatred is needed not just from the perpetrators but from those who stand behind them, those who incite others to violence with threats, abuse and insults. Those are the people who, with rabid, poisonous polemic, stir up the deep and violent hatred, which inspires others to attack.

On September 28th the Executive Committee of the Discrimination Law Association passed the following emergency resolution :-

"In view of the current world crisis, the problems of increasing Islamophobia at work, in the press and in public areas, and the need to ensure that persons of all religions and none are protected equally under the rule of law, the Executive Committee of the Discrimination Law Association calls on the Government to legislate at the earliest opportunity to outlaw discrimination on religious grounds in the workplace in accordance with the Framework Directive. It also calls on the Government at the same time to outlaw all forms of religious discrimination in the provision of goods and services, in relation to housing and all other areas, and to ensure that incitement to religious hatred is a public order criminal offence in the same way as incitement to racial hatred."

There is at present no law in the UK prohibiting discrimination against Muslims. The Race Relations Act 1976 outlaws discrimination on grounds of colour, race, nationality and national or ethnic origin, but not on grounds of religion or belief. The courts have ruled that Muslims are not an ethnic group, and therefore are not protected by the Act. The Act does provides protection for Jews and Sikhs. Since their racial and religious identities are treated as being indivisible, they are protected also by existing laws against inciting racial hatred. But these race laws do not touch the violent hatred now being manifested towards Muslims, nor do they protect other religious groups such as Christians and Hindus. We therefore welcome the government's proposal to introduce new legislation to extend the existing laws against inciting racial hatred to cover incitement to religious hatred.

The right to freedom of thought, conscience and religion enshrined in Article 9 of the European Convention on Human Rights was a direct response to the experience of the last World War. Article 9 protects the right to manifest one's religion or belief in worship, teaching, practice and observance. It contains something for everyone, since it includes the right to be an agnostic, an atheist or a humanist. Not for nothing is it described by the Council of Europe as the foundation of Western human rights ideology.

The right to freedom of expression in Article 10 is a fundamental right of equal status to the right to religious freedom. There is no hierarchy of rights here. Freedom of expression is the right to hold opinions and to receive and impart information and ideas and to do so without interference by public authorities. But like the right to religious freedom it is not unqualified.

The states, including the UK, which adopted the European Convention in 1950 did not forget the dreadful abuses of freedom of expression in Europe during the rise of fascism. They agreed that the exercise of the right to freedom of expression carries responsibilities. It is not to be abused. The right is expressly stated to be subject to such restrictions and penalties as are prescribed by law and *necessary in a democratic society* in the interests of *public safety*. This rule binds us all, lawyers, judges, governments, comedians and commentators, through the Human Rights Act. So a prosecution for inciting racial hatred cannot succeed if the authorities fail to show that it is necessary to protect public safety. The proposed new law will be subject to the same restrictions. Moreover, under the proposed law there will be a double filter: no prosecution will take place unless the Attorney General has first given his approval *(fiat)*.

Vigorous debate about religion is essential to democracy. In his report on *The Future of Multi-Ethnic Britain* Lord Parekh said:

"Dispute and disagreement are integral to democracy. When believers use religion to justify practices that others judge to be unethical, immoral or illegal, it is right that they should be challenged".

If we are to base the defence of our freedoms on universal human rights, it is important to defend the right to manifest a religion or belief.

Briefings Published by the Discrimination Law Association. Sent to members three times a year.
Enquiries about membership to Discrimination Law Association, PO Box 20848, London, SE22 0YP
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Designed by Alison Beanland (020 7394 9695) Printed by The Russell Press

SPECIAL FEATURE

Compensation for personal injury in the employment tribunals

These two articles by Karon Monaghan and Susan Belgrave set out the principles that apply to the assessment of compensation for personal injury in discrimination cases. Karon's article deals with compensation for the injury itself (general damages) and compensation for the financial losses that result from it (special damages). Susan's article deals with compensation for injury to feelings and damages for defamation and stigma.

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Awards of general and special damages

A. Personal injury: generally

A Tribunal can make an award of compensation in respect of personal injury under the SDA and the RRA. The Court of Appeal have recently confirmed this in *Sheriff v. Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481.

Advisers need to be alert to the need to explore with complainants whether they might have a personal injury. The Court of Appeal made clear in *Sheriff* that, in accordance with the normal principles, a complainant has a duty to bring forward all his complaints in one Tribunal. So a complainant who suffers from a personal injury in consequence of unlawful discrimination, should ensure that his personal injury claim is made the subject of any discrimination proceedings he brings or he may lose the right to take action on that issue.

The normal principles of the law of tort apply to discrimination complaints. Thus a complainant must show that his injury has been caused by the unlawful act of discrimination and that the damage claimed is not too remote (i.e. that it can be said to be a foreseeable consequence of the unlawful act).

In the context of discrimination complaints, personal injury claims usually arise either out of assaults or from claims of psychiatric injury. In the case of injury caused by assault, e.g. bruising, abrasions and so on, issues of causation and foreseeability are unlikely to be problematic.[1]

Where a complainant claims compensation for psychiatric injury in consequence of unlawful discrimination, issues of causation are usually more complex. This is in part because psychiatrists are undecided, or not in agreement, about the specific causes of psychiatric illness. However, in the context of a claim for compensation, a complainant need only demonstrate, upon reliable psychiatric evidence, that

Abbreviations	
SDA	Sex Discrimination Act 1975
RRA	Race Relations Act 1976
DDA	Disability Discrimination Act 1995
HRA	Human Rights Act 2000
HL	House of Lords
CA	Court of Appeal (Civil Division)
CS	Court of Session (Scotland)
EAT	Employment Appeal Tribunal
ET	Employment tribunal
ECJ	European Court of Justice
GOQ	Genuine occupational qualification (SDA & RRA)
PACE	Police and Criminal Evidence Act 1984
RRO	Restricted reporting order
DCLD	Discrimination Case Law Digest
Tribunal Regulations	Employment Tribunals (Constitution and Rules of Procedure) Regulations (SI 2001 No. 1171)
Tribunal Rules	Employment Tribunals Rules of Procedure 2001 (contained in the Tribunal Regulations q.v.)
Interest on Awards Regulations	The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations (SI 1996 No. 2803)
Gender Reassignment Regulations	Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999 No. 1102)

the unlawful discrimination caused or materially contributed to the psychiatric injury[2]. This is important, because ordinarily a psychiatrist will suggest that there is more than one cause for the onset of psychiatric injury.

Medical reports

Where a claim for personal injury is made, medical evidence will be required. In the case of psychiatric injury, a report from a consultant psychiatrist will be needed. Usually the consultant psychiatrist will be required to attend the ET to give evidence.

Directions must sought as to medical reports: *De Keyser Ltd v Wilson* [2001] 324.

- A medical report may follow joint instructions to a single expert (to whom both sides may address questions);
- A medical report may follow instructions from one party only. The report will be of greater weight if the other side have been given the opportunity to comment on the instructions and / or ask questions of the expert.

As to the costs of an expert, see Tribunal Rules 14 and 5(a), and Reg. 10 (overriding objective).

- See too: DTI powers to award witness expenses.

Pain, suffering and loss of amenity

An ET, like any other court, may award compensation for the pain, suffering and loss of amenity suffered by a complainant in consequence of the injury he has suffered.

Where the injury consists of bruising or similar injuries, this will be compensation for the discomfort caused by the injury itself and any treatment received in consequence.

Where the complainant has suffered psychiatric injury, the compensation for pain, suffering and loss of amenity may include sums in respect of loss of enjoyment of family life, loss of enjoyment of social life and hobbies, and so on.

Guidance on the appropriate level of an award in respect of pain, suffering and loss of amenity can be found in the Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases.* These indicate the range of awards appropriate to cases where particular damage has been suffered and the factors which will be taken into account in determining the size of an award in a particular case.

Pain, suffering and loss of amenity must be proved, and so a witness statement will be needed from the complainant and, if appropriate, his spouse, partner, or other family members or friends, to substantiate the claim for compensation.

Further, commentaries on cases in personal injury to which a complainant's case might be compared can be found in *Kemp and Kemp*, Vol. 2[3].

In looking at any comparable cases, it is important to take account of the impact of inflation and sums multiplied accordingly. An inflation table can be found in *Kemp and Kemp*, Vol. 2.

Interest: pain, suffering and loss of amenity

Interest on awards of damages for pain, suffering and loss of amenity in personal injury cases are usually assessed at the flat rate of 3% *per annum* from the date of presentation of the claim to the date of computation (*Wells v. Wells* [1999] 1 AC 345). However, in my view, complainants should argue that in discrimination cases that guidance is of no significance, because there is a statutory scheme for interest provided for in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996 No. 2803).

B. Past loss

Past loss – or special damage, as it is usually described – is calculated by reference to the general principle that a complainant is entitled to be put in the same position, or as nearly as possible the same position, as he would have been in, had he not suffered the unlawful act complained of. Therefore, loss of earnings is recoverable net of tax (*British Transport Commission v. Gourley* [1956] AC 185) and National Insurance contributions (*Cooper v. Firth Brown Ltd* [1963] 1 WLR 418).

Where sick pay is paid by an employer in accordance with the employment contract, this should be credited. However, the proceeds of private insurance taken out by a complainant, and pension entitlement, even where the respondent has contributed to the pension scheme, and assistance from friends and relatives, should not be taken into account in determining loss[4].

Interest: past loss

Interest is calculated according to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996[5].

Future loss

For the purposes of calculating future loss, a lump sum has to be calculated to represent the current value (at the date of calculation) of losses which will accrue in the future (lost earnings, expenses etc). The annual net loss will represent the figure known as the 'multiplicand'.

The multiplicand is calculated on much the same basis as past loss. It will, therefore, include the annual earnings lost in consequence of the unlawful act (having regard to any inflationary increases in the meantime, etc.), as well as any other losses which must be annualised for the purposes of determining the multiplicand.

A 'multiplier' is then applied to the multiplicand. The multiplier is determined by reference to the number of years in respect of which the losses can be expected to continue. However, the multiplier is reduced from a figure representing the full number of years in respect of which the loss is expected to continue, to take into account contingencies including mortality.

The appropriate multiplier, having regard to the extent of the injury, may be gleaned from the Ogden Tables[6]. The appropriate discount rate was 3% until recently[7]. It is now 2.5% (by order of the Lord Chancellor under the Damages Act 1996 Section 1).

The Ogden Tables make provision for mortality. However, further discount must be made in order to have regard to other contingencies. Guidance on the appropriate discount can be found in the Ogden Tables, but will depend on the industry in which the complainant was employed (and security of employment); the risk of illness in the complainant's particular case in any event (which might be very material in a case of psychiatric injury), and other contingencies.

The Ogden Tables give credit for accelerated payment.

Interest: future losses

Interest is not payable on future losses.

Pensions

Where future pension losses are likely to be small – because the injury is temporary in nature and any break in pensionable employment short term – an ET may make an award in respect of pension losses based on the loss of the employer's pension contribution: *Kemp and Kemp* para. 6-121.

In other cases, there are two ways of calculating pension losses:

- By determining the cost to the complainant of purchasing the pensionable benefits – equivalent to the lost benefits – in the market place. This is determined by obtaining estimates from insurance companies.
- By determining the present net value of the complainant's loss and applying an appropriate multiplier using the Ogden Tables. The resultant figure must be discounted to take account of other contingencies: *Auty v National Coal Board* [1985] 1 WLR 784.

In the case of a reduced lump sum, the difference in value should be calculated at today's values and then a discount applied for accelerated receipt (with a discount rate of 2.5%). A further discount should be applied for other contingencies: Auty, supra.

'Handicap' on the labour market

Where a complainant is not suffering an immediate loss of earnings, or is suffering a reduced loss of earnings but is vulnerable in the future because of injury caused by the unlawful act, then he may make a claim for damages for 'handicap on the labour market'; *Moeliker v. A. Reyrolle & Co Ltd* [1997] 1 WLR 132, and see *Smith v. Manchester Corporation* [1974] 17 KIR 1. This head of compensation compensates for loss of earning capacity. To support a claim under this head, a complainant will need to show that his or her prospects for the future are affected by the illness suffered in consequence of the unlawful act. This is particularly important where the respondent, responsible for the unlawful act, continues to employ the complainant, but there is a risk that that employment will cease in the future. If a complainant might find himself in the labour market and more vulnerable than he otherwise would have been but for the unlawful act, then he is entitled to be compensated for that. There is no science about the way in which a sum under this head will be calculated, but it is usual to assess it by reference to the annual loss a complainant might expect to suffer. Illustrations of awards under this head can be found in *Kemp and Kemp*, Vol. 2.

Other heads of damage: miscellaneous

Advisers should be aware that in claims for personal

injury heads of damage might include:

- Compensation for cost of care.
- Compensation for cost of DIY and other maintenance previously undertaken by the complainant.
- Compensation for cost of medical care.

Compensation in respect of costs attributable to receiving medical care (taxis etc.).

D. Exemplary damages

What are they?

Exemplary damages, unlike compensatory damages, do not compensate an Applicant but punish a respondent.

When will they be awarded?

They may be awarded in three categories of case:

- Where there has been oppressive, unconstitutional conduct by servants of the government;
- Where the conduct has been calculated to make a profit which may exceed the compensation payable to the complainant;
- Where statute expressly authorises it.

They may be awarded in those cases. Regardless of when the particular cause of action was first recognised or created (see *Kuddus v Chief Constable of Leicestershire* [2001] Briefing 221).

They should only be awarded where a compensatory award (e.g. injury to feelings or loss of wages) is inadequate punishment for the wrongdoer.

Sections 65 and 66 of the SDA, Sections 56 and 57 of the RRA and Sections 8 and 25 of the DDA all permit a county court hearing a discrimination case to make an award of exemplary damages, and probably permit an ET to do so also.

How much?

In making an award of exemplary damages regard should be had to the means of the respondent (see *Thompson v Commissioner of Police for the Metropolis* [1998] QB 498.)

Any award is unlikely to be less than £5,000; for an award to be as much as £25,000 the respondent must be 'particularly deserving of condemnation' and £50,000 is to be regarded as the absolute maximum in any case, see Thompson, *supra*.

An award is less appropriate where the claim against the respondent is based on vicarious liability, and, further, some indications suggest that in such circumstances, the means of the wrongdoer rather than the employer are relevant, see *Kuddus, supra.*

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1. For an illustration of where a complainant was the subject of racially discriminatory assaults in the course of his employment, see *Jones v. Tower Boot Co Ltd* [1997] IRLR 168.
2. See *Winfield and Jolowicz on Tort,* 15th edition (London, Sweet & Maxwell, 1998) p. 199 et seq.
3. Kemp and Kemp *The Quantum of Damages* (London, Sweet & Maxwell, 4 volumes, looseleaf)
4. *Bradburn v. Great Western Railway* [1874] LR 10 Exch 1; Parry v. Cleaver [1970] AC 1; *Chan v. London Borough of Hackney* [1997] ICR 1014 and Liffen v. Watson [1940] 1 KB 556.
5. And in respect of past loss there is no material difference between claims for personal injury in the county courts and the ET.
6. *The Joint Working Party of Actuaries and Lawyers*, chaired by Michael Ogden, *HMSO 1984* approved in *Wells v. Wells*. These are reprinted in Kemp and Kemp Vol. 1.
7. *Wells v. Wells*, supra.

Stop press

The case of ***Kelly Davis - v - Bath and North East Somerset Council*** (see Briefing 192) has now been settled for more than £750,000. This is the first case sucessfully challenging race discrimination in the exercise of a local authority's planning powers.

Adding insult to injury: injury to feelings and stigma damages

'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 in *McConnell v Police Authority for Northern Ireland* [1997] IRLR 625

The three acts, the SDA, RRA and DDA, contain very similar wording: where a complaint is well founded the tribunal shall make such order as it considers just and equitable including an order for compensation for an amount corresponding to any damages which could have been ordered by a county court or by a sheriff court. There are other provisions where an unlimited award can be made in respect of a detriment to an employee or a worker, e.g. health and safety, trade union activities, whistleblowing.

Compensation falls to be assessed under the following heads:

- Loss of earnings and benefits to date of hearing and in the future
- Pension loss
- Personal injury
- Aggravated damages
- Exemplary damages
- Interest

This paper concentrates on damages for injury to feelings and the case of *Virdi v Metropolitan Police (ET Case No. 2202774/98)*.

Type of case

Certain types of case tend to attract a certain level of award and it is helpful, if data can be collected, to find a range of cases in the relevant category:

- Recruitment – loss of a chance
- Failure to promote
- Dismissal
- Harassment – verbal abuse, physical violence
- Disability discrimination
- Pregnancy

In considering the appropriate award the distinctive features of the claim should be borne constantly in mind.

The measure of damages is that used in the law of tort and so must provide full compensation for the injury done. A tribunal must consider the various heads of damage and determine, in its own discretion, what constitutes adequate compensation. The principles governing the award of damages for tortious acts are outlined in *McGregor on Damages*.[1] While there are general guidelines to which the tribunal should have regard, appeal courts have stressed that they will only interfere with an award of compensation where the tribunal have acted on the wrong principle:

'In my judgment, appellate courts when reviewing the assessment of compensation by industrial tribunals should act as they do when reviewing awards of damages by judges sitting alone. Counsel submitted that they should deal with awards made by industrial tribunals in the same way as they deal with awards made by juries. I do not agree. Industrial tribunals are presided over by chairmen who have legal qualifications. Reasoned decisions are given, including reasons for making awards. The giving of reasons distinguishes their decisions from the verdicts of juries. If they have acted on a wrong principle or have misapprehended the facts or for other reasons have made a wholly erroneous estimate of the damage suffered, an appellate court can interfere.' *Coleman v Skyrail Oceanic Ltd* [1981] IRLR 398 CA.

Injury to feelings

Tribunals should bear in mind the awards that are made in the field of personal injury, and should ensure that any sum awarded is not excessive. The award is meant to compensate the applicant and not punish the respondent.

In relation to the general principles which govern the award of damages for injury to feelings the tribunal will be aware of the decisions in *Alexander v Home Office* [1988] IRLR 190, *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162 EAT and *ICTS v Tchoula* [2000] IRLR 643. In particular the case of *Armitage* provides that:

- Awards for injury to feelings should be compensatory.
- Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation.
- Awards should bear some broad general similarity to the range of awards in personal injury cases. 'We do not think this should be done 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.
- Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.

In *Tchoula v ICTS* (UK) Ltd [2000] ICR 1191 Judge Peter Clark laid down guidelines for the award of injury to feelings in discrimination cases. There were essentially two categories – a lower category of £7,000 to 13,000 and a higher category with damages reaching £20-28,000 for severe cases.

Clean hands (whose?)

In *Hurley v Mustoe* [1983] ICR 422 the EAT observed that once a tribunal had decided that the appropriate remedy would be compensatory in nature, there was no scope for making an award that the tribunal considered 'just and equitable', nor for importing an equitable requirement of 'clean hands' before making anything more than a purely nominal award for injury to feelings.

In *Snowball v Gardner Merchant Ltd* [1987] ICR 719 it was held that evidence suggesting that the applicant had engaged in discussions about her sex life was relevant as going to credit and to the question of injury to feelings.

In *Wileman v Milinec Engineering Ltd* [1988] ICR 318 the EAT considered that in a claim for injury to feelings after 4 years of sexual harassment, it was relevant that the applicant had gone to work in scanty and provocative clothing.

If there is a reduction in an unfair dismissal award for contributory fault then it is not inconsistent similarly to reduce an award under the DDA. (*Fife Council v McPhee EAT* 750/00 21 February 2001)

An argument that in a short time an employee would have been dismissed fairly in any event does not reduce an award for injury to feelings. *O' Donoghue v Redcar & Cleveland Borough Council* 15 May 2001 CA

Damages for defamation/stigma

In *Alexander v Home Office (see above)* the CA noted:

'Although damages for racial discrimination will in many cases be analogous to those for defamation, they are not necessarily the same. In the latter the principal injury to be compensated is that to the plaintiff's reputation: I doubt whether this will play a large part in the former. On the other hand, if the plaintiff knows of the racial discrimination and that he has thereby been held up to 'hatred, ridicule or contempt' then the injury to his feelings will be an important element in the damages. That the injury to feelings for which compensation is sought must have resulted from knowledge of the discrimination is clear'

The CA went on to say:

'As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss... then the damages referable to this can be readily calculated. For the injury to feelings, however for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors.'

The CA continued that awards should be restrained and that further 'injury to feelings, which is likely to be of a relatively short duration is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.'

Recent awards

Lee v DERA DCLD Winter 2000

Injury to feelings suffered as a consequence of almost two years of sex discrimination were at the top end of the scale. An award of £25,000 was made. The applicant had complained about her line manager's behaviour but no proper investigation had been made. It had been decided that she did not fit in with the 'civil service ethos'. She lost her job as a result of a re-organisation.

A v B DCLD Winter 2000

Injury to feelings following a four-month campaign of sexual harassment had been heightened by sexual abuse which the applicant had suffered as a child. A reminder that the measure of damages is tortious and the wrongdoer takes his victim as he finds him. Total compensation of £18,500 awarded.

HMS Prison Service v Salmon [2001] IRLR 425

The applicant was one of three women out of 120 prison officers at Canterbury prison employed from 1991. She became increasingly unhappy about the sexualised nature of her working environment. This culminated in an incident in 1996 when a male colleague wrote offensive and sexually degrading comments about her in the dock book at Canterbury Crown Court. She was off work with moderate to severe depression.

The tribunal found that the Prison Service had created a humiliating working environment for women officers. Male colleagues openly read pornographic magazines and engaged in unacceptable sexual banter. The tribunal found that the comments in the dock book amounted to sexual harassment. The award included £45,094.88 in respect of loss of earnings, £20,000 for injury to feelings and £11,250 compensation for personal injury in respect of psychiatric damage caused to the applicant. Full compensation for this injury would have been £15,000, but this was reduced as the tribunal found that the acts of discrimination were 75% responsible for her illness. The award of £20,000 for injury to feelings included £5,000 aggravated damages and an award of £1,000 was made against the individual officer.

Vento v Chief Constable of West Yorkshire DCLD Summer 2001

The applicant was not confirmed in post at the end of her probationary period as a police constable. This was less favourable treatment on the grounds of her sex. The tribunal found that she would have been confirmed as a police constable but for the discrimination and there was a 75% chance that she would have been completed a full police career if she had not been dismissed. An award of £165,829 was made for loss or earnings including £68,712 for loss of pension rights. In respect of injury to feelings the tribunal awarded £50,000 on grounds that the applicant has been put through four traumatic years by the conduct of the respondent's officers; £15,000 for aggravated damages to reflect the attitude of the Chief Constable and his officers – one of 'institutional denial' – and £9,000 for psychiatric damage which left her with an adjustment disorder.

Poontah v Britannia and Project Design Ltd and Lewis DCLD Spring 2001

The applicant was of Mauritian ethnic origin. In January 1999 he was separated from the design engineers' team and moved to an office two floors below and instructed to report to a director a minimum of four times a day. There was no ventilation in the office, which was filthy, and there was no heating. He complained and was abused; this abuse took on a racial tone and shortly afterwards he was dismissed. The tribunal concluded that this was an appalling example of discrimination whereby he had been humiliated, intimidated and degraded, causing incalculable loss to his self-esteem. Award of £33,000 including £7,500 for injury to feelings and £3,000 for aggravated damages. The applicant walks with the assistance of a walking stick and he was awarded £2,500 for disability discrimination (injury to feelings).

Sterling v Leeds Rugby League Club, Lance, Howes and Hetherington DCLD Spring 2001

Black rugby player awarded £15,250 including £10,000 for injury to feelings. The coach told him he was excluding him from the first team squad and made it clear that he would not be selected for the first team, irrespective of his performance in training and in A-team matches. The coach had remarked that Afro-Caribbean players were 'not as well suited as others to playing Rugby League football in Australia'.

Bennett v Christian Salvesen DCLD Spring 2001

During employment from June 1999 to January 2000 applicant was subjected to both oral and written abuse of a racial nature. In one incident 'n***** f*****' was sprayed on his locker. Award of £6,000 for injury to feelings.

Mallidi v The Post Office DCLD Spring 2001

The applicant was employed on a casual basis and required to take an aptitude test for permanent employment. She failed the test and her employment was terminated. It emerged that three white comparators had been given contracts without the need to pass the test; indeed, whole batches of causal employees were given contracts without passing a test. Award of £19,757 including 10,000 for injury to feelings.

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1. *McGregor on Damages* 16th Edition (London, Sweet & Maxwell, 1999)

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Briefing No: 219

The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001

Key points

The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (SI 2001 No. 2660) implement the EC Burden of Proof Directive (Council Directive 97/80/EC of 15th December 1997 concerning the burden of proof in cases of discrimination based on sex).

The Regulations apply only to sex discrimination employment cases, not to sex discrimination cases outside employment and not to *any* race discrimination case. Sex discrimination in employment includes discrimination against married persons ('marital discrimination').[1]

In sex and marital discrimination employment cases the Regulations

- introduce a new definition of indirect discrimination
- change the burden of proof;

The Regulations come into force on **12th October 2001.** If a case has not been concluded in the tribunal by 12 October, the Regulations apply.[2] Thus, they apply to proceedings instituted before the commencement date as well as those instituted after that date.

Indirect discrimination: position prior to Regulations

Before the Regulations the applicant had to show that:

- there was a requirement or condition (e.g. to work full-time);
- which a considerably smaller proportion of women than men could comply with;
- which was to the woman's detriment because she could not comply with it; and
- which was not justified.

New definition of indirect sex and marital discrimination

The Regulations provide a new, broader definition of indirect sex and marital discrimination. This is as follows:

A person discriminates against a woman if
(a) ……[direct discrimination]
(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but
(i) which is such that it would be to the detriment of a considerably larger proportion of women than of men, and
(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
(iii) which is to her detriment. [3]

This is more in line with the Directive, which provides that there is indirect discrimination 'where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'

Main changes

- The problems associated with proving a 'requirement' or 'condition' no longer exist. The courts often interpreted 'requirement' very narrowly, saying that it had to amount to an absolute bar[4] or, in the case of a 'requirement' to work full-time, that this was just part of the job.[5] The need to show a 'provision, criterion or practice' instead should remove these problems and mean that any employment practice can be challenged.
- The provision, criterion or practice is such that it 'would be to the detriment of a considerably larger proportion of women than of men'. The words 'would be' imply that statistical evidence of the actual state of affairs is not necessary for this test. The ET can consider the likely impact of a proposed change. This opens the possibility of broader evidence being brought, for example from economists and sociologists who can refer to relevant national or local patterns.
- It is no longer necessary to show that the proportion of women who can comply is considerably *smaller* than the proportion of men who can comply. This is a different test, but it is not clear whether it will make a significant difference in practice.
- The focus on those excluded by a provision, criterion or practice may be more appropriate than the former SDA (and current RRA) focus on those who can comply, as it is normally those who are excluded who wish to take action to assert their rights. Arguably, the ETD phrase 'any discrimination whatsoever' includes both ways of viewing the situation.
- The new definition does not require the applicant to show that she 'cannot comply' with the 'provision, criterion or practice'. It is sufficient that she shows there is a detriment. So where, for example, a woman argued that a requirement to work full-time was indirect discrimination, she used to have to show that she could not work full-time. Employers often argued that she would be able to work full-time if she made appropriate childcare arrangements. These arguments are no longer relevant.

The question whether the provision, criterion or practice is justified is the same. It could be argued that the failure to incorporate the words of the Directive, that the provision, criterion or practice must be 'appropriate and necessary' as well as objectively justified, means that the Directive has not been properly implemented. Applicants should, if appropriate, draw these words to the attention of the tribunal.

Burden of proof

Regulation 5 inserts s. 63A into the SDA, providing that

'Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent
(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2, or
(b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant, the tribunal shall uphold the

complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.'

This is intended to implement Article 4(1) of the Directive, which provides that when complainants 'establish … facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

Effect on direct discrimination

Prior to the Regulations tribunals generally applied the test in *King v Great Britain-China Centre*[6], which was approved in *Glasgow City Council v Zafar*[7]. Where the applicant provides evidence to show less favourable treatment and a difference of sex, the tribunal should look to the employer for an explanation. In the absence of a satisfactory explanation, the tribunal may infer that there has been unlawful discrimination.

The position since 12 October is different. Where the applicant has shown a *prima facie* case, the burden of proof shifts to the respondent. If the respondent does not provide a satisfactory explanation for the treatment, the tribunal *must* find that there has been discrimination.

The questions are:

1. Has the applicant established facts from which an inference of discrimination can be drawn – the presumption (or prima facie case)?
2. Has the employer provided a satisfactory, non-discriminatory explanation for the difference in treatment?

If the employer cannot provide a satisfactory explanation to show that there has been no discrimination, the tribunal *must* find that there was discrimination.

If, for example, a respondent states that there has been no discrimination in this case 'because we treat everyone badly', such a bald assertion will not be enough to rebut the presumption that there has been discrimination; the employer must prove it.

Effect on indirect discrimination

The effect of the changes is less clear with regard to indirect discrimination, where the burden is already on the employer to show justification. It may make a difference in relation to proving disproportionate impact. For example, if a woman can provide labour market statistics showing that the vast majority of part-time workers are women (about 84%), this may be sufficient to shift the burden onto the employer to prove that there is no disproportionate impact.

Conclusion

The changes in the burden of proof and the definitions of indirect sex and marital discrimination are likely to make it easier for applicants to prove discrimination. It is extremely unfortunate that parallel changes were not made to the RRA or to the non-employment provisions of the SDA, which can only add to the difficulties for advisers. This highlights the need for a comprehensive overhaul and codification of our discrimination laws, so that the same standards are being applied across all appropriate areas.

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1. Regulation 3.
2. Regulation 2
3. Regulation 3(2). The same changes apply to marital discrimination (see regulation 4).
4. See *Perera v Civil Service Commission* [1983] IRLR 186
5. *Clymo v Wandsworth LBC* [1989[] IRLR 241
6. [1992] IRLR 513
7. [1998] 36, HL

Pregnancy dismissal and fixed term contracts

Handels-og Kontorfunktionaerernes Forbund I Danmark (HK) ECJ C-109/00

Implications for practitioners

This decision by the ECJ reiterates the fact that dismissal of a woman because she is pregnant or on maternity leave, whether she is employed permanently or on a fixed-term contract, is unlawful discrimination irrespective of the financial loss to the employer.

The facts of the case

The applicant was recruited by Tele Danmark for a period of six months from 1 July 1995. During the first two months she had to follow a training course. In August 1995 the applicant informed her employer that she was pregnant and expected to give birth in early November. She was dismissed on 23 August 1995 with effect from 30 September on the ground that she had not informed Tele Danmark that she was pregnant when she was recruited.

The employer argued that the prohibition on dismissing a pregnant worker did not apply to a worker, recruited on a temporary basis, who failed to inform the employer of her pregnancy at the time of recruitment, and who, because of her right to maternity leave, was unable to perform a substantial part of her contract.

European Court of Justice

The ECJ laid down the main principles relating to pregnancy dismissal :

1. In view of the risk that a possible dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abortions, the EC has laid down special protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave.
2. There is no exception to this prohibition save 'in exceptional cases not connected with their condition where the employer justifies the dismissal in writing'.
3. Refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which the employer would suffer. The same principle applies to the financial loss caused by the fact that the woman appointed cannot be employed in the post for the duration of her pregnancy.
4. The protection given to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during the period of her maternity leave is essential to the proper functioning of the business. This applies equally to fixed term contracts.
5. Fixed term contracts are covered by the Equal Treatment Directive and the Pregnant Workers Directive. Had the Community legislature wished to exclude them it would have done so.

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Exemplary damages in discrimination cases

Kuddus v Chief Constable of Leicestershire Constabulary [2001] 3 All ER 193 HL.

Implications for practitioners

In limited circumstances, where an award of compensation for discrimination is too little to punish the wrongdoer, a court or tribunal may be able to award extra compensation by way of 'exemplary damages'. Exemplary damages may now be awarded in cases of unlawful discrimination under the SDA, RRA and DDA, provided that the discriminatory act comes within one of the two categories of behaviour identified in *Rookes v Barnard* [1964] AC 1129 HL. This applies to employment cases and to discrimination claims under the County Court jurisdiction. Practitioners should consider in each case whether it is possible to increase compensation by including a claim for exemplary damages.

The facts of the case

K reported an apparent theft to a police officer. He was told that it would be investigated. Subsequently, without his knowledge, the officer forged K's signature on a statement withdrawing the complaint, and so the investigation ceased. K sued for damages in the county court, relying on the tort of misfeasance in a public office. The Chief Constable accepted liability, but contended that he was not liable to pay exemplary damages, and applied to strike out that part of the claim.

County Court and Court of Appeal

The CA upheld the initial decision striking out the claim for exemplary damages. This was on the basis of a rule identified in an earlier case, *Broome v Cassell* [1972] AC 1027 HL, that exemplary damages can be awarded only in respect of torts that had been recognised as attracting exemplary damages at the time when *Rookes v Barnard* was decided in 1964 ('the cause of action rule'). This was not the case in respect of the tort of misfeasance.

House of Lords

The HL decided unanimously that the 'cause of action' rule was not good law. Instead, the crucial factor in every case is whether the particular behaviour fell within one of the two categories identified in *Rookes v Barnard*, namely:

1. oppressive, arbitrary or unconstitutional action by servants of the government;
2. where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant.

Comment

Previously the 'cause of action' rule had been applied to exclude the possibility of claiming exemplary damages in discrimination cases (see *Deane v London Borough of Ealing* [1993] IRLR 209). That is no longer the law. It is now strongly arguable that discrimination claims stand on the same footing as other compensation claims in tort, so that exemplary damages are recoverable if the standard criteria are met. As regards county court discrimination cases, this position is reinforced by the words of the discrimination statutes, which provide that a claim is to be made the subject of civil proceedings in the like manner to any other claim for breach of statutory duty. It would be strange if the position were then any different for ET claims.

However, practitioners should be aware that the speeches of two of the Law Lords (Mackay and Scott) contain observations suggesting – though not deciding – that exemplary damages should be recoverable in discrimination cases only if the particular legislation expressly authorises an award of such damages for any particular breach. It is difficult to see any reason in principle for this suggested limitation, especially as the general thrust of the decision is that it is the nature of the unlawful behaviour, rather than the particular cause of action, that should be the determining factor.

A further objection may be raised. Lord Scott queried whether in law exemplary damages could be recovered when the defendant was not himself the wrongdoer, but was liable on the basis of vicarious

liability – although such awards have previously been made in a large number of cases. The other members of the HL left this point open, although it is notable that Lord Scott was in the minority in terms of his general lack of enthusiasm for exemplary damages. Given that exemplary damages are essentially policy based, it is hard to see how they can effectively perform their main role as a means of punishment and deterrence unless awards can be made against employers.

As regards the general criteria for an award of exemplary damages, it should be noted that both categories for the award of damages are broader than they might at first seem. The first category (oppressive, arbitrary or unconstitutional action by servants of the government) is not limited to those who employed by the government itself and has been held, for example, to include local government officers. Many instances of discriminatory behaviour can be characterised as arbitrary or oppressive.

The second category (conduct that has been calculated to make a profit) applies to all defendants, and has been interpreted as covering situations where the wrongdoer had some appreciation that he was acting unlawfully and in a broad sense felt it was worth running the risk because of the advantage it was likely to bring him. It is not limited to situations where a defendant has made a specific financial calculation: see *Broome v Cassell* (above), *Riches v News Group Newspapers Ltd.* [1985] 2 All ER 845 (among others). So many discriminatory dismissals may come within the definition.

To secure an award of exemplary damages it is necessary to show that the other heads of damages awarded would, taken together, represent inadequate punishment for the defendant. The defendant's means are taken into account in determining the size of an award. Some useful general guidance as to the appropriate level for awards of exemplary damages and the factors that impact upon quantum can be found in *Thompson v Commissioner of the Metropolitan Police* [1998] QB 498 (which was directly concerned with civil actions against the police, but contains much that can be applied by analogy).

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Briefing No: 222

Effect of pending litigation on duty to provide reference

Chief Constable of West Yorkshire Police v Khan
House of Lords 11 October 2001, reported at [2001] UKHL 48

Text at: http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd011011/khan-1.htm

Implications for practitioners

- The notional comparator in a victimisation claim under the RRA is not a person bringing some other type of claim against the respondent.
- It is not unlawful victimisation to refuse to provide a reference to a prospective new employer because of pending tribunal proceedings in which the respondent's evaluation of the applicant's performance is at issue.
- An employer engaged in litigation is entitled to act honestly and reasonably to protect its position in that litigation even where that action causes the applicant detriment.

The facts of the case

K was a police sergeant seeking promotion to inspector rank. He brought a tribunal complaint of race discrimination against his employer, the Chief Constable, because of some unfavourable remarks in appraisal documents which had prevented his promotion internally. While his tribunal case was pending, he applied to another police force for appointment to a post of inspector. That other police force requested a reference from the Chief Constable. The Chief Constable declined to provide a reference because of the pending tribunal case. He informed the

other police force that he was unable to comment for fear of prejudicing his own case before the tribunal. It was argued that he had been placed in the invidious position of either having to reproduce the disputed assessment (thereby repeating the act alleged to be discriminatory), or not repeating the previous comments and affecting the credibility of his defence of the tribunal proceedings.

The issue, therefore, was whether, in refusing to provide a reference because of a pending race discrimination claim, the respondent had unlawfully victimised the applicant contrary to section 4 of the RRA.

Employment Tribunal

The claim for victimisation succeeded. Although the tribunal found that K would not have secured the post even if a glowing reference had been provided, and made no award for financial loss, it awarded £1,500 for injury to feelings.

Employment Appeal Tribunal and Court of Appeal

Appeals by the Chief Constable were dismissed and the tribunal decision upheld.

House of Lords

The House of Lords unanimously allowed the appeal. There had been no unlawful victimisation.

1. Refusal to provide a reference is a detriment and/or a refusal to allow access to a benefit under s.4 of the Race Relations Act 1976, even if the reference would not have been favourable and would not have resulted in the employee securing that post.
2. It is no defence for a respondent to argue that an employee bringing another type of claim (i.e. not under the RRA) would also be denied a reference. The proper comparator is simply an employee for whom a reference is requested.
3. However, victimisation is unlawful where it occurs 'by reason that' the person concerned has done a protected act (in this case, the bringing of tribunal proceedings for race discrimination). This is not an objective test of causation, and an application of the 'but for' test is not appropriate. Instead, the reason, whether conscious or subconscious, for the employer's action must be identified.

There is a distinction between action taken because proceedings have been brought (which section 2 of the RRA renders unlawful), and action taken because proceedings are pending. Litigation alters the relationship between employer and employee. Therefore, an employer is entitled, if acting honestly and reasonably, to take steps to preserve its position in pending discrimination proceedings. If the same action would have been taken had the proceedings been concluded, it might well be victimisation, but if (as here) the action would have been unnecessary had the proceedings already concluded, generally it will not be unlawful.

Comment

The ruling on the proper comparator is welcome clarification.

The distinction between action taken because proceedings have been brought and action taken because proceedings are pending is a fine one which could be difficult to apply in practice, particularly in situations where the 'protected act' is not the commencement of proceedings but is, for example, the making of an allegation or complaint which the employer must investigate.

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SDA does not cover sexual orientation discrimination

Advocate General v. MacDonald [2001] IRLR 431 CS
Pearce v. Governing Body of Mayfield School [2001] IRLR 669 CA

Implications for practitioners

The SDA 1975 in section 1 and Part II makes it unlawful to discriminate against a person on grounds of his or her 'sex' in the field of employment. Section 5(3) of the Act requires a comparison of an alleged victim of discrimination with a comparator to be such that the relevant circumstances in the one case are the same, or not materially different, in the other. These two recent cases concern the interpretation of the word 'sex' in the 1975 Act, the use of the Human Rights Act 1998 retrospectively, and the appropriate comparator in sex discrimination claims involving lesbian and gay applicants. Both cases decide that, for the purposes of the 1975 Act, 'sex' does not include sexual orientation. Normally, the correct comparator in such cases is a lesbian in the case of a gay man or a gay man in the case of a lesbian.

Unless the reasoning in these decisions is overturned by the House of Lords on appeal, those treated less favourably on grounds of sexual orientation, but no less favourably than a comparator of the opposite sex and the same sexual orientation, may have no domestic claim for discrimination (although the Human Rights Act 1998 may provide for a claim against a public authority where the unlawful act took place after 2nd October 2000).

The introduction of the EC Employment Framework Directive (due to be implemented domestically by December 2003) will provide specific protection against discrimination on grounds of sexual orientation in the course of employment.

Until the implementation of the Employment Framework Directive, it will still be possible to succeed in a discrimination claim if a lesbian or gay man can establish that she or he was treated less favourably than a lesbian or gay person of the opposite sex would have been treated, or where, in the context of less favourable treatment on the grounds of sex, sexual orientation is an irrelevant circumstances for the purposes of section 5(3) and should not be considered as a relevant factor at all. Some instances of stereotyping on grounds of sexual orientation may still, then, found a claim.

MacDonald

Facts

M was a flight lieutenant in the Royal Air Force until 1997. He revealed his homosexuality to his commanding officer. As a result, he was compulsorily discharged from the RAF in March 1997. He brought an application in the ET alleging sex discrimination and sexual harassment. In December 1999 the employment tribunal dismissed his claim. In September 2000 the EAT (*see Briefing 118*) allowed his appeal, holding that, in the light of the HRA, the SDA should be interpreted in line with Convention jurisprudence which, the EAT thought, held that 'sex' included 'sexual orientation'. The Advocate General – who conceded that M's right to non-discriminatory respect for his privacy had been violated and that he should be compensated for that breach – appealed to the Inner House of the Court of Session on the issue of the interpretation of the word 'sex'.

Court of Session

It was accepted by all three judges that the obligation to interpret legislation in conformity with Convention rights, imposed upon courts by section 3 of the HRA, applied in determining M's case, even though it had begun before 2nd October 2000, when the Act came into force. All three judges held that the 1975 Act could not be interpreted to give 'sex' a meaning other than 'gender'. The EAT had erred in holding that 'sex' included 'sexual orientation'.

On the issue of the appropriate comparator for M, the Court was divided. Lord Kirkwood and Lord Caplan held that, in comparing like with like for the purposes of section 5(3), a gay man should be compared with a lesbian woman. A lesbian would have been treated in the same way as M, so there was no discrimination on grounds of sex: the approach of the

majority of the Court of Appeal in *Smith v. Gardner Merchant* [1999] ICR 134 was right.

'[M] ...had broken what [the RAF] considered to be an important rule of behaviour. The question is would they have meted out the same treatment to a woman if she too was held to have broken that same rule? As it happens, because the rule is based on homosexuality ... any psychological or physical differences between the two types of homosexuality are not critical to the [RAF's] policy. The policy was applied to all homosexuals and it is a breach of that policy which is the circumstance relevant to any service person being asked to leave.' (Opinion of Lord Caplan, para. 7)

Lord Prosser, dissenting, adopted the reasoning of Dr Robert Wintemute in 'Recognising New Kinds of Direct Sex Discrimination' [1977] 60 MLR 334. Lord Prosser held that a man who was sexually attracted to men should be compared with a woman who is sexually attracted to men, the object of an applicant's sexual attraction being the 'relevant circumstance' for the purposes of section 5(3) of the 1975 Act and not his or her orientation, which is merely a descriptive term.

'...care must be taken to distinguish between directly descriptive terms on the one hand, and words which have a cross-referential or reflexive or additional element contained within them....[M] is attracted by males. He should be compared with a woman who is attracted by males. I see no basis for departing from this simple comparison in favour of one which builds in no new fact, but treats as crucial what in my view is merely a comment on orientation, as revealed by these same facts.... a veto on mixed marriage can scarcely be justified by saying that black and white are treated alike because each is permitted to marry a person of the same, or their own, colour. There is discrimination on the ground of colour in such a situation despite the 'equal' treatment of persons of either colour. And that would not be altered by recourse to linguistic obfuscation, by inventing concepts of homoethnicity or heteroethnicity.' (Opinion of Lord Prosser, dissenting, paras. 34, 37, 39)

Pearce

Facts

P worked as a teacher in a state school. She was subject to abuse from pupils because of her sexual orientation. This took the form of verbal comments, such as 'lezzie', 'lemon' and 'dyke'. On one occasion, pupils persistently called out the word 'pussy', and at the end of the afternoon, P found cat food in her coat pocket. P's health suffered and she was medically retired. She complained to an employment tribunal that her treatment constituted sex discrimination on the part of the school governors, who had failed to deal adequately with her complaints. The tribunal dismissed her claim in April 1999, finding that (with one exception) the treatment suffered was not discrimination on grounds of sex. The EAT (*see Briefing 186*) dismissed P's appeal in April 2000, holding that none of the treatment was discrimination on the grounds of sex. P appealed to the CA.

Court of Appeal

The argument that the behaviour was gender specific did not assist P's claim where a gay man would have been subject to the same sort of sexual harassment, albeit using different words. The decision in *Smith v. Gardner Merchant* was binding on the CA and required them to adopt a gay male comparator, unless the HRA had altered the Court's interpretative obligations. But the impugned decisions of the tribunal and the EAT had been taken before the 1998 Act came into force. Section 3(1) was not to be applied retrospectively. This would create liability (for sexual orientation discrimination) where none previously existed. That would be wrong in principle. 'Sex' meant 'gender' and the appropriate comparator remained a homosexual person of the opposite sex to the applicant. A gay man would have been treated no more favourably than P. The appeal would be dismissed.

Hale LJ said, in passing, that it was possible to incorporate sexual orientation into the definition of 'sex' by adopting the Wintemute comparator, i.e. men and women who had a common sexual attraction to members of a certain sex (e.g. both of whom were sexually attracted to women), rather than a certain sexual orientation. Judge LJ was not persuaded that Hale LJ was correct on this point.

Hale LJ also considered, in passing, that a remedy might lie against a public authority under sections 6 and 7 of the 1998 if it discriminated in respecting an individual's right to privacy. Judge LJ and Henry LJ did not address this point.

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Compensation for discriminatory dismissal can be limited when dismissal is inevitable

O'Donoghue v Redcar & Cleveland Borough Council [2001] IRLR 615 CA

The facts of the case

O was a barrister employed in the Council's legal department. In 1995 a new post of senior solicitor was advertised internally. O, the only applicant, was not appointed. The new post was then advertised externally. O was short listed and interviewed but was unsuccessful. A man was appointed to the post instead. O brought a claim for sex discrimination, claiming that the successful male candidate was less qualified than her and had less relevant experience.

First Employment Tribunal

O won her claim for sex discrimination in the ET. During the hearing she gave evidence that two Councillors had made sexist remarks some years before.

Second Employment Tribunal

After the first ET hearing O was suspended, disciplined and dismissed. O issued proceedings against R claiming unfair dismissal and victimisation. The ET upheld her complaints and found that the dismissal was caused by her having given evidence at the first hearing about the Councillors' sexist remarks.

The ET then concluded that O would have been fairly dismissed no later than six months after the actual date of her dismissal, because of her divisive and antagonistic approach to her colleagues. Compensation of £8,805 was awarded, of which £2,000 was for injury to feelings.

Employment Appeal Tribunal

The Council appealed against the finding of unfair discrimination in respect of the appointment. O appealed against the reduction in her compensation for victimisation and unfair dismissal. The EAT heard the two appeals together. It allowed R's appeal and dismissed O's.

Court of Appeal

The ET was entitled to find that O had been subjected to sex discrimination when she was not selected for a new post in favour of a less well qualified man. The EAT were wrong to allow an appeal against this finding. The ET had asked the right questions and there was evidence to support its findings. The ET's decision would be restored.

The ET was entitled to find that, notwithstanding her discriminatory unfair dismissal and victimisation, O's divisive and antagonistic approach to her colleagues would inevitably have led to her fair dismissal within six months. The ET was correct to regard the date six months after the date of termination of her employment as a cut-off point for the purposes of compensation.

An ET must award compensation that is just and equitable. If the ET finds that, but for the dismissal, the applicant would have been fairly dismissed within the foreseeable future because of her behaviour or characteristic attitude, which the employer reasonably regards as unacceptable, but which the employee cannot or will not moderate, then it is just and equitable that compensation for unfair dismissal should reflect this.

Guidance on percentage reductions

Where it is appropriate to assess what would or might happen in the future, the correct approach is to assess the chance of the event happening. For instance, there may be a 20% chance of dismissal in six months, but a 30% chance in a year. In these circumstances it will be difficult to identify an overall percentage risk. Where the ET are satisfied, as in this case, that the applicant would inevitably have been dismissed in the foreseeable future, it will be legitimate to assess a safe date by which the ET are certain that dismissal would have taken place. They can then award compensation in full up to that date, and avoid the need for complex sliding scale percentages.

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Injury to feelings

The CA concluded that a complainant is entitled to an award for injury to feelings for injury sustained at the time of the discriminatory dismissal. Those feelings would arise at the time of the dismissal. The claim for injury to feelings was based on damages for the sense of anger, upset and humiliation arising from the loss of her job as a result of victimisation for bringing her earlier claim. To make a discount from those damages in respect of a notional future event, which might have increased her sense of outrage, was unjustified and inappropriate. The award of damages for injury to feelings was therefore increased to £5,000.

Comment

The CA found that the dismissal was inevitable because of the characteristics of O, and found that the ET could therefore safely assess a date by which time they were certain that dismissal would have taken place. Such situations will be rare. Usually, there will be significant doubt as to whether an applicant would have been dismissed but for the discriminatory conduct or victimisation. In such cases it should still remain appropriate for the ET to assess the chance of dismissal by way of a percentage.

Since O was dismissed as a result of deliberate victimisation, the award for injury to feelings of £5,000 is low in the light of the guidelines in *Alexander v The Home Office* [1988] IRLR 190 CA and more recently in *ICTS (UK) Ltd v Tchoula* [2000] IRLR 643.

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Briefing No: 225

A wider view of detriment

Garry v London Borough of Ealing [2001] IRLR 681

The facts of the case

G, a Nigerian woman, was employed by Ealing from 1991 as a housing benefits rent team manager. In 1996 the Council's housing benefit investigation team was told that she had been the subject of a housing benefit fraud investigation in her previous job. Consequently Ealing started an investigation. Rather than undertake an ordinary investigation, they appointed a Special Investigator. They did not tell G of the investigation. In May 1997 G discovered she was under investigation, and she was interviewed a month later. In August 1997 the Special Investigator reported to the Council's Director of Regeneration and Housing. The Director concluded that there was insufficient evidence to conduct a disciplinary hearing. However, neither G nor the Special Investigator was told of this decision. G only heard of it in July 1998, when she wrote to ask and was told that 'no further action is intended'. G applied to the ET claiming that the manner in which the investigation had been conducted was as a consequence of her racial origin. She claimed damages for discrimination on grounds of her race.

Employment Tribunal

The ET concluded that that she had been subjected to discrimination on grounds of her race. The ET took note of the fact that, shortly before the investigation against her was instigated, another Nigerian had been dismissed after a widespread investigation into a housing benefit fraud. The ET decided that there would have been an investigation in any event, but the appointment of a Special Investigator instead of an ordinary investigation was motivated by the assumption that as G was Nigerian 'this was likely to be a much bigger scale inquiry…This is an assumption based on stereotyping. It is a matter that arises from her ethnic origin.' The failure to inform G or the Special Investigator of the decision not to pursue the matter further was found to have been the result of incompetence rather than discrimination, although an

ordinary investigation would necessarily have terminated at an earlier date.

Ealing appealed against this decision.

Employment Appeal Tribunal

The EAT allowed the appeal. They decided that G had suffered no detriment. To establish that she had suffered a detriment, she would have to show that she had been disadvantaged in her employment. The ET had not found that such a detriment existed. The ET did not have any evidence before them that could lead them to conclude that G's lack of awareness of whether the investigation was continuing or not had actually caused her some disadvantage.

Court of Appeal

The CA concluded that the detriment was obvious. G had been subjected to a serious and lengthy investigation that was known to senior officers within the authority. This was a disadvantage to her in the circumstances in which she had to work. The fact that she was unaware of this investigation for part of the time did not lessen the detriment that she had suffered. The failure to inform her of the termination of the investigation was due to incompetence rather than discrimination.

Comment

This is an interesting contrast to *Shamoon* (Briefing 226). as it gives a much wider interpretation to the meaning of 'detriment' within the RRA. It acknowledges the damage suffered when action taken by a senior officer casts doubt upon the integrity of an employee, even when this does not have any direct physical or economic consequences. The case also highlights the importance of judging each individual on their merits and the dangers of stereotyping.

Gay Moon
Editor

Briefing No: 226

A narrow view of detriment

Shamoon v Chief of the Royal Ulster Constabulary [2001] IRLR 520 NICA

The facts of the case

S was a chief inspector in the RUC and deputy head of the Urban Traffic Branch. One of her duties was conducting staff appraisals, and it was custom and practice for counselling in respect of the appraisals of constables to be carried out by the chief inspectors. In April 1997 a complaint was made about the way that S had carried out an appraisal and the complaint was upheld. In September 1997 another complaint was made, and this complaint was taken to the Police Federation. The Superintendent agreed that in future he would do all the appraisals. He did not in fact carry out any appraisals before December 1997, when the Force policy on appraisals changed, and the two other chief inspectors, who were men, did carry out appraisals during this period. S complained that she had been discriminated against on grounds of sex because she had had the right to carry out appraisals taken away from her, and she applied to an ET.

Employment Tribunal

The ET, by a majority, upheld her complaint, saying that 'the changing of what had been the custom and practice regarding the completion of staff appraisals by chief inspectors only related to the applicant, and we were satisfied that she had been treated differently because she was a woman.'

Northern Ireland Court of Appeal

The NICA concluded that for an applicant to have suffered a 'detriment' under the SDA, there must have been some physical or economic consequence that was material and substantial. S did not have a 'right' to carry out appraisals, there was no consequent loss of rank and she did not suffer any financial consequences when this function was taken away from her.

They also decided that she could not compare herself to the two other chief inspectors who had continued to do staff appraisals, because she had had complaints

226 made against her. This meant that her situation was materially different from theirs and they were not valid comparators. Therefore S had failed to establish that she had been less favourably treated.

Comment

This is a very restrictive interpretation of 'detriment'. It is contrary to *Jeremiah v Ministry of Defence* [1979] IRLR 436 where it was said that 'detriment' does not mean anything more than 'putting under a disadvantage'. It is also likely to be contrary to the Equal Treatment Directive, which requires that there shall be 'no discrimination whatsoever'.

Gay Moon
Editor

227 Briefing 227

Indirect discrimination – choosing a pool

Harvest Town Circle v. Rutherford [2001] IRLR 599

The facts of the case

R worked for H. In September 1998, when he was 67 years old, he was dismissed for redundancy. He claimed a redundancy payment and unfair dismissal. He said that there was no true redundancy situation. He asserted also that sections 109 and 156 of the Employment Rights Act 1996, which exclude those aged 65 or over from claiming either unfair dismissal or a redundancy payment, indirectly discriminated against him on grounds of his sex, because more men over 65 than women over 65 are in employment.

The ET had to identify a pool within which it could determine the proportions of men and women potentially affected by the provisions of the 1996 Act. It decided to compare men and women over 65 who were economically active (in employment or available to work within two weeks) as percentages of men and women in the population over 65. It concluded that there was a 'considerably higher percentage' of economically active men (8%) than women (3%). The ET found that the provisions of the 1996 Act were indirectly discriminatory, and that H had not produced evidence to satisfy the ET that the provisions of the 1996 Act were objectively justifiable. It determined that those provisions should be disapplied and that it had jurisdiction to hear R's claim.

Employment Appeal Tribunal

On the question of the appropriate pool from which comparisons should be made, Lindsay J set out the domestic and European case law on indirect discrimination and, from it, provided the following guidance for tribunals:

- In some cases, a disparate impact between sexes will be so obvious that a simple consideration of numbers or proportions alone will suffice to show that members of one sex are substantially or considerably disadvantaged;
- In less obvious cases, it will be proper for a tribunal to use more than one form of comparison – no one comparison need be regarded as decisive;
- In such less obvious cases, it will be proper to consider disadvantaged groups as proportions (e.g. 10%) and numbers (e.g. 100 in 1,000) and to look at groups as ratios of each other (e.g. 1:10);
- It will never be wrong for a tribunal to look at more than one form of comparison, if only to confirm an obvious disparate impact;
- As more cases are heard, the level of disparity needed to be considered 'substantial' will become more apparent. But any particular disparity, for example that of 8.5% in *R v. Secretary of State for Employment ex parte Seymour Smith*, need not always be either substantial or insubstantial – different comparisons will throw up different scales of difference, depending on each case;
- The words 'considerable' and 'substantial' used to describe disparities in previous domestic and European cases are interchangeable. It would be a mistake to conclude that any disparity that was more than trivial was sufficient to show discrimination;
- In difficult cases, after looking in detail at a variety of

figures, a tribunal should stand back, assimilating all the figures, to judge if a disparate impact was considerable of substantial.

Having laid down this guidance, the EAT concluded that in deciding to compare those over 65 who were 'economically active' with the total population over 65, the ET was wrong. This comparison might include the self-employed, and others who were practically, if not legally, in control of their employment. The sum total of economically active and inactive people included those over 65 who would not wish to work or be capable of working – those in their 80s or 90s, and those physically and mentally incapable of work. The ET had also approximated the percentages so as to increase the disparity.

The EAT held that the ET had been wrong not to invite the Secretary of State to make submissions on the question of justification. Where the validity of primary legislation, affecting hundreds of thousands of people, is in issue, it is essential that a tribunal should take pains to see that it is sufficiently informed on the question of justification. The Secretary of State should be invited to intervene; in some cases, it might be irresponsible of him not to accept that invitation. The question of justification could not be left on the basis that there was an onus on a private party to discharge a burden. The case would be remitted to a tribunal with the suggestion that the Secretary of State be invited to intervene.

Comment

This case indicates the importance of identifying correctly the pool from which comparisons should be made. The identification of that pool is a matter which the EAT will consider on appeal. The court quoted Sedley LJ:

'...once the impugned requirement or condition has been defined there is likely to be only one pool which serves to test its effect.... the identification of pools [is] a matter ... of logic.... Logic may on occasion be capable of producing more than one outcome, especially if two or more conditions or requirements are in issue. But the choice of the pool is not at large.' *Allonby v. Accrington and Rossendale College* [2001] IRLR 364 at 368.

The guidance given by Lindsay J will be of use in future cases. Where a substantial disparity is clear, there may be no need to analyse figures in great detail. A party seeking to challenge legislation in a case against a private body must remind an ET of its power to invite the Secretary of State to intervene. Lindsay J's judgment declares that 'considerable' and 'substantial' are interchangeable terms in determining whether a disadvantage for men or women is indirectly discriminatory.

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A transsexual may not conduct a personal search

A v Chief Constable of the West Yorkshire Police and anor Cases EAT/661/99 *and* EAT/231/00

Implications for practitioners

This case establishes that, because in law the sex of a transsexual person remains what it was at birth[1], it is not unlawful for an employer to refuse employment to a transsexual in circumstances where the duties of the post include some which must by law be performed by persons of a certain sex, and the fact that in the course of their work the employee would be held out as being of the opposite sex would preclude them performing those duties. The case concerns the police and the law relating to personal searches, but might apply equally to any post falling within the GOQ relating to the provision of personal services.

The facts

A was born male. A underwent surgery and lived as a woman. A regarded secrecy about being a transsexual as fundamental to her ability to lead a normal life (see Briefing 196 concerning her successful application for a permanent RRO for these proceedings).

A was entirely open about being transsexual when she applied to join the West Yorkshire Police, while making clear to the Force that she would not want that information shared other than on a need-to-know basis.

The Force policy is not to recruit transsexuals because they cannot perform the full duties of a police officer. Officers have duties in relation to personal searches. Personal searches must by law be performed by and / or witnessed by a person of the same sex as the person searched[2]. The Force said that A would be held out as female, but women might reasonably object to being searched by her. Furthermore, in law A's sex is male, and it would therefore be unlawful for A to take part in searches of women.

The case was dealt with under the old law, before amendment of the SDA by the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999 No. 1102).

The Force acknowledged that their policy was discriminatory on grounds of sex, and the case proceeded on that basis. The Force's defence was that being a man (or woman) was a genuine occupational qualification for the job, because the job needs to be held by a man to preserve decency or privacy because either:

(i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or

(ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities[3].

Employment tribunal

The ET found in favour of A. They accepted that many people might have religious, cultural or moral objections to being searched by a transsexual. The ET held that, while such objections are to be respected, they cannot be regarded as reasonable, as they largely reflect embarrassment. The ET said also that if A took part in personal searches of women, no one would be any the wiser, and so those objections would not come into play in any event. They said:

'The risks to the Respondent in permitting the applicant as a transsexual to carry out the full range of duties including the searching of women are so small that to give effect to them by denying the applicant access to the office of constable would be wholly disproportionate to the denial of the applicant's fundamental right to equal treatment'.

They nevertheless acknowledged that, if the Chief Constable sought to avoid such a deception by giving an instruction that A was not to take part in searches, her colleagues might question the reason for this, and so her confidentiality might be placed at risk.

Although the issue had no application to A's case, the ET held that the fact that the new SDA section 7B(2)(a) imported by the Gender Reassignment Regulations was qualified by section 7(2)(b) involved a

breach of the Equal Treatment Directive. Certain kinds of personal search – those classed by PACE as intimate searches (searches of orifices other than the mouth) – would always be caught by section 7(2)(b). All police officers had to be able to take part in such searches. That amounted to a complete bar on the recruitment of transsexuals as police officers (and to certain posts in Customs & Excise and in private security firms where powers of search under PACE are being exercised).
The ET did not make any decision as to what A's sex is in law.

Employment Appeal Tribunal

The EAT rejected the ET's conclusion that objections based on religious, cultural or moral beliefs are necessarily to be treated as not reasonable objections. They rejected also the argument that the Force might 'get away' with either letting A take part in searches of women, or discreetly relieving her of such duties. They said such a deception would be neither proper nor practicable. Furthermore, it was necessary to decide what A's sex is in law. They heard lengthy argument on the question of A's legal sex, and held that in law A is male. Consequently, it would be unlawful for the Force to allow A to take part in personal searches of females. Having heard argument from counsel instructed by the Secretary of State for Employment and Education, the EAT held that section 7(2)(b) did not amount to a complete bar on the recruitment of transsexuals as police officers. The ET had found as a fact that the number of intimate searches conducted by police officers is minimal, because such searches are normally performed by doctors or nurses. Therefore, conducting intimate searches does not have to be in the job description of every police officer. (Contrast the position with non-intimate personal searches, which are far more frequent, but will not usually be caught by section 7(2)(b)). There is accordingly no reason in principle why a transsexual cannot serve as a police officer.

The EAT allowed the appeal, and remitted the case to the same tribunal, to decide, on the facts already found by them, whether in this case the defence in section 7(2)(b) is made out. Religious, cultural and moral objections must not be dismissed without full reasons being given. Holding A out as a female for the purposes of carrying out personal searches is not an option as it would be unlawful. The ET might need to hear further evidence as to the extent to which it might be feasible to exclude taking part in personal searches from A's job description.

Comment

The decision that it would be unlawful for a transsexual woman to take part in personal searches of females severely limits the protection conferred on transsexual people by the Gender Reassignment Regulations, since it applies equally to cases heard under the amended SDA. However, in the present state of the case law on the sex of transsexual people, the decision is arguably right.

EC law requires UK law to afford protection to transsexuals. This case demonstrates the line of UK cases commencing with *Corbett* prevents the SDA doing so adequately. A further challenge to *Corbett and Bellinger* would be timely.

While the West Yorkshire Police were appealing this case, the North Yorkshire Police proudly announced that they are allowing a serving officer to prepare for gender reassignment surgery by dressing as a woman on the job for a year before surgery.

Gaby Charing
Discrimination Law Association

1. A line of cases commencing with *Corbett v. Corbett* [1971] P. 83. The position has been most recently affirmed by the CA in *Bellinger v Bellinger* [2000] 3 FCR 733.
2. Police and Criminal Evidence Act 1984, section 54.
3. SDA section 7(2)(b).

Race, community and conflict after Macpherson

Ian Macdonald QC addresses the Annual General Meeting

On 11th September we were very glad to welcome Ian Macdonald QC, President of the Immigration Law Practitioners' Association, as guest speaker at the Discrimination Law Association Annual General Meeting. Ian has been involved with race relations and immigration law since the days of opposition to the Commonwealth Immigrants Act 1962. In the 1960s he was one of a small group of lawyers who put forward proposals for race relations law in the United Kingdom.

Ian began by pointing out that there is a contradiction between the objectives of UK race relations legislation (black people are part of the community and should be given the same opportunities as everyone else without discrimination) and the impact of UK immigration law (immigrants are not part of the community and are only here on sufferance). The two pull in opposite directions. The latest manifestations of this are the public treatment of asylum seekers and section 19D of the Race Relations (Amendment) Act 2000, which expressly permits discrimination on grounds of national and ethnic origin in immigration matters[1]. In the 1960's there were vast demonstrations against racist immigration legislation. Now, xenophobia against refugees receives what Ian termed 'a new legislative endorsement', and opposition to it is relatively muted.

Ian then turned to his main theme, which was institutional racism. He appeared as leading counsel for Duwayne Brooks in the Stephen Lawrence Inquiry, and that experience obviously informed his comments.

What is institutional racism?

Across Europe we see the phenomenon of hate groups with an overtly violent agenda that is fuelled by personal prejudice and animosity towards minority groups. The killers of Stephen Lawrence exhibited the most virulent race hatred. We need to distinguish between two kinds of racism – the violent racism of the killers, and the racism which arises out of racial stereotyping by the well meaning and not so well meaning. When the stereotyping comes from a company or institution's view of a particular ethnic group, we call it 'institutional racism'. The Stephen Lawrence Inquiry used the phrase to describe the practices of large companies and institutions. Institutional racism is sometimes open and undisguised, as in South Africa under *apartheid* and in the case of institutional religious bias against Catholics (religious not strictly ethnic discrimination) in Northern Ireland. More often, institutional racism derives from unconscious assumptions, and the practices based upon them. It need not involve conscious prejudice.

A classic example of stereotyping and institutional racism coming together was the treatment of Stephen Lawrence's friend Duwayne Brooks by the police who arrived at the scene of the murder – a small, but important instance of the systematic failure of the police to carry out a proper investigation of a crime.

Ian cited also the Denman Report on the Crown Prosecution Service. Sylvia Denman found the CPS was institutionally racist towards its staff, and said that underlying racist assumptions might well filter through also into the conduct of prosecutions. Decisions about whether to prosecute, assessment of the strength of cases and the reliability of witnesses, all might be affected by assumptions that were made. The judiciary itself is affected by this. The great US judge Oliver Wendell Holmes referred to 'the inarticulate premises upon which judges reach decisions'.

Stereotypes are often 'inarticulate premises'. They are a useful shorthand that we all use, but when they become rigid and out of touch with reality, they become dangerous. 'The company view' is often an institutional stereotype with damaging consequences. Ian recommended everyone to read Sir Henry Brooke's excellent Kapila lecture, in which he deals with the dangers of stereotypes based on cultural ignorance in

our courts.

From his own experience as an immigration practitioner Ian cited the primary purpose rule, which governs entitlement of spouses to enter the UK. Entry clearance officers often display crass ignorance of cultural practices, dressed up as expert knowledge. 'Why do you want to join your wife in the UK? Your society is patrilocal *(i.e. a wife makes her home with her husband and his family)*, so she should go to live with you in your country'.

Tackling institutional racism

Large organisations tend to recoil in horror from the suggestion that their practices may be tainted by racism. They have learned to regard racism as a most terrible allegation, which if proved may have extremely serious consequences for them. This defensiveness presents a real problem. It undoubtedly inhibits self-scrutiny.

There is no easy answer to this, and it was explored in discussion. There may be a tension between the pursuit of individual cases through tribunals, and the need to enable employers to conduct open and frank scrutiny of their own practices. However, many employers are first forced to confront their own racist practices by losing a tribunal case. What happens afterwards is very important.

Finally, Ian exhorted us all, whoever we may be, to examine our own assumptions. Racism is a complex and difficult issue, and to tackle it requires us to apply 'our minds and our intelligence' to understanding it. He told a cautionary tale about the inquiry that he conducted into racial violence in Manchester schools, following the murder in the playground of 13-year-old Ahmed Ullah by another pupil[2]. The head teacher of that school was a committed anti-racist, yet the manner in which the school dealt with the aftermath of the murder was extremely ill judged. White pupils were made to feel personally complicit in the murder (they were, for instance, forbidden by the school to attend the funeral), and this was a factor leading to a racial polarisation within the school that had not previously existed. A faulty analysis of the problem combined with poor management to create a situation that might have spread out from the school into the wider community. Only the intervention of two remarkable youth workers prevented that happening.

A fascinating discussion followed, which inevitably raised more questions than answers.

The Discrimination Law Association plans to hold a seminar on these issues early next year in conjunction with the Uniting Britain Trust.

1. See *Briefing 207*.

2. His widely proclaimed report was published in book form under the title *Murder in the Playground*.

Lord Chancellor's case latest

The Court of Appeal has just ruled in *Coker & Osamor v Lord Chancellor* that the Lord Chancellor is entitled to appoint a friend to be his special adviser. In a contradictory judgment, which recited the history of special advisers at length, the court ruled that '… making an appointment from within a circle of family friends and personal acquaintances is seldom likely to constitute indirect discrimination'.

However, it added, 'It does not follow that this practice is unobjectionable … It may be likely to result in the appointee being of a particular gender or racial group. It may infringe the principle of equal opportunities.'

The message of the judgment seems to be that the Court recognises that appointing from within a closed circle of friends is likely to reinforce race and gender segregation at work, but is unsure how it should be addressed.

International Covenant on Civil and Political Rights

Fifth periodic report from the UK to the UN Human Rights Committee

The International Covenant on Civil and Political Rights were adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976. The Human Rights Committee was established to monitor the implementation of the Covenant and the Protocols to the Covenant. Under article 40, States parties must submit reports every five years on the measures they have adopted which give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights. The reports are subsequently examined by the Committee in public meetings, through a dialogue with representatives of the State whose report is under consideration. On the final day of the session, the Committee adopts concluding observations summarizing its main concerns and making appropriate suggestions and recommendations to the State concerned. Non-governmental organisations are encouraged to submit written information or reports to the Committee.

The Committee considered the fifth periodic report submitted by the United Kingdom, and adopted concluding observations, at meetings held in October 2001.

The Committee welcomed the entry into force of the Human Rights Act 1998; the conclusion of the Belfast Agreement in April 1998, and the changes adopted in Northern Ireland based upon the agreement, especially the establishment of an independent Police Ombudsman, and the creation of a Human Rights Commission in Northern Ireland; and the Race Relations (Amendment) Act 2000 and the Disability Discrimination Act 1995.

Principal concerns and recommendations

The Committee expressed extreme concern about the following three matters, and required the UK government to report back within twelve months upon progress made in implementing the Committee's recommendations:

- In seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, the UK is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant, and may require derogations from human rights obligations. Any such measures should comply fully the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant.
- A significant number of murders in Northern Ireland, among them those of human rights defenders, have yet to receive fully independent and comprehensive investigations, and the prosecution of the persons responsible. This is doubly troubling because of persistent allegations of involvement and collusion by members of the security forces. The UK should implement, as a matter of particular urgency given the passage of time, the measures required to ensure a full, transparent and credible accounting of the circumstances surrounding these and other cases.
- While noting the introduction of new criminal offences of racially aggravated violence, harassment or criminal damage, the Committee is deeply disturbed by the recent repeated, violent outbreaks of serious race and ethnicity-based rioting and associated criminal conduct in some major cities. The UK should continue to seek to identify those responsible for these outbreaks of violence, and to take appropriate measures under its law. It should also work to facilitate dialogue between communities and between community leaders, and to identify and remedy the causes of racial tension in order to prevent such incidents in the future. It should consider facilitating inter-political party arrangements to ensure that racial tension is not inflamed during political campaigns.

Other recommendations

Other recommendations to be addressed by the UK in its sixth periodic report to be presented by 1 November

2006, are as follows:

- The UK should consider how persons subject to its jurisdiction may be guaranteed effective and consistent protection for the full range of Covenant rights, notably articles 26 (the right to education) and 27 (the right freely to participate in the cultural life of the community). The UK should consider, as a priority, accession to the first Optional Protocol allowing individuals to submit complaints to the Committee.
- The UK should consider the establishment of a national Human Rights Commission to provide and secure effective remedies for alleged violations of all human rights under the Covenant;
- The UK should reconsider its law depriving convicted prisoners of the right to vote.
- The UK should encourage the transparent reporting of racist incidents within prisons, and ensure that racist incidents are rapidly and effectively investigated. It should ensure that appropriate disciplinary and preventative measures are developed to protect these who are particularly vulnerable. Towards this end, particular attention should be paid to improving the representation of ethnic minorities within the police and prison services.
- The UK should take appropriate measures to ensure that its public life better reflects the diversity of its population.
- The UK should extend its criminal legislation to cover offences motivated by religious hatred, and should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs.
- The UK should take the steps necessary towards achieving an appropriate representation of women in these fields.
- The UK should closely examine its system of processing asylum-seekers in order to ensure that each asylum-seeker's rights under the Covenant receive full protection, being limited only to the extent necessary and on the grounds provided for in the Covenant, and should end detention of asylum-seekers in prisons.
- The UK should reconsider, with a view to repeal, the principle that juries may draw negative inferences from silence by accused persons, since this aspect of criminal procedure may not comply with the rights guaranteed under article 14 of the Covenant.
- Under the so-called 'Diplock court' system in Northern Ireland persons charged with certain 'scheduled offences' are subjected to a different regime of criminal procedure, including the absence of a jury. The UK should ensure that, in each case where a person is subjected to the 'Diplock' jurisdiction, objective and reasonable grounds are provided, and that this requirement is incorporated in the relevant legislation. The justification for continuing the 'Diplock' regime should be kept under review.
- Under the general Terrorism Act 2000, suspects may be detained for 48 hours without access to a lawyer if the police suspect that such access would lead, for example, to interference with evidence or alerting another suspect. The Committee considers that the UK has generally failed to justify these powers, and they should be reviewed.
- The UK has failed to demonstrate the necessity for the PACE provisions whereby sensitive evidentiary material, which would otherwise be disclosed to a defendant, is withheld on public interest/immunity grounds, and the court's decision is not reviewable. The provisions should be reviewed.
- The UK should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised, and limited to instances where it has been shown to be necessary to suppress release of the information.

Annual Report 2000-2001

Extracts from the Report presented to the Annual General Meeting

History and aims

The Discrimination Law Association was founded in 1995 with the objective of pushing forward the practice of complainant-oriented discrimination law and creating resources for those involved in practice. From the start strong emphasis was placed on the needs of the voluntary sector.

In 1998 a three-year grant was received from the Community Fund (formerly the National Lottery Charities Board). This enabled us to employ a part-time Development Officer. Membership grew rapidly and in October 1999 the Association was incorporated as a company limited by guarantee.

This report covers the period from July 2000 to September 2001.

Membership and groups

The Discrimination Law Association has two categories of membership: associate membership for organisations, and individual membership. On 31st March 2001 our membership stood at 380, of whom 177 (47%) were associate members and 203 (53%) were individual members. During the period 1st April 2000 to 31st March 2001 approximately 70 new members were recruited. In other words, 18% of our membership at the end of the year had been recruited during the year. This represents steady, if rather disappointing, growth.

The Practitioners' Group for members wholly or mainly advising complainants has continued to meet in Central London. A fresh programme has now started. There was one meeting before the summer break, on compensation in discrimination cases. These meetings are always well attended.

There has been no formal activity by regional groups during the year. However, contact has been maintained with many members in the regions through email and personal telephone calls, and at members' request contact lists were circulated for members in Northern Ireland. Assistance was also given to West Midlands Low Pay Unit in reviving an umbrella organisation in the Midlands for applicant representatives.

Information services

Developing our information services has been a key priority for this year, and further expansion is a priority for the coming year.

Briefings

The role of *Briefings* is to provide succinct and accurate summaries of cases and practice issues, geared to the needs of practitioners, who cannot be assumed to be qualified lawyers or to have access to the full range of law reports. The strong demand for *Briefings* from within the legal profession testifies to their quality.

Four issues of *Briefings* (Volumes 10 to 13) have been issued since the last Annual Report, containing a total of 54 individual briefings. They appeared in June 2000, November 2000, March 2001 and July 2001.

With Volume 13 in July 2001, Briefings became a printed journal. It has been professionally designed to be elegant in appearance while remaining clear and readable. Initial reactions have been very favourable.

Email News

The Email News service has been expanded. Emails are now numbered in sequence, with a clear heading for each one. The list of recipients has been enlarged to include multiple addresses in the offices of associate member organisations. These email now go to more than 400 recipients, and in many cases are forwarded on. They include Requests for Information from members, and job advertisements which have brought in income.

This email service is valued greatly by members. It also helps us to keep in touch with our membership and respond quickly to their needs.

Conferences and training

A sub-group of the Executive Committee has been examining our training strategy. Informal market research has been done to ascertain what training needs exist in two sectors: the voluntary sector, whose need is primarily for daytime skills training, and continuing professional education for the three branches of the legal profession (barristers, solicitors, and legal executives). We are an accredited training provider for all three.

We applied successfully to the Stone Ashdown Trust for funding for a major conference on the areas of law covered by the new EU directives, to be held on 29th October 2001 at the TUC Congress Centre.

Policy issues

We have submitted responses to the following Government consultation documents:

- consultations on the implementation of the EC Employment Framework Directive and on the implementation of the EC Burden of Proof Directive (both DfEE, now renamed DfES).
- the consultation on proposals for implementation of the Race Relations (Amendment) Act 2000 (Home Office)

The Discrimination Law Association has begun to enter into public debate on major policy issues affecting the practice of discrimination law. We were invited to contribute a critique of the new tribunal costs regime to the journal of the Employment Law Association. We hope to have further opportunities to write opinion pieces for other journals.

Referrals

The Discrimination Law Association is not an advice agency. We do not give legal advice to individuals. We do however receive many calls each year from members of the public seeking advice. In each case, we ascertain the broad nature of the problem, and the caller's circumstances, and then provide referral options. By far the largest group of callers were seeking advice about disability issues, mainly disability discrimination.

Organisational development and funding

Funding from the Community Fund ended on 31st December 2000, the final quarterly grant payment being received in October 2000. In addition to the quarterly revenue funding, in April 2000 the Community Fund made a one-off capital payment for the purchase of computer equipment. We are enormously grateful to the Community Fund for their support over these three years.

Annual General Meeting

The Annual General Meeting of the Discrimination Law Association took place at the offices of Irwin Mitchell in Central London on the evening of Tuesday 11th September. More than 40 people were present for the business part of the meeting.

The following were elected to serve on the Executive Committee for the next year:

Chair: Gay Moon
Treasurer: Georgina Hirsch

Other members:
Robin Allen QC
Elaine Banton
Ulele Burnham
Maya De Souza (Rowley Ashworth solicitors)
Tess Gill
Phil Greasley (Lesbian & Gay Employment Rights)
Dai Harris (Thompson's solicitors London office)
Henrietta Hill
David Massarella
Karon Monaghan (Vice-Chair)
Chris Purnell (Slough Race Equality Council)
Simon Robinson (job share with Chris Benson)

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