Discrimination Law Association

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Editorial *A Single Equality Commission – can it happen, will it happen?*

The moment when an integrated Single Equality Commission is created to oversee all areas of equality law is definitely getting nearer. Earlier this year, after the first consultation on implementation of the new Directives, Barbara Roche MP, Minister responsible for equality co-ordination across government, announced that she would lead a project to consider in detail possible models for a single equality body. The aim was to complete the project within six months and to bring forward firm proposals this autumn. But it was said that there would be no changes to structures within the lifetime of this Parliament. (See news item in Briefings, vol 16,p33)

Reacting to this announcement the existing Commissions jointly commissioned research into the possible institutional models for such a new Single Equality Commission. Colm O'Cinneide, a Lecturer at University College London, has carried out the research, looking at a variety of models around the world – Canada, North America, Australia, New Zealand, the Republic of Ireland and Northern Ireland. The research will be published soon in final form.

His research has highlighted the fact that all the comparator commissions agree that it is essential for an effective commission to balance the two goals of enforcement and protection. Separation of these roles normally occurs within the Commission.

Equally important will be the need to balance the resources dedicated to each of the strands covered by the directives so that there is not a hierarchy of protection for each of the grounds for discrimination. One solution would be to grant identical resources to each strand and allow each one to operate semi-independently under an umbrella organisation. However, in the longer term a body that is organised around its various functions and has to ensure that the needs of each strand is adequately met is more likely to achieve an integrated approach to equality.

Casework is another difficult issue: how much could and should a single Commission realistically do? Should it limit its role to 'strategic' casework? Or should it even refuse casework undertaking only to train others to take such cases? Obviously no Single Equality Commission however large and well resourced could take up the case of each and every person who has been subjected to unjustified discrimination. The demand is simply too great to be met. Experience in North America and Australia has shown that too great an obligation to take on case-work can jeopardise the ability of the Commission to achieve its other objectives.

Equality is, of course, a fundamental human right; hence it is vital that any new Single Equality Commission has the necessary powers to take up human rights issues.

But above all else a single simple concept of equality needs to be developed and a Single Equality Act needs to be put in place so that common standards can be applied across all the strands.

Colm O'Cinneide has provisionally concluded that :-

"the recognition that the core principle of diversity applies and underpins all the different grounds, that the equality agenda cannot be separated out into component parts, and overlapping grounds can add value to each other in a mutually re-enforcing process, can form part of this set of values. However, these core values have also to accommodate self-critique and openness, and recognition of the particular needs of specific strands, in particular those strands such as disability that are often simply not adequately understood by equality practitioners."

This is obviously right. Moreover the integrity and reputation of such a Commission will depend on the extent to which it has public support across all communities. Only if there is a single readily understood concept that can explain the common basis for equality for groups as disparate as pregnant women, the elderly, the disabled, gay people, persons of different faiths or none and those of different races, will this happen. The clear definition and explanation of equality is the bedrock of any new and enduring Commission.

A Single Equality Commission for Great Britain can and will happen but there is still a huge amount of work to be done. These two aspects, the reach of the Commission and the basic concept of equality must be resolved from the outset. Only then can a new, popular and enduring Commission be created to replace the older ones.

Abbreviations

SDA	Sex Discrimination Act 1975	ECJ	European Court of Justice
RRA	Race Relations Act 1976	HL	House of Lords
DDA	Disability Discrimination Act 1995	CA	Court of Appeal
HRA	Human Rights Act 1998	CS	Court of Session
ECHR	European Convention on Human Rights	HC	High Court
ECtHR	European Court of Human Rights	EAT	Employment Appeal Tribunal
		ET	Employment Tribunal

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New Parental Rights under the Employment Act 2002 from 6 April 2003

Statutory provisions

The Employment Act 2002 amends the Employment Rights Act 1996.

Draft regulations provide the detail:

- The Maternity and Parental Leave (Amendment) Leave Regulations 2002
- The Paternity and Adoption Leave Regulations 2002;
- The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002;
- The Flexible Working (Procedural Requirements) Regulations 2002.

Regulations also provide for statutory paternity and adoption pay:

- The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002,
- The Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002,
- The Statutory Paternity Pay and Statutory Adoption Pay (Administration) Regulations 2002.

Main changes

a. An increase in ordinary maternity leave (OML) from 18 to 26 weeks, with Statutory Maternity Pay of 90% pay for the first 6 weeks and £100 per week (or 90% of earnings, whichever is the lower) for the remaining 20 weeks;

b. AML to be 26 weeks, immediately following OML;

c. New notice provisions for maternity leave;

d. The introduction of one or two weeks paternity leave for partners of child mother or one of adopters;

e. The introduction of adoption leave for employees with 26 weeks service by the 15th week before the expected week of childbirth (EWC);

f. A new right for employees, with 6 months service, to request new working patterns to care for children under 6 and disabled children under 18.

Definition of partner for paternity/adoption leave and flexible working

Under the Paternity and Adoption Leave and Flexible Working Regulations 'partner' in relation to a child's mother or adopter, means a person (whether of a different sex or the same sex) who lives with the mother or adopter in an enduring family relationship but is not a blood relative.

Many maternity rights will remain unchanged, including

- the right to paid time off for ante natal care,
- the 2-week period of compulsory maternity leave,
- the health and safety provisions,
- rights during maternity leave (including right to suitable alternative work on redundancy),
- the right to return and
- protection from unfair dismissal and detriment.

Implementation

The new maternity rights apply where the mother's expected week of childbirth (EWC) is on or after 6th April 2003 even if the baby is born prematurely.[1]

Employees are entitled to paternity leave where the EWC or birth is on or after 6 April 2003.

Adoption leave and paternity leave for adopters applies where a child is either matched or placed for adoption on or after 6 April 2003.

Ordinary Maternity Leave (OML)

OML of 26 weeks can still start at any time from the beginning of the 11th week before the EWC unless the employee has a pregnancy related absence in the **4 weeks** (not 6 weeks as previously) prior to the EWC in which case she will immediately be triggered onto her leave.

Additional Maternity Leave (AML)

Women with 26 weeks service by the Notification Week (ie the week immediately preceding the 14th week before the EWC) will qualify for AML. AML will

begin when OML ends and run for 26 weeks so that an employee will be entitled to a total of 52 weeks maternity leave.

New notice provisions for maternity leave

Pregnancy, the EWC and start of maternity leave must be notified to the employer in the notification week, or if this is not reasonably practicable, as soon as is reasonably practicable. The employer may request the notification in writing.

The employee can vary the start of her leave provided she gives notice 28 days notice before the original leave date or new date (whichever is earlier) or if this is not reasonably practicable as soon as reasonably practicable. The employer must, within 28 days, write to the employee stating her expected date of return if she takes her full leave.

Where the employee is triggered on to maternity leave, the normal notice requirements do not apply but she must still notify her employer as soon as is reasonably practicable that her absence is related to her pregnancy. The provision whereby an employer could write to the employee after childbirth requesting confirmation of an intention to return will be repealed.

Early return from maternity leave

As with the present provisions, it is assumed that an employee who is entitled only to OML will return the day after the end of 26 weeks and an employee entitled to AML will return the day after the end of the 52 weeks.

An employee who intends to return earlier must give 28 days notice of her return (instead of 21 days notice). If she fails to give the notice the employer may postpone her return until she has given appropriate notice, though not beyond the end of her maternity leave.

Adoption leave and pay

Since 1999 there has been a right for adoptive parents to take 13 weeks unpaid parental leave. From April 2003 one of newly adoptive parents, who has been employed for 26 weeks by the date s/he has been matched with a child for adoption, will be entitled to 26 weeks' ordinary adoption leave and 26 weeks' additional adoption leave, a total of 52 weeks leave. If the placement ends during the adoption leave period, the adopter will be able to stay on leave for up to 8 weeks after the end of the placement.

The leave can start from the date of the child's placement or, if working that day, the following day or from a fixed date up to 14 days before the expected date of placement.

Notice provisions

Adopters must inform their employers of:

– their intention to take adoption leave,
– date due for placement and start of leave,

within 7 days of being notified that they have been matched for adoption (or, if this is not reasonably practicable, as soon as is reasonably practicable).

The employee may vary the start of leave by giving 28 days notice. The employer must, within 28 days of notification, write to the employee setting out the date the employee is due to return to work.

If the employee wants to return to work before the end of the leave, s/he must give 28 days notice (as with maternity leave).

The employer may request evidence (being a document issued by the adoption agency) stating:

a. the name and address of the agency;
b. the name and address of the employee;
c. the date on which the employee was notified that he had been matched with the child, and
d. the date of placement or the date on which the agency expects to place the child with the employee.

The provisions covering the adopter's return to work and rights during leave are the same as for maternity leave. Where an employee is made redundant during adoption leave s/he will be entitled to any suitable alternative employment which exists.

The adopter will be entitled £100 per week (or 90% of earnings whichever is the less) for 26 weeks provided their earnings average at least £75 (the Lower Earnings Limit for NI). Adoption leave cannot be split between parents (but can be taken by either parent) and the other parent can take Paternity Leave.

Paternity leave (birth – reg 4), (adoption – reg 7)

Where either:

a. the baby is born on or after 6 April 2003, or the EWC begins on or after that date, or
b. a child is matched or placed for adoption on or after 6 April 2003,

the father or partner of the child's mother, and, in the

case of adoption, the spouse or partner of the child's adopter (of either sex) not taking adoption leave will be entitled to take either one week or two consecutive weeks' paternity leave. The qualifying conditions are:

a. the employee must have been employed for 26 weeks by the mother's notification week (or in the case of adoption 26 week ending with the week in which the child's adopter is notified of being matched with the child);
b. the employee must have or expect to have responsibility for the upbringing of the child and
c. the employee must be the biological father of the child or be married to or the partner (including same sex partner) of the child's mother (or adopter).

Notice provisions

In respect of a birth notice must be given in or before the notification week (the 15th week before the EWC). For adopters, notice must be given no more than 7 days after the adopter was notified of adoption. The notice to the employer is of:

a. the EWC or the date of placement or date on which the child is expected to be placed with the adopted;
b. the length of period the employee wants to take and
c. the start of the leave.

In addition, employees must, if requested, provide evidence in a document which contains:

a. the name of the employee,
b. a declaration that the employee meets the statutory eligibility requirements for paternity leave, eg length of employment and the relationship with the child;
c. the EWC or birth, or the date on which the child is expected to be placed with the adopter and, if the placement has already occurred, the date of the placement,
d. the length of the period of leave to be taken,
e. the start date of the leave,
f. the date on which the adopter notified s/he had been matched with the child.

At least 28 days of the start of leave must be given. The date of the leave may be varied on 28 days notice. If it is not reasonably practicable for the employee to give this notice, it must be given as soon as is reasonably practicable.

The leave may start from the date of the child's birth (or placement for adoption) or from a fixed period or date after the baby is expected (or placement expected). The leave must be completed within 56 days of the birth (or placement) or, if the baby is early, the expected date of birth (or placement is expected).

The parent or adopter will also be entitled to paternity pay of £100.00 (or 90% of his average pay whichever is the lower) provided his/her earnings average at least £75 (the Lower Earnings Limit for NI).

Employees are entitled to the benefit of their normal terms and conditions of employment, except for remuneration and are entitled to return to the same job. They are treated in the same way as women on maternity leave.

The right to request Flexible Working

There is a new right, under 80F ERA 1996 (as amended by the Employment Act 2002),[2] for employees, who have worked for the employer for 26 weeks, to request a different working pattern to enable the employee to care for a child under 6 (or disabled child aged under 18). The employer must seriously consider the request under a prescribed procedure.

The new right will apply

– only to employees not to workers (unlike the Sex Discrimination Act, which prohibits indirect sex and marital discrimination);
– to men and women (unlike the SDA which generally only enables women to make a claim for indirect discrimination).

However, its major failing is that the legislation does not give tribunals the power to question the commercial validity of the employer's decision. By contrast, under the SDA a tribunal can award compensation where an employer cannot justify a refusal to allow flexible hours and it can make recommendation that the employer grant the employee's request.

The following is a summary of the proposals.

Conditions of entitlement

a. The employee must have been continuously employed for at least 26 weeks at the date of application and not be an agency worker, nor a member of the armed forces;[3]
b. The employee must be:
   i. the mother, father, adopter, guardian or foster parent of the child or
   ii. married to a person of one of the above and living with the child; or
   iii. the partner (including same sex partners) of one of

the above and living with the child; and

c. The employee must have or expect to have responsibility for the upbringing of the child under 6 or disabled child under 18; and

d. The employee must not have made another application to work flexibly under this procedure during the previous 12 months

The proposed procedure for requesting Flexible Working is that:

a. Employees may request a new working pattern at any time from the birth of their child up to 14 days before their child's 6th birthday. This must be for the care of their child.[4]

b. The proposal may relate to the hours worked, times at which the hours are worked, place of work (including working at home), any other aspect of her/his terms and conditions of employment as may be specified by regulations.[5]

c. An application must be in writing (whether be in manuscript, typed or sent by email) and must state whether a previous application has been made to the employer and, if so, when, and be signed and dated. The application must:
   - state that it is such an application,
   - specify the change applied for and the date on which it is proposed the change should become effective
   - explain what effect, if any, the employee thinks making the change would have on the employer and how, in his or her opinion, any such effect might be dealt with, and
   - explain the relationship between the employee and the child.[6]

d. The employer shall only refuse the applicant on one of a number of specified grounds, which are set out in clause 80G of the Act. They include additional costs, detrimental effect on ability to meet customer demand, inability to re-organise work among existing staff, inability to recruit additional staff, detrimental impact on quality or performance, insufficiency of work during periods the employee proposes to work, planned structural changes, other grounds as may be set out in regulations.[7]

e. If the employer agrees to the proposed variation he or she must notify the employee within 28 days, stating the agreed contract variation and the date from which the variation is to take effect.

f. There should be a meeting within 28 days to consider the request, unless the employer agrees to the proposed contract variation and notifies the employee accordingly. If the individual who would consider the application is on holiday or sick leave at the time the application is received, the time limit will be extended to 28 days after the date on which the individual returns.

g. The employer should write to the employee within 14 days of the date of the meeting, either accepting the request and giving a start date, confirming a compromise or rejecting the request and giving a sufficient explanation of the business reasons for doing so and setting out the appeals procedure;

h. The employee may appeal within 14 days after the date of the notice of the decision. A notice of appeal must be in writing, set out the grounds of appeal and be signed and dated by the employee. The appeal must be in the form set out in the schedule to the regulations.

i. Within 14 days of being informed in writing that the employee wishes to appeal the employer should arrange an appeal meeting, unless the employer agreed to uphold the appeal and notified the employee in writing of his or her decision, specifying the contract variation agreed to and the date it is to take effect.

j. An employer shall notify the employee, in writing, of his or her decision on an appeal within 14 days after the date of the meeting to discuss the appeal. This notice must be in writing. Where the employer upholds the appeal the agreed contract variation must be specified and a start date. If the appeal is dismissed, the employer must set out the grounds on which the dismissal is based.

Provisions relating to time limits

There are detailed rules for deciding when an application is made and when the employer takes the appropriate steps. There is provision for the parties to agree to an extension of any of the time limits. The agreement must be recorded in writing by the employer, specify the time limit concerned and the date on which the extension is to end, and be sent to the employee, in writing, signed and dated.

Right to be accompanied

The employee has a right to be accompanied, by a trade union employee or official or another employee, at the

initial meeting and the appeal. The companion cannot answer questions for the employee but can confer with the employee and address the meeting. If the chosen companion is not available the employer must grant an employee's request for a postponement provided it is reasonable and not more than five days later.

The ET will find for the applicant only where the employer has failed to comply with procedural requirements. The ET can award compensation but there is likely to be a cap of four week's pay. The ET may also order the employer to reconsider. Only one request can be made every 12 months.

Complaint to Employment Tribunal

Under the Act, the employee can make a complaint that the employer:

- failed to deal with the application under the prescribed procedure;
- refused the application on a ground other than one prescribed;
- rejected the application on incorrect facts.[8]

A complaint cannot be made to an ET unless the employer has notified the employee of a decision to reject the application on appeal or commits a breach of the procedure.

The time limit for bringing a claim is three months from the date the employee is notified of the decision on appeal or, where the complaint relates to a breach of the procedure, within three months of that breach. An extension of time may be given if it was not reasonably practicable for the complaint to be presented before the end of three months.

Where the complaint is upheld the ET:

- must make a declaration to that effect;
- may make an order for reconsideration of the application, and
- make an award of compensation to be paid to the employee. This will be subject to a maximum number of weeks' pay (to be decided).[9]

The regulations provide that the employee can complain to an ET of the following:

- failure to hold a meeting to discuss the employee's application or failure to hold an appeal meeting;
- failure to give notice to an employee of its decision about the employee's application or decision on appeal;
- failure to provide an employee with a right of appeal;

The above apply even if the application has not been rejected or disposed of by agreement or withdrawn.

In addition, a complaint can be made in relation to:

- a refusal to allow the employee the right to be accompanied by an appropriate person or
- a refusal to allow an appropriate postponement or
- a threat to refuse in either situation.

A complaint must be brought within 3 months.

Thus, no compensation is payable if the employer properly follows the procedure but still refuses the request, even where there are no objective reasons for such a refusal. Most parents should claim under both the new procedure and the indirect discrimination provisions of the Sex Discrimination Act.

Employment Protection

It will be automatic unfair dismissal under Employment Rights Act 1996 section 99 or unlawful detriment (section 47C) if the only or principal reason for the dismissal/ detriment is connected with

- adoption leave,
- paternity leave or
- a request for flexible working.

The existing protection still applies, relating to

- pregnancy,
- maternity leave,
- parental leave and
- time off for dependants

Thus, for example, if billing targets are not reduced for a parent taking leave, or promotion or a pay rise is denied, this is likely to be a detrimenta and may also be sex discrimination.

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1 The rate of maternity/ paternity pay will not go up until 6th April 2003 where the baby is premature.

2 See ss 80F-80I, s47D, s104C ERA 1996

3 The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, Reg 3(1)(a)

4 ERA s80F(3)

5 ERA s80F(1)(a)

6 ERA s80F(2)

7 ERA s80G (1)(b)

8 s80H (1)-(4)ERA 1996

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The main changes	THE POSITION NOW	NEW RIGHTS FOR APRIL 2003
Ordinary maternity leave (OML) and SMP	18 weeks.	26 weeks. SMP will also last for 26 weeks and the lower rate will go up to £100.
Additional maternity leave (AML)	For women with one year's service by the 11th week before the expected week of childbirth (EWC); starts at the end of OML and lasts for 29 weeks from the birth. Maximum leave entitlement is 11 weeks before the EWC and 29 weeks from the birth.	For women with 26 weeks service by the 15th week before the EWC (same service condition as for SMP). Lasts for 26 weeks from the end of OML. Maximum leave entitlement is therefore 52 weeks.
Notice of maternity leave	Must be given 21 days before the start of maternity leave.	Must first be given in the 15th week before EWC but may be changed, on giving 28 days notice
Notice of early return from maternity leave	21 days	28 days
Trigger for the start of maternity leave	In the last six weeks of pregnancy	In the last four weeks of pregnancy.
Paternity leave	May take unpaid parental leave around the time of the birth	A right to up to two weeks' paid paternity leave at £100 a week
Adoption leave	May take unpaid parental leave around the time of the adoption	Parents with 26 weeks service by the date they are matched with a child for adoption are entitled to 52 weeks' adoption leave. Statutory Adoption Pay will run for the first 26 weeks at £100 a week
Flexible hours	Indirect sex discrimination	A right to request flexible hours – in addition to indirect discrimination

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Briefing 254

Age discrimination

Tessa Harding reports

The EC Directive on Equal Treatment will make discrimination on grounds of age unlawful in Great Britain for the first time. But only for employment, and not until 2006.

Help the Aged and its sister organisations are working to ensure that discrimination on grounds of age is seen for what it is – as unjust and unacceptable as any other form of unfair discrimination. It remains a 'hidden' issue, largely unnamed and unchallenged. Yet its impact is profound: not only does it deprive society of the skills and talents of a growing proportion of the population, but in the words of Margaret Simey,[1]

> *'Older people like myself are almost universally aware of the fact that we are somehow different, simply by virtue of our age. We are no longer 'one of them'. We are a problem, a burden, objects of pity and denied a role in the management of our own affairs'.*

Employment is the field in which age discrimination has been most substantially documented. There is

ample evidence to show that older people are discriminated against at work – in recruitment, selection, promotion, training, redundancy and all aspects of working life. For those over state pension age, there is no employment protection at all. The evidence of discrimination is both anecdotal and statistical – much of it is summarised in the chapter on employment in *Age Discrimination in Public Policy – a Review of Evidence.*[2]

The majority of the complaints Help the Aged receives from members of the public concern employment, possibly because individuals are more aware of having rights in the workplace than they may be in other spheres of life, and there are mechanisms in place for them to use to challenge their treatment. Nonetheless, over 30% of people between 50 and state pension age are not working. Examples of discrimination are still rife – like the woman who was brusquely demoted on reaching the age of 60 without explanation or redress, or the many people in their fifties who apply fruitlessly for new positions and are told they are 'too experienced' or sometimes, bluntly, that they are too old. Age discrimination can sometimes amount to indirect race or sex discrimination and there have been several successful cases on this[3] (See Briefing no 265 this is the latest round of the Harvest Town Circle case which was successful on its return to the ET and will be reported in this issue).

In 1999, the Government introduced a Code of Practice on age diversity in employment and has followed this up with the Age Positive campaign to encourage employers to see older workers as an asset, not a liability. In parallel, New Deal 50 plus has introduced incentives to encourage older workers back into employment. The Code has been helpful in demonstrating good practice and encouraging those employers who are well disposed towards both older and younger workers and who recognise the business case for an age diverse workforce. But it does not have the necessary teeth to make a real impact on a deep-seated culture of discrimination against older workers. Research published by the Employers' Forum on Age indicated that the Code was having little effect on the way employers were running their businesses.[4] Even the Government's own research has shown that, although knowledge of the Code is widespread, only one in four employers have adopted its guidelines.[5]

Age discrimination, both direct and indirect, is evident in many other fields as well. In health care, according to a survey of GPs, hidden age bars limit access to various forms of specialist treatment, from coronary care to kidney dialysis. The Audit Commission[6] revealed that the proportion of older patients in specialist Stroke Units varies from over 70% to under 10% – a variation which cannot be accounted for by differences in population. Older patients wait longer in accident and emergency departments and many services on which they depend for their continued independence, such as chiropody and audiology, are accorded low priority and hard to access. In social care, it has been standard practice for local authorities to pay a lower fee for residential or nursing care for older people than that for younger people with comparable needs. Basic services that older people value because they enable them to remain in their own homes despite increasing frailty or disability are in very short supply, tightly rationed, and subject to means-testing.

The social security system is no less discriminatory. People who become disabled over the age of 65 do not receive the mobility component attached to disability benefits, and the qualifying period is longer. The fact that the state pension is treated as a benefit rather than an entitlement means that older people are excluded from a range of benefits available to younger people. This particularly affects those who were on higher income maintenance benefits before state pension age, older carers (one third of all carers), and those who remain in hospital for longer than six weeks (to be extended to thirteen next year).

And so it goes on… the evidence of discriminatory policies and practices in education, in transport and in public life mounts up. There is growing evidence too of such practice in the private sector – for example, in access to financial services and to insurance.

It is encouraging that Government is now taking a keen interest in age discrimination. The Cabinet Office published a report *Winning the Generation Game* in 2000 which urged action on the lost potential of older people to contribute to society. The NHS has now been told that it must 'root out age discrimination' in health and care services,[7] and a great deal of work is going on locally to implement this requirement, overseen by the Department of Health. This is proving challenging both to the health professionals scrutinising their own services and to the older people who are helping them do so, but it is laying important groundwork for

tackling discrimination throughout our public services.

Nonetheless action on age discrimination in employment, in social protection and in goods, facilities and services urgently needs the backing of the law and of proper enforcement procedures. The Government's approach towards legislation has been minimalist so far, with age tailing along at the back of the queue and no current proposals to extend legislation beyond the field of employment. Even age discrimination in employment is seen as particularly 'difficult' to combat, because it challenges wide swathes of public policy in associated fields such as retirement and pensions. Meanwhile ageist assumptions and stereotypes hold sway and individual older people continue to experience injustice on a daily basis with no recourse to redress.

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1 Age Discrimination in Public Policy: A Review of Evidence, Help the Aged, 2002, Foreword, p1.

2 As above p 31-45.

3 See Price v Civil Service Commission [1977] IRLR 291 and Perera v Civil Service Commission [1982] IRLR 147.

4 Employers Forum on Age, 'Report on a survey of senior decision makers in small and medium enterprises' (1999) and IRS/EFA, *Employing Older Workers*, IRS Management Review, issue 21, April 2001.

5 House of Commons Select Committee on Education and Employment, 7th Report, 2000-2001 session: 'Age Diversity: Summary of Research Findings' (March 2001), available at http://www.publications.parliament.uk/pa/cm/cmeduemp.htm.

6 Audit Commission *The way to go home*, London, June 2000

7 Department of Health *National Service Framework for Older People* London March 2000.

Special Educational Needs and Disability Act 2001

In September 2002, the first stage of implementation of the disability discrimination provisions of the Special Educational Needs and Disability Act (SENDA) came into force. SENDA makes amendments to the provisions made for Special Educational Needs, but more importantly it also amends Part IV of the Disability Discrimination Act 1995 (DDA), particularly by new sections interposed between sections 28 and 29 – which previously dealt very sparsely with education. Now anti-discrimination provisions in the amended DDA will have a major impact on the provision of education. This article outlines some of the provisions of the Act.

The first points to note are that SENDA's provisions derive from a mix of the employment provisions (taking "substantial disadvantage" as the trigger for reasonable adjustments) and the goods and services provisions (the duty to make reasonable adjustments being anticipatory). Discrimination against those in pre-16 education will be dealt with in the Special Educational Needs Tribunal (renamed the SENDIST). The post-16 provisions will be dealt with in the county court (Sheriff's court in Scotland for both pre- and post-16 cases). Claims must be made within 6 months of the date of discrimination.

The provisions relating to pre-16 education are fairly comprehensive! They apply to education provided at all schools in Scotland, Wales and England; this includes independent and publicly funded schools, mainstream and special schools; primary and secondary schools; non-maintained special schools and pupil referral units.

These provisions state that it is unlawful for bodies responsible for schools to discriminate against a disabled person:-

- In the arrangements for determining admission to the school as a pupil;
- In the terms on which admission is offered;
- By refusing or deliberately omitting to accept an application for admission;
- In the education or associated services provided for or offered to pupils; or
- In excluding him/her from school, either permanently or temporarily.

Education and associated services is a broad term, and the Code of Practice for Schools, issued by the DRC, lists a wide variety of the sorts of things which are likely to be covered, including preparation for

- entry to the school;
- school sports;
- breaks and
- lunchtimes.

"Discrimination" is defined as treating a disabled person less favourably, for a reason relating to disability, than others to whom that reason does not apply, without justification; and failing to comply with the new duty under section 28C of the DDA to make "reasonable adjustments" without justification.

However there will be no discrimination if the responsible body did not know and could not reasonably be expected to know of a disabled pupil's disability; and, in relation to a reasonable adjustment, the failure to take a particular step or the taking of a particular step, was attributable to that lack of knowledge.

It can be seen that the "less favourable treatment" part of the Act is the same as that already applying in part of the employment provisions and the goods and services provisions. It means that where, for example, a pupil is excluded because they miss school for 3 weeks as a result of having treatment for their visual impairment, there will have been less favourable treatment, even if all other pupils who miss school for 3 weeks would be excluded.

The duty to make "reasonable adjustments" in relation to pupils is an anticipatory one that is owed to disabled pupils at large, as with the Part III duties. It is triggered by pupils being placed at a "substantial disadvantage" compared to non-disabled people by either

- in arrangements made for determining the admission of pupils to the school; or
- in relation to education and associated services provided for pupils.

The duty does not, however, extend to either the provision of auxiliary aids and services (which are intended to be dealt with by the Special Educational Needs provisions) or removing or altering a physical feature (which is dealt with by means of accessibility strategies and plans).

Education authorities are also under a duty not to discriminate. Potentially discriminatory behaviour is justified if it is the result of a permitted form of selection, or if the reason for it is both material to the particular circumstances of the case and substantial. In view of the low threshold for justification, which this wording has been held as having in the employment sphere, it will be interesting to see how SENDIS tribunals and county courts deal with it in an education context.

The provisions relating to post-16 education, specifically those relating to "reasonable adjustments", are even more extensive. They apply to educational institutions that do not include private producers of education and work based training providers – presently covered by Part III of the Act.

Discrimination by an educational institution is prohibited

- in the arrangements for determining admissions;
- in the terms on which admission is offered;
- in refusing or deliberately omitting to accept an application for admission;
- in the student services provided or offered; and
- in excluding a disabled person either temporarily or permanently.

Student services are defined as being services of any description which are provided (or offered) wholly or mainly for students (s.28R(11) of the amended DDA). Discrimination is defined as treating a disabled person less favourably for a reason relating to disability than others to whom that reason does not apply, without justification (as in the employment provisions); and failing to comply with the section 28T duty to make "reasonable adjustments" without justification.

Again there is no discrimination if the responsible body did not know and could not reasonably be expected to know of a disabled pupil's disability; and, in relation to a reasonable adjustment, the failure to take a particular step or the taking of a particular step, was attributable to that lack of knowledge.

The reasonable adjustment duty provides that educational institutions are obliged to take reasonable steps to ensure that disabled persons are not placed at a substantial disadvantage in comparison with students who are not disabled either in relation to the arrangements made for determining admissions; or in relation to student services. There is no limit on the type of steps to be taken, although so far as the duty relates to auxiliary aids and services, it does not come into force until September 2003, and so far as it relates to altering physical features, it does not come into force until 2005.

A responsible body does not discriminate in taking or failing to take a particular step if it shows that it did not know and could not reasonably have been expected to know that the person was disabled and that the failure to take the step was attributable to that lack of knowledge (s.28S(3)).

This qualification, whilst ensuring that the anticipatory duty has some meaning in an enforcement context, does make the provisions somewhat confusing. In addition, less favourable treatment is justified if it is necessary in order to maintain academic or any other prescribed standards; or if it is of a prescribed kind and/or, occurs in prescribed circumstances (no regulations on this have been made to date); or if it is material to the circumstances of the particular case and substantial.

The Disability Rights Commission has issued Codes of Practice for both pre-16 and post-16 education duties, which are admissible as evidence and have to be taken into account when considering questions under the Act (s.53). These are available to download from the Disability Rights Commission website (www.drc-gb.org).

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Note on Transport and the Disability Discrimination Act

The issue of transport and disability has recently received significant press coverage as a direct result of the Disability Rights Commission's decision to issue proceedings against Ryanair under the Disability Discrimination Act (DDA). This was done because of Ryanair's practice of charging disabled people for the use of a wheelchair to get from the airline check in to the departure point. Transport has been the subject of little litigation so far because of the provision in s.19(5)(b) of the DDA which excludes "any service so far as it consists of the use of any means of transport" from the Part III (goods facilities and services) provisions of the Act. Whilst transport is excluded from the Act, the infrastructure, such as transport terminals, is covered, although there had not until recently been any court case brought to establish this.

This note highlights a case that has addressed this exemption and its impact upon cases that, although not dealing specifically with the transport vehicles, are nevertheless bound up in transport issues.

In the case of *Rimmer v British Airways PLC* (Great Grimsby County Court, Case No. GG100921), the court considered at length the transport exclusion. Mrs. Rimmer booked tickets for a flight to Barbados and informed the airline of her disability and indicated that she would need extra leg room on the aeroplane. British Airways, however, would not guarantee her requirement for extra leg-room and thus she cancelled the agreement and was given a refund of her ticket and insurance costs. Mrs. Rimmer brought a claim under the DDA alleging that the defendants had failed to take reasonable steps to change their policy practice or procedure in the allocation of seats, thus making it impossible for her to use their service. British Airways defended the proceedings on, amongst other grounds, the basis that the claimant's claim related to the use of a means of transport and was thus excluded from Part III, and made an application to strike out the claim on this basis.

The court held that the policy regarding allocation of seats on the plane fell within the transport exemption:

> "However narrowly the phrase "the use of any means of transport" is interpreted, it must include the allocation of seats… In this case the claimant raises a case based generally upon the booking facilities. However, a distinction must be drawn between a failure by the airport to make access to the booking facilities available to the disabled and a failure by the airline to take account of special requests when a disabled person books a service. The former circumstance, which does not arise in this case, could form the basis of a claim under the Act. The latter circumstances, which does arise in this case, cannot form the basis of a claim under the Act because it clearly relates to the use of the transport service an therefore falls within the exemption."

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Human Rights for transsexuals

Christine Goodwin v The United Kingdom
[2002] IRLR 664 ECtHR

Implications

This landmark case was concerned with domestic constraints on transgender people in relation to identification documents such as birth certificates, and the right to marry. For the first time it recognises the legal status of transsexuals and has ruled that UK law should treat the Applicant as a woman although she was born a biological male. The European Court of Human Rights (ECtHR) ruled that the UK was in breach of rights under Article 8 (the right to a family and private life) and Article 12 (the right to marry), thereby marking a definite and positive change in the attitude of the ECtHR to transsexuals.

Facts

G is a United Kingdom citizen born in 1937 as a man. In the mid-1960s, she was diagnosed as a transsexual. In January 1985 she commenced treatment and in 1990 she underwent gender re- assignment surgery at a National Health Service hospital.

She claimed to have been sexually harassed by colleagues at work between 1990 and 1992. She attempted to pursue a case of sexual harassment in the ET but she was unsuccessful because she was considered in law to be a man. In 1996 the applicant started work with a new employer and was required to provide her National Insurance ("NI") number. She was concerned that any new employer would be in a position to trace her details once in the possession of the number. Although she requested the allocation of a new NI number from the Department of Social Security ("DSS"), this was rejected.

Moreover the DSS Contributions Agency informed G that she would be ineligible for a State pension at the age of 60, the age of entitlement for women in the United Kingdom.

On 23 April 1997 she entered into an undertaking with the DSS to pay direct the NI contributions, which would otherwise be deducted by her employer as for all male employees.

G's files at the DSS were marked "sensitive" to ensure that only an employee of a particular grade had access to her files. This meant that the applicant had to make special appointments for even the most trivial matters and could not deal directly with the local office or deal with queries over the telephone.

European Court of Human Rights

The ECtHR considered the United Kingdom's actions were violations of G's rights under Article 8 (right to private life) and Article 12 (right to marry) of ECHR.

Under Article 8 the first determinative consideration was the changing standards in society across Europe. Yet despite the surgery G underwent to change from being born a male to living as a female, she was treated as a male for legal purposes. This had a continuing effect upon G's life where sex is of legal relevance as to for example, pensions and retirement age. The ECtHR rejected the United Kingdom's submission that it made due allowances for her difficulties, noting that this in itself called special attention to her status.

Although the Court recognised the difficulties and repercussions it held that there would be no substantial hardship or detriment to the public interest if there was a change of status for transsexuals. When reaching its view on the Article 8 point the Court said:

"… the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention".

In relation to Article 12, the Court was of the view that there had been major social changes in the institution of marriage and that a simple a test of biological factors was an inadequate basis for denying legal recognition to the gender of a post-operative transsexual. In the present climate, G's wish to marry a man could not be denied by the United Kingdom without infringing her Article 12 rights.

While it is for the Member State to determine the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected, the Court found no justification for barring the transsexual from enjoying the right to marry.

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Comment from Rachel Crasnow of Cloisters who assisted with the drafting of Liberty's amicus submissions in the *Goodwin* case

The implications of this case can scarcely be overestimated. Certainly the law will have to be changed so that transgender persons are permitted to change their birth certificates and acquire full legal recognition in their new gender.

These examples of how the judgment and the consequent right to change one's gender will affect life for transgender persons show the width of its effect:

- Now a transgender person can marry someone from the opposite sex to one's new gender;
- The age at which they will qualify for a pension must change;
- The provision of a new National Insurance number must be made; preventing discovering of the former gender identity;
- There will be a right to use single sex facilities including hospital wards and changing rooms appropriate to the new identity
- Such a person will be able to take a job that has a genuine occupational requirement for someone of his/her new gender (see *A v Chief Constable of the West Yorkshire Police*, Briefing no 228).

Discrimination against transgender persons will be unlawful as from the date of the judgment, even prior to anticipated new legislation wherever section 3 or section 6 of the Human Rights Act applies.

The *Sex Discrimination (Gender Reassignment) Regulations 1999* extended the provisions of the SDA to cover direct employment discrimination on grounds of transsexuality. However, for employment related discrimination the SDA must be interpreted consistently with the Equal Treatment Directive (see *P v S* [1996] IRLR 347), which prohibits both direct and indirect discrimination. Consequently the regulations are an inadequate implementation of the *P v S* and they should be amended to include indirect discrimination. After *Goodwin* it is also arguable that non-employment discrimination against transgender persons is now unlawful by virtue of the need to interpret the SDA consistently with the purpose of the Convention.

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ECtHR decision vindicates rights of workers under Article 11 of ECHR not to be treated less favourably for seeking union representation

Wilson and National Union of Journalists v United Kingdom; Palmer, Wyeth and National Union of Rail, Maritime and Transport Workers v United Kingdom; Doolan and others v United Kingdom

[2002] IRLR 568

Implications

This case represents an important decision for Trade Unions and their members as it recognises the collective dimension of the right to freedom of association and purpose of this right. The UK government was found to have failed in its duty to ensure freedom of association when it allowed employers to use financial incentives to induce employees to surrender their union rights.

The facts

The lead cases of W and P arose out a decision taken by their employers to de-recognise the trade unions to which they both belonged and with whom the employers had historically had collective bargaining arrangements. W and P were both offered incentives to persuade them to relinquish their rights to effective Trade Union representation and they both refused to do so. P and W complained to the ET that they had been subject to 'action short of dismissal' on grounds relating to their union membership contrary to the precursor to s.146(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

House of Lords

The HL concluded that the statutory precursor to s.146(1) (under which they brought their claims) could not be construed so as to penalise employers for 'omissions' rather than 'actions'. The HL determined that the absence of pay rises and other benefits in these cases amounted to omissions rather than actions. Similarly, the HL held that the *purpose* of the employers' conduct was not in fact to deter or penalise the Applicants on the grounds of their union membership. The HL concluded that any punitive impact upon the Applicants membership rights was merely incidental to the stated *purpose* of the employers' conduct: to remove any uncertainty arising out of the termination of collective bargaining and to smooth the transition from the house agreement to the handbook. The unwelcome consequence of this decision for collective labour law was that the actions of employers which had the effect of disadvantaging those who sought to make practical use of union membership could be taken with impunity as long as the employers' purpose was couched in neutral terms.

After the HL decision, TULR(C)A 1992 was amended in order to protect employees from being subjected to any detriment (including an omission) on the grounds of union membership. However, it remains the case that employers will not contravene the relevant legislation where their purpose is 'to further a change in his [their] relationship with all or any class of his [their] employees.[1]

European Court of Human Rights

Article 11 of the ECHR provides:

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

P and W and their Trade Unions argued before the ECtHR that two important aspects of their Article 11 rights were infringed:-

- they were denied the right to be represented by their unions in negotiations with the employer, and
- they stated that their employers had violated their rights not to be discriminated against for choosing to exercise the right to be represented.

P and W and their unions relied upon the conclusions of both the International Labour Organisation Committee on Freedom of Association and the Committee of Independent Experts under the European Social Charter that the right of union representation was inherent in the right to union membership.

P and W also complained that their Article 10 right to freedom of expression was unjustifiably curtailed and that there had been a breach of the non-discrimination provisions of Article 14.

The ECtHR found a breach of Article 11 and made awards of 7730 Euros to each Applicant and 122250 Euros to each trade union. Having found a breach of Article 11, the Court expressed no view on Articles 10 and 14. The Court made the following important findings:

- The United Kingdom had failed in its positive obligation to secure the enjoyment of rights under Article 11 by permitting employers to use financial incentives to induce employees to surrender important union rights. This amounted to a violation in respect of both the Applicants and their respective unions.
- The protection given by Article 11 necessarily involves the state giving trade unions the freedom to work for the protection of its members interests. Individual members have a right, in order to protect those interests, that that trade union should be heard. "It is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employers or to take action in support of their interests on their behalf. If workers are prevented from doing so, their freedom to belong to a trade union for the protection of their interests becomes illusory."[2]
- The UK failed to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.
- The fact that it is permissible under UK law to induce employees to relinquish their rights to union representation, where the aim and the outcome of the employers' conduct is to end collective bargaining and to reduce the authority of the union, amounts to:

(a) a disincentive or restraint on the use of union membership to protect the interests of individual members; and

(b) less favourable treatment of those employees not prepared to renounce a freedom which is an individual feature of union membership.

- The absence of an obligation on employers to enter into collective bargaining does not amount to a violation of Article 11 in light of other measures available to protect members interests (e.g. industrial action).

Comment

This decision is welcome because it shows the ECtHR's willingness to recognise that the right of freedom to associate is not merely an individual freedom. In the trade union context perhaps more than any other, it is in essence a right to collective and/or corporate action. The decision re-affirms the principle that a right to protection from discrimination on the grounds of trade union membership would be threadbare if it offered workers protection only against detriment by reason of the *fact* of union membership. It properly extends the protection to cover all of those actions which constitute the 'outward and visible manifestation of membership'[3] such as the right to representation and advice. In addition, the Court's clear statement that employers should not be allowed to erode Article 11 rights by stating that their purpose was otherwise will doubtless necessitate the amendment of s.148(3) TULR(C)A in order to prevent employers from relying on such a defence.

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1 Section 148(3) TULR(C)A as amended by TURERA 1993.

2 [2002] IRLR p575.

3 See Discount Tobacco v Armitage [1994] ICR 97

Court of Appeal Guidance on ET decisions alleged to be perverse

Yeboah v Crofton [2002] IRLR 634 EWCA

The Court of Appeal have now given judgment in this case which was, as far as we are aware, the longest case heard by the ET and then by the EAT.

Facts

Y was the Assistant Chief Executive (Human Resources) of the London Borough of Hackney (LBH). C was its Director of Housing. Commencing in 1994 Y presented six Originating Applications, five against C and LBH and one against LBH alone, complaining of race discrimination.

Y complained that C made persistent and untrue allegations against him of fraud, corruption and otherwise dishonest conduct and had caused him to become subject to a police investigation. Y contended that C had made those allegations on no basis other than the fact that he is West African. Eventually Y resigned and made a complaint of both unfair dismissal and race discrimination against LBH only.

Employment Tribunal

The ET found that in respect of the first three of Y's complaints C had racially discriminated against Y but that LBH had not. LBH succeeded in defending these claims by relying on the defence available to them under s32(3) of the Race Relations Act 1976, namely that they had taken all reasonably practicable steps to stop C discriminating against Y. C therefore was left solely liable for the first three complaints. LBH were found to have discriminated against Y in respect of his dismissal and to have unfairly dismissed him. LBH settled the remedies claim against them for £380,000. The ET ordered that C pay to Y compensation in the sum of £45,000 (including £10,000 in aggravated damages) in respect of the three complaints for which he was found solely liable.C appealed to the EAT.

Employment Appeal Tribunal

C's appeal to the EAT largely rested upon complaints of 'perversity'. The EAT heard the appeal over ten days during which both parties were unrepresented. The EAT concluded that the ET's decisions were perverse in that no reasonable tribunal properly directing themselves could have reached the decisions that they did. The EAT then remitted the cases back to the ET for a re hearing before a freshly constituted tribunal.

Court of Appeal

Y appealed to the Court of Appeal (CA). The CA allowed Y's appeal and reinstated the decisions. In so doing they made the following observations:

1. That the ET was entitled to find C solely liable for the acts of discrimination in circumstances where LBH had made out the statutory defence. In such circumstances the ET were entitled to hold that C had 'knowingly aided' within the meaning of s33(1) (and s 33(2)) of the Race Relations Act 1976 and C was accordingly personally liable.
2. That the EAT were wrong to allow C's appeals against the decisions of the ET because the conclusions in each case were permissible options.
3. That the function of the CA when hearing an appeal in relation to a decision challenged on a second appeal is to review the proceedings in, and the decision of, the ET in order to determine whether a question of law arises from them. If the ET conducted the proceedings and delivered decisions in accordance with the law, no questions of law would arise for correction by the CA: neither the EAT nor the CA would be entitled to interfere with the original decisions, even if they concluded that they might have conducted and decided the cases differently. It is not the function of the CA to review the decision of the EAT to determine whether an error of law arises (except for the purposes of determining whether they were

entitled to interfere in the decision of the ET).

4. That where the principal ground of appeal was perversity there is an increased risk that the appellate body's close examination of the evidence and of the findings of fact by the ET may lead it to substitute its own assessment of the evidence and to overturn findings of fact made by the ET. Only the ET hears all the evidence first hand. The evidence available to the EAT and to the CA on an appeal on a question of law is always seriously and incurably incomplete. Much as one, or sometimes both, of the parties would like it to be so, an appeal from an ET is not a re-trial of the case. The scope of the appeal is limited to consideration of questions of law, which it is claimed arise on the conduct of the proceedings and the decision of the ET.
5. That where there is reliance on perversity the grounds of appeal must always be fully particularized.
6. That the ET did not err in relation to the burden of proof. The ET correctly approached the claims as ones in which the burden of proof lay on Y. In these cases the acts of race discrimination took the unusual form of defamatory accusations, the truth of which was hotly disputed. Y said that they were untrue and C said that his accusations were true, that he believed them to be true and that they could be proved to be true. C contended that, as the burden of proving race discrimination was on Y it was for Y to prove that C's accusations were untrue, that they were falsely advanced and that their truth was not the real reason for making them; and that the ET had wrongly reversed the burden and placed on him (C) the burden of proving that his accusations against Y were true. However, C's arguments were wrong. In principle the onus of proving a fact is on the person who asserts it. Thus, in an action for defamation, if the defendant pleads justification, it is for him to prove that the words used are true. It is not for the claimant to prove that they are untrue.
7. That the ET did not err in the procedural directions it gave. The ET has a wide discretion which includes decisions on the order in which witnesses are called, the exclusion of oral evidence or documents. The discretion was broad and an appeal court is entitled to interfere only on limited grounds such as that there was an error of principle or that the exercise of the discretion was plainly wrong.

Comment

This case is important for a number of reasons. It is a reminder that the EAT has a limited jurisdiction. However tempting it is, the EAT has no jurisdiction to interfere with the factual findings of an ET unless they are truly perverse. Establishing perversity so as to justify an interference with the factual findings is and should be extremely difficult. In any case full particulars must be given of such grounds and the simple assertion 'the findings were perverse/one which no reasonable tribunal could have come to' is utterly inadequate. Further, the CA hold that the old rule 9 (now rule 11 of the 2001 rules) power to regulate its own procedure gives a tribunal very wide discretion to manage both the proceedings and indeed the evidence and that the exercise of such discretion might only be interfered with on appeal on the narrowest grounds.

The CA also identify the limits of the burden of proof – the burden does not extend to rebutting every assertion a respondent may wish to rely upon. A respondent who asserts a positive case in defence (the applicant was dishonest/incompetent etc) carries the burden of proving it.

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Liability of NHS for discriminatory acts

Ahmed Hussain v King's College Hospital NHS Trust
[2002] EWCA Civ 1269 (unreported)

Implications

A doctor who was not appointed to a training post in a National Health Service hospital was entitled to pursue a complaint under s.4 Race Relations Act 1976 against the hospital trust even though the decision on appointments had been taken by a postgraduate dean as agent for the Secretary of State for Health.

Facts

H, a doctor, applied for a training post in Kings College Hospital NHS Trust (KCH). H had been employed by KCH as a senior registrar for a number of years. He left but reapplied to return to KCH when some vacant training posts arose. He was not appointed to any of the posts and alleged that he had been a victim of race discrimination. The decision on recruitment had been taken by the Postgraduate Deanery, the body responsible for the training of junior doctors, but KCH had been consulted and had made representations that H should not be allowed to return to the hospital. D complained that the postgraduate dean did not appoint him to one of the posts because of representations made to him by KCH's senior employees. A specialist training committee ('STC') convened to discuss D's training recommended to the dean that H be placed at a different hospital with intensified supervision. He was not appointed to any of the vacant training posts. He applied to the ET alleging that the hospital was in breach of s4 of the RRA. The ET refused to allow him to amend his application to include a claim under s13 of the RRA and decided that H was not entitled to pursue a complaint against KCH as s.4 of the Act did not apply to this case because the decision complained of was taken by the dean so would fall within s.13 of the Act. H's complaint lay against the postgraduate dean.

Employment Appeal Tribunal

The EAT allowed H's appeal, permitted him to pursue a complaint under s.4 Race Relations Act 1976 and to amend his claim to plead s.13 of the Act. The EAT concluded that the tribunal's decision was wrong. This case turned on the construction of ss.4(1)(a) and (c) of the Act. The employment of trainees in the National Health Service was a unique arrangement and should not be dismembered in the way that KCH had argued for. In general, a postgraduate dean would not foist a placement on a hospital when faced with strong representations from that institution against an applicant. In those circumstances the tribunal reached a legally erroneous decision when it concluded that D was not entitled to pursue his complaint against KCH under s.4 of the Act. As the ET might have taken too much account of the fact that the application to amend was made out of time and virtually no account was made of the fact that the amendment was based on facts which were already pleaded H was permitted to amend his case to include a claim under s.13.

Court of Appeal

The CA decided that Section 4(1)(a) of the Act applied in this case. The word "arrangements" in that section did not mean only the overall scheme created by the Secretary of State for Health. KCH as the employer influenced the scheme to determine which doctors would be appointed and made arrangements for that purpose, including appointing employees to the STC and making representations to the STC. The arrangements fell within the scope of arrangements by an employer for the purposes of s.4(1)(a) of the Act (see *Nagarajan v London Regional Transport* (2000) 1 AC 501). Since s.4(1)(a) applied to this case, s.13 could not also apply by virtue of s.13(2). In any event, given its broad discretion, the ET had been entitled to refuse the application to amend to include a s.13 allegation. To this extent the Appeal was allowed.

Gay Moon
Editor

Justification after the event in DDA cases

Quinn v Schwarzkopf Ltd.
[2002] IRLR 602, Court of Session

Facts

Q was employed as a travelling salesman by S. He became ill and went on sick leave. His illness was later diagnosed as a form of rheumatoid arthritis. He was dismissed on grounds of incapacity. He brought a claim in the ET, part of which related to disability discrimination, including failure to comply with the section 6 duty to make reasonable adjustments.

Employment Tribunal

The ET found that Q was, in fact, disabled within the meaning of the DDA. The employer's position was that it did not know he was disabled at the time and, therefore, had not considered making reasonable adjustments. S maintained that they were justified as there were, in fact, no adjustments they could have made, even if they had considered them.

The ET agreed with S and held that there was no practical way of restructuring their system of operation, nor were there any alternative positions available which might have been filled by Q. The ET concluded that the failure of the employer to comply with its section 6 duty was justified. The reason for the failure was both material to the circumstances of the case and substantial (s5(4) DDA). Q's claim of disability discrimination was dismissed.

Employment Appeal Tribunal

The Scottish EAT (Lord Johnston presiding) held that the issue of justification does not arise at all in circumstances where the employer had disputed disability in the first place:

'We do not consider that the [DDA] contemplates attempts by employers on a hypothetical basis to justify an act subsequently held to be discriminatory which they did not at the time consider to be such, because they were unaware of the existence of disability, upon the ultimate aim of seeking to establish that there was nothing in fact they could have done, a situation not unlike the exercise which is sometimes undertaken in redundancy cases where the employer seeks to maintain that, even though he failed to consult, a consultation would not have made any difference. We do not consider that approach as appropriate in the context of this legislation where the issue of disability… is disputed as a matter of fact in the mind of the employer. The situation would be different if, being aware of the disability, the employer did nothing because he considered there was nothing that could reasonably be done.'

The EAT allowed the appeal and substituted its own finding that Q had been discriminated against. The EAT decision is reported at [2001] IRLR 67. S appealed the decision.

Court of Session

At the outset of the appeal to the CS, Q conceded that the EAT had misdirected itself in holding that an employer cannot discharge the onus of justifying discrimination under the DDA where, during the currency of employment, it did not apply its mind to what should be done because it was ignorant of the disability. This concession was noted by the CS in its judgment at para 5.

Q pursued the appeal against the original ET decision on three other grounds, but the Court of Session dismissed all three and restored the decision of the ET.

Implications

Strictly speaking, this case does not resolve the question of whether a failure to make reasonable adjustments can be justified after the event when, at the time, adjustments were not considered: the point was conceded at the outset of the appeal; the CS did not hear argument on it and did not rule or even comment on it. However, Q's concession undoubtedly reflects the reality of the situation, seen against the background of other EAT authorities handed down over the last two years.

Judgment was delivered in Quinn by the Scottish

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EAT in September 2000. Less than a month later, a division of the English EAT came to the opposite conclusion. In *British Gas Services Ltd. v McCaull* [2001]. Keene J. concluded: that it is not necessary for an employer to have considered what steps, if any, he should take regarding his duty to make reasonable adjustments in order to comply with it; there is nothing in the DDA to prevent an employer arguing after the event that the test of reasonableness has been met; however, he may face evidential difficulties in showing he has complied.

The following year, in *Bradley v Greater Manchester Fire and Civil Defence Authority*, EAT 29th March 2001, unreported, HHJ Peter Clark reviewed the earlier cases and prefered McCaull to Quinn (in the EAT):

'In our view it was open to the [employer] to prove, after the event, that consultation with the [employee] would not have led to any further adjustments, nor would a search for alternative employment have assisted the [employee] to remain in the employment. They were not thereby debarred from relying on the justification defence …'

However, the case which is probably fatal to any attempt to prevent an employer relying on justification thought up after the event is *Callagan v Glasgow City Council* [2001] IRLR 724. This is another decision of Lord Johnston in the Scottish EAT from August 2001. He has this to say of his earlier views;

'In so far as this tribunal may have suggested in Quinn that justification can never occur if the employer is ignorant of the fact of disability at the relevant time, that goes too far… Obviously the fact the employer did not know that disability exists might affect the justification issue but does not preclude it… What matters is to analyse the treatment meted out by the employer.'

It seems that the question is closed – at least for the time being.

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Briefing 262

Drawing inferences in DDA cases

Rowden v Dutton Gregory Solicitors

[2002] ICR 971 EAT

Facts

R had been employed by Dutton Gregory Solicitors ('DGS') as a secretary for over five years. In the period leading up to her dismissal she had periods of time off through illness. She was dismissed in May 1999. The letter of dismissal included specific reference to 'consistent poor time-keeping' and 'excessive sick leave'. However, it also referred to a variety of other matters ('sabotaging a colleague's typing … abuse of the smoking privilege').

R issued proceedings for unfair dismissal and disability discrimination (failure to make reasonable adjustments, contrary to s.5(2) and s.6 DDA, and less favourable treatment, contrary to s.5(1) DDA). The disability she relied on was depression.

R maintained that DGS had failed to implement its disciplinary procedure or properly to investigate matters. The disciplinary hearing was held in R's absence, she being too unwell too attend. In the IT3, DGS gave the reason for dismissal as follows: 'her cumulative behaviour was such that it could amount to nothing less than gross misconduct'. Disability discrimination was denied.

Employment Tribunal

At the ET, DGS conceded that R was disabled and conceded that the dismissal was procedurally and substantively unfair.

DGS argued that it could not be liable for any failure to make reasonable adjustments because it did not know she was disabled at the time. S.6(6) provides that no duty to make reasonable adjustment arises

unless the employer 'does not know or could not reasonably be expected to know' that the employee has a disability. The ET, however, held DGS had sufficient knowledge of R's condition at the time but closed its mind to R's illness and, in consequence, her disability. Therefore a duty did arise and DGS had failed to make even the most elementary of adjustments. It should have adjourned the disciplinary hearing until R was fit enough to attend and address the allegations against her.

As for less favourable treatment, DGS argued that the dismissal was not 'for a reason which relates to [R's] disability' (s.5(1)(a) DDA). It sought to explain the dismissal by reference to six grounds. The ET did **not** accept the employer's explanations. Nonetheless, it held that:

'the dismissal of the Applicant … [was] not related to her disability but to other matters referred to in the letter of dismissal.'

Employment Appeal Tribunal

In a race discrimination case, where less favourable treatment is found, the ET will look to the employer to show that the less favourable treatment was not 'on racial grounds' (s.1(1)(a) RRA). If no explanation for the less favourable treatment is then put forward, or if the ET considers the explanation to be inadequate or unsatisfactory, the ET may infer that the discrimination was on racial grounds (*King v Great Britain-China Centre* [1991] IRLR 513). (The position in a sex discrimination case is different since the coming into force of the 2001 Burden of Proof Regulations: where no satisfactory explanation is provided the Tribunal must, rather than may, infer that the treatment was on grounds of sex (s.63A SDA)).

The EAT considered whether *King* applies equally in cases under the DDA:

'without our attempting to rank racial discrimination and disability discrimination in some order of moral turpitude they are now equally offensive under the law and the likelihood of an admission by a discriminator offending the 1995 Act is hardly greater than in race cases. Direct evidence of disability discrimination can be quite as unusual to find as that of race or sex discrimination. As was said in *King* at paragraph 38 (2):-

"In some cases the discrimination will not be ill-intentioned but merely based on an assumption "he or she would not have fitted in".

So, as in race cases, the outcome will often depend on the propriety of drawing inferences from primary facts. Just as a finding of a difference of race, usually a plain enough issue, can lead to the employer being looked to for an explanation, so also a finding of a disability coupled with something that could be discrimination should, in our view, equally lead to the employer being asked to explain himself.'

The EAT was puzzled by the ET's finding that the dismissal was not 'for a reason related to R's disability':

*'the position surely was that an unsatisfactory explanation had been given by the employer for an act – the dismissal – that **could** amount to disability discrimination … if* King*, as we think it should, provides some analogy, it was thus open to the Tribunal to infer disability discrimination. Further, of the 6 grounds the firm had relied on, two (poor time-keeping and excessive sick leave) plainly **could** have been related to Mrs. Rowden's disability.'*

The finding that the dismissal was not related to R's disability amounted to an error of law. It failed to recognise that the ET might have drawn inferences from the lack of merit in the firm's explanation and it failed to explain why two of the grounds, which could have been related to the disability, were held not, in fact, to relate to it.

'S.5(1) DDA does not require that the reason which relates to the person's disability has to be the only reason for the less favourable treatment so long as it has a significant influence on the outcome – adopting, by analogy, Nagarajan v London Regional Transport *[1999] IRLR 572.'*

The case was remitted to the same ET for re-hearing on the question of liability under s.5(1) DDA.

The EAT also considered the meaning of the phrase 'which relates to the disability' in the context of less favourable treatment by comparison with 'on the ground of her of sex' (SDA), 'on racial grounds' (RRA) and 'by reason that' a protected act has been done (victimisation under all three Acts):

'whilst everything done "on the ground" of the disability or by reason of it would inescapably fall within that phrase, the need for the reason merely "to relate to" the disability can only, in our view, be wider and more inclusive than the use of the 1975 and 1976 Act models would have suggested. The Court of Appeal has already commented on the dangers of approaching the 1995 Act

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upon the basis of assumptions and concepts derived from the earlier Acts – see Clark v Novacold *[1999] IRLR 318 at paras 30 and 91 – and we shall adopt as permitted a width to the expression "which relates to" which is inclusive of causative links beyond those which would fall within "on the ground of disability" or "by reason of" the disability.'*

Implications

The case is important in that it provides guidance on causation under the DDA (in the passage set immediately above) and confirms the application to the DDA of familiar cases under the RRA, *King* and *Nagarajan*.

In most cases, establishing whether less favourable treatment is 'for a reason which relates to the disability' will be straightforward. Where there is a dismissal (less favourable treatment) for long-term absence, for example, there will usually be an unambiguous connection between the absence and the disability.

There will, however, be cases where the connection between the less favourable treatment and the disability is less clear-cut, for example, where the treatment alleged is a refusal to promote the employee. Less favourable treatment is likely to be conceded by the employer. He may say: 'no we did not promote the applicant, but it was nothing to do with her disability, it was because of her performance.' The ET should look to the employer to show that those performance concerns are genuine and were, in fact, the reason for the decision. If it is not satisfied that they are, the ET should consider drawing an inference that the failure to promote was 'for a reason which relates to the disability.' If it decides not to draw such an inference, it must give reasons why. If it concludes that there were genuine performance issues, but that disability had a 'significant influence' on the failure to promote, it must find the failure to be discriminatory.

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Briefing 263

Aggravated damages for excessive defence

Zaiwalla & Co and T Hodsdon v Walia

EAT 24.7. 02 Times Law Report

Facts

In December 1998 W was employed as a paralegal on a short fixed term contract by Z, a firm of solicitors, in anticipation of being given a training contract with them. On February 24th 1999 she was unceremoniously dismissed and she brought a case of unfair sex discrimination and breach of contract against Z and their office manager, H.

Employment Tribunal

The ET concluded that Z had discriminated against her by:

- failing to expose her to substantial legal work,
- failing to give her adequate work under supervision to appraise her suitability for a training contract,
- failing to have an Equal Opportunities Policy in place and failing to take reasonable steps to enforce such a policy,
- failing to prevent H from bullying and intimidating her,
- failing to take reasonable steps to prevent male employees from treating her in a demeaning and discriminating manner,
- failing to carry out a proper or adequate appraisal of her suitability for a training contract and in its notification to her that she would not be offered a training contract.

Additionally they found that H had discriminated against and sexually harassed W by consistently treating her differently from her male comparator and by

subjecting her to intimidatory, hectoring and bullying behaviour with the intention of making her feel vulnerable and nervous and of undermining her. He also discriminated against her on the grounds of her sex by his part in the decision to refuse her a training contract. Z was vicariously liable for H's actions.

There were implied terms in W's contract of employment to the effect that a proper, adequate and fair method of appraisal would be applied to decide whether or not to offer her a training contract and further that she would be given substantial legal work to carry out. Z were in breach of contract in that no proper, adequate or fair method of appraisal was applied to decide whether or not to offer her a training contract.

The ET awarded her £18,696.25 in respect of loss of earnings, £15,000 for injury to her feelings, £7,500 aggravated damages and £1,952.88 interest. In awarding her aggravated damages the ET said:

"When she took Tribunal proceedings a monumental amount of effort was put into defending those proceedings. That exercise was of the most inappropriate kind, attacking the Applicant in relation to her personal standards of professional conduct and holding a series of threats over her head which would be daunting to any individual let alone to someone about to embark on a legal career having difficulty obtaining a training contract. The defence of these proceedings was deliberately designed by the Respondents to be intimidatory and cause the maximum unease and distress to the Applicant. There is no other way of describing it."

Z appealed against the ET decision arguing that the decision was perverse and that the remedies awards were incorrect.

Employment Appeal Tribunal

The EAT, having referred to the case of *Yeboah v Crofton* (see Briefing no 259), concluded that this case came nowhere near the standard needed to succeed in the allegation of perversity.

The EAT then looked at the question of remedies. They confirmed the loss of earnings award and reduced the injury to feelings award to £10,000. Z argued that aggravated damages cannot be awarded for the way in which a respondent has conducted the proceedings. The EAT dismissed this argument saying:-

"there is no reason in law why aggravated damages should not be awarded by reference to conduct in the defence of proceedings in a discrimination case such as the present case…If a respondent misconducts himself in the defence of a discrimination case, it may amount to victimisation of the applicant in respect of the protected act of bringing the claim."

The EAT confirmed the award of £7,500 for aggravated damages.

Comment

All parties to cases, as well as their advocates, need to be conscious that litigation should not be conducted in an intimidatory manner. This judgement is a welcome recognition that awards of aggravated damages can be made in respect of the inappropriate conduct of a respondent in the defence of proceedings.

Gay Moon
Editor

Failure to carry out risk assessments in relation to pregnant workers amounts to automatic sex discrimination

Hardman v Mallon t/a Orchard Lodge Nursing Home
[2002] IRLR 516

Facts

H was employed as a care assistant in a home for elderly frail women and her job involved the lifting of residents. In November 1999, she informed her employer that she was pregnant. In March 2000, she bought to her employer's attention the need for a risk assessment. She produced a medical certificate stating that she needed to avoid heavy lifting and in response her employer's offered her only a cleaner's job. H considered that the cleaner's job was less favourable than her existing job and refused the offer. H claimed that she had the right under the ERA to suspension on full pay therefore she made a complaint to the ET.

Employment Tribunal

The ET upheld H's claim under the ERA on the basis that the Management of Health and Safety Regulations required a risk assessment that, in H's case, was never carried out. However, the ET dismissed H's complaint of sex discrimination on pregnancy grounds. The ET concluded that H had not suffered a detriment under the SDA because she was not treated less favourably than a man or a non-pregnant woman in that the employer would not have carried out a risk assessment for either of those classes of person. The ET stated: "What, it appeared to us, we were being asked to do was to widen the definition of discrimination to encompass a failure of an employer to treat a woman *more* favourably than a man."

Regulation 3 of the Management of Health and Safety Regulations 1999 provides that:-

"Every employer shall make a suitable and sufficient assessment of … the risks to the health and safety of his employees to which they are exposed whilst they are at work …".

Regulation 16 imposes a specific obligation to carry out risk assessment in respect of women of child-bearing age. It also provides that where a new or expectant mother has notified the employer in writing that she is pregnant, has given birth or is breastfeeding, and the employer cannot avoid a risk to health and safety, the employer "shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work." If it is not reasonable to alter her working conditions or hours of work, or if that would not avoid the risk, the employer must suspend the employee from work in accordance with the statutory provisions relating to medical suspension (found in the ERA ss 67 and 70).

Employment Appeal Tribunal

The EAT allowed the appeal and remitted the case to the ET for the assessment of compensation. In so doing the EAT held as follows:

1. The ET was wrong to find that H was not discriminated against on grounds of sex when her employer failed to carry out a risk assessment when she was pregnant. The ET was wrong to conclude that H was not treated less favourably than her employer treated or would treat a man because the employer had not produced risk assessments in respect of any of its employees regardless of their sex.
2. A failure to carry out a risk assessment in respect of a pregnant woman, as required by the Management of Health and Safety Regulations, is sex discrimination. Carrying out a risk assessment is one way in which a woman's biological condition during and after pregnancy is given special protection. Interpreting the SDA by reference to the Equal Treatment Directive 76/207/EEC and the Pregnant Workers Directive 92/85/EEC, it is not necessary for the treatment of a pregnant woman to be compared with the employer's treatment of a comparable male employee, or a non-pregnant female employee. If the basis of the treatment is pregnancy, it is unlawful irrespective of the comparable treatment of men.

Implications

The apparent rationale of the decision of the ET in this case is one that has long been disapplied to those

categories of case in which the treatment complained of is self-evidently gender-specific. Since *Webb v EMO Air Cargo (UK)* Ltd (No.2) [1995] IRLR 645, the legal position in respect of pregnancy discrimination has been that there is no requirement for a comparator where the treatment in question was given to a worker on the grounds of her pregnancy. Such treatment of a pregnant woman (i.e. a woman whose circumstances are incomparably sex-specific) is sex discrimination. In contrast, the ET found that as long as the employer treated non-pregnant woman and men equally badly (i.e. by denying them a risk assessment as well), it could avail itself a defence to a claim in sex discrimination made by a pregnant woman. The consequence of such reasoning would have been to undermine the protections afforded pregnant women by the Regulations and the SDA. The EAT applied *Webb* and followed the decision of *Day v T Pickles Farms Ltd* [1999] IRLR 217 which held that a failure to carry out a risk assessment upon a woman of child bearing age (in respect of whom the obligation arises) might constitute a detriment and amount to sex discrimination.

Comment

This case restates the special position of pregnant women in discrimination law. As the EAT make clear, it is not merely adverse treatment based on pregnancy that might be unlawful sex discrimination but also adverse treatment *related* to pregnancy (this contrasts with the position in race discrimination law where the presence of race-specific circumstances does not by itself make the treatment complained of race discrimination: Briefing no 181, *Sidhu v Aerospace Composite Technology* [2000] IRLR 602).

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Briefing 265

Upper age limit for redundancy and unfair dismissal protection indirectly discriminatory

Rutherford and Bentley v Towncircle Limited (trading as Harvest) (in liquidation) and the Secretary of State for Trade and Industry

Stratford Employment Tribunal Case Ref Nos: 3203345/98 and 2200740/01 22 August 2002

Implications for practitioners

The case has massive implications for those workers dismissed or made redundant over the age of 65. Where there is no "normal retirement age" and the statutory limit of 65 therefore applies, workers over 65 may still be able to claim unfair dismissal or redundancy compensation despite the statutory "bar" on these claims. Although only an ET case, the case follows the earlier guidance provided by the EAT in R's case, see: Briefing no 227 *Harvest Town Circle v Rutherford* [2001] IRLR 599. The government has recently indicated that they will appeal. Cases in the ET for those over 65 and subject to the statutory "bar" will probably be stayed pending the outcome of the appeal, but practitioners should still lodge claims within the time limits.

The facts

R was employed as a pattern cutter by T until dismissed as redundant. SB was employed as a warehouse assistant and tailor by Bodner Elem Limited until he was dismissed on Administrative Receivers being appointed. Both R and B claimed compensation for redundancy, and the former claimed compensation for unfair dismissal. Both workers would have qualified for protection from unfair dismissal and redundancy, but they were over 65 at the time of their dismissal and there was no normal retirement age that applied to them. The "default" normal retiring age of 65 therefore applied and sections 109 and 156 of the ERA would normally have barred the workers' claims. However, the upper age limits were challenged by the workers as being indirectly sexually discriminatory contrary to

Article 141 of the European Treaty, and not justified by objective measures unrelated to the discrimination on the grounds of sex. If the workers were correct, then it was the ET's duty to disapply them and allow the workers' claims to proceed.

Summary of decision

The ET compared a wide range of statistics relating to men and women working, seeking work or wanting to work over a variety of different age bands, including from 55 to 64 and 65 to 74 years of age and over a variety of different years. The tribunal concluded that in both 1998 and 2001 (the respective years of dismissal for each of the workers), the relevant legislative measures disadvantaged a substantially higher proportion of males than females. The measures were therefore indirectly discriminatory unless objectively justified.

The ET then went on to consider the objective justifications put forward by the SS. The ET carefully investigated the legislative history of both provisions. The ET noted that both the sections under attack were the result of policies inextricably linked to the State Pension Age (which has itself been held to be discriminatory). The ET concluded that the justification for the two provisions was therefore tainted with sex discrimination. The provisions could not therefore be objectively justified in accordance with Article 141 of the EC Treaty.

For these reasons, R and B's claims were allowed to proceed.

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Notes and news

Training and seminars

The Disability Rights Commission are holding a seminar to consider **the implications for disability rights of a Single Equality Act**. The keynote speaker will be Professor Barry Fitzpatrick, who is Director of Legal Services at the Northern Ireland Equality Commission, and who has done a considerable amount of work on a single equality act in the Northern Ireland context.
This free seminar will be held on:
21st October – 1pm to 5pm, at Sadlers Wells.
Please contact Tracy Gleeson, DRC, 0207 211 4085 for further details.

The Disability Rights Commission 2002 National Conference **Achieving Aspirations – Improving Young People's Choices** will be held on Monday November 11th at the Radisson SAS Hotel, Manchester. For further details contact – Disability Rights Commission, Marketing Department, Arndale House, Arndale Centre, Manchester, M4 3AQ.
Tel: 0161 261 1818.

Parents Rights at Work: the 2003 Agenda – this major conference will be held on:
Wednesday November 6th at Simmons and Simmons, One Ropemaker Street, London EC2Y 9SS. For further details and booking forms contact Claire Green at Parents at Work, 0207 628 3565 or
e mail seminar@parentsatwork.org.uk

New books by Discrimination Law Association members

This Autumn sees the publication of two new books by members of the DLA:-
The Discrimination Law Handbook by Camilla Palmer, Tess Gill, Karon Monaghan, Gay Moon and Mary Stacey. Published by LAG at £45.00, and
Employment Law and Human Rights by Robin Allen and Rachel Crasnow. Published by Oxford University Press at £39.95.
Both these books will be reviewed in the next edition of *Briefings*.

Court of Appeal's decision in Liversidge v Chief Constable of Bedfordshire Police

Rhodri McDonald of the EOC writes

The recent decision in Liversidge ruled that the wording of the RRA (pre-amendment) meant that the Chief Constable was not vicariously liable for discriminatory acts of one constable against another. Although the RRA has been amended to "correct" this, the SDA incorporates wording which is more or less identical to the pre amendment RRA. The EOC is aware that there are a number of applicants who have cases against the Police where this issue has or is likely to be raised. The EOC would be very grateful to hear from any representatives of such applicants so that an attempt can be made to co-ordinate the approach to this issue.

Please would any such representatives to email me at:- rhodri.mcdonald@eoc.org.uk

It will be useful if representatives could indicate the title of their case; which tribunal is hearing the case; the stage the case has reached; whether the "Liversidge" point has been raised and, if so, how it is being dealt with (I am aware that in some cases tribunals have stayed the cases pending the outcome of Liversidge whereas other applicants are facing applications to strike out their claims).

County Court awards damages for racist behaviour

Bristol County Court awarded damaged for victimisation under the RRA against the Higashi Karate Kai association for wrongly disciplining two black members. The members had complained to the executive committee of HKK, alleging that the chairman and another member of the committee had made racist comments about other fighters, referring to them as 'black bastards'. They copied their complaint to the CRE, the local Racial Equality Council, Bristol Law Centre and one of the sport's governing bodies. The executive committee dismissed the complaints but accepted that they were made in good faith. However, following subsequent complaints by the alleged discriminators, the committee expelled Mr. Russell from HKK for bringing it into disrepute by copying their complaints to outside bodies. Mr. Williams, whose membership had lapsed, was barred from rejoining. Their complaints of victimisation succeeded in the county court. The judge, sitting with two lay assessors, found that the fact that the allegations were about racism had affected the way HKK had dealt with them. They were awarded £4,500 and £5,000 compensation for injury to feelings.

New report on the effect of harassment

Picking up the Pieces – how organisations manage the aftermath of harassment complaints, this new report from the Wainwright Trust examines what employers actually do and what they could do to prevent and deal with harassment in the workplace. The report is based on research done by DLA member Dr Jeanne Gregory, Professor of Gender Studies at Middlesex University. It details the experiences of employers in both the public and private sectors and the lessons that they have learnt. The Guidance for Employers chapter suggests what employers should do: before – to avoid harassment complaints arising, during – if a claim is made, and afterwards – both to deal with the specific problems arising from the case and to avoid similar problems in future.

It is available at £25 from **David Bell, Secretary, The Wainwright Trust, Town Farm House, Mill End, Standon, Ware, Herts, SG11 1LP. 01920 821698.** www.wainwrighttrust.org.uk

News about the EOC'S new website for Legal Advisers

The EOC has launched a new website for Legal Advisers at www.eoc-law.org.uk.

The site aims to provide easy access to up to date information which will be of practical use to representatives of applicants with sex discrimination or equal pay claims.

Contents of the site

The site will provide information on the 5 issues that continue to be the most common causes of complaint to the EOC. The first section – on sexual harassment – is available now. This is supported by a Legal Framework section containing background legal information, such as the relevant domestic and European legislation and how to further research the law.

Date for further sections

The 4 further issues will be added as follows:

Issue	Date to be added
Equal pay	December 2002
Recruitment and selection	May 2003
Maternity and parental rights	February 2003
Family friendly hours	January 2003

Site resources

The site resources will include a database of expert witnesses, glossary, bibliography, useful links and a What's New section. The text is supported by checklists, statistics, model pleadings, useful arguments and case summaries of the leading cases.

There is a **search facility** at the top of the home page. This enables a search of all the information on the site by topic e.g. time limits or transsexuals, or by the name of a case, or by simply using the wording from the Sex Discrimination Act or Equal Pay Act.

Feedback

The EOC is particularly interested in receiving feedback on the contents from discrimination practitioners including:

- any requests for more specific information or topics to be covered.
- any aspects which you feel could benefit from clarification.
- any cases or practical points within your knowledge which would add to the material on-line.

The database of expert witnesses has yet to be compiled and the EOC will be shortly be circulating DLA members seeking recommendations for experts to be included in the database.

Accessing the site

Although there is a link to the site from the EOC's main site at **www.eoc.org.uk**, it will be easier to gain access by saving the address **www.eoc-law.org.uk** into your Favourites.

New Equality Bill

On July 30th 2002 a new draft Equality Bill was launched for public consultation. It has been drafted by Stephanie Grundy and Professor Bob Hepple QC together with the Odysseus Trust. The draft Bill together with the Explanatory Notes are available at **www.odysseustrust.org.uk** and Lord Lester is going to introduce the Bill to the House of Lords later in the Autumn.

This new Equality Bill has been drafted to create a single body of law to provide a unified legal framework to eliminate unlawful discrimination and to promote equality regardless of racial or ethnic origin, religion or belief, sex, marital or family status, sexual orientation, gender reassignment, age or disability. There is an undoubted need for such a Bill to replace the currently fragmented, inconsistent and unsatisfactory statutory provisions.

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

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

Membership will be of particular benefit to you if you 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, please get in touch with the Administrator, Mary Copsey, by e-mail to info@discrimination-law.org.uk, or by writing to her c/o Discrimination Law Association, PO Box 36054, London, SW16 1WF. The Discrimination Law Association is a Company Limited by Guarantee number 3862592 registered in England & Wales.

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