Discrimination Law Association

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Editorial *Growing up is hard to do!*

Sooner or later it happens. Male or female, black or white, we discover that age is an issue. But for some it is a case of confronting reality only slowly and reluctantly. The Government has not been immune from this discovery. Like many of us it has not been in a hurry to confront this thorny problem.

As is often the case in relation to equality issues, Europe got there first. The European Charter of Fundamental Rights makes general provision for the elderly in Article 25, which states that:

> 'The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.'

Despite promising legislation before coming into power the Labour Government offered only the weak and ineffective Code of Practice in its first term. When the Framework Directive made the development of age discrimination laws a necessity it still declined to discuss such basic issues as compulsory retirement ages in its consultation document Equality and Diversity. However the issue is catching up with the Government. In the last issue of Briefings we reported on the case of *Rutherford v Town Circle Ltd and Secretary of State for Trade and Industry* (no 2), which challenged the upper age limit for unfair dismissal and redundancy protection as being unjustified indirect sex discrimination.

Now at last the Government have shown signs of a more serious start to recognising the problems of the new demography. First a revised Code of Practice was published in December 2002, and Andrew Smith, the Secretary of State for Work and Pensions, stated recently:-

> '… too many people are either leaving work too early or being denied the opportunity to work for as long as they'd like… Extending working lives is key… This means making sure that people have access to employment opportunities throughout their adult life. And we need to make sure that these opportunities increase, rather than disappear, as people get older.'

Bluntly there will be fewer workers to support an ever-aging population. Demography and economics have forced these conclusions on the Government. Awareness that there are insufficient funds available or put aside to support the increasingly large aging population with their longer life expectancy means deep social problems. This has led to a new review of the needs of employees at the upper end of the age range. The latest government Green Paper on Pensions proposes the adoption of flexible retirement plans facilitating both the staged retirement for workers who wish to reduce their working hours rather than retire abruptly and/or to continue working on a full time basis (without being penalised by the tax system). Tax laws will therefore need to be changed alongside fixed retirement ages and age related pay and benefits.

As every day statistics show that people are living longer and birth rates are lower, this employment deficit is going to be a major litigation issue for discrimination lawyers in a very few years time. It is a major issue for the planners now. Yet equality must be achieved between persons with very different needs and perceptions and this must be done without using age as a proxy for the proper assessment of capability. Whether or not the decision in *Rutherford* survives an appeal the central proposition is surely correct. There should be no age criteria for protection from unfair dismissal and none in relation redundancy.

But consideration also needs to be given to the lower end of the age range. Can the lower minimum wage rate for 18-21 year olds be justified? Sam Mercer of the Employers Forum on Age has noted:

> 'Today it is illegal to pay a woman less than a man, and to pay a black person less than a white, so why do we still tolerate the attitude that younger workers are worth less than older? It seems odd that such obvious discrimination seems to go unchallenged.'

Soon it will not matter whether you are 18 or 80 if you can find a job you will need to work to some extent to help keep the economy going, and perhaps growing up won't matter so much.

Abbreviations		ECtHR	European Court of Human Rights	CS	Court of Session
SDA	Sex Discrimination Act 1975	ECJ	European Court of Justice	HC	High Court
RRA	Race Relations Act 1976	ETD	Equal Treatment Directive	EAT	Employment Appeal Tribunal
DDA	Disability Discrimination Act 1995	RD	Race Directive	ET	Employment Tribunal
HRA	Human Rights Act 1998	ED	Employment Directive	CRE	Commission for Racial Equality
ECHR	European Convention on Human Rights	HL	House of Lords	DRC	Disability Rights Commission
		CA	Court of Appeal	EOC	Equal Opportunities Commission

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Enquiries about membership to Discrimination Law Association, PO Box 2569, South Croydon, CR8 1WE **PLEASE NOTE NEW ADDRESS**
Telephone 020 8668 1182 **E-mail** info@discrimination-law.org.uk
Editor: Gay Moon *Deputy Editor:* David Massarella Designed by Alison Beanland (020 7394 9695) Printed by The Russell Press

'EQUALITY AND DIVERSITY, THE WAY AHEAD'

The proposed new anti-discrimination regulations: The Discrimination Law Association's response

Introduction

In Spring 2002 the Government consulted on its proposals for implementing the two new European Equality Directives:[1] The Race Directive (RD)[2] and the Employment Directive (ED).[3] As members will know, these Directives require Member States (including the UK) to introduce legislation prohibiting race discrimination and discrimination on the grounds of sexual orientation, religion or belief, age and disability. The Directives introduce specific definitions of direct and indirect discrimination and harassment. They will require the UK to introduce changes to the protection currently afforded against race and disability discrimination and require new protection on the field of age and sexuality discrimination. The Discrimination Law Association (DLA) submitted a response to that consultation exercise last year.

The Government then, in October 2002, published draft regulations designed to implement the two new Directives. Again the Government sought views as to their proposals for implementing the changes required. The DLA had a number of serious concerns about the Government's proposals. We had already sought the views of our membership on the steps Government should take to ensure that the Directives were implemented in an appropriate way through a series of open meetings last year, to which all members were invited.

In December the executive committee arranged a small seminar at which a number of individuals and representatives from NGOs were invited. They were individuals and organisations with special experience and knowledge of particular grounds of discrimination. This assisted us – along with the comments made at the open meetings last year – in formulating a full response to the published draft regulations.

The DLA's response is set out, in a slightly edited form, below:

The general approach

The DLA welcomes proposals designed both to strengthen the protection offered by the existing anti-discrimination legislation and to introduce protection against discrimination on grounds not currently protected by our anti-discrimination laws.

However, we remain concerned about the approach taken by Government to implementing these Directives. The stated aim of Government is to make equality legislation 'more coherent so that rights and obligations are easier for individuals and employers to understand'.[4] The Government's consultation document describes the proposals as 'designed to make equality legislation more coherent and easier to use' and states that they will, for example, 'use the same wording, where appropriate, for all the main concepts: direct discrimination, indirect discrimination, harassment and victimisation'.[5] In fact the present proposals, if enacted, are more likely to have the opposite effect, increasing unnecessarily the complexity and inconsistencies in an area of law that is already complex.

The DLA's fundamental concern relates to the plan to transpose the Directives into domestic law by regulation under Section 2(2) of the European Communities Act 1972. Section 2 of the European Communities Act 1972 permits governments to amend primary legislation by regulation for the purposes of implementing any Community 'obligation' or 'for the purpose of dealing with matters arising out of or related to any such obligation or rights'. It does not therefore permit Government to legislate across the board in the anti-discrimination field by regulation. The inevitable consequence, if this method of implementation is chosen, despite the Government's stated intentions, will be an inconsistent and incoherent set of statutory provisions.

Our concerns in this regard, previously expressed,[6] have proved justified by the contents of the draft Regulations. The undesirable consequences of

implementing the requirements of the Directives by secondary, rather than primary, legislation are particularly acute in the case of the RD – clearly illustrated by the contents of the draft Race Relations Act 1976 (Amendment) Regulations 2003 ('the draft Race Regulations'), as we discuss more fully below.

However, not only will the proposed legislation create inconsistencies as to the protection afforded within *particular* grounds, but it will also establish and/or entrench inconsistencies and lack of coherence in the protection afforded on different grounds. Rather than making it easier for individuals and employers to understand their obligations and rights in law, the proposed legislation will make it almost impossible for them to do so. Thus, for example, the meaning given to indirect sex discrimination in the employment field will be different to that applicable to indirect discrimination on the grounds of racial, ethnic or national origins in the employment field (assuming the draft Race Regulations are passed[8]) and different again to the meaning given to indirect discrimination in the employment field where the complaint is of discrimination on the grounds of colour and/or nationality.[9]

Further, the scope of the equality legislation in Great Britain will be utterly inconsistent. There are already inconsistencies in the legislation; for example, discrimination by public authorities is not outlawed (unless falling within the education, housing or goods, facilities and services provisions) by SDA but is outlawed by the RRA (Section 19B, as inserted by the Race Relations (Amendment) Act 2000). Far from harmonising the legislation, the proposed regulations will increase the inconsistency and create new inconsistencies in relation to the new protected grounds. Discrimination on the grounds of religion or belief will only be prohibited in the employment, vocational training and related fields, unless the religious group constitutes an ethnic group (e.g. Jews and Sikhs[10]) in which case the RRA will apply and coverage will be considerably more comprehensive. Discrimination on the grounds of sexual orientation again will only be covered in the employment and related fields (unless the treatment can be described as sexually discriminatory in which case again the coverage will be more comprehensive[11]). Discrimination against disabled persons has yet a different scope, wider than that provided for in relation to the new grounds (sexual orientation, religion and belief), but less comprehensive than both the SDA and the RRA.

There is no principled reason for the inconsistencies that will exist in relation to the protection afforded against discrimination on different grounds. They arise, presumably, from a desire to meet the EU deadlines for (minimum) compliance with the Directives without the need to use Parliamentary time. The incoherent and complex patchwork of legislation that is proposed undermines the cause of equality; is almost certain to undermine confidence in the legislative scheme and does a disservice to the great efforts made to introduce workable coherent anti-discrimination legislation more than a quarter of a century ago. Far from being a step forward it will constitute an unfortunate and wholly avoidable step backwards.

In our view, as we have previously contended, a single Equality Act is essential. A recent study found that,

> 'The first and most obvious defect of the present framework is that there is *too much law*. At present, there are no less than 30 relevant Acts, 38 statutory instruments, 11 Codes of Practice, and 12 EC Directives and recommendations directly relevant to discrimination'.[12]

If this Government is truly committed to its aims of securing coherent anti-discrimination legislation and implementing the RD and ED – with which they agreed in Europe – in an effective way, as well as securing the manifesto commitment to extend rights and opportunities for disabled people,[13] then it must, as a priority, give Parliamentary time to introducing comprehensive primary legislation against discrimination.

The Draft Regulations

Cross cutting issues

The DLA has a number of concerns about certain aspects of the draft Regulations that cut across more than one ground:

Indirect Discrimination: We are concerned that the draft Regulations do not properly transpose the Directives. The Directives' formula is 'anticipatory' ('*would put persons … at a particular disadvantage*'). This formula plainly outlaws discriminatory barriers whether or not they have in fact disadvantaged a

member of the protected group. The meaning given to indirect discrimination in the Regulations requires an individual complainant/victim (*'which puts B/that other at a disadvantage'*). In our view, the indirect discrimination provisions in the Regulations should reflect those in the Directives.

We note that the draft Race Regulations also propose amendment of section 28 of the RRA, which recognises anticipatory indirect discrimination. Section 28 is not equivalent to the formulation in the Directives since the RRA does not permit individual complaints in any circumstances and permits proceedings by the CRE under section 28 only in the context of CRE formal investigations. Under the formulation in the Directives an individual who is a member of a protected group could bring proceedings when s/he becomes aware of a provision criterion or practice which *would* put her/him at a disadvantage. For example, an established practice by an employer to recruit friends and family of existing employees (all white) by word of mouth could be challenged under the Race Directive without the black or ethnic minority potential employee needing to apply for a job and be rejected, but not under the draft Race Regulations.

Further, the 'justification' provision is not properly transposed. The Regulations provide for a 'proportionality' test in respect of a 'legitimate aim' but make no reference to 'justification', which now has a well-understood meaning in the context of Community and domestic discrimination law.[14] We consider that the changed meaning provided for in the Draft Regulations introduces the possibility of conferring upon employers, and others, falling within the scope of the Regulations a greater margin of appreciation and risk violating the non-regression clause in the Directives.

Harassment: We are not fully persuaded that the test set out in proposed subsection 2 will not conflict with the non-regression principle in the Race Directive. We are concerned that the test for harassment should be understood as *principally* subjective. A Code of Practice explaining this and providing illustrations (from existing case law) would be especially useful in this area. Further, we consider that the words 'or treats a person less favourably by reason of that person's reaction to that unwanted conduct' should be included for harassment on all grounds, and not solely sexual

harassment, as the consultation document is suggesting. This will ensure that a person is protected against discrimination in consequence of his/her reaction to discrimination whether or not they have first complained (and brought themselves within the victimisation provisions).

Victimisation We note that to establish victimisation under the Directives, a comparator is not required. What is necessary to establish is 'adverse treatment or adverse consequences as a reaction to.' We consider that this preferable to the 'less favourable treatment' formulation in the existing legislation, which has often been problematic in individual cases. We would recommend that consideration be given to incorporating the Directives' formulation into all of the proposed regulations, while retaining the fuller list of 'protected acts'.

Genuine occupational requirement The meaning given to 'genuine occupational requirement' in the Race, Religion or Belief and Sexual Orientation Regulations does not properly reflect the terms of the Directives. It fails to introduce the requirement of 'legitimacy'. It is extremely important in determining whether or not a 'genuine occupational requirement' is lawful within the meaning of the regulations (if the Directives are to be properly transposed), that the objective for it is *legitimate*. We consider that the absence of this requirement is such that there is a real risk that the UK will not be in proper compliance with the Directives.

Positive action We welcome the positive action provisions in the draft Religion or Belief and Sexual Orientation Regulations, in particular because they move away from the overly formulaic requirements of the RRA.

Instructions Article 2(4) of the ED provides that an instruction to discriminate shall be deemed to be discrimination but that provision is not transposed into the Sexual Orientation or Religion or Belief Regulations. Thus as the Regulations stand they do not secure compliance with the ED. The DLA believe that this should be remedied by the inclusion of a provision relating to discrimination by way of instructions to discriminate, which would enable individuals to bring proceedings in the same way as they might for harassment. For full compliance, both the RRA and the DDA should be amended to enable individual complaints of instructions to discriminate, since currently proceedings can be brought only by the CRE or DRC.

Self employment and occupation Both the RD and the ED include protection against discrimination in 'conditions for access to ...self-employment or to occupation'. Neither what is currently within Part II of the RRA nor what is proposed in Part II of the Sexual Orientation and Religion or Belief Regulations encompasses fully either self-employment or occupation.

In our view, the Regulations should be amended to reflect this – and absence of such provision will mean that the Regulations will not fully implement the Directives. Further particular examples of 'occupations' apparently not within the Regulations are dealt with below.

Volunteers We are concerned that no provision is made for volunteers.[15] Undertaking voluntary work is often an important route to paid work – it provides valuable experience and, often, training. Even the broader meaning given to employment under the SDA, RRA and DDA will not catch most volunteers (requiring as it does a contractual relationship). The absence of 'volunteers' from the scope of the Regulations probably makes them non-compliant with the Directives, which require protection against discrimination in employment and occupation.

Councillors and Members of Parliament (M.P.s and M.E.P.s) The selection of local Councillors and Members of Parliament and the European Parliament and others seeking to hold or holding political office should be included within the scope of the Regulations.[16] Involvement in the political process by all sections of the community is an important aim to strive for. It legitimises the democratic process; exclusion on discriminatory grounds from that process undermines it. For those reasons, the DLA consider that the holding (or selection for) political office should be included within the terms of the Draft Regulations expressly. In so doing there should be an obligation to make reasonable adjustments in the selection process

upon political parties and an obligation to make reasonable adjustments upon councils and Parliament itself so as to ensure disabled politicians are able to carry out the role effectively.

Protection against discrimination 'on grounds of …' We welcome the incorporation in the Sexual Orientation and Religion or Belief Regulations of the formulation of direct discrimination as being 'on grounds of …' In our view it is essential that this is understood to include prohibition of discrimination against a person because they are perceived to possess the characteristics of a particular protected group, or because they manifest such characteristics (e.g. hold hands with same sex partners etc), or because they are, or are perceived to be, associated with persons in a protected group. We consider that guidance in a Code of Practice would be especially useful in making this plain. This formulation is missing from the Draft Disability Regulations and this is addressed below.

Police The DLA was surprised to find that the proposed Draft Disability Regulations adopt the formulation relating to the employment status of the police that is found in the SDA (and originally in the RRA) which in the case of *Chief Constable of Bedfordshire Police v Liversidge* [2002] IRLR 15 has been found to be wholly inadequate. Further, in the draft Sexual Orientation and Religion or Belief Regulations there is no provision whatsoever to bring 'employment' as a police constable within the scope of matters to which these Regulations apply. In all three instances, the legislation should incorporate provision comparable to section 76A and 76B of the amended RRA, otherwise they will fail to give proper effect to the Directives.

Enforcement We are concerned about the absence of any statutory provision for standing for organisations to bring proceedings either on behalf of or in support of victims of sexual orientation or religious discrimination.

Reinstatement/re-engagement We consider that the Draft Regulations should include provisions empowering an Employment Tribunal to order reinstatement or re-engagement following a failure to recruit and/or dismissal. This should help in tackling the real disadvantages certain groups face in the labour market and ensure that there is no 'financial cost' weighing up by an employer in deciding to dismiss a particular (particularly disabled) employee. We consider that without such a provision there is a real danger that the Regulations will not comply with Articles 7 and 15 of the RD and Articles 9 and 17 of the ED (particularly having regard to the principle of equivalence[17]).

The Disability Discrimination Act 1995 (Amendment) Regulations 2003

The DLA welcomes the provisions of the Regulations that extend the scope of the existing protection against disability discrimination, in particular:

- The extension of Part 2 of the DDA to cover prison officers, firefighters, police officers, barristers, partners in businesses and private households,
- The removal of the small employer exemption,
- The extension of the DDA to cover qualifying bodies,
- The inclusion of constructive dismissal,
- The inclusion of practical work experience (for the purposes of a person's vocational training),
- The introduction of a specific reference to harassment in the DDA.
- A prohibition against discrimination after the relevant relationship has terminated without limit of time
- The introduction of provision permitting the DRC to take action in relation to instructions and pressure to discriminate,
- Stronger provision permitting the DRC to take action in relation to discriminatory adverts permitting a challenge in relation to the advert alone (whether or not a disabled person has been adversely affected in consequence).

However, the DLA have real concerns about the contents of the draft Regulations and about problems in the current scheme that are left unresolved by the draft Regulations. In particular:

The meaning of disability The meaning given to disability under the DDA is complex and, in practice, often requires sophisticated medical evidence to support a contention that a person was disabled at the material time. The ED does not define 'disability' for the purposes of its provisions, but the principles of

construction that apply to the interpretation of Community law are such that it is likely to be given a broad and purposive meaning. It is likely, in our view, that there will be a challenge to the meaning given to disability under the DDA, if its medical focus remains and is not liberalised. A strict meaning of disability does nothing to advance the equal treatment of disabled persons: it operates as a bar to a remedy for discrimination on grounds of disability through cost and complexity, and does little to challenge preconceptions and stereotypes about disabled persons.

In any case, we consider that the Directive requires Government to implement protection against discrimination on the grounds of *perceived* disability and discrimination by *association* with a disabled person. The Directive requires governments to implement legislation prohibiting discrimination on (amongst other grounds), the grounds of disability (Articles 1 and 2 ED). This requires a model similar to that of the RRA (and *distinct* from the SDA, which refers to less favourable treatment on the grounds of the *complainant's* sex ('on the ground of her sex', Section 1(1)(a)). The RRA, like the ED, prohibits less favourable treatment on *racial grounds* (Section 1(1)(a) of the RRA). It is well understood that this formulation in the RRA is sufficiently wide to cover discrimination against a person because of their perceived membership of a racial group and by reason of their association with a person of a particular racial group.[18] To comply with the ED the DDA should make it unlawful to discriminate 'on grounds of disability'.

Justification The DLA are extremely concerned about the absence of any further legislative guidance on the meaning of justification in section 3A of the DDA. The CA, in *Jones v Post Office* [2001] IRLR 384, gave a construction to the meaning of 'justified' which is such that the threshold for justifying disability discrimination is now very low indeed. Whilst the draft Regulations contain an exemption in relation to justification so that treatment will not be justified unless it is based on a consideration of the particular individual's abilities, and is not merely because he has a disability, this requires only that an employer 'consider' an individual's abilities. Once an employer has so demonstrated, and that itself appears not to be a significant hurdle, he is entitled to rely on the *Jones* justification defence. We consider that the test of justification should mirror that under European Community law.[19] We consider that otherwise the Regulations will not comply with the ED and the UK will be in breach of its obligations.

In particular, the DLA's view is that the defence of justification should only be available where, as set out in Preamble 17 of the ED, an employer shows that the less favourable treatment complained of is because the disabled person is not competent, capable or available to perform essential functions, taking into account the employer's reasonable adjustment duty. This is, and should be, an objective test.

Indirect discrimination The DLA are concerned that there is no provision in the new Regulations for indirect disability discrimination. We consider that the reasonable adjustment provisions, which come into operation only in relation to a particular individual in a particular situation, do not meet all the circumstances in which a person with a disability might face indirect discrimination.[20]

The reasonable adjustment duty does not deal with those neutral, and often invisible, barriers that disadvantage groups of disabled people (unless in a particular case *substantial disadvantage* can be shown). In our view the DDA should be amended so as to include indirect discrimination.

In the absence of an indirect discrimination provision, then we propose that provisions should be made imposing a duty on employers to take reasonable action to remove barriers *in advance* of individual complaints (*an anticipatory duty*). This would parallel the provisions that relate to disabled students and customers in Parts 3 and 4 of the DDA. The imposition of such an *anticipatory duty* would encourage employers to think in advance about the ways in which their practices or premises might be made more accessible to disabled people. This would mirror the approach taken by the SDA and the RRA to the indirect discrimination provisions.

Pensions The DLA do not consider that the draft Regulations go far enough in relation to pensions. The DLA support the Disability Rights Task Force recommendations in relation to pensions and consider that the reasonable adjustment provision and the less favourable treatment provision with a *justification defence* is insufficient to afford proper and fair

protection in this area. In our view all workers should be entitled to join a pension scheme at the start of their employment without *any* difference in entitlement based on disability.

Statutory office holders We consider that holding statutory office should be brought within the scope of the DDA. We recognise the difficulty flagged up by the notes to the draft Regulations (paragraphs 199-203) regarding the identification of the proper person upon whom the duty to make reasonable adjustments should fall, in certain cases. We do not consider this sufficient justification not to extend the DDA in full to statutory office holders. Nor do we think that there should be the introduction of what would inevitably be a confusing distinction between statutory office holders in positions analogous to employees and those not. The holding of a statutory office is often prestigious and will usually advance one's career prospects in consequence. The advantages obtained from holding a particular statutory office, whether or not it may be analogous to an employment relationship, are such that excluding it from the protection afforded by the DDA would be unjustified, and in our view likely to be inconsistent with the ED. It will usually be relatively easy to identify the proper 'person' upon whom the duty to make reasonable adjustments should be imposed – for example, the person or body involved in making appointments or the person or body to whom the statutory office holder (or the board etc upon which s/he sits) reports.

Employment services The DLA are concerned that the amendments made to Part 3 of the DDA in relation to employment services are confused. Such services are crucial for securing fair and equal access to the labour market. Further, we are not at all clear that the proposed provision complies with Article 5 of the ED (particularly, for example, in relation to services to assist in participating in or advancing in a particular employment). In our view this could be more clearly and more comprehensively drafted.

The Employment Equality (Sexual Orientation) Regulations 2003

The DLA have the following observations regarding the Sexual Orientation Regulations. Firstly, the DLA, of course, welcomes legislation on discrimination on the grounds of sexual orientation. There is compelling evidence of widespread discrimination on the grounds of sexuality, and legislation prohibiting this is, in our view, well overdue. We note that the proposed legislation is driven by the requirement to meet the timetable for (minimum) compliance with the ED. We regret that Government has chosen to deal with this by secondary legislation thus limiting the scope of the protection to the scope of the Directive. Given the evidence of discrimination in many areas outside employment and training, we would like to see broad and comprehensive statutory protection against sexual orientation discrimination along the lines of the RRA and SDA. We have the following observations on the specific provisions of the Regulations:

'Sexual orientation' As we have already submitted, we consider the expression 'sexual orientation' is sufficiently clear and that further statutory explanation of its meaning is not required. We remain concerned that defining its meaning in the regulations can only have the effect of limiting the breadth of protection, and thus we would prefer to leave the expression undefined. This would be consistent with the approach of the ED and ensure full and proper compliance. It would also allow for a sufficiently flexible approach so as to ensure that unobjectionable sexual orientation of a kind not now in the minds of the legislators would not fall outside the protection of any transposing legislation by reason only of the accident of drafting.[21]

Any concern (which we do not share) that an 'open' meaning might allow for an argument that paedophiles are covered is misplaced – the expression 'sexual orientation' has a well understood meaning domestically and internationally and besides paedophiles are and would be excluded as being a risk to public security (Article 2(4)).

Education The DLA welcome the fact that the Regulations would provide comprehensive protection against discrimination in further and higher education. We consider that this is necessary to ensure that there is sufficient and proper compliance with the ED.

Exceptions We consider that the exceptions currently contained within the draft Regulations are too wide and are inconsistent with the requirements of the ED as well as Convention law (against which the proper

construction of the Directives will inevitably be determined[22]). The ED permits exclusions where they are pursuant to 'measures laid down by national law, which, in a democratic society, are necessary for public security, etc,' (Article 2(5)). A blanket exclusion in relation to acts 'done for the purpose of safeguarding national security' (Regulation 28) is far wider than that provided for by the ED. It is also inconsistent with ECHR authority in the field of sexuality discrimination[23]. It is also far wider than the amended provision in the RRA relating to national security (Section 42) that requires that the particular act of discrimination must be justified as being 'done for the purpose of safeguarding national security'. In our view Regulation 28 should be amended so as to reflect the terms of the ED. It must not permit, of course, any discrimination that is currently outlawed in UK law under the HRA (because that would undermine the non regression clause in the ED).

Benefits based on marital status The DLA strongly oppose the exception in relation to benefits dependent on marital status (Regulation 29), which is not required for compliance with the ED. This reinforces stereotypes and entrenches discrimination against gay men and lesbians. We consider that this is wrong in principle and is likely to be contrary to the HRA. As same sex couples do not have the option of becoming married, all benefits available to persons who are, or have been, in heterosexual relationships should be equally available to persons who are, or have been, in same sex relationships, regardless of marital status.

Genuine occupational requirements Please refer to our comments above. We consider that it would be helpful to have guidance in a Code of Practice providing illustrations of the sorts of occupations in which being of a particular sexual orientation might be considered a genuine and determining occupational requirement. This could address concerns about the extent to which this exception could be used by certain organisations (particularly religious organisations) for the purposes of excluding gay men, lesbians and bisexuals from their employment. The sorts of circumstances in which we envisage that the genuine occupational requirement might apply in the context of sexuality discrimination, and we consider such circumstances would be very rare, would be services involving close personal physical care and counselling services (eg for gay men).

The Employment Equality (Religion or Belief) Regulations 2003

The DLA have some concerns about the draft Religion or Belief Regulations.

Meaning of "religion or belief" The DLA consider that the Regulations should state that "religion or belief" includes an "absence of any, or any particular religion, religious belief or similar philosophical belief", which would be consistent with the Fair Employment and Treatment (Northern Ireland) Order 1998. This is extremely important to ensure equality of protection as between persons who are members of particular religious groups or who hold particular religious beliefs and those, many people, who are not or do not.

Genuine occupational requirement Please see our comments above. We consider that the genuine occupational requirement provision in Regulation 7 is too wide and that that Regulation 7(1) and (2) (with the addition of 'legitimate', as we propose above) without 7(3), is adequate to comply with the requirements of the ED are adequate. In our view, Regulation 7(3) is unclear; its potential scope is too wide and its effect is too unpredictable. Regulation 7(3) does not add anything to Regulation 7(1) and (2) and creates uncertainty, which should be avoided in any legislation in this field.

In the context of occupational requirements we also draw attention to the requirement of Article 16 in the ED, which requires Member States to ensure that laws, regulations etc. contrary to the principle of equal treatment are abolished. Regulation 42(1) of the draft Religion or Belief Regulations provides that "These regulations are without prejudice to – (a) sections 58 to 60 of the School Standards and Framework Act 1998 …". We have considered the contents of sections 58, 59 and 60 of the School Standards and Framework Act; we are concerned that the provisions in section 60 as they relate to the appointment of teachers other than those appointed to give religious education and the dismissal of such teachers conflicts with the principle of equal treatment in the Directive. Section 60 goes much further in restricting employment opportunities for teachers of non-religious subjects, for example, in

maths, physics, geography or foreign languages, than is envisaged in the ED or in the genuine occupational requirements referred to above. In our view, for compliance with the ED, the anti-discrimination provisions of the Religion or Belief Regulations should prevail over any provisions in the 1998 Act with which they conflict, and draft Regulation 42 (1)(a) should be deleted.

The Race Relations Act 1976 (Amendment) Regulations 2003

As we have said in the introduction to this response, we consider that the mode of implementing the Directives proposed by Government will lead to real complexity and confusion most particularly in the field of race discrimination.

The RD applies only to discrimination on grounds of 'racial or ethnic origin' and expressly excludes from its scope discrimination on grounds of nationality. By contrast, the RRA regulates discrimination on grounds of 'colour, race, nationality (including citizenship) or ethnic or national origins'. The draft Race Regulations regulate discrimination on the grounds of 'race or ethnic or national origins', thus reflecting the obligations imposed by the RD (with the addition of 'national origins' which must have been assumed by the drafters to be inherent in whatever is meant by 'racial or ethnic origin'). The Regulations do *not* cover discrimination on the grounds of 'colour' or 'nationality'. There is no definition of 'racial' or 'ethnic' origins or 'national origins' in the RD or draft Race Regulations but it is understood to exclude colour[24].

It is clearly intended that the scope of the Race Regulations will not be congruent with that of the RRA. There is an explicit two-track approach throughout the draft Race Regulations, with different, enhanced, protection applying on grounds of race or ethnic or national origins in contrast to existing definitions and forms of protection on grounds of colour or nationality (see Regulation 3 amending Section 1 of the RRA).

While the RD specifically excludes 'nationality', the UK (and all other Member States) is in any event obliged by Article 39 of the EC Treaty to regulate discrimination on grounds of nationality between citizens of the Member States. The definition of indirect discrimination adopted by the ECJ under Article 39 of the EC Treaty in *O'Flynn v Adjudication Officer* [1996] ECR 1-2617 is at least as wide as that imposed by the RD, making the protection afforded against 'nationality' discrimination (as against EC nationals) much the same as the Regulations. There are comparable decisions of the ECJ concerning direct or indirect discrimination on grounds of nationality or citizenship (against EC nationals) in connection with most of the areas of activity within the scope of the RD.

It is therefore simply impossible to distinguish with any certainty between those forms of race discrimination under the RRA that are to be subject to the amended definitions and other provisions as part of compliance with the RD, or as a matter of EC law, and those which are not.

Similarly it is simply not possible to distinguish with any clarity or certainty between those acts of discrimination in the RRA (as amended by the Race Relations (Amendment) Act 2000) that fall within the scope of the Race Relations Regulations and those that do not. Regulation 3 of the Race Relations Regulations introduces the new concept of discrimination for the purposes of Section 19B of the RRA only in so far as they relate to social security, healthcare, other forms of social protection and any form of social advantage. These expressions are not defined by the RD or by the Race Relations Regulations nor is there a sufficient body of European jurisprudence to properly inform their reach. It is not, therefore, at all clear what meaning of discrimination will be applied to decisions by, for example, public authorities, falling within the scope of Section 19B having regard to the different meaning of discrimination introduced by the Race Relations Regulations in respect of only certain acts that may be within Section 19B. An inevitable consequence is lack of clarity for public authorities as to what is required of them to comply with the first limb of their duty under Section 71(1) of the RRA, namely 'to eliminate unlawful racial discrimination'. As we know from European Community law jurisprudence terms such as 'social protection' and 'social advantage' are likely to be construed very widely, to make the law clear and comprehensible from the outset, we strongly urge that the Regulations should be amended to ensure that all public functions that come within Section 19B carry the same meanings of discrimination.

The Regulations apply the new meanings of discrimination, revised exceptions and the shift of the burden of proof to discrimination in Part 2 of the RRA

(discrimination in the employment field) where most discrimination complaints are currently litigated. Research indicates that establishing race discrimination in the ET under Part 2 is already difficult for complainants. In this context it is worth observing that recent research indicates that only 16% of race discrimination cases win at ETs ('claims of race bias fall by the wayside', Labour Research, April 2002, www.lrd.org.uk). This figure is startlingly low when one has regard to the level of apparent discrimination suffered by certain minorities at work (see, for example: 'Black and Underpaid', [2002] TUC, www.tuc.org.uk). Further, the figure compares extremely poorly with the success rates of other categories of cases, eg redundancy (43%) and the rate of success across all jurisdictions in the Employment Tribunals (43%) (LRD, ibid). The difficulty in establishing discrimination and the costs of so doing are likely to be significantly increased by complex provisions that lack clarity, coherence and consistency.

An unexceptional example of a black African man complaining of direct and indirect discrimination in the employment field illustrates the point. The complainant in such a case and his employer will have to address how to deal with a complaint of colour discrimination (under the RRA in its original form) and nationality discrimination (ditto) and discrimination based on ethnic or racial origin (being African surely falling within those two concepts) with a different meaning of indirect discrimination; the employer will be able to rely on different exceptions in each case and a different burden of proof will apply in each case. It will be impossible to say with certainty where the burden of proof lies on particular issues in such circumstances, or how to unravel the different concepts of indirect discrimination and how to properly predict the outcome, risks and costs associated with the litigation. The complexities introduced by these Regulations cannot be overstated.

The DLA do welcome the following changes:

- The extension of the RRA to cover discrimination occurring after the relevant relationship has ended, whenever it occurs.
- The simplifying and narrowing of exceptions – including the abolition of the exemption in relation to employment in a private household; the removal of the small partnership threshold (6 partners) in the partnership provisions; the removal of the small dwellings exemption and the repeal of Section 41 of the RRA (in so far as these changes apply to discrimination falling within the Regulations).

Of course we consider that these changes should be made to the RRA across the board and not merely to discrimination on certain of the grounds or only certain activities contained therein for the reasons we have given.

In addition to the observations above, the DLA have concerns about the compensation provisions in the RRA. The RD requires Member States to have sanctions for discrimination that are 'effective, proportionate and dissuasive'. We are therefore concerned that the Regulations fail to repeal the anomalous provision in the RRA (Section 57(3)) that prevents compensation being awarded where the respondent proves that indirect discrimination was not intentional.

Other issues

The Consultation document raised a number of very specific questions. Those questions (in so far as they are not answered above) are addressed below.

Questionnaires

The Government propose to require employers and others to respond to a questionnaire within eight weeks, unless there is a good reason. Otherwise, an ET will be able to draw an adverse inference. The rationale behind this is said to be that this will provide clarity for those who respond to complaints, and will help make the process of handling discrimination cases more efficient. The DLA consider that eight weeks is too long and in any case is meaningless because the Government's proposals indicate that a Respondent is permitted to apply for an extension. We consider that if a statutory deadline is introduced, it should be accompanied by a provision enabling a complainant to apply for an extension of time for presentation of a complaint to the ET or Court pending expiry of the prescribed period or a reply whichever is earliest. As this provision is not required for compliance with the RD, there is no reason why, if it is introduced, it should not apply to complaints of racial discrimination on all of the grounds within the RRA.

Barristers and advocates

The Government propose to change equality legislation, so that barristers and advocates – like people

in other jobs – can submit complaints to an Employment Tribunal. The DLA agree with this.

Race: Employment & training for those not ordinarily resident in UK

The RRA provides that it is not unlawful to discriminate in employing a person who is not resident in Great Britain in order to provide training in skills that will then be used overseas. The DLA consider that this section should be repealed.

Race: charities as providers of goods and services

The Government have indicated that they propose to repeal the blanket exception in the RRA that allows charities to target benefits or services at persons of particular racial or ethnic origins. It is the DLA's view that a blanket repeal of the exception in Sections 34(2)-(4) is likely to have serious adverse consequences for a large number of charities. The most obvious example is Jewish charities, which, pursuant to their charitable instruments, provide a wide range of welfare, educational and other benefits in most cases exclusively for Jews. In most instances the benefits they provide would not, in our view, constitute 'positive action'. Such charities would be prevented from operating under the current proposals. Similar problems are likely to arise for charities providing benefits to members of the Sikh community, which in many instances would not come within 'positive action'.

Other religious charities, which provide welfare and other benefits to members of particular religions, may be affected if, in practice, the criteria for defining the class of beneficiaries of such charities are indirectly discriminatory.

The charitable instruments of many charities define the potential beneficiaries by nationality, national origins or association with a particular geographical area – in the UK or other parts of the world. Such charities would have relied on the exception in Section 34 of the RRA. The charitable activities of some may come within 'positive action' but it is likely that many may not.

The DLA would be surprised if it was the intention of the EC Council of Ministers to prohibit the operation of charities the benefactors of which intended to target benefits on particular groups of persons. While Section 20 of the RRA refers to the provision of goods, facilities or services to the public 'or a section of the public' the RD outlaws discrimination in 'access to and supply of goods and services which are available to the public…'. In DLA's view is appropriate to consider further what amendments to Section 34 are necessary for compliance with the Directive.

Race: acts done under statutory authority

The RRA provides that the prohibitions from race discrimination contained in the Act do not apply when an act of discrimination is done to comply with other legislation. In DLA's view this exception is contrary to the RD and we agree with the proposal to repeal it. However, we consider that it should be repealed in respect of all grounds of race discrimination, not merely in relation to discrimination on grounds of race or ethnic or national origins.

Performance Related Pay Schemes and Disabled Persons

The Government proposes that employers should be required to make reasonable adjustments to a performance-related pay scheme if a disabled person is put at a substantial disadvantage by it. The DLA consider that the concept of indirect discrimination should also be introduced in respect of such schemes in addition to a duty to make adjustments and a prohibition against unjustified less favourable treatment in a particular case.

Discriminatory Advertisements: Disability

The Government proposes to bring the DDA's provisions on discriminatory advertisements more into line with those in the RRA and SDA. Discriminatory adverts will be made unlawful and the DRC given powers to bring an action against people who publish such adverts. This will enhance the existing provisions in the DDA that currently enable an ET simply to infer a discriminatory intention where an employer uses such adverts. The DLA agrees with this approach. Further, the DLA considers that such amendment of the DDA should follow the approach in the RRA (Section 29), rather than the SDA, which would outlaw advertisements indicating an intention to discriminate on grounds of disability even if such discrimination itself may not be unlawful.

Written guidance

As we have observed above, the DLA consider that there are other practical questions raised by new and amending legislation that we would like to see covered in guidance. However, importantly there is no provision permitting the issuing of Codes of Practice with statutory force on new grounds. We consider that such provision should be introduced. In relation to grounds where there is no Commission established for the purposes, amongst others, of issuing Codes of Practice, responsibility should rest with the designated Secretary of State.

1. See: Towards Equality and Diversity: Implementing the Employment and Race Directives', www.dti.gov.uk/er/equality.
2. 2000/43/EC.
3. 2000/78/EC.
4. 'Equality and Diversity: The Way Ahead', page 4
5. Ibid, page 9
6. In response to 'Towards Equality and Diversity: Implementing the Employment and Race Directives', www.dti.gov.uk/er/equality.
7. Section 1(2) Sex Discrimination Act 1975 (as amended by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, SI2001/2660.
8. Regulation 3
9. Section 1(1)(b) of the RRA.
10. *Mandla v Dowell Lee* [1983] 2 AC 548; *Seide v Gillett Industries* [1980] IRLR 427.
11. By reason of the SDA: this, in turn, depends upon the outcome of the HL hearing in *Pearce v Governors of Mayfield School*, due to be heard in February 2003. Further, still such discrimination might be unlawful under the Human Rights Act 1998 and actionable in the County/High Court.
12. '*Equality: a new Employment, Report of the Independent Review of the Enforcement of UK anti-discrimination legislation'* Hepple et al [2000], Hart, p 21.
13. *'Equality and Diversity: The Way Ahead'*, page 5.
14. See e.g. *Bilka Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.
15. With the exception of coverage provided by the 'practical work experience' provisions in the Draft Disability Regulation, which might catch some such cases.
16. And recent case law in the field of race discrimination indicates that the selection of councillors does not fall within the scope of the qualifying bodies provisions: *Triesman v Ali* [2002 IRLR 489.
17. See for example *Levez v Jennings Case 326/96* [1998] ECR I-7835.
18. See for example: *Weathersfield (t/a Van and Truck Rentals) v Sargent* [1999] IRLR 94.
19. See e.g. *Bilka-Kaufhaus*, supra.
20. Though we are also pleased that the reasonable adjustment duty will extend to dismissals.
21. See for example *P v S & Cornwall County Council* [1996] ECR 1-2143 holding that transsexuality falls within the scope of "sex" for the purposes of the Equal Treatment Directive 76/207 which could barely have been in the minds of the drafters at the time of drafting the Directive.
22. See Clause (1) of the Employment Directive.
23. *Smith and Grady v UK* [1999] 29 EHRR.
24. Consultation paper, paragraph 8, p 10.

Positive discrimination

This article considers whether it is time to update and expand the circumstances in which domestic discrimination law permits affirmative action or positive discrimination to promote the employment or advancement of women or ethnic minorities where they are under-represented in the workplace or on other bodies covered by the legislation. This topic will be explored in more detail at the next Practitioners' Group Meeting.

The term affirmative action is used for acts that favour one sex or racial group where they are under-represented in the post or on the body concerned, in order to facilitate greater representation. Affirmative action may be acts preparatory to selection for the job or post concerned such as training provisions or 'outreach' schemes. If it goes further and permits discrimination at the point of selection it is often referred to as positive discrimination, such as the provision for reserved seats on elected bodies of trade unions, referred to below.

The general scheme of the SDA and RRA is to permit affirmative action in very limited circumstances, in order to encourage those who are under-represented to apply and be appropriately trained for jobs but stopping short of permitting discrimination at the point of recruitment.[1] In addition there are exceptions to the principle of non-discrimination to permit access to facilities and related benefits to meet the special education, training or welfare needs of particular racial groups.[2] These provisions have not been amended since the Acts were originally passed and there have been few reported cases arising from reliance on the provisions. Allied, although separate, are the genuine occupational qualifications that permit discrimination at the point of recruitment, but only where the nature of the job, within specified categories, requires it.[3] Under the proposed amendments arising from the Employment Directive and the Race Directive those categories of exceptions are to be replaced by a single exception, where the nature of employment or its context results in race, sexual orientation etc being a genuine and determining occupational requirement and it is proportionate to apply that requirement.

A longstanding example of permitted positive discrimination is that trade unions are allowed to reserve a minimum number of seats for women or make additional seats available to women on an elected body such as a trade union executive committee.[4] This provision appears to have given rise to little controversy, and worked successfully, in ensuring at least a minimum of women serve on the leading bodies of those unions which utilise it.

There have been four developments that might encourage a fresh look at the circumstances when positive discrimination is allowed and raise the question as to whether it is time to be bolder and more creative. Judgments of the ECJ have explored when the Equal Treatment Directive permits positive discrimination in selection for jobs where one sex, in practice women, are under-represented.[5] It is plain that the SDA is more restrictive than the ETD.

The SDA has been amended to permit positive discrimination in the selection of candidates by political parties.[6] The amendment followed cases on whether the selection process fell within the employment provisions of the SDA or RRA, and in particular the sections prohibiting discrimination by qualifying bodies.[7] The case under the SDA arose from attempts by the Labour Party to positively discriminate in favour of women by means of women only short-lists, while those under the RRA have complained that the Labour Party has discriminated against black candidates in the selection of councillors. Ultimately, the CA held that selection of candidates did not fall within the employment provisions of RRA (and by analogy it would appear the same is true of the SDA), however, RRA, s25, prohibiting discrimination by associations including

clubs may apply. There is no equivalent provision to s25 RRA in the SDA, as s34 permits sex discrimination by clubs.[8] The end result seems to be that discrimination against black candidates in relation to some of the acts by political parties may have a remedy in s25 RRA, but the exception to allow positive discrimination to achieve racial balance in local or national political office is not available, perhaps reflecting there is no political will to take affirmative action in respect of black candidates. However, permitting political parties to positively discriminate is to be welcomed given the long standing and gross under-representation of women and raises the issue as to whether such permissive powers should be extended.

Then, fourthly, there is the statutory duty placed on specified public authorities in the Race Relations (Amendment) Act 2000 not only to eliminate racial discrimination but also to promote equality of opportunity and good relations between persons of different racial groups. A representative public sector workforce may be an important factor in carrying out this duty, as well as positive measures in relation to service delivery to overcome the long failure of public authorities to meet the needs of different racial groups, as highlighted by the Stephen Lawrence Inquiry. At present a public authority, such as the probation service or with greater difficulty, a police force, which wishes to discriminate lawfully on recruitment by, for example, advancing the recruitment of a particular racial group to achieve racial balance in its workforce would appear to try to bring the post within RRA s5 (2)(d), the genuine occupational qualification for a job which provides persons of a racial group with personal services[9] which in many circumstances may be not be possible. Yet if such advancement is permissible for political posts should it not also be permissible elsewhere? Should not targets be approved for such purposes? While there are already targets across the public sector and they could be used to justify appropriate and proportionate positive discrimination. They would not be quotas in the sense of requiring the public body to take action to ensure that the quota was reached, though such a policy might be appropriate in certain circumstances, and bodies such as the CRE, EOC and trade unions would be given some enforcement powers.

Specifying the principles that should apply would assist any re-appraisal. These are likely to include, significant under-representation of the disadvantaged group, efforts to eradicate direct and indirect discrimination as the first step, use of targets to set the appropriate minimum level of representation to be achieved, and possibly time limits and regular monitoring of the use and effectiveness of the measure concerned.

This article does not attempt to consider what affirmative action might be appropriate in other areas of discrimination, such as disability, where the duty to make reasonable adjustments is a form of permitted positive discrimination, or sexual orientation, as each requires careful and separate consideration.

Tess Gill
Old Square Chambers, 1, Verulam Buildings,
Gray's Inn, London WC1R 5LQ
020 7269 0300

1. Ss47 and 48 SDA and 37 and 38 RRA.

2. S35 RRA. There are also exceptions for charitable benefits, competitive sport, insurance and communal accommodation, (ss43-46 SDA) but these do not fall into the category of affirmative action.

3. S.7, 7A and 7B SDA, s5 RRA.

4. s.12 SDA

5. See Article 2(4) of the Equal Treatment Directive 76/207, Article 141 (4) both of which affirmative action "to promote equal opportunities" (ETD, or to "make it easier for the under-represented sex "to pursue a vocational activity or career", (Article 141. Case 409/95 Kalanke [1995]660, Case 409/95 Marschall [1998] IRLR 39, Badeck [2000] IRLR 432, Abrahamsson [2000]732.

6. Sex Discrimination (Election Candidates) Act 2002 amending as from February 26 2002, the SDA to insert new clause 42A. The Act expires at the end of 2015 unless an order provides for a later date.

7. S13, SDA and s12 RRA. *Jepson and Dyson-Elliot v Labour Party* ET, *Ali and Sohal v Triesman* [2002] IRLR 489, CA.

8. Discrimination against women remains widespread in from working men's clubs, through to golf clubs, and extending to the Garrick club with its male only membership rule.

9. *See Tottenham Green Under Fives Centre v Marshall* [1989] IRLR 147, CA and *London Borough of Lambeth v Commission of Racial Equality* [1990] IRLR 231 as to the principles which apply in determining whether a job falls within the GOQ.

Victories on the discrimination battlefield for ex–British Army Gurkhas

The involvement of the Gurkhas, an élite band of Nepalese soldiers, in the British Army is the stuff of military legend. Yet in recent years it has also become the source of increasing dissatisfaction for many Gurkhas, aggrieved by what they see as entrenched race discrimination against them by those they serve. *Thapa v Ministry of Defence*, the first attempt to challenge disparity in Gurkha pay and pensions, was recently settled on favourable terms, but it raised several issues of interest to practitioners bringing race discrimination claims against the Army. *Gurung and others v Ministry of Defence*, decided in the High Court at around the same time, also served to highlight the wider campaign for equality by former Gurkhas.

History of the Brigade of Gurkhas

The Gurkhas, so called as they originate from the Gorkha region of Nepal, are famed for their loyalty, bravery and endurance as soldiers. Military legend has it that it was the Gurkhas' bravery which so impressed the British-Indian Army ("BIA") in its war against Nepal in 1814 that it decided to recruit them into their own ranks. The Gurkhas continued to serve in the BIA until the grant of Indian independence in 1947; at which point the main British Army and the new Indian Army each retained a share of the Gurkha regiments. This arrangement was formalised in a series of documents which has become known as the Tri-Partite Agreement ("TPA"), so called because it (or at least parts of it) were signed by Britain, India and Nepal. Since then the Gurkhas have formed an integral part of the British Army, and have served in Britain's conflicts all over the world including the Falklands and the Gulf, and as part of the UN peace-keeping force in Bosnia, East Timor, Sierra Leone and Afghanistan. The Gurkhas' exemplary record is reflected in the disproportionately high number of Victoria Crosses they have been awarded, and the fact that command of a Gurkha unit remains one of the most popular destinations for new British officers leaving Sandhurst. Those Gurkhas who serve in the Indian Army are, by and large, well treated and have not had cause for complaint. The British Gurkhas, though, have become increasingly dissatisfied with their treatment.

The Gurkhas' complaints

The principal complaint by the Gurkhas has been one of massive pay disparity with the British soldiers alongside whom they serve. The origin of this is that under the TPA, a British Army Gurkha's pay was to remain linked with that of an Indian Army Gurkha, and therefore reflected the lower cost of living there, even if the British Gurkha was elsewhere. Thus the payslip of a Gurkha on exercise at one of their bases in Church Crookham, Hampshire, would still show 'Indian Army Basic Pay' of somewhere between £9 and £46 per month. Although this Basic Pay was supplemented by a small 'Indian Addition' (payable where the Gurkha was serving or on leave in India or Nepal), or a higher 'Gurkha Addition' (if he was permanently based in Brunei, Hong Kong etc), and by other allowances such as the Length of Service Increment and Good Service Pay, the fact remained that until 1997 their total pay package was substantially less than that of their British counterparts.

For Hari Thapa, the Applicant in *Thapa v Ministry of Defence*, this meant that over his 15 years' service with the Gurkhas, he earned around 60% of what a comparable British soldier received. This amounted to a pay disparity of some £43,000. In 1997, the Army undertook a major review of the Gurkhas' Terms and Conditions of Service, and included within that was a substantial improvement in their pay. The 'Universal Addition' was introduced, replacing the Indian or Gurkha addition, to represent the cost of living outside Nepal. Therefore, with effect from 1 July 1997, Gurkhas have been treated largely comparably with British soldiers as far as pay is concerned. Mr Thapa only benefited from these changes for a short period, as he was sent on his terminal leave to Nepal in August

1997, and was discharged in early 1998. His complaint before the ET therefore included a claim for back pay for his 15 years' service.

Inextricably linked with the Gurkhas' concern about pay, is that relating to their pensions, and this was not fully resolved by the 1997 Review, and has not been since. Indeed, as the numbers of serving Gurkhas are now much lower than they once were (around 3,000 a year), there are many more who are retired Gurkhas (around 30,000) relying on their pensions. Pension provision can also be tracked back to the TPA, which purported to link the pension arrangements for the British Gurkhas with those in the Indian Army Pension Regulations. Mr Thapa's pension was initially around £17 per month; it has increased over the last couple of years to around £71 per month, but is still significantly less than an equivalent British soldier (and some Gurkhas receive less than Mr Thapa, as little as £200 per year in total). There was a substantial increase in Gurkha pensions with effect from 1 April 2000, albeit that there is still not full parity, and, according to the Gurkhas still insufficient for them to live adequately on their return to Nepal. Tales abound, for example, of ex-Gurkhas being discovered living in dire conditions when the British authorities track them down to provide them with medals for bravery.

Exploration of the manner in which the Gurkha Brigade is operated reveals that while efforts are made to retain their unique ethnic and cultural identity, there are still shortcomings in the ways they are treated, aside from the formal matters such as pay and pensions, which some would say are resonant of a colonial or paternalistic attitude towards them. These include especially brutal recruitment exercises (in which many Gurkha boys are injured); the denial of accompanied service for the wives and children of Gurkhas; a ban on Gurkhas having mixed marriages (in place until relatively recently, and for breach of which at least one Gurkha has been discharged); a clumsy religious policy which incorrectly assumes that all Gurkhas are Buddhists; and little or no information being provided as to the fate of large numbers of Gurkhas who fought in the two World Wars and who did not return. Mr Thapa, for example, also complained of discrimination in the medical treatment the Army gave him for a back injury he suffered on service, and that the Army unfairly hampered his application to join the Territorial Army after his discharge.

Thapa v Ministry of Defence

Mr Thapa's case was supported by the Commission for Racial Equality. The CRE has long been interested in the issue of racism within the Army. In 1996, it published the results of a formal investigation into the Household Cavalry. Evidence was found of racial discrimination and the investigation led to the Ministry of Defence signing up to a five year binding action plan to put in place new polices and procedures throughout the armed forces, running from 1996 to 2001. This required them to meet clear targets for the recruitment of ethnic minority service personnel set by the Secretary of State for Defence.

Mr Thapa lodged a complaint of race discrimination in the Industrial Tribunal (as it then was) in early 1998. Like any other soldier he had the benefit of a more generous (six month) time limit for doing so under section 68(1)(b) of the RRA 1976. However, he first had to lodge an application for redress with the Army Board under section 180 of the Army Act 1955 (as amended by section 20 of the Armed Services Act 1996). The combined effect of the Race Relations Act 1976, ss.75 (8) and (9), as amended by section 23 to the Armed Forces Act 1996, and the Race Relations (Complaints to Industrial Tribunals)(Armed Forces) Regulations 1997 SI 1997/2161, is that any soldier wishing to complain of race discrimination to the Tribunal must first lodge an application for redress, which he or she must not have withdrawn.

Although it was not necessary that this internal mechanism be concluded before the Tribunal hearing could begin, it is fair to say that the two proceedings running in parallel led to a substantial delay in his case. Mr Thapa's case was listed for full hearing before the ET on several occasions throughout 2000 and 2001, with, on each occasion, adjournments being sought pending the conclusion of the internal Army Board procedure. When the Army Board finally did determine his application in January 2002, days before his ET hearing was due to start, it entirely omitted to determine his main complaint of disparity in pay. The decision of the Army Board, by members whose names were not disclosed to Mr Thapa (instead the decision was signed by indecipherable initials), was later described by the ET as *'scrappy…[a]fter 4 years it resulted in 1 page of unreasoned conclusions, which offered nothing more than an apology and an offer of medical treatment… an insult to Mr Thapa.'* The redress

procedure was *'either inefficient, unwilling or absurdly cumbersome'*. Only after judicial review proceedings were commenced on Mr Thapa's behalf did the Army accept that it had to set aside that determination and look again at his complaint.

In response to the ET proceedings the Army admitted that Mr Thapa had suffered a substantial disparity in his pay and pensions, and that this was on the grounds of his nationality. Aside from arguments as to whether pensions-related discrimination fell within the ET's jurisdiction, and whether the tax and National Insurance provision for Gurkhas was in fact part of their employment contract, the Army's IT3 made clear that their substantive defence to the discrimination was that the TPA *required* them to treat the Gurkhas differently. Accordingly, they invoked s.41 (2)(a) of the RRA 1976, which provides that discrimination on *nationality* grounds is not unlawful if it is done:

'in pursuance of any arrangements made (whether before or after the passing of this Act) by or with the approval of, or for the time being approved by, a Minister of the Crown'.

The Army were set to argue that the TPA and policies under it, namely the submission of the annual applications to amend the Pay Warrant for Gurkhas, and the Directed Letters which fixed the rates of Gurkha pensions constituted 'arrangements' within the meaning of s.41 (2)(a).

Mr Thapa's first answer to this was that the arrangements made for pay, at least, were not in fact 'approved of, or for the time being approved by' a Minister of the Crown, but rather (and much to the delight of leading counsel, seeing the Queen's personal signature on the relevant documents!) by Her Majesty alone. Secondly, he was set to argue that even if the Army could show the necessary 'arrangements' for the purposes of s.41, it would still need to prove that the discrimination was 'reasonably necessary' (see the House of Lords in *Hampson v Department of Education and Science* [1990] IRLR 302) which it plainly was not. As the Army had been able to make substantial increases to pay and pensions in 1997 and 2000, while still respecting the TPA, Mr Thapa would argue that there was nothing to stop them making their pay and pensions fully equal with their British counterparts, and therefore that the historical failure to do so was not justified.

The Army's other principal argument was one of non-comparability, namely that in seeking to compare himself with a British soldier, Mr Thapa was not comparing like with like, as required by s.3 (4) of the RRA. The Army pointed to the different recruitment procedures for Gurkhas, their differing periods of service (a maximum of 15 years for Gurkhas), the fact that many of the Gurkhas speak Nepali amongst themselves and their provisions for long leave in Nepal. Mr Thapa was set to argue that many of these 'relevant circumstances' were indeed race- or nationality-specific and therefore could not be relied on (see *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7); and that on the Army's own case the Gurkhas are an integral, and integrated, part of the Army. They perform exactly the same service as British soldiers and are equally eligible for deployment the world over. Thus they are clearly comparable. The Army also relied on *Wakeman v Quick Corpn* [1999] IRLR 424 in which the CA held that higher wages paid to seconded Japanese employees of a Japanese firm operating in London was due to their secondment from Japan, not to unlawful racial preference over British employees and therefore that the source of the discrimination was not their race but an extrinsic factor (their status as secondees), which Mr Thapa would say did not apply to his case.

However these interesting arguments as to the scope of s.41 and whether Gurkhas really can be compared with British soldiers were never run, because the case was settled after legal argument on two jurisdictional points.

The first was whether the ET had 'temporal' jurisdiction to hear Mr Thapa's complaints. This flowed from the fact that prior to 1 October 1997, soldiers were excluded from the right to make a complaint to the ET under the RRA 1976 Act as the right did not apply to any person "… if at the time when the act complained of was done the complainant was serving in the armed forces and the act of discrimination relates to his service in those forces" – ss. 54, 75(9) and 75(8) of the RRA 1976 Act. The Army argued that as the ET could only consider race discrimination complaints from soldiers with effect from 1 October 1997 (because of the Armed Forces Act 1996 (Commencement No. 3 and Transitional Provisions) Order 1997 and the Race Relations (Complaints to [Employment Tribunals] Armed Forces) Regulations 1997), those parts of Mr Thapa's complaints which occurred before then (including the majority of his pay claim) could not be

considered. There was some relevant authority, namely *Melbourne v Ministry of Defence* (EAT Unreported, 14 January 2001, which was decided in the CA on 26 April 2002). However, the ET accepted Mr Thapa's arguments that in fact his complaints of pay and pension treatment were part of an ongoing, continuing policy which embraced his entire period of service (see *Barclays Bank plc v Kapur* [1989] IRLR 387, CA). Thus it ruled that it did have 'temporal' jurisdiction over Mr Thapa's complaints.

The second was whether it had 'geographical' jurisdiction to hear Mr Thapa's complaints. This argument by the Army was based on the fact that as Mr Thapa did his work "wholly or mainly" outside Great Britain, under s.8 (1) of the RRA he did not work at 'an establishment within Great Britain' and so was outside the scope of s.4 (2) RRA. The words "or mainly" were removed with effect from 16 December 1999 by the Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999 (SI 1999/3163) in order to implement Article 3(1)(g) of the Posted Workers Directive 96/71/EC (and because the previous scheme had been declared incompatible with Article 48 of the Treaty of Rome (freedom of movement) in *Bossa v Nordstress Ltd* [1998] IRLR 284, [1998] ICR 694, EAT). However, as Mr Thapa was discharged on 23 January 1998 all his complaints were governed by the original version of s.8.

The only CA authority, *Carver v Saudi Arabian Airlines* [1999] ICR 991, was brief in the extreme. It simply indicated, in comparable sex discrimination case that what must be looked at was 'where the Applicant wholly or mainly did her work at the relevant time of the discrimination'. This had been applied very strictly in the context of a soldier in *Saggar v Ministry of Defence* (ET Case No. 2500131/00, decision dated 18 September 2001 which is now under appeal) where he was found to have been outside the protections of the RRA by virtue of his posting to Akrotiri in Cyprus. Conscious of the dire consequences that such a strict reading of *Carver* and s.8 (1) would have for soldiers, it was argued on Mr Thapa's behalf that this could not have been the intention of Parliament, and was contrary to the international prohibition on race discrimination. Further, he relied on the later provisions of s.8 (4) and argued that, as he had been working at several "establishments" throughout his career (some of which such as his jungle postings might not accurately be described as 'establishments' in any event), his employment had to be treated as being done 'at the establishment with which it has the closest connection…' which on any view was the Ministry of Defence in Whitehall.

The ET accepted the Army's approach and ruled that it did not have geographical jurisdiction to hear the majority of his claims including that of his pay and pensions discrimination. Some, such as the allegations of discrimination in medical treatment and in relation to the Territorial Army all occurred at a time when it was agreed Mr Thapa was based in the UK, and so they were permitted to go forward. However, Mr Thapa was set to appeal to the EAT on the main decision, when the Army offered him a substantial sum and several other non-financial remedies (seeking to locate his father's bravery medals etc) to settle the case, which he accepted. The sum was equivalent to all his back pay, and after years of litigation enabled Mr Thapa and his young family to move on with their lives.

Conclusion

In an interesting twist to Mr Thapa's case, on the very day his case settled, in a resounding re-affirmation of the 'common law principle of equality', Mr Justice McCombe ruled in the High Court that it had been irrational of the Home Office to exclude the Gurkhas from payments made to Japanese Prisoners of War (*Gurung, Thapa and Pun v Ministry of Defence*, 27 November 2002). McCombe J said "The Gurkhas were excluded [from the £10,000 compensation package] on the basis of a constitutional distinction and which was in fact founded upon race…[the decision to exclude them] appears to me... to be irrational and inconsistent with the principle of equality that is the cornerstone of our law…". With Gurkhas manning the Green Goddess fire engines, almost certainly being sent to any war in the Gulf, and a further challenge to the discrimination they have suffered being argued under the HRA in February 2002 (*Purja and others and Lama and others v Ministry of Defence*), the issue of the Army's treatment of its Brigade of Gurkhas looks set to remain firmly on the agenda.

Implications for practitioners bringing race discrimination claims against the Army

- Remember the requirement to lodge (but not have concluded) an application for redress with the Army

Board before the Tribunal claim.
- Remember the six months' time limit for lodging a Tribunal claim.
- Be mindful of the Tribunal's criticisms in this case of how the Army Board conducted itself and the delays it caused to the Tribunal hearing.
- Be alive to the significance of nationality as a ground of discrimination as this may trigger the s.41 defence.
- If the Applicant is a Gurkha, beware the non-comparability argument.
- Be alive to the fact that the Tribunal only has jurisdiction over complaints against the Army since 1 October 1997 (subject to 'continuing acts' arguments).
- Be conscious of the consequences of s.8 (1) and the 'wholly' outside Great Britain provisions, and look out for the *Saggar* decision from the EAT.
- Speak to us if you would like to know more about how we dealt with these problems!

Henrietta Hill, junior counsel in *Thapa v Home Office* (led by Robin Allen QC and latterly Declan O'Dempsey)
Doughty Street Chambers, 10-11, Doughty Street, London WC1N 2PL
h.hill@doughty street.co.uk

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The Disability Discrimination Act – An update

A great deal is happening in relation to disability legislation at the moment:
- the consultation has closed on the proposed draft regulations to implement the European Employment Directive in relation to disability, and the final regulations are expected in the spring:
- the government is preparing draft regulations which will deem all those certified as blind and partially sighted as disabled for the purposes of the Act;
- there is presently a private members bill in the House of Commons which, if passed, will impose a positive duty on public bodies – in the same way as the Race Relations (Amendment) Act 2000 does in respect of race – in relation to disability:
- there is a ten minute rule bill being presented on 4th February on discrimination in clubs on the basis of sex and of disability; and
- the Government announced on Wednesday 22nd January that it is drafting a disability bill, the contents of which will include implementation of some of the Disability Rights Taskforce recommendations including the inclusion of transport, some widening of the definition of disability to include cancer and HIV from the date of diagnosis and membership of larger private clubs.

This update looks at some of the recent key decisions made under the employment provisions of the DDA, the next issue of Briefings will contain an update of the goods and services provisions of the DDA.

Definition of disability

The most contentious issue in the DDA remains the definition of disability. The last research done into the operation of the Act (Monitoring the Disability Discrimination Act 1995 (Phase 2) Sara Leverton et al, IDS, Feb 2002) which looked at all the cases brought under the DDA between its implementation and September 2000 found that the most common reason for rejecting a DDA claim related to the definition of disability. In 26% of all the unsuccessful tribunal cases the reason given was that the applicant was not disabled.

The most recent decision of note in relation to the definition of disability highlights a particular problem for those with cancer. The case of *Kirton v Tetrosyl Ltd* [2002] IRLR 840, involved a man who had cancer of the prostate. As a result of the diagnosis, he had a radical prostatectomy and pelvic node clearance, which left him with a weakened sphincter muscle and thus some urinary incontinence.

Mr Kirton (K) was dismissed by Tetrosyl Ltd (T). K brought claims against his employer, including one

under the DDA. Whether he met the definition of disability contained in section 1 of the Act was raised as a preliminary issue. The ET heard evidence from consultants about his incontinence and the long-term prognosis. The ET held that K was not disabled within the meaning of the Act. They found that he had 'infrequent minor leakage from the bladder' but they found that the leakages could not be regarded as frequent occurrences and that they had no substantial adverse effect on his normal day-to-day activities. They took into account the experience of the panel members, two of whom happened to have mild incontinence. The ET also rejected K's alternative claim that he met the definition of disability because he had a progressive condition, in accordance with para 8(1) of Schedule 1, which states:

'Where a person has a progressive condition (such as cancer…) as a result of that condition, he has an impairment which has (or had) an effect on his ability to carry out normal day to day activities, but that effect is not (or was not) a substantial adverse effect, he shall be taken to have an impairment which has such a substantial adverse effect if the condition is likely to result in his having such an impairment.'

The ET found that the words 'as a result of that condition' must mean as a direct result of the cancer, not as a result of the radical prostatectomy.

K appealed against the decision, on the grounds that the ET's decision was perverse; that the ET should not have taken its own experience into account in assessing whether his impairment had a substantial and long term adverse effect on his ability to carry out his normal day to day activities; and that the ET was wrong to conclude that his condition was not a progressive one.

The EAT rejected the appeal. They found that the ET was not wrong in law, nor had they acted in such a way as to deprive K of a fair trial by taking account of their own experiences in their holding that the limited incontinence revealed by the evidence did not have a substantial effect on K's ability to carry out normal day to day activities. In addition, the ET had had regard to the Guidance on Matters to be taken Into Account in Determining Questions Relating to the Definition of Disability, particularly paragraph C17 which states that it would not be reasonable to regard as having a substantial adverse effect 'infrequent minor leakage from the bladder'. They reminded themselves that a substantial effect had to be one that was more than minor or trivial.

In addition, the EAT upheld the ET's decision that the words 'as a result of the condition' must mean as a direct result of the cancer, not as a result of the radical prostatectomy. It held that Paragraph 8 operates when

- a person with a progressive condition starts to have an impairment.
- a person who suffers an existing, but not substantial, impairment from a progressive condition falls within the ambit of paragraph 8.

But a person who suffers an existing substantial impairment, not from a progressive condition but from treatment for it, cannot rely on para.8. A person who has an, as yet, asymptomatic progressive condition which does not fall within the ambit of para.8 does not receive any other special protection from the Act, no matter how dire the prognosis.

This decision does not seem to permit a purposive interpretation of the Act. There have been a number of cases involving people with cancer who have failed to meet the definition of disability because they are asymptomatic, or because they have gone into remission. The DRC, in its consultation on its review of the DDA, raised this matter. They urged the Government to implement the Disability Rights Taskforce recommendation, which it had agreed with, in order to specifically address the issue of cancer, so that the DDA definition of disability operates from the point at which the cancer is diagnosed as being a condition that is likely to require substantial treatment. It seems that this is a provision that will be included in the disability bill and thus will mean that people in K's position will no longer have to go through such hoops to gain the protection of the DDA. In addition, the Government will have to revise the Guidance to bring it in line with this change.

Another EAT decision on the definition of disability which created some controversy was the case of *McNicol v Balfour Beatty Rail Maintenance Ltd* which was heard with *Rugamer v Sony Music Entertainment Ltd* ([2001] IRLR 644). Both cases involved men who had a physical impairment but the pain which they encountered and the effects which they experienced appeared not to be as a result of the physical impairment – so called 'functional (or psychological) overlay' cases. The EAT held that functional overlay was not a physical impairment within the meaning of

the definition of disability. It held that the dividing line between physical and mental impairment depends on whether the nature of the impairment itself is physical or mental, rather than on whether a physical or mental function or activity is affected. There was no clear evidence in either case that the applicant had a 'clinically well-recognised illness', and thus the ET was not wrong to find that the applicants did not have mental impairments within the definition of disability. Both parties were given leave to appeal to the CA, but Mr. Rugamer settled his case and withdrew the appeal. Mr. McNicol represented himself in person, and the DRC was given leave to be joined as a party to the appeal.

The result of the appeal (*McNicol v Balfour Beatty Rail Maintenance Ltd*. 2002 EWCA Civ 1074) was that although they dismissed the appeal on the grounds that there was no error of law in the ET's decision, the CA did address what had been seen as the EAT's incorrect interpretation of the legislation. The CA held that the approach of the ET should be that the term 'impairment' in this context bears its ordinary and natural meaning.

'It is clear from Schedule 1 to the 1995 Act that impairment may result from an illness or it may consist of an illness, provided that, in the case of mental impairment, it must be a 'clinically well recognised' illness. Apart from this, there is no statutory description or definition of physical or mental impairment'.

LJ Mummery went on to point out that the Guidance (on definition) states that it is not necessary to consider how an impairment was caused. The essential question for the ET in each case is whether, on sensible interpretation of the relevant evidence, including the expert medical evidence and reasonable inferences which can be made from all the evidence, the applicant can fairly be described as having a physical or mental impairment. He also said that the appeal highlighted the crucial importance of applicants making clear the nature of the impairment on which the claim of discrimination is advanced; and of both parties obtaining relevant medical evidence.

Unfortunately, it seems as a result of several cases including this, there is likely to be increasing reliance upon medical evidence.

Mental health

There has been concern for some time that the definition of disability – in particular the list of what must be affected in relation to 'normal day to day activities' specified in Schedule 1 of the Act – coupled with the Guidance, has served people with mental health problems particularly badly. According to the most recent research (as referred to above) those with mental impairments were held to be disabled in only 15.3% of ET cases, compared with 58% of those with physical impairments. The DRC pointed out, in its consultation on the legislative review, that the 12 month requirement in the definition of disability is proving a persistent problem for people with depression and anxiety disorders. In a DRC case a man who had attempted suicide, and had his job offer withdrawn as a result, was held not to be disabled because he could not establish that the substantial effects of his depression were likely to last 12 months or more. Further, in a number of cases people who have experienced a series of severe depressions, each individually lasting less than a year, have been ruled not to be disabled. The applicant may argue that because they have a recurring depressive illness this should be covered. However, unless he or she can show a persistent low-grade depression (known as dysthymia) technically they will have an impairment which recurs, rather than a continuing impairment with recurring effects. This means they will not be protected by the DDA.

A recent example of the way in which mental health issues are being dealt with under the Act arises in the case of *Douglas McFarlane v Shell UK Ltd* (Appeal No. EATS/0016/02), November 2002. Mr. McFarlane (M) had a depressive illness and, following dismissal, brought a claim under the DDA, as well as one of unfair dismissal. The ET held that he did have a depressive illness and it did have an effect on normal day to day activities; but the effect was not substantial, nor capable of lasting for at least 12 months. In considering the effect of the depression upon M, the ET stated:

'As with cases of depression generally, we accepted that the only circumstance in the list [that in Schedule 1] which was applicable was the effect on the applicant's memory or ability to concentrate, learn or understand…the applicant's evidence was that he was able to concentrate for only brief periods when reading, he was forgetful about minor matters such as switching off lights, items he was going out to buy, for which he now

needed a list, or doing up his trousers. More significant was his complaint that he had to take a nap between Aberdeen and Forfar when driving to and from work. …The fact that the applicant decided to pull in to take a nap when driving to and from work indicated that he was aware of physical danger. We noted also the example given in Para C21 (perception of risk of physical danger) in relation to crossing the road. To qualify as substantial, the level of underestimation of physical danger suggested is persistent inability *to cross a road safely. The evidence, such as it was, on that point fell far short of that standard.'*

With regard to the question of whether the disability was long term, the ET considered the lengths of the episodes of depression suffered by M, as well as the evidence both from the doctor and from M, that he had recovered to a large extent. The ET went on to say that:

'The fact the applicant was still on anti-depressants was as a precautionary measure to forestall the possibility of relapse. He himself testified that he was experimentally varying his dosage at that time to establish if he could reduce his intake without it affecting him'.

The ET also rejected the suggestion that M should be regarded as having a past disability, as the episodes of depression did not appear to have lasted for at least 12 months.

M appealed, on the basis that the ET should have considered the effect of his depression upon his mobility (this was something which was raised at the ET but rejected on the basis that there was no evidence that his mobility was affected); and that the ET had failed to consider the effect of his impairment without the benefit of medication.

The EAT upheld the ET's decision, on the basis that the ET accepted evidence in regard to the issue of medication 'that it was not so much affecting the extent of the disability but more therapeutic and protective'. With regard to mobility, it was held that 'they plainly considered that the limited consequences in relation to driving were not sufficient to amount to a finding that such had a substantial effect on the way of life of the appellant'.

This case illustrates the difficulty with depression cases: the list of factors which must be affected in order for normal day to day activities to be affected are largely unsuited to mental health issues and the Guidance is of little assistance in this respect. Many episodes of depression, although making the individual subject to considerable discrimination as a result, tend to be short-lived. Although recurrent condition was not argued here, it would undoubtedly be difficult to do so, as doctors are extremely reluctant to indicate that depression is more likely to occur than not, and in any event, as shown above, an underlying recurrent impairment has to be identified. It is far from clear in this case that the ET did discount the effects of treatment – or indeed that of mobility – but this is not uncommon with cases such as this.

The DRC's consultation on review of the legislation did suggest a number of measures to address the poor rating of mental health issues in DDA cases – including that depression should have to meet a less-than-12-month test in order to classify as a disability. The DRC will be producing its final proposals in the spring but, in the meantime, it is to be hoped that the revision of the Guidance will provide an opportunity for mental health issues to be better addressed.

Less favourable treatment

Clark v TG Ltd t/a Novacold [1999] IRLR 318 has all but wiped out any debates as to what is less favourable treatment within the meaning of s.5 (1) of the DDA. There are still some cases, however, which are finding their way to the EAT such as the case of *Rowden v Dutton Gregory* (see Briefing no 262), where the EAT noted that it is unlikely that a person will admit to having discriminated against someone on the grounds of disability. So they saw no reason why, where an ET tribunal is not satisfied by an employer's reason for detrimental treatment, it should not draw an inference that disability discrimination contrary to s.5 (1) DDA has taken place.

Reasonable adjustments

The research carried out by DWP appears to indicate that this part of the Act is working relatively well. It found that the disability discrimination claims with the highest success rates concerned reasonable adjustments (with a success rate of 25.7 per cent). The most common type of adjustment, mentioned in 35% of cases, was a transfer to an existing vacancy.

The recent case of *Archibald v Fife Council* (EAT 0025/02) was concerned with the issue of transfer to an existing vacancy. Ms. Archibald (A) worked as a road sweeper, Grade 1. As a result of surgery, she suffered a complication that led to severe pain in her heels,

rendering it almost impossible for her to walk. She was unable to continue working. She was dismissed and brought a claim of disability discrimination and unfair dismissal. The disability claim relied solely upon breach of s.5 (2) – a failure to make reasonable adjustments. In particular, A, because of her disability, was having to apply for desk jobs, which were at a slightly higher grade; the respondent, FC, had a policy that where someone was applying for a higher grade job, there had to be competitive interviews. A applied for over 100 jobs but did not get one. She indicated to the ET that her failure at interview for the posts seemed to stem from the attitude take towards her being a road sweeper.

The ET held that she had not been discriminated against. They had been addressed solely as to the step is s.6 (3) of the Act – transferring to fill an existing vacancy (although they believed that there were in any event no other steps which FC could reasonably have taken in relation to A) and held that there was no obligation for her not to have to partake in competitive interviews. They cited s.6 (7) that states that nothing in Part II is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others. The ET held that even if there was a failure to comply with the s.6 duty, it was justified.

On appeal, it was argued that the ET had misdirected itself in its application to section 6, as it had not categorised the implementation by the council of its policy of requiring competitive interviews for upgrading applications as a failure to take reasonable adjustments.

The EAT, in its decision, pointed to the distinction between s.5 (1) and s.5 (2), in particular the broad nature of s.5 (1). S.5 (2), it was stated, requires a 3 stage process

- there must be a disabled person,
- s/he must be at a substantial disadvantage in comparison with persons who are not disabled (in marked contrast to the test in s.5 (1)) and
- the disadvantage in comparison with the other persons must arise from 'arrangements' made by or on behalf of the employer which are defined in subsection (2).

The EAT said that, looking at the definition generally, it was clearly of the view that this points to either a formal arrangement or informal working practice and goes far beyond the mere fact that a person in a certain job has become disabled. The EAT upheld the ET decision.

'The policy of the Council was clearly established and applied to everyone. That is the "arrangement" in terms of section 6 and it did not place the appellant at a substantial disadvantage per se because it applied to everyone. Even if such a policy was discriminatory, it could be justified upon the basis that it is designed to obtain the best persons for the relevant job …At one point, Mr. O'Carroll [the appellant's representative] seemed to suggest that, in any event, the employer should have removed the appellant from the application of the policy on grounds of disablement and that in itself was an adjustment that could easily have been made. Whilst we recognise that they could have offered her another job without requiring competitive interview, we do not consider that they were compelled to do so because the obligation to make an adjustment had not been triggered for the reasons we have given. Finally, in this respect, we consider Mr. O'Carroll's argument would be to place disabled people in a stronger or more favourable position than those who are able-bodied because he accepted that, in essence, the appellant had a right to redeployment because of her disablement and nothing more. That, in our opinion, is precisely what subsection (7) of the section is designed to avoid'.

The EAT did, however, indicate that it felt that the case should have been brought on the basis of s.5 (1), with regard to the interviews which took place for the posts. Although undoubtedly different on the facts, this case does not seem to accord with *Kent County Council v Mingo* [2000] IRLR 90 and is potentially extremely restrictive. It is being appealed to the Court of Session.

There is no definition in the Act of the term 'arrangements' although the Code of Practice at paragraph 5.2, states, 'the word 'arrangements' has a wide meaning'. There have been some cases, however, which have limited the scope of the reasonable adjustment duty, including *Kenny v Hampshire Constabulary* [1999] IRLR 76 and, more recently, the case of *Mills v London Borough of Hillingdon* (EAT/0954/00). Ms. Mills (M) brought her claim of disability discrimination on the basis that she had been transferred from her job as a home carer – which she could no longer cope with because of depression and stress – to a temporary post in the personnel department. She had been encouraged to believe that she had a long-term future within the department, as the post was to be made permanent and she would not

even have to apply for it. In the event, the employer decided not to create that post and it was never offered to anyone. M reacted badly to this and subsequently resigned her employment. The EAT, in relation to the 'non-creation' of the job, stated that:

'arrangement…indicates or envisages some positive steps taken by the employer whether by a scheme of work or instructions as to how work should be performed which then triggers a question of disadvantage in relation to a disabled person if the employer does not react by making a reasonable adjustment in terms of subsection (3). It requires, on our view, therefore, a positive act on the part of the employer to create an "arrangement" and cannot arise by means of an omission or a single act in isolation not performing part of "an arrangement".'

Cases such as *Edwards v Mid Suffolk Council* [2001] IRLR 190 (Briefing no 213) have been more positive about the scope of adjustments.

Justification

Following the decision of the Court of Appeal in *Jones v Post Office* [2001] IRLR 384 CA (Briefing no 212), practitioners had been anxiously awaiting a decision which pushed the boundaries of Jones, specifically in relation to the reasonableness of a health and safety assessment. The case of *Surrey Police v Marshall* [2002] IRLR 843, which was so helpful at the ET, has, at the EAT added to the problems which disability discrimination cases face in relation to justification.

Ms. Marshall (M) applied for a post with Surrey Police (SP) as a fingerprints recognition officer. She disclosed that she has bipolar affective disorder for which she had been hospitalised on 3 occasions. She was interviewed, tested and offered the post, subject to medical clearance. She was then informed that the police's medical officer, C, who had had vocational training in psychiatry, had decided that she did not meet the required medical standard. C feared that M might relapse and, if she did, that there would be a risk to her and others in the laboratory. She was particularly concerned by the fact that M had stopped taking the lithium normally prescribed for her condition.

M brought a claim for disability discrimination against SP. The ET held that SP had failed to show that their treatment of M was justified within the meaning of s.5 (1)(b) and 5(3) of the DDA, in that it was not both material to the circumstances of the particular case and substantial. The ET held that SP did not obtain suitably qualified and expert medical opinions about the particular circumstances of J's case in advance of reaching a decision not to appoint her – in short; it was not a properly conducted risk assessment. Although M had given details of her consultant to the employer, C had made her decision before receiving the medical report from M's consultant.

The ET did not take into consideration the evidence from the consultant psychiatrist called by SP as to the increased risk of further episodes of mania or depression as a result of M deciding to stop taking lithium. This was, according to the ET, in accordance with the decision of *Jones v Post Office* that it could not take account of evidence which was not before the employers when they reached their decision not to appoint.

The EAT allowed the appeal and remitted the case to a different ET. They held that the ET was wrong

- not to make findings on expert medical evidence because SP did not have it at the point when they rejected M, and
- in holding that the rejection of the application for employment was not justified.

The EAT stated that there is nothing in *Jones* which barred the ET from making findings of fact on some of the medical evidence obtained after M's rejection. Parts of the evidence were material, not as to whether C's assessment of risk was right or wrong in the light of further post-rejection medical inquiry or of other material not before the employer at the time, but as to whether there was material in C's hands by the point of decision on which a decision such as she made *could* properly have been made and as to whether it was a decision open to a reasonable decision maker on the material before her. The EAT went on to say that whereas in unfair dismissal cases, the ET, as the 'Industrial jury' can expect, without evidence on the point, to be familiar with the width of the band of reasonable response, in a highly technical area such as that in issue in M's case, expert evidence for and against, including evidence other than from the decision maker and obtained after the decision, will often be desirable, or even necessary, if the decision maker's credibility and rationality are to be examined.

The EAT also criticised the ET's finding that SP's decision was not based on the properly formed opinion of suitably qualified doctors. The EAT also stated that there is a real danger, if ETs set too high a requirement

for medical advice as to justification, that employers will be deterred from offering jobs because of the expense, delay and difficulty in obtaining the correct experts to report. It contrasted this case with that of *Jones*, where the employer would have been able to form some view of disability and capability over many years, as opposed to a recruitment case. This comment as to medical evidence seems slightly ironic in view of their comments as to having to obtain medical evidence for ETs – employers will seemingly have to obtain further medical evidence for an ET hearing in any event and thus this may as well be done at the outset.

Perhaps the best thing to be taken from this case for applicants is that it does mean that it is possible to bring in post-decision evidence to case doubt as to the reasonableness of a report upon which a decision to dismiss or not appoint was made.

A more recent case, that of *Joy v Connex South Central* (EAT 975/01, 13th November 2002), looked at the question of up-to-date medical evidence in justifying a potential s.5 (1) breach. Mr. Joy (J) had worked for British Rail and then Connex (C) since 1978. At the time of dismissal, he was employed in a clerical position at a station. In January 2000, he visited his cardiologist who recommended a heart investigation and he was signed off sick, this continued throughout that year and heart by-pass surgery was advised following investigation. L, one of the Respondent's Occupational Health Advisers, visited the applicant on 7th April. She wrote to his GP, who replied on 24 April, referring to the investigation results and proposed surgery and expressing the opinion that, in view of J's heart disease, he would probably be on sick leave for a considerable length of time. On 8 May L forwarded that information to H, a Health Welfare and Pensions Adviser. L completed a form describing J as unfit for all duties.

On 14 July a home meeting took place attended by a number of C's staff with a view to making a decision about his future employment. At the time no date had been given to J for surgery. They decided to dismiss him on health grounds. He appealed internally and the appeal was heard over two days. He was unable to attend the second day of hearing due to the stress of the journey from his home to Crawley, where the hearings took place. He still did not have a date for the operation. The appeal was dismissed.

He brought a claim of unfair dismissal and disability discrimination to the ET. The ET dismissed both claims. On the disability discrimination claim they found that, had J had a date for surgery at the meeting held on 14 July, C would have tried to find him alternative duties. However, the treatment of J was justified by C. No adjustment as an alternative to dismissal was practicable since J was unable to perform even light duties and suitable alternative work was not available. There was no failure to make reasonable adjustments in the form of alternative work; if there was a failure, it was justified.

J appealed against the decision of the ET, primarily on the basis that the ET failed to consider his case that C had not obtained up to date medical evidence from suitably qualified doctors (i.e. specialist cardiologists) on his medical condition, nor had they carried out a properly conducted risk assessment. J relied upon *Jones v the Post Office*, and – in arguing that the ET failed to properly consider what adjustments were available to remove or reduce the disadvantage suffered by him and whether it was practicable for C to make adjustments, on *Fu v London Borough of Camden* [2001] IRLR 186 (Briefing no 214); and *Cosgrove v Caesar and Howe* [2001] IRLR 653.

The EAT dismissed the appeal. They did not accept that a respondent must always obtain up-to-date specialist medical evidence, each case depends on its own facts. The ET must consider the nature and extent of an applicant's disability and then consider its impact in terms of his ability to carry out his normal work or adjusted work (see *Edwards v Mid Suffolk District Council* [2001] IRLR 190 – Briefing no 213). In the present case, the facts were clear from the GP's report dated 26 April, itself in part based on a report to the GP by a Consultant Cardiologist, dated 24 January 2000. No operation date had been notified by the time of the 14 July meeting. J and his partner were making it clear to C that he was not fit for work – the EAT asked what further medical evidence was necessary in this case?

This case was distinguished from *Jones* in that in the present case, no evidence was called by or on behalf of J to challenge C's assessment, based on the medical opinion by J's own GP, that he was not fit for any work, even if light work was available (which the ET permissibly found was not) prior to J's as yet unscheduled surgery. This case was quite unlike *Fu* – in particular, in that case, no one could answer the question as to what disabilities the applicant had,

whereas the answer to the same question in this case would be patently obvious. Similarly, in *Cosgrove*, Lindsay J. said

'There will, no doubt be cases where the evidence given on the Applicant's side alone will establish a total unavailability of reasonable and effective adjustments'.

In the EAT's judgment, this was one such case.

The issue of knowledge and justification has caused considerable confusion: it is well established that knowledge of disability is not required for discrimination under s.5 (1) to occur. Many felt that the EAT went too far, though, in its views on the issue of knowledge and reasonable adjustments.

The Court of Session also considered the issue in *Quinn v Schwarzkopf Ltd* [2002] IRLR 602 (see Briefing no 261).

Remedies

As reported in Equal Opportunities Review, compensation awards in Disability Discrimination Act cases have been increasing, with the highest award known of having reached £284,445.58, including interest (*Newsome v The Council of the City of Sunderland*, Case No. 6403592/99, Newcastle ET). A recent (unreported) EAT case of *Cosgrove v Caesar & Howie* (Appeals EATS/0022/02 & EATS/0023/02) shows a particularly harsh, and legally inaccurate approach to compensation and Disability Discrimination.

In around 1995/1996, Ms Cosgrove (C) began to suffer from depression and panic attacks. She went off sick as a result of treatment that she experienced, in particular being accused of bullying newer staff, in 1997, and never returned to work. She was dismissed in March 1999.

Following an ET hearing of her claim of disability discrimination and unfair dismissal, the ET dismissed her claim on both grounds. She appealed to the EAT in relation to disability discrimination, where very helpful comments were made on the reasonable adjustment issue (see *Cosgrove v Caesar and Howie* [2001] IRLR 653, EAT). The EAT found that C had been discriminated against, in that there had been a failure to make reasonable adjustments, in particular, to consider the question of reasonable adjustments in relation to her work while she was still in their employment.

At the hearing on compensation, C was awarded £53,219 in total. Both parties appealed this. Before the appeal was due to be heard, a new ground of appeal was lodged claiming that since C had been fairly dismissed, she was not entitled to an award of loss of earnings in regard to a discriminatory dismissal.

Following the appeal hearing, the EAT dismissed C's appeal. They stated that the critical question to be asked is whether or not the finding of discrimination made by this tribunal has added any dimensional element to the health problems of the employee that would give rise to a separate remedy. The answer, upon the evidence, had to be in the negative,

'She was not fit for work at the time of dismissal and even if such is to be regarded as the discriminatory act, she was not fit for work thereafter, as the Tribunal below recognised, since it did not make any award for loss of earnings for the first year after the dismissal'.

The EAT held that there was no basis for making any form of compensation for loss of earnings in relation to the alleged discrimination. In addition, they found that the ET was wrong to make an award for both personal injuries and injury to feelings.

'There is no evidence to suggest that she even considered at the time that she had been discriminated against nor that there is any grounds for solatium or the equivalent in relation to both the personal injuries claim and injury to feelings'.

The EAT concluded:

'We have great sympathy for the position of the employee, given her health problems, but we do not consider that she is entitled to any compensation…by reason of the fact that the dismissal or termination of employment was determined by the Employment Tribunal to be fair and no issue is now taken in that respect'.

The issues in respect of Goods, Facilities and Services for disabled people will be considered in the next issue of Briefings, volume 19.

Catherine Casserley
Disability Rights Commission, 222, Gray's Inn Road, London WC1X 8HL
020 7211 5074
Catherine.casserley@drc-gb.org and

RNIB, 224, Great Portland Street, London W1W 6AA
020 7388 1266
ccasserley@rnib.org.uk

Equal pay claims where the differences in pay are not attributable to the same source

Lawrence & Others v Regent Office Care Ltd & Others
(Case C-320-00) [2002] IRLR 822

Facts

The 447 applicants were originally employed by North Yorkshire County Council. The majority are women employed as catering assistants, although some are cleaners and the lead applicant is a man. The work of the catering assistants had been assessed as equivalent to road sweepers and gardeners under a Job Evaluation Scheme.

The Council had been required to contract-out its catering and cleaning services and consequently had created a direct service organisation (DSO) in order to take part in the tendering process. To improve the DSO's chances in the tendering process, the pay of the catering assistants and cleaners had been reduced to less than that of their comparators. An equal pay claim succeeded [*Ratcliffe v North Yorkshire County Council* [1995] IRLR 439], as a result of which the pay rates of the catering assistants and cleaning staff who were still employed by the Council were equalised.

However, during the litigation in *Ratcliffe*, the provision of catering and cleaning services were again put out to competitive tender. The DSO lost the majority of the catering and cleaning contracts to outside contractors. Some of the staff were re-employed by the outside contractors and there was a dispute as to whether TUPE applied. All the applicants were asked to work on lower rates of pay than at the Council. They, therefore, brought an equal pay claim seeking to rely on Article 141 of the EC Treaty, so as to compare themselves with current employees of the Council whose work had previously been rated as of equal value under the Job Evaluation Scheme.

Employment Tribunal

The ET dismissed the claims at a preliminary hearing. They held that, in order for there to be discrimination in relation to pay between male and female employees the 'discriminator' must be *'in control of both the women's wage and the comparator's wage'*.

Employment Appeal Tribunal

The EAT dismissed the appeal. They held that, in order to bring an equal pay claim, the applicant and the comparator must be in the same establishment or service. Although the EAT recognised that it was not necessary for the same entity to be the employer of both, or for the employers to be associated, they must be connected in a loose and non-technical sense. The EAT held that there was nothing to distinguish this case from a case where an applicant tried to claim equal pay with a comparator employed by another company which was not even part of the same industry.

Court of Appeal

The CA referred two questions to the ECJ for a preliminary ruling:

1. Is Article 141 directly applicable in the circumstances of this case such as to allow the applicants to compare their pay with that of men employed by the Council who are performing work of equal value?
2. Can an applicant only place reliance on the direct effect of Article 141 where her employer is in a position to be able to explain why the comparator's employer pays its employees more?

European Court of Justice

The ECJ held that the applicability of Article 141 is not confined to cases where the applicant and the comparator work for the same employer. However, where, as in this case, the difference in pay of the applicant and the comparator cannot be attributed to a single source, Article 141 is not applicable. This is because there is no body or entity that is responsible for the inequality and which could restore equal treatment.

Comment

The central question of the case was whether the ambit of Article 141 could stretch to encompass a situation where the applicant worked in a different organisation

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to the comparator and where the only connection between the two employers was that the comparator's employer had previously employed the applicant. Their employment was not governed by statutory rules, nor was there a collective agreement or centrally laid down terms and conditions of employment.

The appellants argued in the ECJ that they were still employed in the same service as their comparators and continued to perform the same work (which had been deemed equivalent to their comparators' work). They argued that it followed from the case of *Worringham and Humphreys v Lloyds Bank* [1982] IRLR 74 that persons employed in the same service may well have different employers and that a formalistic approach with artificial constraints should be avoided in order to realise the principle of equal pay. Therefore, a more fluid approach should be permitted, to allow comparisons to be made outside of any one undertaking, particularly within sectors of work in which women predominate, such as cleaning and catering.

The ECJ decided that the scope of Article 141 could not encompass a situation where the entities were not connected in any way and, therefore, the differences in pay could not be attributed to a single source that could restore equal treatment in the event of inequality.

This case, therefore, puts a limit on the ambit of Article 141 and, by extension, a limit to the application of the principle of equal pay. Along with *Allonby v Accrington & Rossendale College* [2001] IRLR 364 (currently referred to the ECJ), the limits of Article 141 appear to be being drawn to prevent an applicant from casting her net too broadly.

Claire McCann
Cloisters, 1 Pump Court, Temple, London EC4Y 7AA
cm@cloisters.com

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Briefing 271

Putting the genie back in the bottle... injury to feelings revisited

Vento v Chief Constable of Yorkshire Police
[2002] EWCA Civ 1871

Implication for practitioners

The CA has taken the opportunity presented in the appeal of *Vento v Chief Constable of West Yorkshire Police* to provide guidelines for ETs in handling claims for discrimination and assessing the sum, which should be awarded for injury to feelings. ETs now have a steady diet of discrimination claims and are more than familiar with the need to exercise restraint. The sad fact is that some cases of discrimination are quite glaring and the ET seeks to reflect this in its award. The CA's judgment may be viewed as downplaying the severe and lasting damage that can be caused to an individual victim of discrimination. Comparisons with other jurisdictions such as awards in the field of personal injury only serve to remind us that the level of damages in many areas (criminal injuries compensation, for example) is woefully inadequate.

Employment Tribunal

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

Employment Appeal Tribunal

The EAT varied these awards by substituting a sum of £25,000 for injury to feelings and £5,000 for aggravated damages. They concluded that the assessment that there was a 75 % chance of V remaining in the force amounted to an error of law and remitted this to a fresh ET for a decision.

Court of Appeal

The CA restored the award for loss of earnings and further reduced the award of injury to feelings to £18,000 plus £5,000 for aggravated damages.

Lord Justice Mummery gave the judgment of the court and reviewed the authorities in relation to injury to feelings. He started with the well-known authorities of *HM Prison Service v Johnson* [1997] ICR 275, *Northern Region Health Authority v Noone* [1988] ICR 813 and *ICTS v Tchoula* [2000] IRLR 643. ETs were also reminded to have regard to the JSB Guidelines for awards in the field of personal injury. These authorities are familiar and were considered in some detail in the article ('Adding insult to injury' Briefings no 231). In place of Judge Peter Clark's two categories of claims in *Tchoula*, three broad bands of compensation were identified:

- the top band, which should normally be between £15,000 and £25,000 for the most serious cases. It is only in the most exceptional case that an award should exceed £25,000;
- the middle band of between £5,000 and £15,000 should be used for serious cases which do not merit an award in the highest band;
- awards between £500 and £5,000 for less serious cases where the act of discrimination is an isolated or one off occurrence. Tribunals were advised that awards of less than £500 should be avoided.

Empirical analysis shows that awards have ranged from around £3,000 to £40,000. When looking at the lowest category, damages of £500 for discrimination are rarely, if ever, seen nowadays. Given litigation costs, few applicants (or unions) are likely to spend several thousand pounds pursuing a claim for what many would consider a derisory sum of money. Even cases such as a failure to shortlist or promote, would have been expected to attract damages between £1,500 and £3,000. Petty acts of verbal abuse are often ongoing for some time before an applicant will decide to resort to court.

Prior to the decision in *Virdi v Metropolitan Police* (ET case no 2202774/98) in 2000, the highest figure for an award for injury to feelings was in the case of *Yeboah*. Many applicants have used the Virdi decision to claim damages closer to £100,000 without fully considering the argument advanced in Virdi. The EAT in Vento viewed it as 'wholly exceptional'. The Virdi case was argued on the basis that the injury suffered was primarily lasting damage to the Applicant's reputation: being *'held up to hatred, ridicule or contempt'* in keeping with *Alexander v the Home Office* [1988] ICR 685. It should also be remembered that the parties agreed that the tribunal would be entitled to depart from the normal tariff because of the gravity of the discrimination suffered by V (indeed, an open offer of £60,000 was made). The CA, however, commented that awards in that region create some concern as to whether discrimination awards are in line with damages in other areas.

While accepting that no money can provide true restitution for the injury suffered as a result of discrimination, it is to be hoped that tribunals will view the comments of Lord Justice Mummery as guidelines not tramlines.

Susan Belgrave
9, Gough Square, London EC4A 3DE
020 7832 0500
sbelgrave@9goughsq.co.uk

Assessors' role in determining County Court Race Discrimination cases

Ahmed v The University of Oxford and Zimmerman
Times 17th January 2003

Implications

With the advent of the Race Relations (Amendment) Act 2000 there will be many more race cases heard in the County Court. It is not widely known that the RRA (continuing a regime originating in the 1968 Act) requires that such cases be heard in designated County Courts by judges sitting with Assessors. It is only if the parties agree that the judge may sit without such Assessors. The question that has puzzled practitioners for some years is what exactly is the role of these Assessors. This case answers that question. Their role is central and very close to that of wing members in the ET. It will need to be borne in mind by all involved in any race case heard in the County Court in the future.

The facts

A, a graduate student, bought a case in the Oxford County Court alleging discrimination by Oxford University and his supervisor Z. The allegations centred on the comparative treatment by Z of A and his two fellow students on the same course. Ultimately, after a trial lasting several days, the Court held that, although, there had been less favourable treatment of A as compared with a white student and, that there were grounds upon which an inference of discrimination might be drawn, nevertheless those grounds were displaced and an inference should not be drawn. In these circumstances knowledge of the role played by the Assessors became particularly important. The Trial Judge had assigned a relatively limited role to the Assessors and it was not plain from the decision whether they had also agreed with the decision not to draw the necessary inferences.

Court of Appeal

The CA noted that the position under the RRA was different to that under the SDA. There was no power for the judge to sit and determine the case without the assistance of the Assessors except with the agreement of the parties: section 67. The critical issue was therefore to what extent should they be involved. Since the RRA required that the Assessors have "special knowledge and experience of problems connected with relations between persons of different racial groups" it was plain that they had an important role to play. CPR rule 31.15, which makes general provision in relation to Assessors, did not apply to them. The CA held that the Court did not have a broad discretion as to the role that they were to play in the litigation. The Court was to be assisted by their contribution. That role could involve both providing expert evidence of race relations matters and also in assisting in the evaluation of the evidence. Their primary role was in the decision-making process and directions in relation to the law to be applied were to be given to the Assessors in open court.

If the Assessors gave expert evidence, that evidence should be disclosed to the parties so that they could respond prior to judgment. However, where the Assessors were involved in the process of judicial decision making by participating in the discussions, those discussions did not need to be disclosed and should normally remain confidential.

On the other hand, it had to be apparent from the judgment that the judge had complied with section 67 and had used the Assessors in reaching the final decision. So, where the judge agreed with the Assessors this should be disclosed in the judgment. Disagreement would be rare but where it occurred the judge should spell out the disagreement and the reasons for his taking a different view. That would enable the parties to see whether the judge had used the Assessors as required under section 67 and for the CA to conduct a proper review.

In the present case, the Court of Appeal dismissed the appeal on the grounds that it was 'clear that no miscarriage of justice had taken place.'

Comment

Many County Court judges have had very little experience of trying discrimination cases. They are

much less familiar with the process of drawing inferences. The role of these expert Assessors is therefore crucial in achieving real justice. In the past it has been much too easy for judges to simply ignore the Assessors altogether or to ignore or downplay the contribution that they should be making. This has lead to some poor decisions in the County Court. This judgment will make that much more difficult. If the judge disagrees with the advice that he has received from the Assessors this should be apparent in the judgment and therefore the possibility of a proper review should be much easier. Although the County Court jurisdiction in relation to other discrimination cases is not subject to mandatory assistance from Assessors it may be sense to ask for them to be appointed and to use this judgment to provide the parameters for their role.

Robin Allen QC
Cloisters, 1 Pump Court, Temple London EC4Y 7AA
ra@cloisters.com

Briefing 273

Liability of Police Commissioners for the acts of officers under their control

Joy Hendricks v Commissioner of Police for the Metropolis
[2002] IRLR 96 EWCA

Facts

H, a black police officer, has been in the Metropolitan Police Service (MPS) since 25th January 1987. She is still employed, but has been on long-term sick leave since 15 March 1999 suffering from stress, as a result of charges of assault being brought against her by another police constable.

On 12th September 1999, H was acquitted of the assault. She maintained that the bringing of the prosecution was a discriminatory act based on her race and gender. In March 2000 she made a complaint to the ET on the basis of this incident, along with a further 99 incidents of race and sex discrimination against her dating back to 1989.

The Commissioner contended that the complaint was brought out of time, as no specific acts or omissions amounting to discrimination had occurred in the three month period preceding March 2000.

At a preliminary hearing on this point, the ET identified the main issue as whether the alleged acts and omissions constitute a 'continuing act'.

Employment Tribunal

The ET concluded that the alleged acts complained of did constitute an "act extending over a period". The Commissioner appealed.

Employment Appeal Tribunal

The EAT allowed the appeal, concluding that the ET had failed to address properly the question of what constituted the "continuing act" upon which H relied. There were no allegations that other women or members of ethnic minorities had been the victims of a "policy" of discrimination. The allegations were all specific to H. The EAT said,

"Something more is needed that could demonstrate the existence of a policy or practice which needs, in our opinion, to be more tightly defined than that determined by the Employment Tribunal." (paragraph 43)

H appealed to the CA.

Court of Appeal

The CA held that the ET had made no error of law, and that, on the evidential material before it, it had been entitled to make a preliminary decision that it had jurisdiction to consider the allegations of discrimination made by H at a full hearing. Mummery LJ, in the leading judgment, said that the relevant test was the statutory language of "an act extending over a period", rather than expressions such as "institutionalised racism", "a general policy of discrimination", or a "climate" or "culture" of unlawful discrimination.

The CA felt that both the ET and the EAT had adopted too literal an approach to the language of the authorities on 'continuing acts'. (see: *Owusu v. London*

Fire & Civil Defence Authority [1995] IRLR 574 at paras 21-23; *Rovenska v. GMC* [1998] ICR 85 at 96; *Cast v. Croydon College* [1998] ICR 500 at 509) The concepts of 'policy', 'rule', 'practice', 'scheme' or 'regime' in the authorities were given merely as examples of when an act extends over a period, and should not be treated as the only ways in which the test can be satisfied. Mummery LJ said:

'The EAT allowed itself to be sidetracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.'

The fact that H was off sick from March 1999, and so absent from the working environment did not preclude the possibility of continuing discrimination against her. She remains a serving officer in the MPS, and her complaints are not confined to acts against her whilst in the working environment. They extend to less favourable treatment of her in respect, for example, of the contact (and lack of contact) with her by the MPS, during her absence.

Her appeal was allowed, and the case will proceed to a full hearing.

Comment

Mummery LJ's judgment modifies the requirement, in cases such as Owusu and Cast, for applicants to show that a 'regime' or 'policy' of discrimination was in operation against them by their employers. Instead, he reverts to the language of the statute as a guide, saying that the applicant must prove that

'the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".'(para 48)

What does seem clear is that the burden on the Applicant has been made lighter by this decision, as simply proving that the incidents are linked would seem to be significantly easier than proving the existence of a 'policy' or 'regime' of discrimination in operation against them.

'The Liversidge point'

Although not taken before the ET or the EAT, the Commissioner attempted to take a *Liversidge* point in the CA. In *Liversidge v. Chief Constable of Bedfordshire* [2002] IRLR 15 (Briefing no 236), the CA held that, before amendments introduced by the RRAA, it was not possible, on a true construction of s.16 of the RRA 1976, for Chiefs of Police to be vicariously or constructively liable for the actions of officers under their control. The SDA 1975 contains effectively identical provisions to those in the RRA 1976, and has not been amended to date. Accordingly, giving the provisions a like construction, they would not ascribe vicarious or constructive liability to Chiefs of Police.

The events of the present case took place before the amendment of the RRA 1976, and so, even if H succeeded on the limitation point above, the Commissioner asserted that he had no liability under the SDA 1975 or the RRA 1976 for the actions of his officers.

For H it was argued that as, by s.10 Police Act 1996, a police force is under the 'direction and control' of its chief officer, such officer is directly (as opposed to vicariously) responsible for the acts of his subordinates. This is an example of the sort of liability that was found to exist in the case of *Burton v. De Vere Hotels* [1996] IRLR 596. Such an argument clearly requires an ET to hear and determine the evidence and cannot therefore be dealt with as a preliminary point. The CA declined, in the light of the way the case was put, to allow the Respondent to argue the *Liversidge* point.

Furthermore, in raising the Liversidge point, the Respondent attempted to distinguish the EAT decision of *McGlennon v Chief Constable of Cumbria* [2002] ICR 1156, in which a broader construction had been given to the provisions of the SDA in order to comply with the ETD. The CA expressed the view, without deciding the point, that a different interpretation of the SDA may well be required in the light of the Directive. Clearly, this leaves McGlennon intact and with a degree of blessing. Both cases ought to be relied upon in cases under the SDA.

Richard Sharpe
Cloisters, 1, Pump Court, London EC4
020 7827 4000
rs@cloisters.com

Rights of transsexual employees in the workplace

A v Chief Constable of West Yorkshire Police & Secretary of State For Work & Pensions [2003] IRLR 32 EWCA and *Croft v Consignia plc* [2002] IRLR 851 EAT

A v Chief Constable of West Yorkshire Police & Secretary of State For Work & Pensions

Facts

A is a male to female transsexual. She underwent gender re-assignment surgery in May 1996. In January 1997 she applied to become a police constable in the West Yorkshire Police. In her letter of application she raised the question as to whether there would be any problem in a transsexual carrying out searches. The Police indicated they would give consideration to this question. However, subsequently she was told that 'transsexuals will not be appointed to the Force'. She was told that she would 'not be able to carry out full duties' because of the requirements relating to carrying out searches.

A issued proceedings for sex discrimination. The CC accepted A had been discriminated against, but contended that the discrimination was not unlawful. Although A presented as female, she was legally male. He argued that 'conformity of legal and apparent gender' was a 'genuine occupational requirement' ('GOQ') for the job, within the meaning of s.7 of the SDA.

The relevant part of s.7 (2)(b) provides that being a woman

'is a genuine occupational qualification for a job only where … the job needs to be held by a [woman] to preserve decency or privacy because it is likely to involve physical contact with [women] in circumstances where they might reasonably object to its being carried out by a [man], or …the holder of the job is likely to do [her] work in circumstances where [women] might reasonably object to the presence of a [man] because they are in a state of undress or are using sanitary facilities…'

Employment Tribunal

The ET decided that CC had discriminated against A on the ground of her sex and that the phrase 'might reasonably object' in s.7 (2)(b) of the 1975 Act did not extend to those who might have religious, cultural or moral objections to being searched by a transsexual person.

Employment Appeal Tribunal

The EAT allowed CC's appeal, finding that the bar on transsexual people joining police forces was not contrary to the SDA 1975. It decided that whilst objections to being searched based on embarrassment, ignorance or prejudice would not be reasonable, religious, cultural or moral, foundations for such an objection were covered by the expression *'might reasonably object'* in s.7 (2)(b) of the Act.

The relevance of *Goodwin*

After the EAT's decision, the ECtHR decided in *Goodwin & I v UK* [2002] IRLR 664 ECtHR (Briefing 257) that transsexuals should be legally recognised in their new gender.

Court of Appeal

The CC, supported by the Secretary of State for Work and Pensions, submitted the CA should focus on the powers of stop and search under s.54 (9) of the Police and Criminal Evidence Act 1984 (PACE), which provides that *'a constable carrying out a search shall be of the same sex as the person searched'*. (It should be noted that section 55 PACE states that intimate searches cannot be conducted by a member of the opposite sex.)

A argued that the *Goodwin* decision established that a post-operative male-to-female transsexual was entitled to be regarded for all purposes as female; and this decision had direct effect prior to the HRA coming into force through the ETD and the SDA.

The CA agreed that the ECHR had direct effect through the ETD. Kennedy LJ said in paragraph 28 of the decision:

'If when dealing with the appellant's application for employment the Chief Constable was bound to treat her as female, then it was not open to him to discriminate against her on the basis that she was transsexual, and no

possibility of invoking section 7 {genuine occupational qualifications} could arise'

The CA decided that, after *Goodwin*, it was not open to a Chief Constable to invoke section 7 SDA (which covers genuine occupational qualifications) as the basis for objecting to the employment of a transsexual police officer, particularly where the officer was prepared to disclose his or her transsexuality.

A's appeal was allowed.

Comment

Strangely, despite the CA's finding that section 7 cannot be invoked, some parts of the judgment seem to say that A may remain a male for the purposes of the criminal law, in particular for s.54 (9) of PACE.

Crucially, if A *is* deemed to be female, no question arises under section 7B(2)(a) SDA 1975 or section 54(9) PACE. On the facts of this case, A, a post-operative transsexual, would now be legally recognised as female.

Despite this seemingly obvious point, Buxton LJ only found that CC's section 7 GOQ defence was destroyed, in the light of A making clear she had no objection to colleagues and possibly others having knowledge of her transsexuality. This seems to miss the point. There are no difficulties in complying with section 54(9) PACE for an undisclosed transsexual police officer once their new identity is accepted as such. Surely the disclosure point is superfluous to the argument, for if A is deemed to be the same sex as those she searches, how is CC unable to comply with his obligations under section 54(9) PACE?

The confusion in the CA judgment arises from unfortunate historical points of procedure which arose earlier in the litigation and which should not obscure the point of principle established by Kennedy LJ (see quotation above).

Rather unsatisfactorily, the Court of Appeal comments that whether A is deemed to be female or not may depend upon the purposes for which she seeks to claim her new identity. Buxton LJ says in para 41 that:

'the court will have to consider in every case whether the subject's interest in achieving respect and recognition for her identity is outweighed by countervailing considerations of the public interest.'

Hence, when assessing whether there is a breach of Article 8 for these purposes the court would have to consider the difficulties perceived by CC as arising from A's transsexualism. Obviously, in some cases, where an officer has only just started to dress as a woman, yet remains male in every other respect and has not even started hormone treatment, the difficulties that could arise under section 54(9) would be real. But such individuals are most unlikely to acquire legal recognition in their new gender as such an early stage of their transgender passage.

The problems that this lack of recognition causes was highlighted by the EAT in *Croft* (see below), where it stated: '…until surgery is completed there is no transformation, and there will be difficulties for which the law provides no redress in the interim.'

CC has applied for leave to appeal to the HL.

Croft v Consignia plc

Facts

In this case female employees objected when C, a male to female transsexual asked to use the female toilets at work. Consignia refused her request.

Employment Tribunal

The ET dismissed the claim that the employers had discriminated by not allowing C to use the female toilets once she had started living and working as a woman as, until she had become a woman for the purposes of the SDA, she was not entitled to use female facilities. They concluded that, the point at which the definition of her gender would change for the purposes of the SDA, was the final operation to change physical characteristics.

Employment Appeal Tribunal

The EAT also held that C had not been constructively dismissed or subjected to discrimination on grounds of her sex. It found that adequate sanitary facilities, namely disabled toilet facilities, had been provided in accordance with health and safety legislation. The employer was required by the Workplace Directive and Regulations to provide separate toilet facilities for 'men' and 'women'. These definitions were to be determined by the position in law or what the employer believed their legal sex to be. This was their sex at birth, rather than the gender a person might select for himself or herself later on. This decision is now being appealed to the CA.

Comment

It is clear that the management at Consignia felt themselves to be in a dilemma. Their female workers had known C as a male colleague for a number of years. They changed into their uniforms in the toilet and female cloakroom. They felt uncomfortable about sharing these facilities with C. Had this change been imposed upon them without notice, they could arguably have brought constructive dismissal cases, arguing that the implied term of trust and confidence, along with their privacy rights under Article 8 of the Convention, had been breached. However, had C been post-operative, and the other female employees been given due notice of her intended move to the women's toilets, they would have been very unlikely to have had any legal redress for the change imposed upon them.

The case demonstrates the importance of equal opportunities training in the workplace and the need for clear guidelines relating to the integration of transsexuals in the workplace in their new gender.

Implications

Both cases raise difficult practical problems about conflicting rights in the workplace. Whilst it is possible that the *Croft* issue could cause workplace conflict and dilemmas for employers seeking to integrate post-operative transsexuals into the workplace after *Goodwin* is incorporated into UK law, for pre-operative transsexuals the situation will be far more fraught.

The consequence of the decision in *Croft* is that it bars those in C's position from fully living the 'real life' test. The same situation could arise from any dispute over single sex space, such as where a women's group objects to the attendance by a male to female transsexual who had just commenced her initial hormone treatment.

But while those in C's position can at least know that, when they complete their treatment, they can register their new gender and acquire the accompanying rights, a question mark remains over the legal position of those whose age or health means they are unable to undergo the complete gender reassignment procedures. At present they would remain excluded from all 'women only' space and not entitled to rights conditional on establishing female status. It is hoped that when the Government publish the draft bill for legislation to implement *Goodwin*, the proposals will take this point into account and permit those who are unwilling or unable to undergo the full treatment for gender reassignment to apply for legal recognition in the acquired gender.

A further issue that remains is that of whether a Chief Constable has any remaining powers to refuse to employ a prospective transsexual police officer. The CA confusingly retain the possibility that the determination of a transsexual's Article 8 rights is kept case-specific and any Article 8(2) qualifications will be put into the balance, despite *Goodwin*.

The Lord Chancellor's Department announced on 13 December 2002 that transsexual people were to be given legal recognition in their acquired gender. This would make it possible, from the date of recognition, for transsexual people to marry in their acquired gender, claim State pensions at the appropriate age, and request updated "birth" certificates. This should remove the confusion.

So if the authorising body, having scrutinised an application for legal recognition in the acquired gender, permits the individual to register in the new gender, the police force considering an employment application from a transsexual person should not be concerned about any legal requirement to disclosure his or her former gender, regardless of the CA's comments about weighing up public interest considerations. This is where *Goodwin* makes a notable difference to UK law.

It is worth noting that the changes made to the SDA by the Gender Reassignment Regulations 1999 (inserting a new SDA s 2A) do not provide protection for transsexuals outside the workplace. There is a gap in the field of transsexual's rights in relation to goods, services and facilities. Complainants in this field must rely upon a purposive interpretation of the word 'sex' in sections such as s.29 SDA. The legislation needs to be amended for greater transparency.

The Government's intention to legislate as soon as possible to give transsexual people their Convention rights will not directly impact upon this gap. Lord Lester's Equality Bill 2003 would do this (see http://www.odysseustrust.org/equality.html) but how long it will be until such a Bill is passed is difficult to say.

Rachel Crasnow
Cloisters, 1 Pump Court, Temple, London EC4Y 7AA
rcr@cloisters.com

Excluding future claims in compromise agreements

Royal National Orthopaedic Hospital Trust v Howard
[2002] IRLR 849 EAT

Facts

H was employed by the hospital for eighteen years. She left in November 1998 and brought a claim of sex discrimination and constructive dismissal against the hospital.

That claim was compromised by way of a COT3 agreement, the terms of which described it as being:

'in full and final settlement of these proceedings and all claims which the applicant has or may have against the respondent (save for claims for personal injury and in respect of occupational pension rights) whether arising under her contract of employment or out of the termination thereof … or arising under the Employment Rights Act 1996, the Sex Discrimination Act 1975 or under European Community law.'

In 2000 H was asked by a consultant surgeon to assist him at an operation as a technician. This entailed H being employed by the hospital on a temporary contract for the day. H alleged that the hospital refused to allow her to work there. She alleged that this was because she had previously brought a sex discrimination claim against them. She issued proceedings for victimisation under the SDA.

The hospital applied to the ET to have her claim dismissed on the grounds that she was excluded from bringing it because of the earlier compromise agreement.

Employment Tribunal

At a preliminary hearing the ET concluded that the COT3 agreement did not operate to bar H's claim of victimisation. The hospital appealed.

Employment Appeal Tribunal

Counsel for the hospital argued:

(i) that the words 'all claims which the applicant has or may have' were plainly designed to preclude potential future claims; and

(ii) that the fact that the COT3 agreement specifically stated that it did not exclude potential claims in respect of personal injury and occupational pension must mean that it *did* exclude all other potential claims.

Counsel for H argued that:

(i) as a matter of public policy, it was impossible for a party to contract out of their right to bring claims which had not yet come into existence;

(ii) that the use of the words 'has or may have', rather than 'has or may have now or in the future' indicated that the parties intended to draw a line under complaints that H might have against the hospital at the date of termination. There was no reference to claims arising after the termination of H's employment.

The EAT confirmed that ordinary rules of construction apply to COT3 settlement agreements. They quoted the House of Lords in *BCCI v Ali* [2001] IRLR 292:

'The law does not decline to allow parties to contract that all and any claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise agreement, that was the intention of the parties … If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come into existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for.'

The EAT could see no public policy reason why a party could not contract out of a future claim. However, in the present case, there was nothing to indicate any intention to contract out of future claims. H's claim in the present case arose out of the alleged conduct of the hospital after the date of the COT3 agreement and the termination of her employment. The true construction of the agreement did not prevent her bringing proceedings. The express reference to personal injury and occupational pension claims was a regular feature of COT3 agreements, which, in part, reflected a nervousness on the part of lawyers about the

difficulties surrounding pension claims and an awareness of the possibility of personal injury claims, such as asbestosis, emerging years after a settlement is concluded.

Implications

This case confirms that close attention must be paid to the language of settlement agreements. If the parties are seeking to express agreement to terms which are in any way exceptional, they must do so as explicitly as possible.

Currently, a case such as this concerning victimisation which takes place after the end of the employment relationship can only be brought under the SDA (*Coote v Granada Hospitality* [1999] IRLR 452). A similar claim of post-termination victimisation is not possible under the RRA or DDA as the law stands at present (see Briefing 215 on *D'Souza v London Borough of Lambeth* and Briefing 242 on *Jones v 3M Healthcare*). Both of these cases were heard on appeal to the House of Lords in December 2002. That judgment will provide definitive guidance on post-termination discrimination under all three Acts in their current form.

The position for new claims will change when the government gives effect to the Race Directive and the Employment Directive later in 2003 (although not in relation to discrimination on grounds of nationality). An applicant will be able to complain of discrimination (not just victimisation) which takes place after the employment has ended, provided a 'close connection' can be shown between the discrimination and the former employment relationship. The position will be the same under all three existing discrimination Acts and under the Regulations outlawing discrimination on grounds of sexual orientation and religion or belief.

David Massarella
Cloisters, 1 Pump Court, Temple, London EC4Y 7AA
dm@cloisters.com

Briefing 276

Institutional racism and race discrimination

Commissioners of Inland Revenue and Cleave v Morgan
[2002] IRLR 776 EAT

Implications for practitioners

This case addresses two interesting issues. The first of those issues was whether the notion of 'institutional racism' is of any relevance to establishing a race discrimination complaint. The Stephen Lawrence Inquiry Report (CM 4262) placed the concept of institutional racism at the centre of the discussion about substantive racial equality. The Report defined institutional racism as

'The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people' (Para 6.34, Stephen Lawrence Inquiry Report, CM 4262-I).

The first question in *Morgan* related to the relevance, if any, of that concept to race *discrimination* as defined by Part 1 of the RRA.

The second issue in *Morgan* involved consideration of the proper scope and extent of the principle in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, namely, that acts done for the purposes of protecting a Respondents' position in pending discrimination proceedings will not constitute victimisation.

Facts

M is a black barrister who was employed by the IR in their solicitors' department. She complained of race discrimination in respect of her career progression in the ET. She also complained that C had victimised her when he circulated a memo to her departmental colleagues informing them that M had brought race discrimination proceedings and warning them that as a result details of their personnel records might become public knowledge.

Employment Tribunal

The ET upheld both of M's complaints, holding that M's progression through the career grades was slower than that of her white colleagues. They noted that lawyers from ethnic minority groups progressed at a disproportionately slow rate as compared to their white colleagues. The ET found that the acts complained of (some of which related to incidents outside the three month time limit) amounted to

'a continuous act within that definition and that there was a practice in accordance with which decisions were taken that amounted to a continuous discrimination'.

They also found that in circulating the memo, C had victimised M, concluding that;

'it is clear that the memorandum … was directly in relation to the applicant bringing a claim which brings it within S.2 and it obviously had an adverse effect on the attitude of the colleagues of the applicant to her, bearing in mind the wording of the memorandum'.

The ET added that there appeared 'to be 'institutionalised' racism in the department.'

Employment Appeal Tribunal

At the EAT the IR and C contended that the ET's reasoning was inadequate. They argued that it was not open to the ET to conclude that there was a continuing act because there was nothing truly specific identified by way of a policy, rule or practice pleaded by M. It was suggested that the ET's conclusions were not open to it on the evidence and, having regard to the decision in *Khan,* C's action did not amount to victimisation.

The EAT expressed 'unease' about the decision, however, it found that the conclusions of the ET were, in fact, open to it on the evidence. As to the 'time' point, the ET had concluded that a 'practice' existed sufficient to enable M to complain of earlier events. The EAT further concluded that the finding that the IR's explanation for the difference in treatment of M (in circumstances where there was a difference in race) was not satisfactory or adequate was a 'permissible option' (and therefore the EAT could not interfere with it).

The EAT then examined the victimisation claim. They held that there must be circumstances in which an employer can circulate its staff about an outstanding discrimination claim, for example, for the purposes of identifying witnesses to a particular act. However, in this case, the memo sent by the C did not advance the Respondents' case in the proceedings, and nor would it have harmed their case if the memo had not been sent. It was not a step to 'preserve their position in pending discrimination proceedings' or a response to 'protect the employer's interests as a party to the litigation'. Consequently, the circulating of the memo fell outside the Khan exception and hence the ET were entitled to find that it amounted to less favourable treatment.

The EAT expressed particular concern at the finding of 'institutionalised racism'. It found that such a claim was not made by M, and had such a claim been made it would probably have been met by an assertion that it should be struck out. The EAT stressed that there is no statutory or other offence constituting 'institutionalised racism' and such an assertion had not been identified as an issue in the case. The EAT went on to criticise the ET for reaching this conclusion without any explanation as to what it understood by the meaning of 'institutionalised racism'. The ET's apparent basis for the conclusion, namely that the department had 'a practice which did not embrace wholly ethnic minority lawyers', was, the EAT concluded, unsatisfactory. Nevertheless, the EAT concluded that this conclusion was not sufficient to undermine the decision as a whole and it did not allow the appeal.

Comment

The EAT's conclusions on the victimisation claim are consistent with the decision of the HL in *Khan* and the policy reasons behind the victimisation provisions. These provisions are designed to protect complainants against adverse treatment based on the fact that they have made a complaint of discrimination (or done another 'protected act'). They are, as the HL made clear in *Khan*, not designed to prevent employers reasonably and properly conducting a defence to any such complaint. However, the *Khan* 'exception' (as the EAT describe it) cannot be used to excuse all less favourable treatment related to outstanding discrimination complaints – that itself would completely undermine the protection afforded by the victimisation provisions.

The EAT's concern about the ET's conclusion of 'institutional racism', on the facts of the case, was probably justified. There had been no such claim or assertion in the pleadings and no evidence regarding the existence of structural discrimination. In this sense, the finding of 'institutional racism' by the ET does appear to have been insufficiently reasoned.

Nonetheless, there will be cases in which the fact that a Respondent is 'institutionally racist' will be highly significant. In order to rely on this, it is instructive for Applicants to first define the concept, most usefully and easily by reference to the Stephen Lawrence Inquiry Report definition, and then, with evidence, prove it. The fact that a Respondent is, properly described, 'institutionally racist' will be highly relevant to the drawing of an inference of race discrimination. Further, from July 2003, when the burden of proof in race discrimination cases will shift , the existence of evidence of institutional racism will be particularly powerful.

Ulele Burnham
Doughty Street Chambers, 10-11, Doughty Street, London WC1N 2PL.
u.burnham@doughtystreet.co.uk

Briefing 277

The requirement to prove detriment in a racial harassment case

Thomas v Robinson [2003] IRLR 7

Facts

R is of black Afro-Caribbean origin, T is white. Both began working for their employer around the same time. In June 2000, R and T attended a weekend residential training course. T made remarks about Caribbeans coming to the UK: 'they come over here and scrounge off the system then go back.' R's parents had recently returned to the Caribbean. R immediately complained to their employer about the racist comment.

Soon after R had disciplinary proceedings taken against her. These alleged sexual misconduct that brought the employer into disrepute, whilst on the residential training course. R was dismissed for misconduct. T was given an oral warning for the racist remarks. R brought a claim of race discrimination against T and the employer.

Employment Tribunal

R gave evidence as to the detriment she had suffered as a result of T's racist remark: she was shocked and deeply offended. T's representative tried to cross-examine her on that reaction, but was prevented from doing so by the ET Chair, who stated that all racial abuse was detrimental. The ET found that the words used by T amounted to racial harassment of R.

Employment Appeal Tribunal

The ET had been wrong not to consider whether R suffered detriment as a result of the racist comment and to prevent T's representative from cross-examining R as to the effect on her.

A single act of racial abuse is enough to found a complaint of racial harassment, but there are two elements to racial harassment, both of which must be proved:

'a Tribunal which is considering whether an employer has been discriminated against by the use of racist language should consider both whether the language has been used and whether the employee has suffered detriment as a result. If both elements are established, then as a matter of shorthand it can be said that the employee has been racially harassed. In very many cases the second element will be extremely easy for the employee to establish, but this does not entitle the Tribunal to assume the second element, nor (as the tribunal seems to have done here) to decide that proof of the language created an irrebuttable presumption of detriment. There are some work environments in which (undesirable though it may be) racial abuse is given and taken in good part by members of different racial groups. In such cases the mere making of a racist remark could not be regarded as detriment.'

In this case, the EAT commented that T might have had the basis for substantial cross-examination. It might, for example, have been suggested that R had not been upset by the racist remark. There was evidence that she had good relations with T after the remark was made. It might have been suggested that R had complained of racism only because she herself was the subject of a complaint of misconduct. Whether such an approach in cross-examination would have helped or harmed the respondents' case, the EAT could not say. T

277 had been denied the opportunity to put that case and that amounted to an error of law. The appeal was allowed and the case remitted to a different ET.

Comment

The judgment confirms the established principle that, if the language concerned is race-specific, there is no need for an applicant to show that a person of a different racial group would have been treated differently. Racist abuse is, in itself, less favourable treatment on racial grounds. However, the applicant must take care to go on to give evidence as to the detriment she suffered, to spell out the impact on her, even if she considers that it ought to go without saying. She must also expect to be challenged as to her reaction.

This case is also worth noting because the EAT applies the definition of Brandon LJ in *Ministry of Defence v Jeremiah* [1979] IRLR 436 CA that 'subjecting someone to a detriment' means no more than 'putting someone at a disadvantage'. In preference to the alternative definition, preferred by respondents, in *De Souza v Automobile Association* [1986] IRLR 103 CA. In that case May LJ suggested that, to prove detriment, an applicant must show that 'a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he had thereafter to work'. In this case the EAT commented:

'That dictum must now be treated with some reserve because it is clear that some levels of distress will now be regarded as detriment, and in any event a requirement of working in an environment where racist remarks are tolerated may itself be a detriment.'

David Massarella
Cloisters, 1 Pump Court, Temple, London EC4Y 7AA
dm@cloisters.com

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ETs should not make assumptions about racial characteristics

Bradford Hospitals NHS Trust v Al-Shabib [2003] IRLR 4

Implications for practitioners

In a race discrimination case an ET cannot assume that a specific characteristic may be linked to a particular ethnic group. An ET should not base its findings upon cultural and racial differences unless there is some evidential basis for them, such as expert evidence.

Facts

A was an Iraqi working as a researcher at Bradford Royal Infirmary. He joined the Infirmary's staff gym and he signed a memorandum agreeing to comply with its rules. The rules stated that where a deliberate breach of the guidelines occurs this would lead to the loss of gym membership without any refund and an exclusion from any future use of the gym area. The rules provided that relatives and friends of gym members should not be allowed into the gym.

A brought his wife and child into the gym. Other members complained. In January 2000 A was asked by the gym officer not to bring his family into the gym. A later angrily confronted the staff gym officer. The director of rehabilitation instructed the gym manager to investigate the matter. Following the investigation, A's gym membership was cancelled on the grounds that he could not be trusted to abide by the rules in the future.

A initiated a complaint under the internal grievance procedure. The director of patient care, S, heard the appeal. During the hearing A alleged in emotive language that he was the victim of racism. S rejected A's grievance. She found that the withdrawal of gym membership was a result of A having been in breach of gym rules, and not race discrimination. A brought ET proceedings against his employers.

Employment Tribunal

The ET held that A had been discriminated against on grounds of race when his membership of the gym was withdrawn and in the way in which his employers had dealt with his grievance. They found that A was treated less favourably when his gym membership was withdrawn, as a hypothetical comparator would have been given the opportunity to abide by the rules.

The ET concluded that, in dealing with the grievance; S had 'closed her mind to the applicant's case' as she felt that A's conduct was challenging her authority. S told the ET that A had used language that was inflammatory and excessive, and this had led to her decision that he would not abide by the gym rules in the future. The ET considered that A did not behave in a *'conventional Anglo-Saxon way'*, that S was unreasonable in expecting him to do so, and had demonstrated a lack of awareness of racial and cultural differences.

The ET also found that A had been victimised contrary to s.2 of the RRA, even though victimisation had neither been pleaded in the IT1 nor raised as an issue in the course of the ET hearing.

Employment Appeal Tribunal

The EAT concluded that the ET had been wrong in law in finding that, by withdrawing his gym membership, the employer treated A less favourably than it would have treated a hypothetical comparator, in that a hypothetical comparator would have been given the opportunity to abide by the rules. The EAT' considered that there was no evidence from which the ET could have constructed the hypothetical comparator so as to draw an inference of differential treatment. The ET had merely concluded that the employer's treatment of A was 'unreasonable' rather than 'less favourable'.

The ET's finding that the handling of A's grievance was discriminatory was based on the view that A was unconventional in that he was difficult to control and used emotive language. The ET had attributed this unconventional conduct to A's racial and national origin and had adopted a very broad distinction between 'Iraqi' and 'Anglo-Saxon' behaviour. Whilst it may sometimes be legitimate for an ET to take into account differences in behaviour that reflect racial and cultural differences, it is wrong for an ET to make findings based on the existence of such differences unless there is some evidential basis for them. For an ET simply to assume that a particular ethnic group has a specific characteristic is fundamentally wrong, even if the assumption is made for a benign purpose.

The ET ought to have asked itself whether the manager would have followed the same approach in the case of any employee who behaved discourteously and used inflammatory language in the course of a grievance hearing.

The ET was wrong in finding that A had been victimised when he had not actually complained of victimisation. The ET only has jurisdiction to hear decide those complaints that have been put before it. The appeal was allowed and the case remitted to a differently constituted ET.

Comment

This case clarifies the way in which racial and cultural differences ought to be considered by ETs. An applicant who wishes to rely on cultural distinctions as part of his case must produce evidence to support the existence of that distinction. This will usually take the form of expert evidence. The case is also an important reminder that reliance on a hypothetical comparator must be supported by some evidence.

Semaab Shaikh
Cloisters, 1 Pump Court, London EC4Y 7AA

Single Equality Act Campaign

On Tuesday, 14 January, Lord Lester introduced his Equality Bill in the House of Lords. The Equality Bill will have its Second Reading in the Lords on 28 February 2003. The future of the Bill after that is not clear; Lord Lester would prefer the setting up of a Select Committee so that interested parties could give evidence. The Bill, which has 94 Clauses and 8 Schedules, and Explanatory Notes are available on the website of the Odysseus Trust www.odysseustrust.org

On May 12th JUSTICE, the National AIDs Trust and the TUC will be holding a joint conference at the TUC on 'Equal Protection: Working for a Single Equality Act'. The speakers will include Robin Allen QC, Tufyal Choudhury, Sandra Fredman, Anthony Lester QC and Professor Barry Fitzpatrick. Further details from Ruth Allen at JUSTICE 020 7762 6437.

EOC recently commissioned Professor Sandra Fredman to write on the Future of Equality in Britain. This excellent paper is available on the EOC website at http://www.eoc.org.uk/cseng/research/a_future_of_equality_in_britain.pdf

Hard copies are available on request from info@eoc.org.uk.

Sexual Orientation Discrimination case reaches the House of Lords

The case of Ms Pearce, a lesbian teacher who says she was forced out of her job by a "sustained campaign of harassment" by pupils has taken her fight for compensation to the House of Lords. The ET in 1999, the EAT in 2000 and then the CA have all dismissed her case. Her case was heard on January 27th and a decision is awaited.

Convent payout for barred pupil

A former convent schoolgirl who was barred from classes after she became pregnant has won £6,250 compensation in an out-of-court settlement. Mount Lourdes convent grammar school at Enniskillen, Co Fermanagh, admitted sex discrimination and agreed to pay the compensation to Margaret McCluskey, just as her case was about to reach a county court hearing. She brought her case with the help of the Northern Ireland Equality Commission.

Trevor Phillips to head the Commission for Racial Equality

It was announced on January 18th that Trevor Phillips, the broadcaster and London assembly chairman, is to be the new chairman of the Commission for Racial Equality. He will be working for four days a week. It was a close-run contest and Mr Phillips narrowly beat Naaz Coker and Zahida Manzoor, two women of Asian origin, who also made the final shortlist of three.

Sexual Harassment at Royal Mail to be investigated

On January 17th it was announced that the Equal Opportunities Commission had launched a formal investigation into the wide-spread sexual harassment of women postal workers at Royal Mail. The EOC, in a rare move, accused Royal Mail of failing to take sufficient steps at national, regional or local level to prevent "significant" sexual harassment of its female employees "over a sustained period."

Sun accused of racism

The Press Complaints Commission are to investigate the Sun following complaints (mainly referring to racism) over a satirical feature in the Sun Newspaper. All newspapers are subject to the PCC's code of conduct, which outlaws 'prejudicial or pejorative reference to a person's race, colour, religion or sexual orientation' under clause 13, which deals with discrimination. Under clause one, which concerns accuracy, the code stipulates newspapers must not publish 'inaccurate, misleading or distorted material including pictures' and adds that while papers are 'free to be partisan', they 'must distinguish clearly between comment, conjecture and fact'. A spokeswoman for the CRE said as the body has no power over the media, it redirects complaints to the PCC.

No ban on guide dogs under Islamic Law

Recent guidance from the Shariat Council has confirmed that trained assistance dogs can accompany disabled people into restaurants or taxis managed or driven by Muslims. With two million Muslims in Great Britain, many running businesses in the service sector, this represents an important ruling with potentially far-reaching effects. The DDA requires service providers to change practices deemed to be discriminatory. Therefore, this guidance helps to clarify religious law and prevent any possible conflict with secular law.

Government's Single Equality Body Consultation

The Government launched "Equality and Diversity: Making it Happen", a consultation document on new arrangements for promoting and enforcing equality on October 22nd. The paper seeks views on options for new equality arrangements in the future including the option of a Single Equality Commission, which would cover disability, race, gender, age, religion and sexual orientation. The consultation ends on 21 February 2003. The DLA held a consultation meeting for members on February 3rd and we will be submitting a response on behalf of the DLA. Copies of the response will be available from the DLA office on request.

Anglican clergy denied basic workplace rights

In December the Church of England admitted change was needed as the union, Amicus, completed consultation talks with the DTI about extending statutory employees' rights to the clergy. Historically the law has not recognised that clergy have a terrestrial employer, only God, so they have no protection against unfair dismissal and discrimination. Now the Archbishop's Council, the Church's managing body, has promised to set up a working group with a view to "enhancing safeguards against injustice".

DLA News

Change of DLA address & new contact information:

Since the last issue of DLA Briefings, the DLA has a new member of staff and a new office address. To contact the DLA please note our new details as given below:

Karen Whitehead – DLA Administrator,

DLA Office, PO Box 2569, South Croydon CR8 1WE

Tel: 0208 668 1182 / Email: info@discrimination-law.org.uk

Please note that the DLA is largely run on a voluntary basis by an elected management committee of members, elected annually at the AGM. It employs one member of staff on a part-time basis. In particular the DLA office phone is only manned and open to callers Monday – Wednesday 9am – 1pm.

DLA EMAIL NEWS Some members may be unaware that Email News has been revived and is now issued as a weekly-fortnightly news service for DLA Members. It includes details of events and conferences, recruitment advertising, membership news and information as well as current UK News relevant to the DLA's aims and member's interests. To receive your copy, email the DLA office on info@discrimination-law.org.uk and get yourself up to date with current DLA membership information and news. We welcome your news and information – send this to info@discrimination-law.org.uk for inclusion in future issues.

Renewal deadline & Membership Directory Members may be unaware that the DLA membership year runs from April – March and the next membership renewal deadline is approaching. By early March you should receive a notice inviting you to renew your DLA membership (and continue receiving membership services such as Briefings and Email News). With this renewal notice, you will be asked to complete a more detailed form, with the option to have your details included in the forthcoming membership directory. It will also ask if you would like any information made more widely available outside the DLA membership, by inclusion in a more widely available referral directory. Please look out for and complete the membership form – and help the DLA to improve its services for you.

Website redevelopment plans The DLA is currently redeveloping its website with the aim of providing more membership services in a special member-password section as well as improving and expanding the general discrimination law information. Any members with website development expertise are asked to contact Karen Whitehead in the DLA office – the DLA is a membership organisation, run on a voluntary basis by members, for its members and your ideas and input are valued.

Employment Law and Human Rights

by Robin Allen QC and Rachel Crasnow

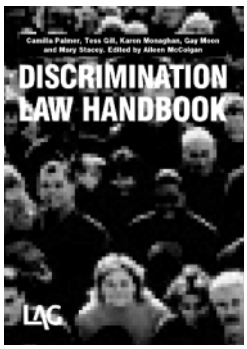
Blackstone's Human Rights Series, Oxford University Press, 2002, £39.95

This key text is a welcome addition to the Blackstone's Human Rights series, which takes a discrete area of law and aims to provide practitioners with expert, practical advice on the implications of the Human Rights Act 1998 in that area. Written by Robin Allen QC and Rachel Crasnow, acknowledged experts in employment and human rights law, this book amply meets its aim and does for employment what previous editions in the series have done for media, immigration and local authority law.

Those who brave the slightly bizarre front cover (a rather concerned-looking surgeon donning her operating theatre mask?) will find a concise and useful text. It assumes relatively little knowledge of the European Convention on Human Rights or the Human Rights Act, but within a few easily readable chapters the reader would become familiar with the mechanics of both, and the key ways in which employees and employers alike can deploy their concepts. Chapter Four provides a particularly helpful analysis of what constitutes a 'public authority' for the purposes of the Act, with a useful checklist of questions that can be asked in order to address this frequently vexing issue. The next eight chapters provide detailed yet concise commentaries on the manner in which employment law is affected by Articles 4, 6, 8, 9, 10, 11 and Article 1, Protocol 1 of the Convention, with Article 6 and 8 (the right to a fair hearing and to privacy and family life, respectively) being particularly well-covered. The book closes with two chapters addressing where human rights and employment law truly meet – in discrimination law. Chapter 13 is a useful overview of the concept of discrimination in international human rights instruments other than the Convention. Chapter 14 unpacks Article 14 and its most practical uses in domestic law, particularly in plugging the legislative gap before the implementation of Employment Directive that will bring legislation to address discrimination on the grounds of sexual orientation, religion or belief and age.

The narrative resonates with the advocacy style of both writers, namely authoritative and well-informed, but also frank, anecdotal and practical. The slight delay in publication of the book is actually a blessing as it has enabled the writers to take account of two years' worth of case law under the Human Rights Act, while hinting at the changes to the discrimination landscape which implementation of the Employment and Race Directives will bring. It would be an invaluable addition to any employment lawyer or human resources manager's bookshelf.

Henrietta Hill
Doughty Street Chambers, 10-11, Doughty Street, London WC1N 2PL
h.hill@doughty street.co.uk



Discrimination Law Handbook

by Camilla Palmer, Tess Gill, Karon Monaghan, Gay Moon and Mary Stacey
Edited by Aileen McColgan
Legal Action Group, 2002, £45

The Discrimination Law Handbook is an up to date, accurate, user friendly and plainly written guide to what is a fascinating and at times challenging area of law. Discrimination law consists of a fusion of domestic, European and Human Rights legislation. This handbook guides you through the minefield of all aspects of what is an enormous area of law.

Currently domestic legislation prohibits discrimination on grounds of race, sex, disability, marital status, part-time work and gender reassignment. The handbook helpfully assesses the current state of affairs and the impact of future legislation, which will in coming years prohibit discrimination on grounds of sexual orientation, religion and belief and age. At all times the backdrop of the Human Rights Act 1998 is considered in respect of each form of discrimination.

The topics covered in the handbook provide guidance to the essential areas in the fields of both employment and non-employment related discrimination. The legal structure and grounds of discrimination form an essential introduction to the area, with guidance on different types of discrimination, covering definitions of and proving discrimination. Disability discrimination is subject to in-depth analysis on concepts such as reasonable adjustments, less favourable treatment, and the interrelationship with justification and how this may be approached. Chapters considering victimisation, positive action and indirect discrimination follow this. Positive action is defined, domestic provisions (such as those found under the RRA 1976 and the Race Amendment Act 2000) and those under EC law are explored and put into context.

Indirect discrimination is helpfully broken down and step-by-step each factor that has to be established is explored; such as identifying the pool, disparate impact, proportionality and justification, using examples to illuminate issues. This leads on to other types of discrimination and how EC and human rights law may often be helpfully utilised to buttress unclear, or presently deficient domestic legislation, in areas such as sexual orientation, religion and belief and age discrimination.

The chapter on human rights provides guidance on developments in those aspects most commonly encountered in the field such as Articles 3, 6, 8, 9, 10 and 14. The chapter on recent EC legislation probes the Employment Directive and New Equal Treatment Directive. The procedural aspects and effects of EC law on domestic law are set out and future legislation aiming to combat discrimination on grounds of sexual orientation, religion and belief and age is analysed.

The relatively recent legislation on maternity leave, parental leave, dependent leave and 'child friendly' issues are all put into context. Discrimination by qualifying and other types of bodies, discrimination outside the field of employment to remedies and enforcement are all also scrutinised. Throughout the book, with each topic, the impact of new types of legislation and its interrelationship with already existing key legislation is explored.

The impact of new case law is discussed in relation to each subject and how such authorities or developments may be adopted or distinguished. The combined use of practical examples and 'key points' summarising the main issues for each subject, provide a useful checklist for the topic covered in each chapter. Precedents that provide an invaluable resource for practitioners who may be unfamiliar with running discrimination cases in either employment tribunals or county courts are helpfully included in the appendices.

The Discrimination Law handbook provides a comprehensive and erudite key text in the domain of discrimination law. For all those with an interest in equal opportunities or working in the field of discrimination law, adjudicators, lawyers, advice workers, HR personnel, trade union representatives and complainants alike it is a much welcomed resource.

Elaine Banton
36 Bedford Row, London WC1R 4JH
020 7421 8000
Erbant@aol.com

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