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Editorial *Do we need a Single Equality Act?*

Since the first discrimination acts were passed in the 1970's the number of legal provisions to deal with discrimination has mushroomed. In 2000 it was calculated that although there are four principal Acts of Parliament dealing with discrimination in Great Britain, to get a comprehensive picture of our discrimination laws you would have to consult thirty Acts, thirty-eight statutory instruments, eleven codes of practice and twelve EC directives and recommendations. Additionally, there are numerous inconsistencies between the main discrimination Acts. This is because the law has developed as a series of piecemeal reforms to remedy an immediate problem. Consequently the law is notoriously complex and convoluted and cannot be said to be accessible to the lay person. The Hepple Report found that the complexity and inaccessibility of anti-discrimination legislation and case law were identified by their respondents as being among its greatest weaknesses.

The employment tribunals were set up to enable a non-lawyer to take his or her own case, and it was envisaged that this was the means by which employees who felt they had been subjected to unfair treatment would find a remedy. This must be a very questionable proposition in the context of discrimination law.

In the UK there is no general, overriding legal principle of equality, although the Equal Treatment Directive (in relation to sex discrimination) and the new Race and Employment Directives do provide that member states should ensure that "any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished."

What is needed is the incorporation of a general principle of equality, so that there is an overriding principle of UK domestic law that no unjustified discrimination is permissible.

The UK Government now has to decide how to implement the new EC directives. If, as it has suggested, it uses statutory instruments to amend the existing laws, the position can only become even more difficult to interpret. Furthermore, Parliamentary procedure means there will almost certainly be no adequate debate on the provisions and their potential impact.

In Northern Ireland the Government is currently consulting on a new Single Equality Act.

The time is surely right for a Single Equality Act in England, Wales and Scotland also, to consolidate the diverse provisions on discrimination, and ensure that, unless special reasons exist, there are common standards across the different areas of discrimination. This principle need not prevent such an Act having a separate chapter to deal with the particular problems of one aspect of discrimination. For example, as disabled people do not start from an equal position, and may need reasonable accommodation made in order to put them in a equal position, their situation might need to be dealt with in a separate chapter of the Act.

We believe that these general principles should influence the way in which organisations and individuals respond to the Government's consultation document Towards Equality and Diversity: Implementing the Employment and Race Directives.

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)
NICA	Northern Ireland Court of Appeal
EAT	Employment Appeal Tribunal
ET	Employment tribunal

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Towards equality and diversity: implementing the employment and race directives

Responding to the Government's Consultation Document

Introduction

The Race and Employment Directives were agreed during the course of 2000 (See Briefing 178, November 2000). They were a consequence of a novel provision imported into the EC Treaty by the Treaty of Amsterdam. Article 13 provided:

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred upon it by the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

Many people feared that sufficient unanimity on such measures would never be found among the Member States. However, the election of a far right Government in Austria, and the possible expansion of the European Community to Eastern European states, provided the impetus for agreement.

In responding to this consultation paper I believe we should be demanding that the Government produce legislation that is consistent, clear and comprehensible across all the areas of discrimination. Wherever possible and appropriate, common standards should be adopted.

The Race Directive

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin deals with discrimination on grounds of racial or ethnic origin in areas ranging from employment to social protection and access to goods and services. It has become known as the Race Directive. It operates as an instruction from the European Union to each Member State to put in place directly enforceable legal measures to the minimum standard set out in the Directive. Member States have until 19 July 2003 to do this.

The EC Employment Framework Directive

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation also resulted from Article 13. It will prohibit direct and indirect discrimination on the grounds of Religion and Belief, Sexual Orientation, Age, and Disability, but only in the spheres of employment and occupation. The provisions on religion and belief and sexual orientation must be implemented by 2 December 2003, and the provisions on age and disability by 2 December 2006.

In relation to each of the four grounds of discrimination, an act, which would otherwise be unlawful, will be permitted, where the nature of the work or occupation or the context in which it is to be carried out creates a genuine and determining occupational need. There must be a legitimate objective and the requirement must be proportionate.

Non-regression clause

Importantly, both Directives contain a non-regression clause, which provides that the implementation of the Directive may not be used as a pretext for reducing the level of protection against discrimination already available in the Member State.

Direct discrimination

Direct discrimination is defined in both Directives as occurring when one person is treated less favourably than another person is, has been or would be treated in a comparable situation.

The Consultation Document proposes to adopt this definition for all areas of discrimination. This will require no change in the RRA or SDA, but will entail changes to the definition contained in the DDA (see below).

Indirect discrimination

Both Directives define indirect discrimination as a situation in which:

– an apparently neutral provision, criterion or practice

would put persons having a particular racial or ethnic origin, religion or belief, sexual orientation, disability or age at a particular disadvantage compared with other people; AND

– the respondent cannot show that the provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

This definition will encompass discriminatory practices and preferences that do not amount to a 'must'. Under the Race Relations Act 1976 the need to show a 'requirement or condition' which is a 'must' has been used to exclude discriminatory practices and preferences, as in *Perera v Civil Service Commission* [1983] IRLR 166. The new definition does not require statistical evidence about the proportions of the relevant groups affected by any disputed provision, criterion or practice. This is important, as statistical evidence is not always available; clearly, if it is available, it can be very helpful.

As it refers to a provision, criterion or practice that 'would' put persons at a disadvantage, the definition does not require proof that the disadvantage has already occurred. Consequently, it can be used when a particular disadvantage is anticipated. It would be possible to call evidence from sociologists or economists to show the anticipated discriminatory effect of a provision.

In respect of indirect discrimination for race or ethnic origin it is proposed:

EITHER to adopt the Directives' formulation of indirect discrimination in new legislation;

OR to extend the existing definition in the Race Relations Act (RRA) to include "provision, criterion or practice" and to make clear that a claimant may seek to establish whether 'a considerably smaller proportion' of his or her racial group could comply with the provision, criterion or practice.

The definition in the Directives would be used for indirect discrimination on grounds of sexual orientation, religion and belief, age and, 'in certain limited areas', disability. Clearly, a single standard for all areas of discrimination is preferable.

Harassment

Both Directives prohibit harassment as a form of direct discrimination. In the SDA, RRA and DDA harassment is not specifically mentioned, although case law has evolved recognising harassment as a detriment capable of amounting to less favourable treatment. The Directives define harassment as:

1. Unwanted conduct based on one of these grounds of discrimination;
2. The conduct had the purpose or effect of violating his or her dignity, or it actually did so; and
3. The conduct had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment.

UK case law on the RRA does not include the third requirement. It therefore cannot be included in the implementation provisions concerning racial and ethnic origin, as this would breach the non-regression clause.

The Consultation Document proposes:

EITHER retaining the current position under the RRA (relying on case law) and adopting the stricter definition (involving all three elements as above) for religion and belief, sexual orientation, disability and age;

OR using the existing, less onerous definition of harassment (excluding the third element) that has been evolved in respect of racial harassment under the RRA for all grounds of discrimination.

The Document seeks views also on a suggested further requirement: that tribunals should consider 'whether a reasonable person would have regarded the conduct concerned as violating the dignity of the complainant'. Arguably, in relation to the RRA, this would breach the non-regression provisions.

Genuine and determining occupational requirements

Member States may legislate that a difference of treatment based on a characteristic related to racial or ethnic origin, sexual orientation, religion or belief, disability or age will not be unlawful discrimination when that characteristic can be shown to be a genuine and determining occupational requirement, and the object is legitimate and the requirement is proportionate.

The Consultation Document proposes inserting a provision that membership of a particular racial or ethnic group, or having a particular sexual orientation, religion or belief or disability, or being a particular age, can be a genuine occupational requirement in the rare situation where it is an essentially defining feature of a job. In the case of race, this would involve deleting RRA section 5

which deals with genuine occupational requirements for race discrimination, and substituting it with a provision that membership of a particular racial or ethnic group can be a genuine occupational requirement where it is an essentially defining feature of a job. This will need to be very carefully drafted in order to ensure that it does not add to the available defences under the RRA, and so breach the non-regression provision. No change is proposed in relation to disability discrimination.

Burden of proof

Once an applicant establishes before a court or tribunal facts that indicate that there has been discrimination, it will be for the respondent to prove that no discrimination has occurred.

The Consultation Document proposes that the burden of proof provisions should be similar to those recently implemented in respect of sex discrimination in employment by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (Regs 5 & 6, inserted in the SDA as ss. 63A and 66A – see Briefing 219, December 2001).

Victimisation

The Directive requires that Member States should legislate to protect individuals from any adverse treatment or adverse consequences suffered as a reaction to a complaint being made or proceedings being taken to enforce the principle of equal treatment. This will include protection after employment has ended, in contrast to *Adekeye v Post Office* (No. 2) [1997] IRLR 105.

The Consultation Document proposes provisions for victimisation similar to those that are already in place under the RRA and DDA.

Protection after employment has ended

Both Directives provide that the protection from discrimination should extend even after the relationship in which the discrimination occurred has ended.

The Consultation Document proposes to implement this requirement.

Remedies

Member States must put in place a system of sanctions that is 'effective, proportionate and dissuasive'.

The Consultation Document proposes that, for discrimination on grounds of sexual orientation, religion and belief, and age, tribunals and courts should be given similar powers to those already in place under the RRA and DDA. However, are these 'effective, proportionate and dissuasive'? Ought there not to be an additional power to require the discriminator to alter his or her practices so that discrimination cannot recur?

Positive action

Both of the Directives permit, but do not require, a Member State to maintain or adopt positive action measures to compensate for past disadvantage related to racial or ethnic origin, sexual orientation, religion and belief, disability, and age.

The Consultation Document proposes that the new provisions on sexual orientation, religion and belief, and age should include positive action provisions comparable with those permitted under the RRA; it does not propose extending the existing RRA provisions. Positive discrimination (i.e. the preferential treatment of specified groups of people) will not be permitted.

Information duties

Member States are under a duty to bring to the attention of the general public all provisions adopted under both Directives.

Dialogue with non-governmental organisations

Both Directives put the Government under a duty to encourage dialogue with non-governmental organisations (such as the Discrimination Law Association) which have a legitimate interest in contributing to the fight against discrimination.

The Consultation Document is worryingly silent about what action is proposed to fulfil this objective, and the information duties (above).

Race Directive

What actions are covered?

The Directive prohibits both direct and indirect discrimination on grounds of ethnic or racial origin. It also recognises harassment and instructions to discriminate as forms of discrimination.

What is its scope?

The Directive applies to both the public and private sector, in relation to:

– conditions for access to employment, including

selection criteria and recruitment conditions;
– access to all levels of vocational training and re-training;
– employment and working conditions;
– membership of an organisation of workers or employers, including professional organisations;
– social protection including social security and healthcare;
– social advantages;
– education; and
– access to and supply of goods and services which are available to the public, including housing.

The Directive does not define racial or ethnic origin. Differences of treatment based on nationality are expressly excluded, but they are covered by our Race Relations Act 1976. Additionally, provisions relating to the entry and residence of third country nationals and stateless persons, and treatment that arises from that legal status, are excluded. It will be important to look at the way this Article is implemented within the UK, as to exclude discrimination on grounds of nationality from the new provisions may give rise to further challenges under EC law or the HRA.

The Consultation Document does not deal with the definition of racial or ethnic origin, so it must be assumed that the Government does not intend to alter the definition in the RRA. To alter the existing definition would produce a situation where different standards applied according to whether you were claiming discrimination on grounds of ethnic origin or nationality, which would be very difficult for the courts to apply. It is worth commenting in any response to the Government that this is assumed to be the position.

The Government are also consulting on whether a number of specific exclusions should now be eliminated. These include exceptions for seamen recruited abroad, training for people not ordinarily resident in the UK, charities as employers and providers of goods, facilities and services, partnerships of fewer than six people, and the disposal and management of small dwellings.

Bodies for the promotion of equal treatment

Member States must designate an independent body or bodies for the promotion of equal treatment without discrimination on the grounds of racial or ethnic origin. Such a body should:
– provide independent assistance to victims of discrimination;
– undertake independent surveys about discrimination;
– publish reports and to make recommendations about such discrimination.

In GB the Commission for Racial Equality and in Northern Ireland the Equality Commission for Northern Ireland will fulfil these functions. It is noticeable that this provision, which is found only in the Race Directive, does not require that the body give advice to employers – an obligation that can and does give rise to conflicts of interest within the Commissions.

Employment Directive

What actions are covered?

The Employment Framework Directive prohibits direct and indirect discrimination on grounds of religion and belief, sexual orientation, disability and age. It recognises that harassment and instructions to discriminate are forms of discrimination. Indirect discrimination is assumed to have occurred where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, sexual orientation, disability or age at a particular disadvantage compared with other persons, unless:
1. the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary; or
2. in the case of disability, the employer (or other organisation to whom this applies) is under a statutory duty to make reasonable accommodation for the disabled person.

The Directive is stated to be without prejudice to national laws which, in a democratic society, are necessary for :
– public security;
– the maintenance of public order and prevention of criminal offences;
– the protection of public health; and
– the protection of the rights and freedoms of others.

What is its scope?

The Directive applies within the public and private sectors in relation to employment and conditions of work that are defined very widely, but it does not cover goods, facilities and services. It specifically excludes differences of treatment on grounds of nationality and treatment that relates to the legal status of third

country nationals or stateless persons. It also specifically exempts state social security and social protection schemes. Member States may exempt the armed forces from complying with the provisions of the Directive concerning age and disability.

The definition of direct discrimination on grounds of disability will be amended to make it clear that direct discrimination (as defined by the Directive) on grounds of disability cannot be justified, although employers will still be able to justify, on grounds of capability, not employing a disabled person who will be unable to do the job even with a reasonable adjustment. (It should be noted that the definition of discrimination on grounds of disability under the DDA which looks at discrimination occurring for 'a reason related to a person's disability', taken with the duty to make reasonable accommodation, is much wider than direct discrimination.)

The Government do not propose to extend the concept of indirect discrimination to disabled people, because they consider that the existing concept of discrimination under the DDA, taken together with the duty to make reasonable adjustments, covers the same area. They propose amending the DDA in areas where there is currently no duty to make reasonable adjustments, including performance-related pay, occupational pensions and group insurance schemes. They are consulting about whether those areas should be subject to a duty to make reasonable accommodation, or a duty to justify the discriminatory aspect of the scheme.

Sexual orientation

'Sexual orientation' is not defined in the Directive.

The Consultation Document proposes to outlaw discrimination on grounds of 'heterosexual, homosexual or bisexual orientation'. The question must be asked whether this would be sufficient to implement the terms of the Directive. What about cross-dressers or transgendered people? Will they be included? As with religion and belief (below), it may be better to leave the meaning of 'sexual orientation' to the courts.

Religion and belief

'Religion' and 'belief' are not defined in the Directive, although they have been extensively considered by the European Court of Human Rights in the context of Article 9 ECHR, and are likely to be construed in the same way by our courts.

The Consultation Document proposes there should be no further definition of religion or belief, except to say that belief should be taken to refer to a religious or similar belief, and not to a political belief. If any definition is adopted, it should be in line with Article 9 ECHR. If it is not defined, the courts will have to interpret it in line with Article 9.

There is also a specific provision concerning organisations such as churches and other public or private institutions that have an 'ethos' based on a particular religion or belief. Member States may maintain existing legislative provisions, or introduce new legislation based on existing national practices, which permit such organisations to discriminate in their occupational activities on the basis of religion or belief; but only where the nature of those activities, or the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This exception will not permit such organisations to discriminate on other grounds.

In addition, such organisations may lawfully require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

The Government propose to insert a provision applying these exceptions. They do not intend to define an organisation having an ethos based on religion or belief, nor say which posts within such an organisation are essential to underpin that organisation's ethos. This is an area where a Code of Practice similar to that prepared by the NI Fair Employment Commission might be very helpful. The Government should be asked to make it clear that no genuine or determining occupational requirement may amount to discrimination on another ground, so that, for example, a religious school set up by a white supremacist church such as the South African Dutch Reformed Church under apartheid would not be able to discriminate on grounds of race even though its religious beliefs entailed racial discrimination.

Reasonable accommodation for disabled persons

In situations where a disabled person is subject to indirect discrimination, Member States must either:

– make provision for a reasonable accommodation to be made for people with disabilities in order to ensure that they will receive equal treatment. This obliges employers to take appropriate measures to enable a disabled person 'to have access to, participate in, or advance in employment, or to

undergo training unless such measures would impose a disproportionate burden on the employer'; or
– permit the treatment in question to be justified.

Justification of differences of treatment on grounds of age

Different treatment on grounds of age can be justified under national law if it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, provided the means of achieving that aim are appropriate and necessary. The Directive specifies that such differences of treatment may include:

– The setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities, in order to promote their vocational integration or ensure their protection;
– The fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; or
– The fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Another exception relates to occupational social security and pension schemes. National legislation may allow such schemes to continue to have age rules relating to admission or entitlement to retirement benefit, and the use of age criteria in actuarial calculations will not constitute discrimination on grounds of age, provided it does not result in sex discrimination.

The Consultation Document does not make any proposals about how age discrimination should be dealt with, as it proposes to undertake a further consultation exercise on age later in 2002. It does, however, raise a number of questions to help identify when age discrimination occurs and in what circumstances it would be justifiable.

Northern Ireland

The Directive makes two specific provisions for Northern Ireland concerning discrimination on grounds of religion and belief that reflect the lobbying done by the UK Government prior to agreement on the Directive (Employment Directive Article 15(1)).

A Single Equality Commission?

The Consultation document says, "We believe that, in the longer term, there are arguments in favour of a single, statutory commission offering integrated advice, guidance and support on equality matters." This must be right, although the exact nature of such a commission would need to be clarified. A single, over-arching equality commission with a series of sections to deal with the different aspects of discrimination might be a solution which would enable the budgets of specific sections, such as disability, to be protected.

Gay Moon
Editor

The Consultation Document, *Towards Equality and Diversity: Implementing the Employment and Race Directives* is available from Prolog telephone 0845 60 222 60. It is available in English and Welsh, Braille, large print and on tape. It can be downloaded from www.dti.gov.uk/er/equality. The Web site includes links to versions in Arabic, Hindi, Chinese and Gujerati. There is a questionnaire for responses, but clearly additional comments may be helpful, as the questionnaire does not cover all the questions that need to be dealt with in implementing these Directives. Responses should be sent to: Towards Equality & Diversity, Consultation Unit, Area 1B, Castle View House, Runcorn, Cheshire, WA7 2GJ. They must be received by the end of March 2002.

Gypsies, travellers and discrimination law

The Race Relations (Amendment) Act poses many challenges for advisers. It extends the Act, beyond employment and goods & services as hitherto defined, to embrace most of the functions of public authorities. In appropriate cases, advisers dealing with housing, education, health, policing and prisons (among others) must now consider use of the RRA. Discrimination specialists need some familiarity with the substantive law in those areas in order to advise clients experiencing discrimination by public authorities.

This Briefing considers the position of Gypsies and Irish Travellers in Great Britain from the point of view of discrimination law. No group has more complex legal needs in the areas of planning, education, health and the criminal justice system.

Who is protected under the RRA?

In the case of *Commission for Racial Equality v Dutton* [1989] IRLR 8 the CA held that Romany Gypsies are a racial group under the RRA by reason of their ethnic origins. The Court applied the test set out by the HL in the leading case of *Mandla v Lee* [1983] IRLR 209 HL.

Dutton was a county court case brought by the CRE under section 29 of the RRA. It concerned a discriminatory advertisement (a 'No Travellers' sign outside a pub). The CA decision binds English courts and employment tribunals. In Scotland it has persuasive authority only. In a recent report the Equal Opportunities Committee of the Scottish Parliament has recommended that Gypsy Travellers be regarded as a racial group for the purposes of framing legislation and policies concerning public services.

The case of *O'Leary & Others v Punch Retail & Others* (Westminster County Court 29 August 2000, unreported) was brought by Irish Travellers refused service in a number of pubs. HHJ Goldstein, sitting with two assessors, tried as a preliminary issue whether or not Irish Travellers are a distinct racial group for the purposes of the RRA. After a six-day hearing the court ruled that they are, by reason of their ethnic origins. This decision has persuasive authority only, in England, Wales and Scotland. In Northern Ireland Irish Travellers are specifically protected under the Race Relations (Northern Ireland) Order 1997.

Travelling, although historically of great significance, is only one part of the identity of Romany Gypsies and Irish Travellers. Coercion, economic necessity, lack of adequate sites, their children's need for schooling, all mean that many are now in some degree "settled". Whether or not they are nomadic, Romany Gypsies and Irish Travellers are protected by the RRA as racial groups defined by their ethnicity. Conversely, there are other Travellers (such as so-called New Age Travellers) who are not so protected. Not all those protected are Travellers; not all Travellers are protected.

The point is important. Those who move into Council or private housing retain their culture and identity, and continue to face prejudice, but may find it less easy to access specialist services. Public authorities lose interest in them, and the Government has little information that might enable their specific needs to be identified. The UK's most recent report to the UN Committee for the Elimination of Racial Discrimination (CERD) was criticised by the Committee for the absence of information about settled Romany Gypsies.

'No Travellers' – direct or indirect discrimination?

Both *Dutton* and *O'Leary* concerned pubs with a 'No Travellers' policy. In *Dutton* it was held that the discrimination was indirect, because the court found on the facts of that case that a Gypsy living in a house would not have been caught by the pub's 'No Travellers' rule, whereas a non-Gypsy Traveller would have been. In *O'Leary* by contrast the allegation was of direct discrimination.

The discrimination faced by Romany and Irish Gypsies will often be indirect, not direct, for two

reasons: firstly, because the act complained of may be directed at them as Travellers rather than as Gypsies (but the issue will always be, not the language used, but the group that is or will be affected); and secondly, because the discrimination may consist in treating them the same as other people, when their needs are different.

The extension of the RRA

Section 19B(1) of the RRA as amended by the RRAA makes it unlawful for a public authority to discriminate in carrying out any of its functions. Public authorities include all local authorities and NHS trusts, but not general practitioners, who are however caught by the original goods and services provisions.

Specific duties under the Act

Every local authority, NHS trust and police authority (among many others) is required, by 31st May 2002, to publish a Race Equality Scheme; that is, a scheme showing how it intends to fulfil its general duty to work towards the elimination of unlawful racial discrimination and promote equality of opportunity and good race relations. Local pressure will be needed to ensure that the needs of Romany Gypsies and Irish Travellers are addressed. Authorities may need reminding that both are racial groups under the Act.

State and Voluntary Aided schools must produce a less detailed written statement by the same date.

The Human Rights Act

Section 3 of the HRA requires that the RRA as amended be interpreted so far as is possible in a way that is consistent with Convention rights. Section 7 of the Act creates a free-standing cause of action against a public authority where Convention rights are violated.

Gypsies and Travellers face enormous difficulty in securing their most basic needs for a home, adequate health care, and education for their children. It is not surprising that there has been a series of challenges under Article 8 to interferences by the State in Gypsies' homes and family life. In Strasbourg such challenges have so far been unsuccessful, because in each case the ECtHR, while acknowledging that there has been an interference, has refused to rule the interference unlawful, and has instead allowed the UK government a wide margin of appreciation. The most recent such case is *Chapman v UK* No. 27238/95 (The Times 30.1.2001).

A UK court or tribunal must take into account the judgments of the ECtHR to the extent it considers them relevant, but is not bound by them (HRA s. 2). In allowing the UK a margin of appreciation in cases such as *Chapman*, the ECtHR is in effect exercising a supervisory jurisdiction. However, the margin of appreciation has no application to the domestic courts, which must therefore engage with the substantive issues when a violation of Convention rights is alleged.

Where Convention rights of Gypsies and Irish Travellers are violated, the facts may well found a claim under the RRA, in which HRA points can be taken. In any case where racism is suspected, full use should be made of the Race Relations Questionnaire (RR65) procedure.

Evictions under the Criminal Justice & Public Order Act 1994

Ever since legislation in 1960 gave local authorities the right to close commons to Travellers, there has been a grave shortage of sites where Gypsies and Travellers can lawfully stop, even for short periods. The concomitant duty to provide sites was never fully complied with and has now been repealed. Most publicly provided Gypsy sites are specifically excluded from the security of tenure provisions in the Mobile Homes Act 1983.

The Criminal Justice & Public Order Act 1994 gives draconian powers to both local authorities and the police to evict Travellers camped unlawfully. The case law and statutory guidance say that before the decision to evict is taken, full enquiries must normally be made as to the family's circumstances. Nevertheless, hundreds of evictions take place every year.

This is an area which both local authorities and the police should be pressed to address in their Race Equality Schemes. A claim of direct racial discrimination may be well founded if the applicant can find a comparator. For instance, when there is trouble on a Council housing estate, it is the practice to go after those causing the trouble. One does not hear of entire estates being evicted, yet that is what can happen when there is trouble at an unauthorised Gypsy site. Of course this comparison is not exact enough to found a claim under the Act.

Planning

Section 19A of the RRA makes it unlawful for a planning authority to discriminate in carrying out their

planning functions. This provision was in the RRA even before the RRAA amendments.

Planning permission is required for the carrying out of any material development of land, and a change in the use of land for the stationing of caravans (trailers) can constitute a development. Those who resort to buying their own land very often find that they are refused planning permission to station their trailers on it. Such refusals of planning permission can be justified on planning grounds, since Local Development Plans rarely contain any provision for the needs of Gypsies and Travellers. The position is exacerbated if the land is in a Green Belt.

In these circumstances, it is hard in practice to obtain evidence that a planning decision, ostensibly made on good planning grounds, is in fact tainted by racism towards the applicant. It is not surprising that, to my knowledge, no such case has ever been brought. Yet the whole process reeks of racism from start to finish, and is constantly challenged as a breach of Article 8. Most of the cases taken to Strasbourg have been on this issue: see for instance *Buckley v UK* No. 20348/92 (1996) and *Chapman* (referred to above).

In an important development, the use of injunctions to enforce planning decisions has recently been curtailed by the CA decision in *South Buckinghamshire District Council v Porter* The Times 9.11.01. The CA overruled a long line of cases sanctioning the grant of what were effectively rubber-stamp injunctions. The CA applied the HRA and found that such a practice breached the Article 8 right to respect for home and family life. An injunction may still be granted in an appropriate case, after due consideration.

The RRA can be invoked at every stage of the planning process. Planning authorities may be sensitive to accusations that by ignoring the needs of Gypsies and Travellers they are in breach of their general statutory duty under section 71 of the RRA. Individual refusals of planning permission can in an appropriate case be challenged under the RRA as either directly or indirectly discriminatory, and HRA points can be taken in the proceedings.

Education

Statute law in this area is largely satisfactory, and Government funded Traveller Education Services provide support to children and their families. It is in the areas of policy and practice that problems arise.

In its observations on the UK's last report (see above), CERD expressed concern about admission and access to schools for Romany Gypsy children. Schools that refuse to offer places to children in their area should always be challenged to explain their decision, possibly through an RR65.

There is a great deal of bullying of Gypsy and Traveller children, and it is a factor in low attendance rates (another is the disruption caused by repeated evictions of families who would like to stay put during term time so that their children can attend school).

Exclusion rates for Gypsy and Traveller children are very high, and warrant the same concern as exclusion rates for Afro-Caribbean boys. Exclusions may involve both direct and indirect discrimination. Ignorance of Gypsy culture may on occasion cause behaviour to be misinterpreted. Equally, it is beyond belief that decisions are never taken on racial grounds. This area is ripe for challenge under the Act.

Health and social services

This is another area in which legislation is largely adequate, but policy and practice may fail to take into account the special needs of Travellers.

GP's who refuse to offer temporary or permanent registration to Travellers in their area can be challenged with an RR65 Questionnaire.

The situation of disabled adults and children is of particular concern, as their needs are often inadequately met. Disabled children may not be identified, and so they and their families may not receive the services and support to which they are entitled. In appropriate cases, challenge under both the DDA and the RRA should be considered, and Questionnaires served.

Mental health is an area of widespread failure to make appropriate provision. A major problem concerns detention, both under the Mental Health Act and in prison. To confine a person used to a nomadic lifestyle in a hospital or prison is arguably to place them at grave risk of suffering psychological damage. It is thought that a disproportionate number of young men committing suicide while on remand may be from such backgrounds. There is no easy answer to this problem, but the Prison Service and health authorities (including the Special Health Authorities) are subject to the s. 71 general duty and also the specific duty to prepare Race Equality Schemes. Regimes that indirectly discriminate

against Gypsies and Travellers can and should be challenged under the RRA.

Conclusion

Gypsies and Irish Travellers are among the most marginalised groups in our society. The RRA as amended by the RRAA provides a framework within which to challenge both direct and indirect discrimination against them, and its use should be considered whenever there is reason to suspect such discrimination. The RR65 Questionnaire procedure provides a very useful tool for eliciting information, on the basis of which it should be possible to ascertain whether there is a case.

Gaby Charing
Discrimination Law Association

The Traveller Law Research Unit (TLRU) at Cardiff Law School has recently published the Traveller Law Reform Bill. It is the product of a massive exercise in consultation among Gypsy and Traveller organisations and other concerned individuals and organisations. Its main purpose is to tackle the social exclusion of Gypsies and Travellers by amending discriminatory statutory provisions and removing decisions concerning site provision and site "toleration" from the political stage.

The Bill, an explanatory memorandum and a brief guide can be downloaded from the TLRU Web site at www.cf.ac.uk/claws/tlru. It can also be ordered by e-mail from TLRU-L@cardiff.ac.uk or by post from Traveller Law Research Unit, Cardiff Law School, P O Box 427, Museum Avenue, Cardiff, CF10 3XJ.

Briefing 231

Adding insult to injury: injury to feelings and stigma damages

A section was left out of Briefing 218, which appeared in our last issue. We apologise to Susan Belgrave and to our readers for this error. The complete Briefing follows, and replaces Briefing 218.

'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. Tribunals may well consider harassment by a manager to be an aggravating feature since it amounts to an abuse of position, and this may attract a higher award than harassment by a co-worker of the same grade.

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

By far the most creative aspect of a damages claim in a discrimination case is the sum awarded for injury to feelings. 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.

(per Smith LJ)

Tchoula v ICTS (UK) LTD [2000] ICR 1191

The leading case in the area is now *Tchoula* where Judge Peter Clark laid down guidelines for 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. This case seeks to impose some sort of order and cap on awards in discrimination claims. These should be seen as guidelines rather than tramlines.

What are the factors which a tribunal will take into account in considering an award for injury to feelings.

Clean hands?

The tribunal is not meant to determine whether the applicant is deserving or undeserving of an award of damages. 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. However, in practice, tribunals do take into account, even if subconsciously,

the behaviour of the applicant.

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 1/2 years sexual harassment it was relevant that the applicant had gone to work in scanty and provocative clothing. There must, however, be some doubt as to whether these cases remain good law.

While a reduction can be made for contributory fault for loss of earnings (*Fife Council v McPhee* EAT 750/00 21 February 2001), a Polkey reduction cannot be made to an award for injury to feelings: *O'Donoghue v Redcar & Cleveland Borough Council* [2001]IRLR 615 CA.

Damages for defamation/stigma

It is also possible to argue, quite apart from an argument under *BCCI* for stigma damages, that the award for injury to feelings should encompass an element for loss of reputation occasioned by the act of discrimination.

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.'

An applicant may be able to argue that in fact the injury to feelings will *not* be of relatively short duration, and indeed the harm done to him will have a lasting impact. It was this argument that succeeded in the case of *Virdi v Metropolitan Police* Commissioner Case 2202774/98 remedies 8 December 2000.

The facts of Virdi

Sgt Virdi had been arrested in April 1998 after two sets of 'race hate' mail had been sent to ethnic minority officers and civilian staff on Ealing division. The case never came to court as the CPS decided not to prosecute. Sgt Virdi was dismissed from the force in March 2000 after a disciplinary hearing. He issued two separate, but clearly related, claims (one in June 1998 and one in May 2000 following his dismissal). In July/August 2000 a tribunal (Chairman: Mrs. Jessica Hill) found that there was no evidence that he was the author of the race hate mail and considered that the manner in which the investigation into the affair had been handled amounted to an act of discrimination. The tribunal found that Sgt Virdi had been the only real suspect, and that he had been treated differently to a white female officer who had been interviewed and quickly eliminated from the investigation. Sgt Virdi was not interviewed until after his arrest and suspension when he had been able to give an account on his movements on the night when they believed that the first batch of letters had been produced. His home had been subjected to a fruitless eight hour search by the specialist POLSA team usually reserved for terrorist searches and other serious crime (e.g. drugs). His personnel file had been sent to a national profiler and they later sought to entrap him on the basis of the opinion provided. The tribunal concluded that the police had been largely responsible for the publicity in the press: his arrest was vaunted as an astonishing twist to the tale. The policy file of the investigation contained a media strategy document which provided:
When giving out arrest and charge details, we would not normally release the ethnicity of a defendant. However, in this case, it is felt important to redeem the efforts of the MPS in addressing issues of racism and to redress the false assumption that the incident has arisen through inter-cultural hostility, i.e. white against black. We therefore propose that a separate IF ASKED

statement is prepared confirming the ethnicity of the suspect if asked by reporters we would not go into details about his motive.

The respondents conceded that this case was unique and likely to attract an award outside the existing tariff. It was argued on the applicant's behalf that the appropriate legal comparator was not, in fact, the field of personal injury, but cases of defamation. The case of *Elton John v MGN* [1997] QB 586 CA was cited as well as the case of *Esther Rantzen v Mirror Group Newspapers* [1994] QB 670 CA. Ms. Rantzen had sued *The People* newspaper which had alleged that she had protected a child abuser by keeping secret the fact that he was an abuser. An award of £110,000 was made in that case. In this case, Sgt Virdi, received £100,000 for injury to feelings, £25,000 for aggravated damages and just under £25,000 for interest.

Implications

This case should have some relevance in instances where the reputation or standing of an applicant has been damaged by the act of discrimination. The accusations against Sgt Virdi had been placed in the public domain deliberately by the police and it was inevitable that he would be ostracised in his local community as well as vilified in the national press. Employers will need to take greater care when making serious allegations of misconduct which may get into the public domain or, at least, become known to prospective employers where such accusations stem from discriminatory acts. In Sgt Virdi's case there had been no need to provide proof of loss of reputation (unlike stigma damages). The situation may not be so straightforward in other cases.

The past year has shown that awards in discrimination have not to spiralled out of control as a result of this decision.

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.

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)

On 6 February Sgt Virdi received a personal apology from the Metropolitan Police Commissioner.
Susan Belgrave represented Sgt Virdi

Update on disability discrimination cases

Catherine Casserley of the Disability Rights Commission and the Royal National Institute for the Blind reviews two cases on the definition of disability, and a difficult case on the goods, facilities and services provisions

Definition of disability

The definition of disability under the Disability Discrimination Act 1995 is one of the most contentious parts of the Act, and potentially the most difficult for tribunals to get to grips with. It seems to be the single biggest category of DDA claims that make their way on appeal to the EAT.

One of the issues around the definition is the fact that "work" is not classed as a "normal day-to-day activity" (see Guidance on matters to be taken into account in determining questions relating to the definition of disability, Part II , Para C3). Many looked to the definition used in the Americans With Disabilities Act, which seemed to be broader than the UK definition. Its equivalent to "normal day to day activities" is "major life activities", which appears to encompass work as part of the definition.

However, recently the Supreme Court has narrowed the scope of its definition by ruling that finding someone disabled, on the basis of their inability to meet the demands of an assembly line job, and of other jobs that require gripping tools and working with arms elevated and outstretched, was too narrow a focus on which to base a finding of disability. (see *Toyota Motor Manufacturing Inc v Williams*, No. 00-1089).

While the definition has been narrowed in America, it has been broadened in the UK with the decision in *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24. Mr Cruickshank worked as a core maker in a foundry and developed breathing difficulties. He was diagnosed as having occupational asthma. The company's medical adviser said in a report that Mr Cruickshank should not work where he would be exposed to fumes. He was transferred to work in the despatch department, driving a forklift truck. However, following a reorganisation, his duties were altered, and he was put to work near the core shop. There, he was exposed to fumes, which seemed to trigger his asthma, and as a result he had a large amount of sickness absence. The asthma worsened each day with work, but did not worsen when he was at home. The medical adviser concluded that the only safe work for him would be totally out of the foundry, in the offices or the yard.

The employers decided there were no vacancies in the offices or the yard, and dismissed Mr Cruickshank. He claimed unfair dismissal and disability discrimination.

The ET dismissed the DDA claim; it found that he was not a disabled person within he meaning of the DDA, as he had not established that the asthma had a substantial adverse effect on his ability to carry out "normal day to day activities".

On appeal, the EAT considered two key questions:

- When defining an impairment where the severity of the symptoms fluctuates, at what point should the tribunal assess the disability, what periods should be taken into account, and what circumstances should be taken into account in assessing it?
- Where, at the time of the discriminatory act complained of, the employee is absent from work but still in employment, should the focus be on day-to-day activities while at work, or while absent, or both? What circumstances should be taken into account in cases where the severity of the impairment may depend on such circumstances?

The EAT allowed the appeal. It held:

- The ET erred in law in finding that the applicant was not a disabled person within the meaning of the Disability Discrimination Act because his impairment did not have a substantial adverse effect on his normal day-to-day activities within the meaning of s.1. The ET was wrong to consider the applicant's condition at the time of the hearing. The material time at which to assess the disability is at the time of the alleged discriminatory act. A claim that an employer discriminates against a disabled person, contrary to s.5 of the Act, must involve an examination of what the employer knew, or ought to have known, of the employee's disability at the time of the actions complained of.

– The ET was also wrong in failing to assess whether the applicant met the definition of disability on the basis of his ability to carry out day-to-day activities during his employment and by making that assessment instead on the basis of his condition away from work. The fact that a condition may be caused at work is not in itself a reason for excluding it from consideration. The Act, in defining disability, is not concerned with its cause, and disability is not confined to any particular cause. There is no provision in the Act that restricts its operation to common or usual situations, except when measuring the effect; the cause may be exceptional, but the measure is the effect on the ability to carry out day-to-day tasks. Simply because the work situation is unusual, it does not follow that consideration of such effects must exclude consideration of the individual's ability to work at his job. Thus, in a case where, as a result of a medical condition, the effects of an impairment on ability to carry out normal day to day activities fluctuate and may be exacerbated by conditions at work, the tribunal should consider whether the impairment has a substantial and long-term adverse effect on the employee's ability to perform normal day-to-day activities both at work and while not at work. If, while at work, the applicant's symptoms are such as to have a significant and long-term effect on his ability to perform day to day tasks, such symptoms are not to be ignored simply because the work itself may be specialised and unusual, so long as the disability and its consequences can be measured in terms of the ability of an applicant to undertake day to day tasks.
– The EAT also went to say that an employer may be confronted by an employee with an incapacity which gives rise to obligations on the employer under the Act, for instance to make reasonable adjustments. It seemed to the majority that it would risk "turning the Act on its head" if the employer were able to avoid any such liability by dismissing the employee and thereby distancing the employee from the cause of the worst of the adverse effects and making it easier for the employee to carry out everyday tasks.

In the recent case of *Morgan v Staffordshire University* (EAT/0322/00 24th October 2001, unreported) on the definition of disability, the EAT made a number of general observations on the issue of proving mental impairment under the DDA. The case concerned an applicant who worked in the respondent's catering department. She was assaulted by a supervisor at work; developed stress and anxiety; and was offered alternative work, none of which would guarantee that she would not again encounter the supervisor who had assaulted her. She did not accept the offers of alternative work and resigned. She claimed constructive dismissal, and was permitted by the ET to add a DDA claim at a later date. She did not call any medical evidence, but her medical notes were available to the ET. The ET accepted that she was suffering from stress and anxiety and was depressed, and that this had an effect on her life. However, they concluded that she did not suffer from a medical illness which is recognised by a respected body of medical opinion, and that she did not therefore have a mental impairment within the meaning of the Act (as it must be "clinically well recognised").

The EAT upheld the ET decision, as they found no error of law. The general observations made were essentially that:

– Claimants should clearly identify the impairment they say is relevant. Respondents should indicate whether impairment is an issue, and why. Tribunals should insist that both sides do this.
– A loose description such as '"anxiety"', '"stress"' or '"depression"' will not of itself suffice unless there is credible and informed evidence that in the particular circumstances so loose a description nonetheless identifies a clinically well-recognised illness. In any case where a dispute about such impairment is likely, the well-advised claimant will therefore equip himself, if he can, with a letter from a suitably qualified medical practitioner. This should indicate how it is that the practitioner is able to speak about the claimant's condition; it should clearly diagnose an illness specified in the Whole Health Organisation International Classification of Diseases (identifying which), or else provide an alternative diagnosis of some other clinically well-recognised mental illness, or its consequences. The letter should identify it specifically and (in this alternative case) give the grounds for asserting that, despite its absence from the WHOICD, it is nevertheless to be accepted as a clinically well-recognised illness or the result of one. The presence or absence of the symptoms identified in the diagnosis Guidelines of the WHOICD should be identified.

– A full consultant physiatrist's report will not be required in every case, as there will be many cases where the illness is sufficiently marked for the claimant's GP to prove it by correspondence in terms which satisfy the DDA.
– If it becomes clear that impairment is to be disputed on technical medical grounds, thought should be given to obtaining further expert evidence (see *De Keyser v Wilson* [2001] IRLR 324)
– The dangers of the tribunal forming a view on "mental impairment" from the way the claimant gives evidence on the day cannot be overstated. Few mental impairments are such that their symptoms are obvious all the time.

Goods, facilities and services

There are still relatively few cases coming before the county courts under Part III of the DDA (latest estimates are no more than 60 since the implementation of the Act).

What seems to be the first case involving the tricky issue of "reasonable adjustments" (the section 21 duties) came before the Hull County Court in October 2001.

The case of *Mark Baggley v Kingston upon Hull City Council* (Case No. KH101929) concerned a wheelchair user who bought tickets for himself and a friend for a concert at Hull City Hall. The concert was to be all standing. When he arrived for the concert, he was directed to the back of the hall, and as a result was unable to see anyone on stage. The Council subsequently purchased and fitted a platform in the hall, which would enable anyone in Mr Baggley's position to see the concert clearly.

Mr Baggley brought a claim for breach of s.19(1)(b) of the DDA, claiming that the defendant had failed to comply with the section 21 duty, in that they had failed to provide an auxiliary aid in the form of a platform, or to provide an alternative method of making the service available – s.21((2)(d) and (4)(b). This rendered it unreasonably difficult for him to make use of the service.

The Council had considered two possibilities. One was to adapt the hall and have a platform purpose built at a cost of £20,000. The other was to go to a nearby building (where they do have a platform) and move their platform to the City Hall for each concert – this would cost somewhere between £400 and £800 each time. This, as District Judge Evans said in his decision, would have "swallowed the profit of the concert". The Council, however, said that £20,000 was outside its budget, and the platform which they subsequently found by advertising on the internet cost only £4,000.

District Judge Evans accepted that Mr Baggley was "disadvantaged" (i.e. that it was unreasonably difficult for him to use the service). It was accepted that there was an auxiliary aid which would have dealt with the situation. The issue was whether the Council failed in not installing the aid prior to the concert, bearing in mind the anticipatory nature of the duty.

Although District Judge Evans said: "Whilst I find that I do not think that the cheaper [option of] moving a platform for each performance was a reasonable step, I am more attracted to the view that spending £20,000 could be regarded as a reasonable step" (as this would be a one-off cost lasting many years), on balance he accepted that the purpose-built platform was not a reasonable step in view of the fact that standing concerts are only one percent of what the Council does. The cheaper option was also not a reasonable step. The judge was satisfied that the Council had not failed to take reasonable steps, either to make the facility permanently accessible, or to as a more temporary measure to provide an auxiliary aid to do so. District Judge Evans did say, however, that it was a "difficult matter to decide" and that the decision was "a close-run thing". Leave to appeal was given, and the case is indeed being appealed.

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Closed recruitment: is it discriminatory to employ a friend or relative without advertising the position?

Coker & Osamor v. Lord Chancellor & Lord Chancellor's Department
[2002] IRLR 80 EWCA

Implications for practitioners

The CA has upheld the decision of the EAT reported in Briefing 216 (July 2001). Both EAT and CA held that, on the facts of the case, the Lord Chancellor did not indirectly discriminate by appointing a personal acquaintance as his Special Adviser. Where a condition or requirement prevents almost the entirety of a pool of people, who would be otherwise be eligible to do so, from applying for a position, it will be very difficult to show a *considerably* smaller disproportionate impact between men and women, or between different racial groups.

However, as a footnote, the CA warned that, in certain factual circumstances, word of mouth or informal appointment procedures may be discriminatory.

Facts

The Lord Chancellor decided to appoint H as his Special Adviser. He did not advertise the position or carry out any selection process. H was well known to him personally. C and O subsequently heard of H's appointment. They submitted ET claims of direct and indirect discrimination under the SDA; O also claimed direct and indirect discrimination under the RRA.

Employment Tribunal

The Lord Chancellor did not attend the hearing to give evidence to the ET.

The discriminatory condition

The ET held that, in selecting his Special Adviser, the Lord Chancellor had imposed a condition or requirement that the adviser should be someone personally known to him. The ET also identified a set of other 'neutral' requirements, including first-class common sense and judgment, deep knowledge of how a broad area of government worked in practice, and a commitment to New Labour.

Disproportionate impact

In a written answer to the ET, the Lord Chancellor acknowledged that he had considered no one else for the position of Special Adviser. He acknowledged also that, among his close personal acquaintances, there were more white men than women, and that those from minority ethnic backgrounds were in a very small minority. The ET found that the condition of personal acquaintance would have had a disproportionate impact as between men and women and as between white people and those from ethnic minorities.

Justification

The ET found that this disproportionate impact could not be justified where the reasonable need was to appoint someone on merit.

Detriment

The ET found that the Lord Chancellor's failure to advertise the post had been to C's detriment, in depriving her of the opportunity to apply for the position; C could have expected her application to be given consideration. The ET found that C satisfied the other 'neutral' criteria; but O was not committed to New Labour and would have sought to influence the Lord Chancellor rather than support him. The ET found that O was 'not remotely appointable'.

Direct discrimination

The ET found that C and O had not been directly discriminated against. The criterion applied by the Lord Chancellor was an apparently neutral criterion that had a disproportionate impact on women and those from ethnic minority backgrounds. But it was not a gender-based or racially based criterion. It would be unrealistic to consider that C or O had been treated less favourably by the Lord Chancellor on grounds of sex or race.

C's indirect discrimination claim was upheld; O's claim of indirect discrimination was dismissed; both direct discrimination claims were dismissed.

The Lord Chancellor appealed against the finding of indirect discrimination; O appealed against the finding

that she had not suffered a detriment; C and O appealed against the finding that there had been no direct discrimination.

Employment Appeal Tribunal

The EAT accepted that the condition or requirement identified by the ET was the correct one, namely personal acquaintance. But the ET's reasons were inadequate and they did not apply the proper test of adverse impact. The EAT reversed the ET decision, concluding that adverse impact had not been established, but held that the ET had been entitled to conclude that the Lord Chancellor had failed to justify the requirement. They said that, because of the very special nature of the Lord Chancellor's appointment, this was an exceptional case.

C and O appealed to the CA against the decision that they had not been indirectly discriminated against.

Court of Appeal

The appeal was a challenge to the practice of closed or internal recruitment. In accordance with its normal practice the CA concentrated on the decision of the ET, not the decision of the EAT.

The CA proceeded on the basis that a vacancy existed for the post of Special Adviser and the Lord Chancellor had made arrangements for determining who should fill that vacancy, even though there had been no such arrangements in fact, and he had simply offered H the job.

The CA had to identify the pool of persons who would be qualified for the appointment, if the condition or requirement in question did not exist. If the *proportion* of women in the pool who could satisfy the impugned condition was *considerably smaller* that the *proportion* of men who could satisfy it, the Lord Chancellor would have indirectly discriminated against C and O unlawfully, unless he could justify the imposition of the condition or requirement. Selection of the wrong pool would invalidate the exercise.

Disproportionate impact

The ET's conclusion that the requirement that candidates should be personally known to the Lord Chancellor would have screened out a considerably larger proportion of women and racial minorities than white men was fundamentally flawed. A condition or requirement can only have a discriminatory effect within the RRA and SDA if a significant proportion of the pool is able to satisfy the requirement. Only then will it be possible for the requirement to have a disproportionate effect on the men and women, or the racial groups, which form the pool. Where the requirement excludes almost the entirety of the pool, it cannot constitute indirect discrimination.

An appointment from within a circle of family, friends and personal acquaintances will hardly ever constitute indirect discrimination. People known to the employer are likely to represent a minute proportion of those who would otherwise be qualified to fill the post. The requirement of personal knowledge will exclude the vast majority of the pool, be they men, women, white or another racial group. Those members of the elite pool who were personally known to the Lord Chancellor were, on the unchallenged evidence, reduced to a single man. However, there may have been many other potential candidates, whatever the proportions of men and women or racial groups in the pool; the requirement excludes the lot of them, except H. Plainly, the requirement could have no disproportionate effect on the different groupings within the pool.

The CA did not address the issue of justification.

Detriment

An employer may carry out a recruiting exercise under which those who do not satisfy a certain condition will not be informed that there is a vacancy for which they would be qualified to apply. In such circumstances it is arguable that the condition has been *applied* to those who are so excluded. However, the CA decided not to reach a decision on this issue.

Postscript

The CA observed, "It does not follow… that [recruiting from a circle of family, friends and acquaintances] is unobjectionable… It may not produce the best candidate for the post. 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… It is possible that a recruitment exercise conducted by word of mouth, by personal recommendations or by other informal recruitment method will constitute indirect discrimination …"

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The power to draw inferences of discrimination is limited

Miriki v General Council of the Bar
The Times, 22 January 2002

Implications for practitioners

In this case the CA suggests some qualifications to the HL decision in *Anya v University of Oxford* (see Briefing 210, July 2001). *Anya* was a case in which it was alleged that the cumulative actions of a particular individual could be used to draw inferences of racial bias. The CA say *Anya* cannot be held to mean that in every case the ET should make an express finding on every piece of circumstantial evidence, simply because the applicant chooses to make it the subject of complaint.

In the present case, M had made allegations of previous trivial incidents of racism in the workplace. They were out of time and were not causally linked to the true subject of her complaint, which was her dismissal. The individual who had dismissed M was not alleged to have been responsible for the previous incidents. Although the ET could be criticised for failing to set out its findings on the previous incidents, in the circumstances of the case this did not amount to an error of law.

The case will give respondents considerable scope to distinguish *Anya* in cases where the applicant relies on an accumulation of factors from which the ET is asked to infer racial grounds.

Facts

M is a black woman who was employed by the Bar Council from 1991 until she was made redundant in 1998. In the period immediately before she was informed of her redundancy, she was absent from work, first on maternity leave, and then because of a period of leave spent in Nigeria. She did not give her employers any contact details whilst she was in Nigeria, and her stay was extended because she caught malaria. M was the only person in her department to be made redundant.

Employment tribunal

M complained to an ET of unfair dismissal, unfair selection for redundancy, race discrimination and wrongful dismissal. She argued that there were no black staff at managerial level, no black staff had been promoted, and her manager was unpleasant to all black staff. In reply to a request for examples of racism, she cited differential recognition and celebration of the birthdays and weddings of black and white staff.

The ET rejected her claims. It decided that redundancy was the reason for the dismissal, that the lack of consultation was due to M's absence from work, for which the employer could not be blamed, and that the dismissal was not on racial grounds. In its reasons it made no specific findings of fact about the examples of differential treatment provided by M.

Employment Appeal Tribunal

M appealed on the grounds that the ET:-

- was wrong in its findings about lack of consultation with M;
- did not give adequate reasons for preferring the employer's evidence; and
- did not record, among other things, what findings of fact led to the conclusion that the dismissal was fair and that discrimination had not taken place.

The EAT allowed M's appeal. It criticised the ET decision, saying that it did not :-

- contain the customary recital of the facts found by the ET;
- disclose clearly what facts were found proved; and
- where there was conflict of evidence, disclose which evidence was accepted and why.

The ET had:-

- fallen into error over the questions it should have asked itself with regard to the matters before it;
- failed to direct itself correctly concerning the definition of fair consultation;
- failed to identify the questions it should have asked itself concerning less favourable treatment; and
- in the event that less favourable treatment was found, the further question whether or not it had been on racial grounds.

The case should be returned to a differently constituted

tribunal for a re-hearing.

The employer appealed.

Court of Appeal

M argued that the ET's decision gave no account of the basic story and failed to give any indication why the claim failed. M submitted that the complaint was in two parts: firstly a pattern of discriminatory treatment prior to the dismissal, and secondly the dismissal itself. M relied on *Anya v University of Oxford* to argue that the ET should set out its findings even on peripheral matters, and give its reasons for rejecting the complaint.

The CA rejected this argument. They said that it was plain from the ET's decision that redundancy was the reason for the dismissal. The finding that racial considerations did not enter into her selection for redundancy was consistent with that finding.

The CA said the alleged pattern of less favourable treatment was not a matter of which M could complain. The alleged treatment was trivial, and in any event she was out of time to make it the subject of a complaint. M's real complaint was her dismissal. The other matters were "at best" circumstantial evidence, and in any case the ET did not accept M's evidence on those matters.

The CA accepted that the ET might be criticised for not setting out its findings more fully in relation to the alleged pattern of less favourable treatment. However, its failure to do so was not an error of law. *Anya* was a completely different case, in which the applicant argued that his treatment by his supervisor over a period of time was evidence of the superior's racial bias against him, which culminated in the supervisor's decision to reject him for a research post. One could readily see why in that case it was important for the ET to make findings about the previous conduct of a specific individual against whom racial bias was being alleged. In the present case, the alleged discriminator was not the person alleged to be responsible for the previous incidents, and those incidents were in any event peripheral to the dismissal.

The CA said that each case should be decided in the light of its own circumstances. It went on:

"It cannot be right that in every case the tribunal must make express findings on every piece of circumstantial evidence, however peripheral, merely because the applicant chooses to make it the subject of complaint".

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Briefing 235

No less favourable treatment where highest rated candidate is appointed

Gill v Northern Ireland Council For Ethnic Minorities [2002] IRLR 74 NICA

Implications

An ET could not properly infer that the employers treated the applicant less favourably than they treated the successful candidate where there was clear evidence before the ET that the highest rated candidate was chosen by the employers.

An applicant's views on anti-racism do not constitute a political opinion for the purposes of the Northern Ireland Fair Employment legislation. The difference between the "anti-racist" and "culturally sensitive" approaches to racism was one of method, and was not the type of political opinion intended by Parliament in enacting the fair employment legislation.

Facts

In January 1996 the Northern Ireland Council For Ethnic Minorities (NICEM) advertised the post of coordinator. G and Y were two of four people shortlisted for the post. After interview Y was selected and G was placed in reserve. G claimed he was discriminated against on grounds of political opinion contrary to the Fair Employment Act. He claimed he had been unsuccessful because he advocated a more aggressive "anti-racist" approach to the solutions of racial problems in Northern Ireland, whereas the successful candidate advanced the "culturally sensitive" approach favoured by NICEM.

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Employment tribunal

The ET held that the applicant's "anti-racist" approach constituted a political opinion within the meaning of s. 16(2) of the Fair Employment (Northern Ireland) Act 1976. The ET concluded that the interview panel preferred the successful candidate to the applicant and that preference included an evaluation of the "culturally sensitive" model over the "anti-racist" one. The ET held the interview panel treated the applicant less favourably than the successful candidate, the applicant had a different political opinion from the successful candidate, and the employers had given no explanation for the less favourable treatment.

Northern Ireland Court of Appeal

NICEM appealed against the ET's finding of unlawful discrimination in relation to the appointment. NICEM argued that the applicant's views were not a political opinion, and they had not discriminated against the applicant because of his views.

NICA held that the ET erred in finding that the applicant was treated less favourably than the successful candidate. The ET must have taken the view that the applicant was the better candidate but had been passed over because of his political opinions. No tribunal properly directed could reasonably have concluded that the employers treated the applicant less favourably than they treated other candidates. There was evidence in the scoring of the applicant and Y that Y was rated higher than the applicant, 372 marks as opposed to the applicant's 353.

The ET was also wrong to refuse to allow NICEM to call further witnesses after closing its case the previous day. The ET then took into account against NICEM that no other witnesses apart from the Chairman had been called to give evidence. This perpetrated a serious injustice.

The applicant's anti-racist views were not the type of political opinion envisaged by the Fair Employment legislation. The object of the legislation is to prevent discrimination against a person, which may stem from their association with a political party, philosophy or ideology. In this case the "anti-racist" and "culturally sensitive" approaches were both means of advancing the interests of people from ethnic minorities, one being more aggressive and confrontational than the other. This was not the type of political opinion contemplated by Parliament in enacting the Fair Employment legislation.

Comment

The decision emphasises the importance of obtaining evidence from which an inference of less favourable treatment can properly be sustained. The decision also suggests that, in the light of the operation of the Human Rights Act 1998 (specifically Article 6(1) of the European Convention of Human Rights), tribunals should be slow to rule out the calling of evidence on excessively formal or technical grounds, even after a party has closed its case.

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Race discrimination and the police

Chief Constable of Bedfordshire Police v Liversidge [2002] IRLR 15 EAT

Implications for practitioners

This case concerns the vicarious liability of Chief Officers of Police for the purposes of the employment provisions of the RRA. It applies *only* to claims brought by police officers in relation to acts of race discrimination occurring *before* the entry into force of the RRAA on 2 April 2001.

Facts

L was a black police constable. She was subjected to racist name calling by a colleague, another constable. There was an internal investigation. Her complaint was not upheld.

L brought two cases under the RRA. The first was against the Bedfordshire Police and the individual officer. It alleged discrimination in relation to the racial abuse.

The second case was against the Chief Constable. It alleged discrimination and / or victimisation in relation to the inadequate internal investigation.

The Chief Constable appealed against the ET's refusal, at an interlocutory hearing, to strike out the claim against him. He asserted that the ET had no jurisdiction to consider the claim.

The issue

Police officers are not employees but office holders. Therefore, under the RRA before its amendment by the RRAA, Chief Officers of Police (i.e. Chief Constables and the Metropolitan Police Commissioner) were not in general vicariously liable for the actions of individual police officers, and only the individual officer could be sued: see Farah v Commissioner of Police for the Metropolis [1998] QB 65 (CA).

However, section 16 of the RRA (now section 76A(2)) provides that for the purposes of Part II of the Act (the employment provisions):

"… the holding of the office of Constable shall be treated as employment –

(a) by the Chief Officer of Police as respects any act done by him in relation to a Constable or that office;

(b) by the Police Authority as respects any act done by them in relation to a Constable or that office".

Employment Appeal Tribunal

The EAT held that section 16 applied only to acts done in relation to the applicant by the Chief Constable personally. Section 16 did not make the Chief Constable vicariously liable for the discriminatory acts of one officer against another.

In other words, a police officer can bring a claim of race discrimination in employment only where the perpetrator is the Chief Constable.

L has appealed to the Court of Appeal and the case is listed for hearing in May.

Comment

This problem has now been resolved by section 76A(3) of the RRA, inserted by the RRAA, which provides that a police officer is to be treated as an employee for the purposes of section 32 (liability of employers and principals).

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The importance of an applicant's right to disclosure of the documents needed to establish discrimination

Knight v Department of Social Security EAT/0537/01 unreported 12.11.01.

Implications for practitioners

Applicants making complaints of discrimination are entitled to disclosure of documents that may help them establish discrimination. Respondents, such as government departments, cannot ordinarily withhold documents on the grounds of administrative inconvenience, even if disclosure may cause them to incur substantial expenditure, for example because they will need to introduce new application tests.

Furthermore, tribunals should not make orders which anticipate the tribunal having sight of documents which may be relevant to the case, unless they ensure that the applicant has the same access.

Tribunals should consider applications for disclosure by reference to Part 31 of the Civil Procedure Rules (CPR).

Facts

A, who is disabled, applied for an administrative post with the Benefits Agency. In common with other government agencies, the DSS operates a scheme whereby applicants for such posts who are disabled and who do not have the requisite educational qualifications are nevertheless invited to sit an examination which, if they pass, will lead to an interview.

A sat the examination in February 1999. Soon after, he received a letter informing him he had passed and inviting him for interview. He then received a further letter telling him there had been an error, that he had in fact failed and was not being invited to attend an interview. As a result of the recruitment process which A took part in, 32 people were appointed to posts.

A, acting in person, lodged a complaint of discrimination on the grounds of disability, alleging amongst other things that his test results had been doctored. He applied for disclosure of four categories of document: (i) his original test papers; (ii) the test papers completed by the 32 successful candidates; (iii) the test questions; and (iv) the application forms of the other candidates.

Employment tribunal

At a preliminary hearing, the ET refused to order disclosure to A, but instead ordered that the DSS provide copies of the documents to the ET which would sit by itself, without A, at the start of the full hearing to consider those documents.

Employment Appeal Tribunal

A appealed from that order and the DSS conceded that it should be set aside. The DSS continued to object to disclosure of certain of the documents requested (that request had been enlarged so as to include a request for disclosure of a set of model answers to the test), on the grounds that they were confidential and/or that if the model answers or questions were to enter the public domain, the DSS would have to design a new test. The DSS estimated that the cost of designing a new test would be £150,000-£200,000. Accordingly, the DSS sought an undertaking from A's solicitors (who had been instructed for the purposes of the appeal only) that if they were supplied with the documents, they would not allow A to make copies of them. In the course of the hearing, counsel for the DSS offered, as an alternative, to make the documents available to A at the full hearing so long as he agreed not to remove them from the tribunal building.

A rejected all these offers and contended that he was entitled to disclosure of all the documents he sought.

The EAT held that the order made by the ET appeared to have accepted the relevance of the documents, but had not then provided for their disclosure to A. That approach was inappropriate, and offended the principle that one party could not enter into a secret communication with the court.

All the documents requested by A were relevant. The restrictions upon disclosure sought by the DSS were "unattractive".

It was appropriate on the facts of this case to adhere to the procedure set out in CPR Part 31. In particular, as A was acting in person in the ET, an order should be

made which referred expressly to the limitation (set out in CPR Part 31.22) on the purposes for which a document that is disclosed may be used.

Confidentiality is not in itself a basis for refusing disclosure. In respect of the DSS's reliance on the overriding objective set out in Rule 10(1) of the Tribunal Rules ("The overriding objective of the rules … is to enable tribunals to deal with cases justly"), the EAT had carefully considered the question of cost, but was more influenced by the fact that the test had been used in numerous circumstances for six years.

In the circumstances the proper order was for there to be disclosure to A of all the documents sought.

Comment

The EAT's decision may be helpful for applicants seeking disclosure in order to establish that discrimination has occurred. It is of particular concern that the ET should have made such a bizarre order when A was not legally represented. Tribunals need to be reminded of the limit of their powers in respect of such orders and, where it appears that they have acted outside the principles established by CPR Part 31, advisers should be bringing appeals against such interlocutory orders.

It is to be borne in mind that applicants acting in person in DDA claims may need particular assistance from the tribunal to identify the documents that may be of relevance and to formulate the appropriate requests for disclosure.

The EAT's approach re-emphasises the primacy of the duty to disclose, and should be seen as a warning to those respondents who would seek to avoid it.

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Blackstone's Guide to the Race Relations (Amendment) Act 2000 by Henrietta Hill.

Oxford University Press 2001. ISBN 1 84174 268 6. 248 pp. Price £24.95.

Please place race relations pdf in this box.

Many thanks.

This book by Discrimination Law Association member Henrietta Hill is essential reading for all race discrimination practitioners. It sets out the history and provisions of the Race Relations (Amendment) Act. It examines in detail the new extended areas of liability of public authorities for both direct and indirect discrimination and goes on to set out the new general and specific duties on public bodies to promote equality. Finally, it examines the procedure for challenging unlawful discrimination under the Act. The book contains the text of the new Act and, very usefully, the text of the Race Relations Act 1976 as amended by the new Act.

Gay Moon
Editor

Briefings needs editorial input

Briefings urgently needs a second Deputy Editor to share the editorial work with Gay Moon and David Massarella. Sub-editing skills would be particularly useful. The editors are unpaid at present, but a small honorarium is under consideration. If you are interested, please get in touch with Gaby Charing at the DLA office.

Fourth National Conference

From equality of opportunity to equality of outcome: the new EC directives and mainstreaming equality

200 delegates attended the fourth national conference of the Discrimination Law Association held on Monday 29th October 2001 at the TUC Congress Centre. Gaby Charing picks out some highlights from a very successful day

Our annual conference is an important occasion for our members. Our aims this time were twofold: to provide a detailed account of the two directives and their legal context, and to prepare the ground for the debate about options for implementation. This was an ambitious agenda, which recognised that members of the Discrimination Law Association have differing needs. It also reflected my personal view that training is made more interesting if it includes some high quality discussion of the issues.

We were honoured to have Lord Justice Sedley as keynote speaker. He got us off to a very good start. "We are entitled to ask our judges and politicians why is it necessary to have organisations like DLA and conferences like this one. We should be asking these questions not just in relation to race, sex and disability, but also age, sexual orientation and (perhaps most controversially) religion." His strong call for an end to discrimination in the legal profession and for a more sexually and racially mixed judiciary was reported by *The Times*.

All our speakers were leaders in their field. Here is a very personal selection of points made by them, and by delegates in discussion.

Adam Tyson from the European Commission explained that the inclusion of sex (gender) in the EC Treaty came about for political and economic reasons, because France had equal pay legislation and feared being undercut by other EC members unless it was applied to them also. Later, Adam commented, as a former UK civil servant, that the UK Government has been keen in the past to ensure that it has complied with the objectives of directives, but has been accused of going beyond those objectives. That set me thinking about the massive and well-resourced campaign that is being waged against the Framework Employment Directive (specifically, the sexual orientation provisions) by the Christian Institute. We should not under-estimate the hostility that exists in those quarters to the very idea of equality, or the power of their lobbyists.

Barbara Cohen from the Commission for Racial Equality gave a high-speed, but characteristically lucid, account of both the RRAA and the Race Directive. Then the TUC Race Equality Officer, Roger McKenzie, in a hard-hitting speech that was very well received, reminded us not to be complacent. "One of the other problems is that when people talk about institutional racism, they think it's buildings which are discriminating against them." He went on to tell us about the steps taken by the TUC to root out institutional racism in its own organisation and in affiliated unions.

Dr Richard Stone, a member of the Stephen Lawrence Inquiry, and, among his many other activities, Chair of the Commission on Muslims and Islamophobia, kept the temperature high with an impassioned speech that touched on his own experience, as a former GP and a long-time campaigner, of racism and religious intolerance. He ended with a call for legislation now against incitement to religious hatred.

Robin Allen then took us through the religious discrimination provisions. The role of the state provides the context within which the whole of this debate operates. Are religious schools contributing to social divisiveness? If so, what is the solution? There is much unease about the Government's commitment to having more of them. If we were starting from a clean slate, we would have no such schools, but that is to ignore history.

Next, Angela Mason of Stonewall, always a good speaker, was in up-beat mood. She drew attention to the Preamble of the Employment Directive. It really is about certain principles: human rights are very

important; discrimination law is seen in a wider context. There is reference to solidarity, and working with non-governmental organisations. Angela was concerned about the blanket exclusion of state social security and social protection schemes. While being relatively at ease with the religious exemption generally, she was worried that the requirement concerning adherence to an organisation's "ethos" might be used to justify discrimination against lesbian, gay and bisexual people who are open about their relationships. She called for the scope of this exception to be narrowly defined.

The session immediately after lunch often earns the name "graveyard slot", but not on this occasion. The debate on age, between the Director-General of Age Concern, Gordon Lishman, and Dominic Johnson of the CBI, was outspoken, but there was a remarkable degree of agreement between them. Chronological age is no guide to performance, and industry has to find better ways of managing people's need to withdraw gradually, and with dignity, from highly pressured jobs. Discrimination is short-sighted and wrong.

Then another excellent speaker from the TUC, Richard Exell. Richard is one of the disabled members of the Disability Rights Commission. He began by "coming out" as a person with a history of mental illness. "Those of us who have some prominence have a duty to start telling people about it, if we're going to counter prejudicial attitudes". I think many of us raised a silent cheer. In a diffident manner that belied his grasp of his subject matter, Richard went on to give us an extremely useful tour of the disability provisions, and how they may interact with the DDA. For those with a keen interest, this was obviously a very useful session.

The final speaker was Petra Sheils, Legal Director of the Equality Commission for Northern Ireland. This was a fascinating session, and I cannot do it justice. She brought with her a consultation paper on a draft single equality bill. "Single legislation provides an opportunity to codify and clarify, to strengthen that law, to bring current new law into synch with EC and international standards, to better achieve equality." But there are problems. In 80% of responses to their consultation, the main concern was the risk of a loss of focus to the separate work of each of the separate agencies. This clearly struck a chord.

Then the final panel discussion. Should there be a public duty in relation to gender, like the one on race? Yes, said all the panel. Yes – in gender and every other area, said Petra. Is there a financial price to pay for ending state funding of religious schools, and is it worth it? Yes, to both questions. Robin said, "When we leave today, we should take away this – we must not forget our history … but we must not be hidebound by our history."

And then it was time to say goodbye for another year, and to start thinking about next year's conference.

Stop Press

The Court of Appeal has overruled *Sawyer v Ahsan* (Briefing 108), in which a tribunal held that section 12 of the RRA applied to the selection process for a candidate for the local Council. In that case the tribunal followed *Jepson v The Labour Party*, which concerned similar wording in section 13 of the SDA.

In *Triesman v Ali and Sohal* the Court of Appeal has ruled that a person seeking selection as a Labour Party candidate, whose membership of the Party is suspended, has no remedy under section 12 if s/he alleges that the suspension was discriminatory on grounds of race. A full report will appear in our next issue.

Bills before Parliament – a round-up

The Sex Discrimination (Election Candidates) Bill has completed its passage through both Houses of Parliament and will shortly receive the Royal Assent. It will enable a political party to adopt measures for the selection of candidates for elections (including women-only shortlists) that reduce the present inequality in the numbers of male and female candidates. It reverses the 1996 tribunal decision in *Jepson v The Labour Party* that section 13 of the SDA makes all-women shortlists unlawful.

Candy Atherton's Age Equality Commission Bill, sponsored by Age Concern, was withdrawn during its second reading on 23 November 2001 as the Government will consider such a Commission as an option during their consultation on implementing the Directives. Age Concern has welcomed the Government's acknowledgement that age discrimination is not confined to employment.

Two private members' bills in the HL have been referred to Select Committees, an unusual step in the HL.

Lord Lester QC's Civil Partnerships Bill, sponsored by Stonewall, had its second reading on 25th January and will be considered in Committee on 13th February. It would provide for registration of a civil partnership by any two unmarried individuals living together (whether in a sexual relationship or not) who are not close relatives. Lord Lester emphasised the dire position in law of unmarried partners at present, and emphasised that civil partnership is not an alternative to marriage, and this is not a charter for 'gay marriage'.

Lord Avebury's Religious Offences Bill to abolish the common law offence of blasphemy and certain other offences and create an offence of religious hatred received its second reading on 30th January. No date has yet been fixed for the Select Committee hearing. The offence of religious hatred will be in identical terms to that proposed in the Anti-Terrorism Bill, but withdrawn by the Government after being rejected by the HL.

Ensuring equality: do we need Protocol 12?

Conference jointly organised by the TUC & JUSTICE and sponsored by Bindmans

Monday, 15 April 2002 at the TUC Congress Centre, Great Russell Street, London, WC1B 3LS

Protocol 12 amends the European Convention on Human Rights so as to create for the first time a free-standing right to equality of treatment, thereby significantly improving protection from discrimination under the Convention. It was opened for signature on 4 November 2000 and will enter into force when there have been ten ratifications. The UK has yet to sign or ratify.

This conference offers opportunity for trade unionists, campaigners and NGOs to:

- assess the potential of Protocol 12
- identify how to use current protections under the Human Rights Act more effectively
- consider the European experience of similar provisions
- build a coalition of support for the Protocol's signature and ratification by the UK

For further details and booking form contact Ruth Allen at JUSTICE, 59 Carter Lane, London, EC4V 5AQ. Tel: 020 7762 6437. Fax : 020 7329 5055. E mail rallen@justice.org.uk

About the Discrimination Law Association

Briefings is published by the Discrimination Law Association. The Discrimination Law Association was founded in 1995 and now has nearly 450 members. Our President is Geoffrey Bindman.

Our aims are:

1. to promote and improve the giving of advice, support and representation to individuals complaining of discrimination, harassment or abuse on grounds such as race, gender, religion, disability, sexual orientation, age, health status, political opinion, marital or family status and trade union affiliation or activity
2. to raise awareness and encourage debate on discrimination law and practice
3. to promote the teaching of discrimination law
4. to secure improvements in the scope and enforcement of UK anti-discrimination legislation
5. to share information and ideas internationally

Membership of the Discrimination Law Association is open to any individual or organisation interested in discrimination law who is in general agreement with the Association's aims.

Our members include the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission, the Equality Commission for Northern Ireland, the Equality Authority in Dublin, many trade unions, and other non-governmental organisations large and small.

In the voluntary sector we have Law Centres, Citizens' Advice Bureaux, Race Equality Councils, and other advice agencies. We have strong support from solicitors' firms and barristers' chambers. Our individual members include some eminent lawyers, other solicitors and barristers who are starting to make their mark, and advice workers and trainers with many years of experience.

Membership will be of particular benefit to those who are advising clients in discrimination cases, interested in legal developments in discrimination law, looking for training in discrimination law, or seeking to network with others interested in discrimination law.

For further information about membership, or to advertise in *Briefings*, please e-mail to info@discrimination-law.org.uk, or write to Discrimination Law Association, PO Box 20848, London, SE22 0YP.

The Discrimination Law Association is a Company Limited by Guarantee number 3862592 registered in England & Wales.

Policy forums

The Discrimination Law Association is holding a series of seminars to discuss the issues arising from the Government consultation document Towards Equality and Diversity: Implementing the Employment and Race Directives. The discussions at these sessions will inform our response to the consultation.
The following are forthcoming:
Wednesday 20th February at 6.30:
Religion and Belief: Robin Allen QC; Sexual Orientation: Dr Mark Bell (University of Leicester)
Thursday 28th February at 6.00:
Age: Michael Rubenstein, and Richard Baker, who represents Age Concern on the Government's Age Advisory Group.
Thursday 14th March at 6.00:
Final discussion, and consideration of any over-arching issues.

All meetings take place in the seminar room at **Matrix Chambers, Griffin Building, Gray's Inn, London, WC1R 5LN** (nearest tube Chancery Lane). All members of the Discrimination Law Association are welcome to attend.

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