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Editorial *Religion and sex under scrutiny*

The implementation of the first Directives made under Article 13 EC was never likely to be uncontroversial. So it was no surprise that the Parliamentary Standing Committee on Statutory Instruments should call in the first draft regulations for extra scrutiny. They were right to do so. The Framework Employment Discrimination Directive was deliberately opaque about the interrelationship between the right to protection against discrimination on grounds of sexual orientation and the rights of religious organisations, and it is here that the first problems have arisen.

To recap on the story so far. In December 2001 the Government issued *Towards Equality and Diversity: implementing the employment and race directives* and started to consult on the implementation of the new Employment Directive. On October 22nd 2002 the Government issued draft regulations for consultation together with a further consultation paper *Equality and Diversity: the way ahead*. In January 2003 the DLA with many other interest groups responded to this consultation. Since then there has been further consultation on the Codes of Guidance on the interpretation of the detail of these provisions.

The Draft Sexual Orientation Discrimination Regulations now published are inconsistent with anything trailed before. Nor were key provisions consulted on. Regrettably they contain an exception that clearly and unequivocally panders to prejudice. It is also in breach of the provision in Article 4(2) of the Employment Directive that occupational requirement exceptions 'should not justify discrimination on any other ground'. If the draft regulations become law, and if they don't fall foul of ECJ scrutiny, it will be lawful for a religious organisation to impose a sexual orientation, not merely for reasons of doctrine but 'because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religions' followers'.

This proposition does not take much unpacking. If there is sufficient anti-gay or lesbian prejudice in a church the requirement will be lawful. The implementation of it in a specific case brings to mind the Salem witch hunts.

But there is worse. The draft regulations do not merely say that a person has no rights if they failed to meet the requirement of a specific sexual orientation. Even if they do meet the requirement but the employer is not satisfied that the person meets the requirement then there may be no protection against discrimination. The only qualification is that the employer would have to prove that it was 'reasonable for him' not to be so satisfied. Reasonable for him? These are three key words. There may well be two views about what it is reasonable for a bigoted or misguided cleric to think.

How might this work out in practice? Suppose in one parish a female member of the congregation had lived for years with the employed female organist. A whispering campaign is started that they are lesbians. Before long the Vicar is asked by the Parochial Church Council to find out the truth. Horror of horrors, he decides that he cannot simply ask them outright what they do in bed since that would both be embarrassing and might confront him with a denial or worse still a refusal to discuss the issue. Much better he thinks, to watch their house at night. Like a social security snooper he makes notes about the lights in the house and what he can glimpse through the lace curtains. With all appropriate solemnity for the double negative he must address, he concludes that he is not satisfied that they are not now and, (like the MacCarthyite he has become), never have been, 'very fond' of each other. So with the apparent power of the law, but probably not a very clear conscience, the organist is dismissed.

The trial commences and the Vicar then has to go into the witness box to explain why he was not satisfied on reasonable grounds that the sexual orientation of these two women conflicted with the strongly held religious convictions of a significant number of the parish. At this point your editor's imagination goes into overdrive as to the reaction of the press, the other members of the church, the tribunal and so on…

This is neither theology nor ontology but simply ridiculous. The provision is idiotic and inconsistent with the Directive. It diminishes all who have anything to do with it. Time to think again!

Abbreviations

SDA	Sex Discrimination Act 1975	ECHR	European Convention on Human Rights	CA	Court of Appeal
RRA	Race Relations Act 1976			CS	Court of Session
RRAA	Race Relations (Amendment) Act 2000	ECJ	European Court of Justice	HC	High Court
DDA	Disability Discrimination Act 1995	ETD	Equal Treatment Directive	EAT	Employment Appeal Tribunal
ERA	Employment Rights Act 1996	RD	Race Directive	ET	Employment Tribunal
HRA	Human Rights Act 1998	ED	Employment Directive	CRE	Commission for Racial Equality
		HL	House of Lords	DRC	Disability Rights Commission
				EOC	Equal Opportunities Commission

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Disability Discrimination Act Update – Goods, Facilities and Services

Section 19 of the DDA provides that it is unlawful for a provider of 'services' (which term includes goods and facilities) to discriminate against a disabled person in certain circumstances. A person is a provider of services if s/he is concerned with the provision of services to the public, or a section of the public, in the UK. The DDA contains no definition of 'service', 'facility' or 'goods', but it does include a list of examples:-

- Access to and use of any place which members of the public are permitted to enter,
- Access to and use of means of communication,
- Access to and use of information services,
- Accommodation in a hotel, boarding house or other similar establishment,
- Facilities by way of banking or insurance or for grants, loans, credit or finance
- Facilities for entertainment, recreation or refreshment,
- Facilities provided by employment agencies,
- Services of any profession or trade, or any local or other public authority.

The Department for Work and Pensions (DWP) research indicates that only 53 cases had been issued in the county court under the goods and services provisions up to 1st February 2001. Whilst the number has undoubtedly increased since the establishment of the DRC, it nevertheless remains low.

There have, however, been some useful decisions. *Alistair Appleby v Department for Work and Pensions (Lambeth County Court*, Claim No. LB001649, DJ Worthington) concerned a man who has a hearing impairment. He wore binaural hearing aids, but had to supplement his hearing with visual clues. As a New Zealand national, he had to attend at the Benefits Agency Office to obtain a National Insurance number on 13th November 1999. The office operated a numbered ticket queuing system for interviews. A visual display monitor system was installed which was intended to display the ticket number of the person whose next turn it was. There was also a tannoy system which called out the number. Both of these, DJ Worthington found, were intended to address the needs of those with hearing and visual disabilities, but on the day on which the claimant attended, they were out of operation. Mr Appleby (AA) asked the security guard to inform him when it was his turn. He was eventually called, and, as he could not hear what was being said to him because the staff member was behind a glass screen, he asked for, and was given, an interview room without a glass screen.

The following week, AA received a telephone message that he had to return to the office with his passport and to ask for someone called David. When he returned the systems were still out of order. He explained that he was deaf and asked to be notified when it was his turn. This request was refused and he was told that he would have to ask another member of the public to tell him when his turn came up. AA said that this would not address this problem, as all those in the room would have already had their turn before he had to go in, but he managed to determine when it was his turn by the process of elimination of the penultimate ticket holder and with the help of a young boy who told him the room number. He was shown to a screened interview room where he had an interview with David, but found it hard to understand what was being said. He asked for an unscreened room but this was not given. He said that the interviewer became frustrated with his inability to understand what was being asked of him. At no stage, did he recall seeing a sign that indicated that there was an induction loop fitted.

A claimed breach of the s.21 (1) duty in relation to policies procedures and practices in relation to:

- the waiting room practice or policy,
- the monitor practice or policy,
- the security screen policy.

DJ Worthington dealt with the waiting room and monitor practice together. The DWP argued that, a practice, policy or procedure requires some concerted action to link the actions from which such a policy or practice could be inferred [*Hendricks v Commissioner of Police of Metropolis* was cited, see Briefing no 273]. Asking the claimant to ask other people in the waiting room when it was his turn did not amount to such a policy. DJ Worthington rejected this argument, though, as he held that it was a standing instruction, issued at busy times when the monitor or tannoy were out of action, to request someone such as the claimant to ask other customers to notify him when his turn arose. In the event, however, he held that the practice did not make it 'unreasonably difficult' for AA to use the service: this was based on his evidence, and the DJ stated that 'Indeed with commendable imagination and improvisation he enlisted without apparent difficulty the help of two members of the public who, it would appear, were more than willing to assist, and he was thus able to ascertain when it was his turn.'

In respect of the security screen policy, however, the DJ held that there was a breach of the DDA. The DWP was relying upon its installation of induction loops to meet their obligations under the Act, but the DJ found that there were no signs either in the reception area or the screened interview rooms indicating the presence of such a system. The DJ also stated in his judgement that 'Failure to make its (the induction loop) existence known is tantamount to a failure to have such a system in the first place'.

A declaration of discrimination was made, in light of the failure by the DWP to offer any apology to the claimant or to deal substantively with the matters raised in a letter of complaint written on his behalf to the DWP. DJ Worthington stated 'It is also intended as an acknowledgement of the actual discrimination suffered by the claimant rather than just a 'customer service' issue to be addressed by the defendants.' Mr. Appleby was awarded £850 for injury to feelings.

This case is particularly useful in relation to the failure to display information about reasonable adjustments that have been made for disabled people. This is addressed to some degree by the Code of Practice, but underscored by DJ Worthington's judgement.

There is concern however, regarding the judge's interpretation of 'unreasonably difficult'. The code gives some guidance on this, and in fact the latest code has the addition of 'dignity' as one of the factors to be taken into account in determining the unreasonable difficulty or otherwise. This decision indicates a high threshold, although it can be limited to the particular facts in this case, and it does not appear that the guidance in the code of practice was taken into account.

There are some other comments within the body of the decision giving rise to concern: for example, the DJ states 'It is not suggested that by the display being temporarily out of order it was the defendant's practice policy or procedure not to display the numbers, but that the defendants had failed to make reasonable adjustments to their policies practices and procedures by failing to have a contingency plan in place in anticipation of such a breakdown'. Yet, the duty in relation to auxiliary aids and services is to take 'such steps as are reasonable' to provide these: a failure to maintain such a system is surely a failure to take 'reasonable steps' to provide the aid? (despite the prohibition on aids requiring alteration to physical features before 2004, it is arguable that the reasonable steps will relate to its maintenance once an aid has been installed). Auxiliary aids and services – which have a lower trigger than that of policy procedures and practices – were not, however, raised in this case, although this may relate to the fact that neither AA nor the DWP seemed to be aware initially of the existence of the induction loop!

Many of the relatively small number of goods and services cases brought under the DDA concern guide dog owners who are refused access to premises. So far, most of them have settled, with only remedies to be determined by the court. *Ian Glover (by his executrix Mrs Sylvia Glover) V Mr. Lawrence Crawford t/a Hannah's Café*, Case Number MA 202633, Harrogate County Court, however, saw the first full judgment in a DDA guide dog case. The decision gives full weight to the purpose of the Act of eliminating discrimination against disabled people and affording them the same rights of access as those who are not disabled.

Mrs Glover(G), along with her son, Ian (IG), who had died by the time of the hearing, and some other friends, were looking for some refreshment. G went into the defendant's café (HC) to ask whether IG

could go in with his guide dog. She was told that the café operated a policy of 'no dogs in the eating area'.

IG brought a claim against the defendant for breach of the DDA, both s.19(1)(a) and s.19(1)(b) – a refusal of service and a failure to make reasonable adjustments – and within the meaning of s.20(1) and s.20(2) (less favourable treatment, and the failure to comply with the reasonable adjustment duty). The café owner defended the claim on the basis that he had an incident with a guide dog some years previously when the dog had been sick in the café and had caused £1,000 of loss. He also indicated that there was not enough room in the café for the dog to be- in essence, a health and safety justification. With regard to the s.21 aspect of the claim, HC claimed that his policy did not make it impossible or unreasonably difficult for the claimant to use the café, since he offered to accommodate him on the basis that the dog could be left safely in the yard at the rear where she would be fed and watered (although G disputed that this offer was ever made).

It was conceded that IG was disabled within the meaning of s.1 of the Act; and it was not in issue that as a provider of services, the defendant refused to allow IG to use the facilities of the café if accompanied by his guide dog, as it would be contrary to his policy of 'no dogs in the eating area'.

With regard to the issue of less favourable treatment: the District Judge held that there had been less favourable treatment in imposing the condition that Mr. Glover could only enter the café if he left his dog outside. 'Imposing a condition on entry which self-evidently was not applied to any person wishing to use the café without a guide dog, the appropriate comparator (*Clark v TDG Ltd t/a Novacold* [1999] IRLR 318) must amount to less favourable treatment' The reason for the less favourable treatment was related to his disability – the reason for the guide dog's presence was to give assistance to IG who was a visually impaired person.

The District Judge then turned to the issue of justification. He found that the 'no dogs in the eating area' policy, implemented in response to this incident, was primarily out of financial rather than health and safety considerations. 'In any event, adults and children may become ill when using a restaurant; events of this nature will always be a possibility and this is not a reason for excluding them'. In relation to the size of the premises, the district judge preferred the evidence of IG's witnesses as to the availability of tables and the ability of the dog to sit under them. In addition, HC made no attempt to make an objective assessment of the policy he adopted in relation to the incident, and did not assess the situation when IG arrived at the café. It was held that HC's opinion that guide dogs present a danger to health and safety was not a reasonable one for him to hold in all the circumstances of the case.

With regard to the s.21 claim – that the defendant had failed to take reasonable steps to alter his policy so as not to make it impossible or unreasonably difficult for the claimant to use his service; the District Judge considered whether the separation of a visually impaired person from his guide dog in these circumstances could be justified: he found that if this were to happen, IG would have to be led to the table, and went on to state 'It is surely the independence afforded by the provision of a guide dog that enables a visually impaired person to carry out normal day-to-day activities that the act is designed to uphold.' In addition, IG would have to have taken the dog round the outside of neighbouring buildings along the roadside in order to reach the yard.

It was held that 'in the context of the issues that the Act is designed to address, this procedure would have been so cumbersome and undignified for Mr. Glover as to make it unreasonably difficult for him to use the café facilities'. The judge found that the defendant failed to make the necessary adjustments to his policy of 'no dogs in the eating area' which would have enabled Mr. Glover to use the café services, and such failure was unjustified. Damages of £1000 were awarded.

Another decision on guide dog's access to restaurants is to be found in *William Purves v Joydisk Ltd* (see Briefing no 287 in this issue) when the Court of Session awarded £1,000 damages for a restaurant's refusal to admit a guide dog.

Housing

The DDA provides limited rights in relation to housing. It prohibits discrimination on grounds of disability, however, the key DDA requirement to make reasonable adjustments does not apply to housings.

Christine Brazier v North Devon Homes Ltd (QBD,

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Exeter, Case no BP200068) appears to be the first decision on appeal to concern the housing provisions of the DDA, and is likely to have a significant impact on those seeking possession of premises from people with mental health problems. The Act prohibits discrimination against disabled people in, amongst other things, evictions.

Christine Brazier (B) was a tenant of North Devon Homes Ltd (NDH). She had been a 'problem tenant' since 1999, with records of disturbed behaviour which had established a 'chronic state of conflict' with her neighbours. A home visit by a psychiatrist led to the conclusion that she had a paranoid psychosis. Following two years of what was classified as 'bizarre behaviour', involving police and social services involvement, she was moved to another property in March 2001. Her behaviour continued to be 'disagreeable and aggressive'. There was no dispute that her behaviour was antisocial and included 'shouting at neighbouring residents and keeping neighbours awake at night by banging and shouting within the premises, using foul language in front of neighbours, making rude gestures to neighbours and causing nuisance and annoyance to neighbours'

NDH initiated possession proceedings in January 2002, on the basis that the B was in breach of the clause of her tenancy agreement which contained a covenant to use the premises 'so as to ensure that no nuisance, annoyance, inconvenience or harassment was caused to neighbours or to the public'. The court had a discretion under section 7 of the Housing Act 1988 to make an order for possession if it considered it reasonable to do so. B had argued that an order for possession constituted eviction and would be contrary to the DDA.

The County Court found that B's conduct was unlawful by virtue of the 1995 Act but nonetheless that it was reasonable to grant a possession order, on the basis that

- it was not reasonable for the other tenants to put up with B's behaviour any longer;
- B had been rehoused once already;
- there was little chance of an improvement in B's condition; and that
- in these circumstances it was not appropriate to allow the DDA to override the discretion afforded by the 1988 Act.

On appeal, it was held that NDH in evicting B was treating her less favourably, in accordance with *Clark v TDG t/a Novacold* [1999] IRLR 318. This was because the reason for the breach of her tenancy terms was caused by the disability. The recorder himself had found that the appellant was unable to prevent herself from behaving in a manner that was in breach of the tenancy agreement.

With regard to justification; NDH contended that the discrimination was justified on the basis that the eviction was necessary in order not to endanger the health or safety of any person (s.24(3)(a)). Justice Steel rejected this submission, on the basis that:

- There was no evidence that the respondent ever formed such an opinion (*Beart v HM Prison Service* [2003] IRLR 238, CA). It appeared that NDH had not directed its mind to s.24 at all
- With regard B herself, and her health and safety, the psychiatric report indicated that if she were evicted and made homeless it would produce a worsening of her clinical state
- With regard to the neighbour, the evidence was that the abuse and noise were 'wearing her down', and the Recorder made an express finding that 'although the neighbours underwent a great deal of uncomfortableness's and are still experiencing these difficulties, they are not such as to endanger the health or safety of any person'

Justice Steel held that NDH's conduct was unlawful under the DDA. He dealt with the suggestion by the Recorder that the breach of the DDA constituted a bar to relief under the 1998 Act, stating:

'Whilst I accept that fact of unlawfulness under the 1995 Act would not necessarily be determinative of the application under the Housing Act, nonetheless it seems to me that this passage is based upon a misconception. The Act does not bar evictions: only those which are not justified by the specific circumstances set out in section 24. The respondent, having adopted a proper review of the situation in accordance with the express terms of the Act, may conclude in the future that the health and safety of her neighbours are prejudiced and thus steps should be taken to evict the appellant. But this situation has not arisen'.

The fact that the eviction of B was not justified by the terms of the DDA was said to be a 'highly relevant' consideration in the exercise of the

discretion; the 1995 Act furnishes its own code for justified eviction which requires a higher threshold than the 1988 Act; the court was being invited to exercise its discretion by way of promotion of unlawful conduct; the limitations on interference with the appellant's right to respect for her home were set out in the 1995 Act – and it was appropriate for the powers in the DDA to be read in a compatible manner pursuant to section 3 Human Rights Act 1998.

In the circumstances, it was held that it was not appropriate to make an order for possession and the appeal was allowed.

The wording on justification for Part III cases has been the subject of varying court opinions. This case, however, demonstrates that it is quite a high threshold for service providers to reach, in particular, it must be **necessary** in the interests of health and safety. It is not sufficient for there merely to be evidence of some concern.

Reform

The Disability Rights Commission, in its publication 'Disability Equality: Making it Happen' has made recommendations for change to, amongst other things, Part III of the Act. This publication is available from the DRC helpline and the next Briefing will provide an outline of the full recommendations.

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The Facts and Figures of Discrimination

The National Census is undertaken every ten years. The results of the most recent census, conducted in 2001, became available in February 2003. It is the most reliable as well as the main source of information on the social make up of the UK. This census was more detailed than the 1991 census. It is available on the web at www.statistics.gov.uk In this article we round up some of the facts and figures relevant to discrimination.

Gender

There are still significant differences between men's and women's work patterns. 54% of women between the ages of 16 and 74 are employed, 30% of women are in full time employment, 20% in part time employment and 4.4% are self employed. Women remain concentrated in the lower paid occupations or grades and they are more likely to work part time with 42% of women working part time. The average hours worked by men are 42.2 hours a week compared to 31.4 hours a week for women. Women tend to be concentrated in the service industries (84% are women), administrative and secretarial work (78%) and sales and customer services staff (71%). Men dominate the skilled trades; they make up 91% of the mechanics, bricklayers and electricians as well as 83% of the process plant and machine operatives. They make up 66% of those classifying themselves as managers, senior officials and professionals.[1]

Race and ethnicity

The Census took greater account of the diversity of ethnic backgrounds within the UK and it provided a wider range of definitions, which people might select as representing their ethnic origin. Furthermore, it introduced a 'mixed' category, which recognised the increasing proportion of British residents who come from a mixed heritage. It also introduced for the first time a question on religion, in recognition that although there was not yet legislation to protect people on the grounds of their religion, a debate on the importance of religion is emerging.

The categories of ethnic groups in the 2001 census consisted of the following:

- White (British, Irish or any other White background)
- Mixed (White and Black Caribbean, White and

Black African, White and Asian, or any other Mixed background)
- Asian and Asian British (Indian, Pakistani, Bangladeshi, any other Asian background)
- Black or Black British (Caribbean, African, or any other Black background)
- Chinese or other ethnic group (Chinese or any other)

It is significant also that no figures were collected in relation to Gypsies or Travellers in the census. However, the Traveller Law Research Centre has estimated that there are about 200,000 Gypsies and Travellers in the United Kingdom.[2]

The results of the 2001 census show that 7.9% of people in the UK did not classify themselves as White; this figure includes those who classified themselves coming from a mixed ethnic group.[3] When the figures for England and Wales are considered separately the percentage is higher – 9.9%, the figures for Wales and Scotland are about 2 %. The census shows that of the people who did not classify themselves as White, 50.2% are from South Asia (India, Pakistan and Bangladesh), 5.3% are Chinese and 24.8% classify themselves as Black or Black British. Their age profile is young, so that 50% of those in the ethnic minority groups are under 15 years old.

Employment

Ethnic minority groups such as those of Black African, Black Caribbean, Pakistani and Bangladeshi origin, are particularly disadvantaged in the labour market. However, the picture is more complex when different ethnic groups are considered. In 2001 5% of White men were unemployed compared with 13% of black African or 9% Afro-Caribbean men, 7% of Indian, 16% of Pakistanis and 20% of Bangladeshi men.[4] These differentials are likely to be due partly to the younger age structure of the black population[5] (for men from ethnic minority groups unemployment is much higher amongst the under 25 age group), partly because of the over-representation of black workers in areas of high unemployment[6] and partly because of continuing discrimination in the job market.

People from ethnic minorities are disproportionately represented among the unemployed, low-waged and socially excluded. For example, while 5% of white men are unemployed the rate is 20% for Bangladeshi men. These figures rise significantly in the 16-24 age-group.

A high proportion of Black Caribbean women (72%) and Black African women are economically active, although the proportions of Pakistani (28%) and Bangladeshi (22%) women are substantially smaller.[7] Ethnic minority women who work are much more likely to work full time compared to White women.[8]

Health

Poor health is more common among Pakistani, Bangladeshi and other Asian people, they are above average when analysed by age group. For example, among men aged 50-64 with a limiting long term illness the average proportion reporting their health as not good is 13.7%, compared to this Bangladeshi men this figure is 30.9% and Pakistani men it is 26.3%.

It is also known that there are certain conditions that have a higher incidence among the ethnic minority communities compared with the population as a whole, these are diabetes, hypertension, coronary heart disease, stroke and vascular disease. For example, the rate of diabetes is 2.2% in the population as a whole, 5.9% among Afro-Caribbeans and 7.6% among South Asians.[9]

The statistics show that Black and Afro-Caribbean people are over-represented as users of mental health services and they experience poorer outcomes.[10] In particular, their experience is more likely to be

1. See Census results 2001 at www.statistics.gov.uk, see also www.eoc.org.uk
2. See www.cf.ac.uk/claws/tlru/Inf.html
3. See Census results 2001 at www.statistics.gov.uk
4. Census 2001.
5. 50% are aged 15 or younger – Census 2001.
6. See Ethnic Minorities and the Labour Market : Final Report, Cabinet Office, 2003, p 10.
7. Census 2001, see also Social Exclusion Unit Report 'Jobs for All' cited in Ethnic Minorities and the Labour Market: Interim Analytical Report, Performance and Innovation Unit, 2002, p41.
8. Ethnic Minorities in Britain: Diversity and Disadvantage, T Madood, R Berthoud et al, Policy Studies Institute, 1997, p86.
9. See Lord Parekh, House of Lords, Hansard 11.2.02 discussing the NHS National Plan (Cm 4818).

characterised by hospital admissions under the Mental Health Act 1983, involvement of the police, forcible administration of medication and difficult relationships with staff.[11] Black people are more likely to be subjected to compulsory admission under the Mental Health Act.[12] Black service users are the most disaffected of those using mental health services.[13]

Education

There has been continuing evidence that Black, Bangladeshi and Pakistani pupils achieve less well than other pupils at all stages of their education,[14] and there is also evidence that Black Caribbean pupils are four times more likely to be excluded from school compared to White pupils.[15] By contrast, Indian and Chinese/other Asian pupils do better than their White counterparts.[16] Bangladeshi, Black and Pakistani pupils in particular achieve less well than others – many of these children enter the school system with equal ability to White children, but underachieve progressively as they go through the school system.[17]

Housing

Cabinet Office studies have shown that all ethnic minority households are more likely to live in deprived areas than White households, although this is less true for Indian people than other ethnic minority groups. Particularly significant is that over half of the Pakistani and Bangladeshi households live in the 10% most deprived wards in England, as do over a third of Black Caribbean households compared to only 14% of White households.[18] About one third of Pakistani and Bangladeshi households live in unfit properties compared to about 6% of White households.[19] Bangladeshi and Pakistani households are also more likely to be overcrowded than other households.[20]

People from ethnic minorities live in geographically concentrated areas; half the ethnic minority population of Britain lives in Greater London where they make up 32% of the total population. An eighth in the West Midlands while Greater Manchester and West Yorkshire also have substantial ethnic minority populations. 70% of people from ethnic minorities live in the most deprived local authority districts, compared to 40% of the general population.[21]

Homelessness is also a continuing problem. People from minority ethnic groups are most likely to be homeless. For example, in London between June and September 2000, 49% of households accepted as homeless by local authorities were from ethnic

10. See Breaking the Circles of Fear : a review of the relationship between mental health services and the African and Caribbean communities, Sainsbury Centre for Mental Health, 2002.

11. N Goater and others (1999) Ethnicity and outcome of psychosis, British Journal of Psychiatry, 175 (1) 34-42 and G Thornicroft and others (1999) Health service research and forensic psychiatry: a Black and White case. International Review of Psychiatry 11 (2/3) 250-257.

12. Mental Health Act Commission, 8th Biennial Report (1999), London, HMSO see also Ethnic differences in risk of compulsory psychiatric admission among representative cases of psychosis in London, British Medical Journal, 312 (7030) 533-7.

13. No change: A Report by the National Schizophrenia Fellowship comparing experiences of people from different ethnic groups who use mental health services, G Sandamas & G Hogman (2000),London: National Schizophrenia Fellowship and Ethnic differences in satisfaction with mental health services among representative people with psychosis in South London, S Parkman and others, PRiSM study no 4, British Journal of Psychiatry, 171, (3) 260-264..

14. Aiming High: Raising the Achievement of Minority Ethnic Pupils, DfES, 2003.

15. Aiming High: Raising the Achievement of Minority Ethnic Pupils, DfES, 2003 and Statistics of Education : Permanent Exclusions from maintained Schools in England, DfES, 2002.

16. Aiming High: Raising the Achievement of Minority Ethnic Pupils, DfES, 2003 and Improving labour market achievements for Ethnic Minorities in British Society, Performance and Innovation Unit, Cabinet Office, July 2001,p5.

17. Cabinet Office, Ethnic Minorities and the Labour Market Project, (July 2001)

18. 1999/00 Survey of English Housing, DTLR, 1996 English House Condition Survey, DTLR quoted in Improving labour market achievements for ethnic minorities in British society, Performance and Innovation Unit, Cabinet Office, July 2001, p11.

19. Cabinet Office, Performance and Innovation Unit, op cit.

20. Ibid

21. See Improving labour market achievements for ethnic minorities in British society, Performance and Innovation Unit, Cabinet Office, July 2001, p4-5.

minorities. Of these 23% were from African and Caribbean households, although they comprise only 11% of households in London.[22]

Political representation

In 2002 only 12 of the 652 MPs (1.8%) were from non-White ethnic minority groups. Were the House of Commons to accurately reflect the UK's racial diversity one would expect to see 55 – 60 Black and Minority Ethnic MPs. Paradoxically, in this respect, the House of Lords is more representative than the House of Commons as it has 20 non-White peers out of 685 peers (2.9%).

Crime

In England and Wales in 2001/2, there were 714,000 police stops and searches recorded; 12% of these were of Black people, 6% of Asian people and 1% of other ethnic minority people. This meant that a Black person was eight times more likely to be stopped and searched than a White person.[23] Although the policy's use dropped by 17 percent from 2000-2001, the number of Black people exposed to this increased by 4 percent. In London, where the overall instances of stops dropped by 40 percent in 2000 and 6 percent in 2001, the number of Blacks and Asians stopped rose by 6 and 3 percent, respectively, while dropping by 14 percent for Whites. Moreover, very few of these stops actually resulted in arrests. According to the Home Office, 87 percent of the people stopped were not found to be in violation of any law. Additionally, Black people were four times more likely to be arrested for a notifiable offence than a White person or someone from another ethnic minority group.[24]

The British Crime Survey found that 'individuals and households from Black and Asian groups have consistently shown higher levels of concern about crime than individuals from other ethnic groups'. The Survey found that Black and Asian adults were twice as likely to be worried about suffering from some form of personal attack as were White people.[25] Asian adults were three times as likely to be worried about being insulted or pestered compared to White adults.

Religion and belief

The question on religion had the following categories:

- None
- Christian (including Church of England, Catholic, Protestant and other Christian denominations)
- Buddhist
- Hindu
- Jewish
- Muslim
- Sikh
- Any other religion

The vast majority of the UK population identifies itself as being Christian.[26] The information from the census 2001 shows that there are 1.5 Million Muslims, 2.7% of the population, 0.55m Hindus, 0.33m Sikhs and 0.26m Jews in the UK.[27] London has the highest proportion of people who are Muslim, Hindu, Jewish, Buddhist or of 'other religions'.

Disabled people[28]

Disabled people make up a significant proportion of the population in Britain – at least 8.6 million, representing one fifth of the total adult population.[29]

Among adults, disability prevalence increase steeply with increasing levels of area deprivation, with residents in the most deprived areas being more than twice as likely to have one or more disabilities as residents in the least deprived areas.[30]

22. Ibid

23. See Stop and Search Statistics 2001/2, Home Office.

24. See Statistics for 2001/2 on Arrests for Notifiable Offences and the Operation of Certain powers under the Police and Criminal Evidence Act 1984 (PACE), Home Office.

25. See Social Trends no 32, 2002 edition, National Statistics, HMSO, p155, quoting the Home Office British Crime Survey 2000. These questions have not been raised in the British Crime Survey since, so it is not possible to give more up to date statistics on this.

26. About 26 Million are nominally Anglican, and 5.7 Million Roman Catholic. The other Christian denominations account for about 5.5. Million according to the Parekh Report, 'The Future of Multi-Ethnic Britain', published by the Runnymede Trust and Profile Books Ltd, 2000, page 236.

27. See Census results 2001 at www.statistics.gov.uk

28. This section has been provided by Caroline Gooding of the Disability Rights Commission.

29. Grundy et al, Disability in Great Britain.

30. Health Survey 2001, England.

- In Britain, disabled people are only half as likely as non disabled people to be in work:
- 50% of disabled men (of working age) are in employment, compared with 87% of non disabled men.
- for disabled women, the employment rate is less than 50%, compared with 76% for non disabled women.[31]

Employment rates vary significantly by type of disability. Only one fifth of people with mental illness are in work (21%), compared with 64% of people with a hearing impairment (64%). However, this contrasts with the overall employment rate of 81% for the non disabled population.[32] Disabled people are nearly twice as likely to be unemployed as non disabled people – 8% compared with 5%.[33]

Households with a disabled adult have a higher workless rate than those without. In autumn 2001 around 5.7 million, or a third of working-age households in Britain, contained at least one disabled adult of working age. In the population as a whole the total workless household rate was 16.4 per cent. However, households with a disabled adult had a workless rate of 31.1 per cent, compared with a rate of 9.7 per cent for those households where no disabled adult was present.[34]

Lower income & higher reliance on state benefits

- Disabled households have a total income that is 20-30% less than all households in Britain.[35]
- Disabled people are nearly five times more likely than non disabled people to be out of work and claiming benefits. There are currently over 2.8 million disabled people out of work and on benefits, over a million want to work.[36]
- For the disabled population out of work, over 42 percent received state benefits, compared with only 9 per cent of the out of work non-disabled population.

Education

Disabled people have lower levels of educational qualifications than non disabled people. Only 16% of disabled people have a higher qualification, compared with 27% of non disabled people.

Over half of disabled people (54%) in Britain have no qualification at all, compared with 28% of non disabled people.

Housing

- 13.1% of long-term sick and disabled people under 60 were in poor living conditions, compared to 6% of all interviews.[40]
- A survey of families with a disabled child in the Northern and Yorkshire regions found that three quarters reported unsuitable housing. Just under a fifth lived in cold damp housing in poor repair.[41]

Transport

In the year ending 31 March 2002, 29 per cent of the full size local bus fleet was wheelchair accessible. The government target is for half the full size bus fleet to be wheelchair accessible by 2010.[42]

Sixty per cent of disabled people have no car in the household, compared with just 27% of the general population. Among those over 70, a rapidly growing proportion of the population, 55% live in households without a car.[43]

Gay Moon
Editor

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31. Labour Force Survey, Summer 2002.
32. Ibid.
33. Ibid.
34. Labour Market Trends, August 2002.
35. Grundy et al, Disability in Great Britain
36. Labour Force Survey, summer 2002
37. Ibid.
38. Ibid.
39. Disabled for Life, 2002.
40. English House Conditions Survey, DETR 1998.
41. Rowntree Trust 1998.
42. Bulletin of Public Transport Statistics GB: 2002 Edition.
43. DPTAC Attitudes of Disabled People to Public Transport in England and Wales, 2002.

Who judges the Judges?

The DLA has long been concerned about the under representation of women ethnic minority people and people with disabilities in the judiciary, particularly the senior judiciary. The facts noted by Consultation Document of the Bar Council Working Party on Judicial Appointments and Silk chaired by Sir Ian Glidewell emphasise the basis for this concern:-

> It is now 38 years since the first woman High Court Judge was appointed and 21 years since the first Circuit Judge of minority ethnic origin took office. Since that time, the number of women judges has increased steadily but slowly. At 1 April 2002, of a total of 3,554 holders of judicial office, 511 (14.4%) were women. However, many of these are in the lower ranks of the judiciary. Of 1,468 District Judges and Deputy District Judges (Civil, Family and Magistrates' Courts) 284 at that date were women – 19.4%. On the other hand, there were at that date only 56 female Circuit Judges out of 604 (9.3%), 6 female High Court Judges out of 105 (5.7%) and 2 Lady Justices of Appeal (now 3) out of a total of 35 members of the Court of Appeal. There has not yet been a woman member of the Judicial Committee of the House of Lords. For members of ethnic minorities the numbers are much smaller – there are none in the House of Lords, Court of Appeal or High Court. As at 1 April 2002 there were 7 Circuit Judges of ethnic minority origin (1.2%), 39 Recorders out of 1, 287 (3.0%), and 36 District Judges and Deputy District Judges (2.5%). It is therefore not surprising that the expressions of concern about the small proportion of women and people of ethnic minority origin amongst the judiciary concentrate particularly on the judges in the higher courts.

It is noticeable that no mention is made of disabled people.

The Lord Chancellor has taken some action to alleviate the position. Vacancies for the lower echelons of the judiciary are now widely advertised and subject to job descriptions and specific criteria for appointment. However, this does not apply to posts in the higher tiers of the judiciary, from the Court of Appeal upwards. The Lord Chancellor has commissioned research to identify the factors affecting decisions to apply for judicial appointments and/or silk. A Commission for Judicial Appointments has been set up to provide an independent mechanism for applicants who feel that their candidacy has not been considered fairly.

These are useful and important first steps but further action needs to be taken. The Bar Council Working Party is now consulting on this and Ulele Burnham and Tess Gill have prepared a response on behalf of the DLA an edited version of which appears below.

1. The DLA welcomes the Consultation Document and endorses a great many of its proposals for ensuring that both the Bar and the judiciary are diverse and representative. The DLA also supports the Consultation Document's aim to ensure that the procedures for appointment to the judiciary and to silk are both transparent and fair.
2. There are, however, certain aspects of the Working Party's proposed methods of achieving the stated aims with which we disagree. This brief Response will focus on those issues indicating, where possible, our suggestions for how the relevant objectives might best be achieved having particular regard to the fundamental importance of substantive equality.

Chapter 2: The need for diversity in the Judiciary

3. The DLA endorses the Consultation Document's identification of diversity in the judiciary as an end in itself and as a prerequisite for the creation of a system of justice in which our heterogenous society has confidence. The DLA notes that the proposals for increasing diversity cited in this chapter concentrate on greater representation of women and ethnic minorities. We also encourage the Working Party to reiterate the importance of increasing the representation of other groups facing significant

disadvantages on the basis of disability, sexual orientation, age, health status, political opinion, marital or family status and trade union affiliation or activity.

Chapter 3: The Reasons for under-representation

4. The DLA agrees with the Committee's assertion that the demands of child-rearing differentially, and deleteriously, affect both the pace and fact of career advancement for many women at the bar and on the Bench. The DLA would like to see the Committee make clear and concrete recommendations to address and reduce this structural disadvantage. One obvious example of a potentially discriminatory practice is the requirement for members of the senior judiciary to be 'on circuit' for a number of weeks per year. For women with childcare responsibilities this may mean having to spend several weeks per year away from their children and families. Such a requirement does not appear to lend itself to objective justification. We would encourage the Committee to ensure that all such practices are subject to rigorous examination and are allowed to continue only where there is a 'real need' which outweighs the disadvantage which they are likely to cause to a significant proportion of women candidates.
5. In respect of the lack of openness in the current judicial appointment procedure, the DLA strongly disagrees with the Committee's suggestion that so called 'secret soundings' are 'an inevitable and proper aspect of the appointment process'. The process of soundings is by its nature non-transparent and lacks objectivity. Comments made by consultees in the course of such soundings may damage an applicant's prospects either by offering faint praise where unstinting support is required, or by taking the form of unwarranted and unchallengeable criticism.
6. In addition, where the identity of an applicant's critic is withheld, the applicant faces an insuperable hurdle in terms of being able to challenge a comment which could have devastating effects on the success of that, and subsequent applications, for judicial appointment. Without knowing the identity of the person making the comment the applicant may be unable to identify the event to which the comment relates and, as a consequence, will be unable to justify, explain the context of or refute the content or implication of the comment.
7. In respect of the latter criticism, the Committee's position appears to be based upon the notion that identification would prejudice a full and frank consultation process. As stated below, the DLA opposes the present practice of consultation with automatic consultees who may have no professional knowledge of the applicant. We question the need for consultation beyond the applicant's referees and, possibly, her/his head of division. In any event, if consultation is to continue at all, a full, frank and fair process can only be guaranteed if those chosen to act as consultees are prepared to substantiate critical comments and be held accountable for having made them. It is our view that the damage to the fairness of the process which will be occasioned by withholding the identity of those who are critical is much greater than any perceived risk of lack of candour. On the contrary, it is our view that the present opacity of the process may well discourage, rather than promote, probity.
8. The DLA shares the Working Party's concern about the dominance of an elite group of chambers; the statistics provided in the Consultation Document are extremely worrying.

Chapter 4: Widening access to judicial appointments

9. The DLA supports the proposals made in this chapter subject only to requests for clarification of a few issues. The DLA specifically endorses:
   a) the appointment of an independent Judicial Appointments Commission. If, contrary to our submissions, the system of consultation with automatic consultees is to continue this must provide something of a check on the system; and
   b) the institution of 'fast track' promotion procedures for judges of high ability in order to promote the process of diversification.
10. It is suggested that an increased proportion of women and ethnic minority lawyers should be encouraged to take part in their professional activities including, in particular, advocacy training. First, we would like the Working Party to clarify whether there is any statistical basis for the (at least implicit) suggestion that women and ethnic minority lawyers do not take part in their professional activities. Second, if there are sound

reasons for such a suggestion, we seek clarification as to why 'advocacy training' has been singled out as an area of particular importance. We hope (and indeed believe) that it is not being suggested that women and ethnic minorities present as lacking in professional commitment and/or require special advocacy training.

Chapter 6: The Appointment of judges in other jurisdictions

11. We do not understand the basis upon which it is asserted that there is little to be learnt from other civil law jurisdictions with a career judiciary. Anecdotal evidence (which we are sure is supported by statistical evidence although we have been unable to locate this within the consultation time-frame) suggests that the proportion of appointed judges from non-traditional backgrounds and/or non-traditional career paths is much higher in these jurisdictions. A career judiciary with open recruitment procedures would, in our view, be ideal system for appointment to public office in the 21st century. Whereas the UK may choose to set eligibility criteria which are different from that of, say, France, (e.g. making it a requirement for successful candidates to have 10-15 years of relevant legal experience), full consideration of the career judiciary option is instructive. The DLA therefore invites the Working Party to carry out a more detailed and comprehensive review of civil jurisdictions with a career judiciary.
12. The review of the Scottish, Canadian, Irish, American, Australian and New Zealander systems of appointment provides little support for a wide consultation exercise. It would appear from the information provided from the Consultation Document that the consultative exercise in many of the jurisdictions considered is limited to one or two persons (usually the relevant minister/member of the executive).

Chapter 8: The Appointment of Circuit Judges

13. As stated above, we do not agree that the present consultative process is either inevitable or proper. The list of consultees for appointment as a Circuit Judge suggests that 10 or more persons are likely to be consulted before candidates are shortlisted for interview. The practice of consultation prior to an objective selection exercise is contrary to the most basic principles of fair recruitment/selection and equality of opportunity (See the EOC and CRE Codes of Practice). The detrimental effect on the fairness of the procedure is obvious: before the candidates applications are even judged against objective selection criteria consistently applied, they are vulnerable to 'blackballing' by consultees including, surprisingly, the Chairmen of Bar Messes. The exclusionary/discriminatory effect upon ethnic minorities and women, groups identified by the Working Party as least likely to be 'known' amongst Circuit Leaders and Chairmen of Bar Messes, is likely to be even more pronounced. There can be no justification for such deviation from established fair employment practices. **The DLA strongly recommends that the practice of consultation before shortlisting be discontinued.**
14. The DLA's position is that there should be no consultation for judicial appointments and silk, but if it is to continue then it should:
    a) Be limited only to members of an Appointment Panel (which can comprise members of the senior judiciary and lay members), possibly the Head of Division in the applicant's declared specialist area and the applicant's referees.
    b) Require that comments are fully particularised and that the circumstances in which the applicant and/or his or her work have been observed are clearly identified. In particular the making of unparticularised allegations of misconduct or criticism by any members of the Appointment Panel and/or other consultees should be prohibited. Whilst the Lord Chancellor's policy of disregarding such allegations is welcome, the information sent to consultees should make it clear that such allegations should not be made at all.
    c) Permit applicants to identify their critics and respond in detail to particular criticism. The disclosure of the identity of the consultee and the details of his/her criticism should not be dependent upon the consultee's consent after s/he has made the critical comment. Consultees should be advised at the beginning of the process that it will be the duty of the Appointment Panel to disclose the identity of consultees making particularised complaints together with the

content of the complaint. Consultees will therefore be mindful of the duty of disclosure from the outset. As a matter of comment, there is little to be gained by withholding the identity of a consultee if the detail of the allegation made is revealed.

d) Be monitored by the Judicial Appointments Commission to ensure that the highest standards of fairness and equality are upheld.

Chapter 9: The Appointment of Recorders

15. The DLA's comments on the consultation process, in respect of the appointment of Circuit Judges and more generally, apply equally to the appointment of Recorders. We are concerned that the list of automatic consultees is more extensive in respect of Recorder appointments. Subject to our principled objection to anything more extensive than the carefully circumscribed consultation process referred to above, we endorse the recommendations made in this chapter.

Chapter 10: Appointment as a High Court Judge

16. The DLA strongly supports the recommendations made by the Working Party at paragraph 10.19. We also recommend that such a Board also be established to appoint judges to the Court of Appeal and the House of Lords.
17. Whilst the current system of appointment remains in being, the DLA believes that the following are necessary safeguards:
    a) The process of 'invitation' to apply by the Lord Chancellor should be no more than a literal 'invitation'. The same objective criteria applied to applicants should formally be applied to invitees and it should not be assumed that the fact of 'invitation' by the Lord Chancellor will guarantee appointment. We should stress that would still consider this to be a very unsatisfactory system seen inevitably to favour those who have been 'invited' to apply by the ultimate decision-maker himself, the Lord Chancellor.
    b) The list of consultees should be far more limited. Appointment to senior positions in public office, ministerial or prime-ministerial office for example, does not involve such a process of consultation. It is therefore difficult to justify its use in respect of the appointment of the judiciary. Rather, its deployment has led and will continue to lead to criticism of the Bar and judiciary as restrictive practices bent on self-replication.
    c) There should be an interview prior to any consultation.

Appendix 2: Appointment to Silk

18. The DLA considers that the Silk system should be reviewed as proposed in the Lord Chancellor's recent Consultation Paper. The DLA would wish to make further representations on the desirability of the present system itself as part of the consultation exercise. The comments made here are therefore made 'without prejudice' to those further representations.
19. We endorse the Working Party's recommendation for the publication of a clear description of the consultative and internal-decision making processes which lead to the appointment to Silk. The DLA reiterates its criticisms of present consultative exercises and supports the proposals made at paragraph 7 of the Bar Council's Draft Response.

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Definitive ruling on direct discrimination and comparators

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL

The question after the House of Lords ruling in *Shamoon v Chief Constable of the Royal Ulster Constabulary* is has it raised more questions than it has answered? In particular, how is the burden of proof to be addressed now that the Employment Appeal Tribunal has ruled in relation to s63A SDA in *Barton v Investec Henderson Crosthwaite Securities Limited* (see Briefing 283)?

The facts

The facts in Shamoon were straightforward. Chief Inspector Shamoon (S) was stripped of her role in counselling constables for their appraisals following complaints from two constables and a meeting between her superior officer, Superintendent Laird, and the Police Federation on the subject of counselling. She claimed that she was discriminated against on grounds of sex and the ET upheld the complaint. It found that the comparators in her case were the two other (male) Chief Inspectors in the Traffic Branch. These two officers had not been made the subject of any complaint concerning their counselling and they were not under the command of Superintendent Laird. Nor had they been relieved of their counselling duties.

The Chief Constable successfully appealed the decision to the Northern Ireland Court of Appeal (NICA) which made controversial rulings in relation to detriment and comparison.

Detriment

The NICA's restrictive interpretation of the requirement of detriment from the SDA s6(2)(b) was decisively rejected by the HL. The NICA held that in order to suffer a detriment, there had to be some physical or economic consequence for the complainant that was material and substantial. This is difficult to prove as in many cases of discrimination, for example, harassment, there will rarely be any physical or economic consequence for the complainant. However, Lord Hope held that it was not necessary to show this type of detriment. Instead, one must look at all the circumstances and determine whether the treatment was such that a reasonable worker would, or might, take the view that it was a detriment. On the facts of *Shamoon*, Lord Hope found that once news got out that S had been relieved of part of her normal duties shortly after a complaint by the Police Federation, she would be likely to lose standing among her fellow police officers and had therefore suffered a detriment. This is an important decision restoring the relatively low threshold for proof of detriment to where it had been thought to have been.

The Two-Stage Test for Direct Discrimination

Hitherto ETs have asked first whether a complainant was treated less favourably and then at the question what were the grounds for the treatment ('the why test'). This two-stage analysis was rejected by the HL. It was cited as reason for the arid and confusing debates that have occurred in order to identify comparators. In essence, the HL ruled that one must enquire into the reason for treatment as part of determining whether a complainant was treated less favourably. For S, it was unhelpful to look in isolation at the decision to remove her counselling duties, without at the same time looking at the background to this decision, in particular, the complaints that had been received concerning her counselling ability. If this latter approach was taken the determination of who was the correct comparator becomes more self-evident.

The Comparator

A clear distinction was drawn between victimisation cases such as *Chief Constable of the West Yorkshire Police v Khan* [2001] 1 WLR 1947 (see Briefing no 222) in which the comparator is a fellow employee, real or hypothetical, who has not done the protected act – a wider category of people – and cases of direct discrimination where the comparator must be someone whose circumstances are much closer to those of the complainant. What this meant in *Shamoon* was that the

other Chief Inspectors from the Traffic Branch were not the correct comparators, because they had not been the subject of complaints regarding their counselling. This would have been clearer if the comparators were selected after examining both limbs of the Two-Stage test together.

However, contrary to the finding of the NICA, the HL held that a claim is not bound to fail if the incorrect comparator is used. The ET on its own initiative can remedy such a deficiency. Other comparators who are not in the same position as the complainant in all material respects, such as the other Chief Inspectors from the Traffic Branch, could still be relied on in such cases. They could be of evidential value to the ET as it builds up a picture of how the employer would have treated a hypothetical comparator. The weight of their evidence depends on the degree of materiality of differences between the 'evidential comparators' and the complainant.

Inferences and the Burden of Proof

Once a finding of less favourable treatment has been made then inferences can be drawn that the woman has suffered discrimination, which the respondent must rebut by showing that there was an adequate explanation for why she was treated that way. However, no mention was made of the amended s63A SDA which came into force on 21 October 2001 bringing about reversal of the burden of proof in this situation (although this was not in force at the time the ET heard S's claim). Nor was the problem addressed that, as a result of the HLs' finding, that the Two-Stage test should be approached in one go, it is not apparent when the burden of proof should be reversed. If an ET follows the Two-Stage test guidance from *Shamoon* then the 'less favourable treatment' and 'why' limbs will be amalgamated leaving no opportunity for the burden of proof to be reversed with respect to the 'why' test.

This is significant since on the 19 July 2003, new Race Regulations will come into force which will have similar effect to s63A, reversing the burden of proof in race discrimination cases to bring English law into line with EC Directives. They will stipulate that once the complainant has established facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no such discrimination.

Thus practitioners should be prepared to identify why the complainant was treated as she was at the earlier, less favourable treatment stage if this is necessary in order to understand whether or not such treatment was indeed less favourable. The reasons for the treatment may or may not be on the grounds of sex or race. If the complainant is able to prove on the balance of probabilities facts from which an ET could conclude in the absence of adequate explanation from the respondent that discrimination has occurred, the burden of proof will be reversed.

The EAT has looked at burden of proof in the recent decision of *Barton* and set out new guidance which updates *King v Great Britain China Centre* [1991] IRLR 513 in light of the statutory change brought about by s63A SDA. It is for the complainant to prove on the balance of probabilities facts which in the absence of any adequate explanation the ET could conclude that the respondent has committed an act of discrimination against the complainant. ETs should bear in mind that they are unlikely to find direct evidence of discrimination. If such primary facts are found the ET will go on to consider what inferences of secondary fact can be made. These inferences can, in appropriate cases, be drawn from failure to comply with any relevant Code of Practice or questionnaire procedure. If inferences of discrimination could be drawn, the burden of proof then moves to the employer who must prove, on the balance of probabilities, that it did not treat the employee in any sense whatsoever on the grounds of sex. In order to discharge this burden of proof, the employer will be expected to provide cogent evidence that sex was not any part of the reasons for the treatment complained of. The stringency of this requirement is due to the reality that the facts necessary to prove any given explanation will normally be in the possession of the employer.

The result of *Barton,* therefore, is that the onus is firmly on the employer to show that its treatment of the employee is in no way influenced by discrimination and updates the position from that in *Shamoon*.

Constructive Liability of the Chief Constable?

A matter that was not resolved in *Shamoon* is on what basis the HL could have found the Chief Constable of the RUC liable for the actions of Superintendent Laird. The case of *Liversidge v Chief Constable of Bedfordshire* [2002] IRLR 651 was not referred to in the judgment, although it could have been determinative of the case.

282 WPC Liversidge was unable to bring her race discrimination case against the Chief Constable of Bedfordshire concerning acts done by another police constable because, by what was then s16 of the RRA, a chief officer of police was only liable for acts of discrimination suffered by a police officer if he had himself done those acts. His liability did not extend to acts done by one constable against another. S17 of SDA is a similarly worded provision. If the CA in *Liversidge* is to be followed then there is no reason why the Chief Constable of the RUC should be liable for acts done by Superintendent Laird.

It may be however that the HL, like the EAT in *Chief Constable of Cumbria v McGlennon* [2002] ICR 1156, assumed that the Chief Constable was acting through another officer – Superintendent Laird – under his authority and command as part of the direction of the force and therefore as being directly liable although he did not do the discriminating act himself. However, without comment in *Shamoon* as to whether *Liversidge* was distinguished or overruled, practitioners should be careful to draft sex discrimination claims against the police as the Chief Constable acting through another officer as part of his direction of the force rather than using the terminology of constructive liability. This may not of course be possible.

This position was resolved with respect to race discrimination from 2 April 2001 by s73A RRA as inserted by the RRAA s4. The Chief Constable is treated as the employer of members of the force and is therefore vicariously liable for the acts of all police officers under his command. This will also be the position regarding the new discrimination regulations on grounds of sexual orientation or religion or belief, which come into force at the beginning of December 2003. The Home Office has undertaken to bring sex discrimination into line soon.

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...and new directions for ETs on burden of proof in discrimination cases

Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332 EAT

Facts

In *Barton*, Mrs Barton (B) issued proceedings under the SDA and the Equal Pay Act. The field of employment was investment banking, and B was a fund manager. Her colleague and comparator (H) was headhunted by a number of organisations. Investec (IHCS) increased H's basic wage and Long Term Investment Plan (LTIP). Later, when share options and bonuses were awarded, H was awarded more than B.

B also relied on a second comparator, S, for the purposes of her SDA claim only, complaining that he was awarded a higher bonus than her, especially given the fact that he had been in the organisation for only ten months of the bonus year.

Employment Tribunal

The ET concluded that IHCS had shown genuine reasons for the difference between H's pay and LTIP and those of B. Further, it held that the grant of share options was due to a material factor other than sex, and therefore the issue of equal pay did not arise. IHCS did not treat B less favourably on the grounds of sex in awarding bonuses.

Employment Appeal Tribunal

On appeal the EAT re-examined the guidance on the burden of proof in sex discrimination cases in light of the new s63A SDA. This, in broad terms, provides that, in a sex discrimination claim, once the employee has shown less favourable treatment, the burden of proof shifts to the employer to show that the difference in treatment was not on grounds of sex.

This judgement of the EAT updates *King v Great Britain China Centre* [1991] IRLR 513 in light of s63A SDA. This matter was not addressed in *Shamoon*. The EAT's guidance is here set out in full.

1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the Applicant who complains of

sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondents have committed an act of discrimination against the Applicant which is unlawful by virtue of Part 2 or which by virtue of section 41 or 42 SDA is to be treated as having been committed against the Applicant. These are referred to below as 'such facts'

2) If the Applicant does not prove such facts he or she will fail.
3) It is important to bear in mind in deciding whether the Applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
5) It is important to note the word is 'could'. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts proved by the Applicant to see what inferences of secondary fact could be drawn from them.
6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the Sex Discrimination Act see *Hinks v Riva Systems* EAT/501/96.
7) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
8) Where the applicant has proved facts from which inferences could be drawn that the Respondents have treated the Applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.
9) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.
10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
11) That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.
12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

On the facts of the case it was found that B had produced sufficient evidence of sex discrimination to shift the burden of proof to IHCS but the ET had not done this. The EAT found that, in hearing her claim for equal pay, the ET were wrong to fail to take into account IHCS's reluctance to answer the Mrs Barton's questionnaire and provide her with information she requested concerning pay and bonuses.

As to the Equal Pay claim, the EAT held that, under the guidance in *Brunnhofer v Bank der Oesterreichischen Postsparkasse AC* [2001] ECR 4961, the burden was on IHCS to prove:

1) that there were objective reasons for the difference;
2) unrelated to sex;
3) corresponding to a real need on the part of the undertaking;
4) appropriate to achieving the objective pursued;
5) it was necessary to that end;
6) that the difference conformed to the principle of proportionality;
7) that was the case throughout the period during which the differential existed.

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The EAT accepted the submission on behalf of B that on the facts of this particular case, the discrimination was both tainted by sex and involved a lack of transparency. Reliance was placed on dicta of Lord Browne-Wilkinson in *Strathclyde Regional Council v Wallace* [1998] IRLR 147:

> 'Where the factor explaining the disparity in pay is tainted by sex discrimination, whether direct or indirect, the employer can still establish a valid defence under s1(3) by objectively justifying such discrimination.'

The ET had failed properly to deal with whether IHCT had proved that there were objective reasons for the difference, the issue of proportionality and whether there was a real need on the part of the business for the differences existing throughout the period of the difference. In light of the fact that the case concerned transparency, those were major defects and the case was remitted to be heard by a different tribunal. Accordingly the EAT allowed the appeal in relation to the Equal Pay claim and remitted it for re-hearing before a different ET.

Comment

Barton has provided the much-needed update to the standard *King* direction in discrimination cases in light of changes to discrimination legislation bringing the law into line with European directives. This EAT guidance serves as a model direction which applicants and their representatives should adopt in their submissions. Additionally, on 19 July 2003, new Race Regulations will come into force which will bring the burden of proof in race cases into line with S63A SDA. Then this direction should also be used in those race cases to which the new regulations apply.

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Briefing 284

When does a symptomless but progressive condition become a disability?

Kirton v Tetrosyl Ltd [2003] IRLR 353 CA

Implications for Practitioners

It is well known that unless a person is disabled within section 1 of, and schedule 1 to, the DDA, that Act provides no protection. Less well known is the fact that the DDA mixes a social and medical concept of disability to create its own definition. This mix is most difficult to understand and apply in the context of progressive definitions such as cancer and HIV. From both a medical and social point of view, many people, would consider that those who suffer from these conditions were disabled. But surprisingly, here the DDA provides no protection until the progressive condition has some (not necessarily substantial) effect on normal day-to-day activities: paragraph 8(1) of Schedule 1 to the DDA. Moreover the effect must be as a result of the condition. *Kirton v Tetrosyl Ltd.* addressed the question whether and when the indirect effect of a progressive condition on day-to-day activities was sufficient to trigger protection under the DDA. It seems likely that the Government will introduce legislation to provide that certain progressive conditions are to be treated as disabilities from the point of diagnosis. This will bring the legal definition closer to the medical model of disability. Until that happens this case will remain important in ensuring that the protection of the DDA is available at an early stage after the discovery of the condition.

Facts

Mr. Kirton was diagnosed with asymptomatic prostate cancer after routine tests. A decision was taken to conduct a prostectomy and thereafter he suffered mild incontinence as a result of the surgery. After his return to work he was dismissed. He claimed that this was because of his cancer. His employers denied that he was disabled. It was accepted that the incontinence had

some effect on his normal day-today activities, but it was argued that it was neither substantial nor, more importantly, that it was the result of the cancer. The ET and EAT agreed, holding that the effect on his normal day-today activities was not the result of the progressive condition, but of the surgery.

The Court of Appeal

The CA held otherwise, pointing out that tests in relation to causation might yield different answers according to the purpose for which they were used. Because the surgery used was a standard response to the discovery of the condition, and the subsequent incontinence was always a real possibility, causation between the cancer and effect on normal day-to-day activities was proved. The incontinence had occurred in the ordinary course of events from this disease, even though the disease itself remained without symptoms. The relevant provisions were not to be construed narrowly. Accordingly he was to be treated as disabled and the case remitted to the ET for determination of the substantive claim in relation to the dismissal.

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Briefing 285

Guidance on the 'just and equitable' provision for extending time in discrimination cases

London Borough of Southwark v Afolabi [2003] IRLR 220 CA

Facts

Mr. Afolabi (A) brought a claim of race discrimination against London Borough of Southwark (LBS), alleging that he had been discriminated against in the way in which various matters of grading and internal promotion had been handled.

S.68 RRA provides that a claim of race discrimination must be brought within three months of the act complained of. The unusual feature of this case was that one of A's allegations related to a decision not to appoint him to a post taken some nine years before proceedings were issued. Not surprisingly, LBS argued that this allegation was out of time.

A argued that time should be extended under the provision (s.68(6) RRA) which allows the ET to extend time if it considers it 'just and equitable' to do so. He was not aware that he had an arguable claim of race discrimination in respect of this allegation until he inspected his personnel file. He issued proceedings within three months of inspecting the file.

The Employment Tribunal

The ET considered the time point as a preliminary matter and decided to extend time. It considered that the passage of time 'would be equally prejudicial to the applicant, who has to prove racial discrimination, as it would be to the respondent.' They then went on to uphold all A's complaints of race discrimination.

Employment Appeal Tribunal

LBS appealed to the EAT, which dismissed the appeal on all grounds. LBS then appealed to the CA.

Court of Appeal

The main grounds of appeal related to the actual findings of discrimination, which LBS argued were perverse (i.e. no reasonable tribunal could have found for the applicant). These grounds of appeal, which were dismissed by the CA, are not considered in this report, as they are confined to the facts of the case and have no wider significance.

However, LBS also appealed against the decision to extend time in respect of the nine-year-old complaint.

They relied on the case of *British Coal Corporation v Keeble* [1997] IRLR 336, in which the EAT held that the ET's discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by s.33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions. This requires the court to consider the prejudice which each party would suffer as a result of the decision to be made, and also to have regard to all the circumstances of the case, in particular:

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had co-operated with any requests for information;
(d) the promptness with which the applicant acted once he or she knew of the facts giving rise to the cause of action; and
(e) the steps taken by the applicant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

LBS argued on appeal that the ET had made an error of law by failing to consider all the matters set out in s.33 of the Limitation Act 1980.

The CA held that there was no requirement to go through all these matters in each case:

> 'Parliament limited the requirement to consider those matters to actions relating to personal injuries and death. Whilst I do not doubt the utility of considering such a checklist (or that in CPR 3.9(1)) in many cases, I do not think it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no significant factor has been left out of account by the ET in exercising its discretion… whether the ET commits any error of law in reaching the decision [to extend time] will depend on the particular circumstances, including what has been urged on the ET by the parties.'

The CA noted that, of the matters that LBS argued the ET had failed to consider, 'some do not appear to have been established by evidence and appear to be of little weight'. The CA commented that it might have been relatively easy to mount a powerful argument that time should not be extended, had LBS produced evidence in support of an argument that a fair trial was no longer possible because of lack of documents or lack of memory of the relevant events on the part of their witnesses. However, LBS produced no such evidence.

The appeal was dismissed, but with the following words of warning:

'Parliament having envisaged that complaints within the jurisdiction of the ET will be determined within a short space of time after the events complained of, it will be an extremely rare case where the ET can properly decide that there can be a fair trial so long after those events.'

Comment

The factors set out in s.33 of the Limitation Act 1980 remain potentially relevant. However, the ET will only be required to consider a particular factor if the party relying on it explicitly urges it on the ET in its submissions and supports those submissions with evidence.

British Coal Corporation v Keeble [1997] IRLR 336 remains authority for the fact that the 'just and equitable' discretion is much wider than the 'reasonably practicable' test in unfair dismissal.

Applicants seeking an extension of time should also consider the case of *DPP v Marshall* [1998] ICR 518 at 528, in which the EAT suggests that the possibility of a fair trial is a paramount consideration:

> 'The industrial tribunal must balance all the factors which are relevant, including, importantly and perhaps crucially, whether it is now possible to have a fair trial of the issues raised… if a fair trial is possible despite the delay, on what basis can it be said that it would be unjust or inequitable to extend time to permit such a trial?'

It will often prove difficult for a Respondent to argue that a fair trial is no longer possible when the extension of time sought by the Applicant is relatively short.

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Contingent Claims can be valid Causes of Action

South Ayrshire Council v Milligan [2003] IRLR 153 CS

How can a man benefit from the equal pay action of his female colleagues? That was the question behind *South Ayrshire Council v Milligan*. This case, along with *Preston v Wolverhampton Healthcare NHS Trust* [1997] IRLR 233 CA, goes one step further than the cases of *Jenkins v Kingsgate (Clothing Productions) Ltd,* 96/80 [1981] IRLR 228 ECJ and *Jesuthasan v London Borough of Hammersmith & Fulham* [1998] IRLR 372 CA, in addressing the difficult procedural issues involved. Here an occupational group, which was mainly female, had brought equal pay proceedings making a comparison with a predominantly male occupational group. However, there were male members of the first group who did not wish to be left behind but who, because of their gender were unable to bring proceedings. The lawyers devised a practical solution that now has the blessing of the Court of Session.

Facts

Female Scottish primary school headteachers launched equal pay claims comparing their salaries with those of secondary school headteachers. The majority of the primary headteachers were women; the majority of secondary school headteachers were men.

Mr. Milligan the applicant in *South Ayrshire Council v Milligan* [2003] IRLR 153 was a male primary school headteacher who wished to compare himself with a female primary school headteacher, who was herself one of the applicants in the cases making a comparison with the secondary school headteachers. There was of course no direct secondary school headteacher comparator for Mr. Milligan(M), and at the time of his action commencing his female comparator's pay was the same as his or less. His claim was clearly contingent on his comparator winning her equal pay claim.

The problem with his postponing his case until she had won was that this would impact upon the amount of back pay he could recover from his employers in the event of his comparator's success. He would be at a disadvantage compared with his comparator and other female headteachers whose claims had been made earlier. (For further background see *South Ayrshire Council v Morton* [2002] IRLR 256 see briefing no 249).

Employment Tribunal

M wanted to obtain a stay (called a sist in Scotland) of his claim pending the resolution of his comparator's equal pay claim. His employers argued that he had not cited a valid comparator, and he should not be allowed to present his claim on a contingent basis.

The ET granted the stay and the EAT upheld the ET decision. The employers appealed to the Court of Session.

Court of Session

The employers tried to distinguish this case from that of *Preston*. In *Preston* the CA had found that a male part-time worker could bring a claim for equal access to an occupational pension scheme even though no female part-time worker had yet succeeded in her claim. In such circumstances, a claim made on a contingent basis was a valid cause of action. Otherwise the male part-timer would be unable to achieve equality of benefit with his comparator. The Secretary of State lost the argument that the claim of the male applicant was groundless (as he could suffer no discrimination unless and until the claim of a female worker succeeded).

The employer tried to argue that *Preston* was distinguishable as the discrimination alleged by M did not result from the sort of barrier that was considered in *Preston*. The CS, like the EAT before it, rejected this submission and found that both cases involved discrimination relating to inequalities in pay.

The CS said it was wrong to assume that until the comparator succeeded in her equal pay claim that M had no valid comparator. His claim was based on the proposition that the comparator is the subject of

indirect discrimination **here and now.** If that were established, M would immediately be in a position of being directly discriminated against, bar any change in position by his employer. This was coupled with the fact that his delaying in the lodging of his claim would inflict real injustice upon him. To take the employers' course, and to exclude these types of contingent claims as a matter of law, would impede the claimant from achieving true equality of pay and breach Article 141 of the Treaty as well as the Equal Pay Directive. This is due to the impact on being able to claim a shorter period of back pay if he could lodge a claim only after the comparator's claim succeeded.

The Court of Session approved the decision of the EAT in *Preston* (cf. [1996] IRLR 484, at paragraph 143) that not to stay the claim might inflict real injustice on male claimants.

Comment

Equal pay claims are essentially comparative by nature. Because they are founded on Article 141 of the EC Treaty and Article 6 of the Equal Pay Directive 75/117/EC the Member State is obliged to take the necessary measures to ensure that the principle of equal pay is observed in the domestic law. Refusing M's stay here would have amounted to a failure to take a necessary measure.

The Government's draft Equal Pay (Amendment) Regulations 2003, propose to extend the limitation period for claiming arrears of pay to up to six years before the date the proceedings are instituted in England and Wales (and up to five years in Scotland). This time period relates to the contractual limitation period in these two jurisdictions. From July 2003 when these regulations are expected to come into force the need to bring M's type of contingent claim should be reduced. For the time being, an employee who is aware that a colleague of the opposite sex to him or herself is bringing an equal pay claim, would be prudent to submit a 'contingency' claims.

In a similar vein, women over the age of 65 who have been dismissed and wish to rely upon the challenge to the age bar litigated in *Rutherford v Town Circle (t/a Harvest) (in liquidation) (No 2)*; *Bentley v Secretary of State for Trade and Industry* [2002] IRLR 765, ET, should also submit Originating Applications within three months of the date of their dismissal, in order to preserve their right to bring unfair dismissal claims pending the resolution of this litigation.

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Equality for discrimination damages in the County Court

William Purves v Joydisk Ltd, Edinburgh Court of Session, 25.2.03.
Unreported

Facts

In December 1999 Ms McGowan (M) telephoned a restaurant owned by Joydisk Ltd (J) to make a booking. She mentioned that she would be coming accompanied by a blind friend, Mr Purves, with his guide dog. The assistant manager took a provisional booking saying that the manager would have to ring back to confirm whether the dog could be admitted. The manager then rang back to say that no dogs would be allowed in the restaurant. M cancelled the booking. She later rang back to ask him if he was aware of the DDA. He replied 'Dinna get yourself upset'. Mr Purves (P) was both angry and upset. He brought an action against J in the Sheriff Court (the equivalent of a County Court).

Sheriff Court

The Court found that P was disabled and the refusal to admit him with his guide dog was discriminatory. He awarded P damages of £350 for injury to his feelings. The reasons given for the amount of this award were:-

- The discrimination did not take place in public, but over the phone in private,
- The refusal was not directed to P but relayed to him by his friends,
- Understandably P was angry and upset, and
- Awards given in ET cases are given on an entirely different basis.

P appealed against the size of the award to the CS.

Court of Session

The CS considered the principles on which an award of damages for injury to feelings should be assessed and concluded that awards in the Sheriff Court should be within the same range as those in the ETs. It was held that 'It would be erroneous, … to assume that the measure of damages in an action based on one ground or in one context must necessarily always be greater or smaller than in an action based on some other ground or in another context.'

The CS then considered, and applied, the guidelines on injury to feelings awards for ETs set out in *Armitage v Johnson* [1997] IRLR 162:

- Awards for injury to feelings are compensatory,
- Awards should not be too low, nor should they be excessive,
- Awards should bear some broad similarity to the range of awards in personal injury cases,
- In exercising their discretion in assessing a sum, ETs should remind themselves of the value in everyday life of the sum they have in mind,
- ETs should bear in mind the need to public respect for the level of awards made.

The CS concluded that the sum of £750 is the least that may nowadays be awarded for the slightest injury to feelings. The injury in this case was significantly greater that a very slight injury. Noting that J had offered no apology, applying the principles set out in *Armitage*, the amount of the award was increased to £1,000.

Implications

This case is important because it sets out clearly that damages awarded for discrimination in the Sheriff Courts and the County Courts should be on the same scale as those in the ETs.

Gay Moon
Editor

Meaning of disability

Power v Panasonic UK Ltd [2003] IRLR 151

Implications

The definition of disability under the DDA continues to be the subject matter of the majority of appeals to the EAT in respect of the Act. This case concerns the Disability Discrimination (Meaning of Disability) Regulations 1996, reg 3(1) which provides that 'addiction to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes of the Act'. This appears to be the first time that this particular aspect of the regulations has been considered by the EAT.

Facts

Ms. Power (P) was employed by Panasonic UK Ltd (PUK) as an area sales manager, from January 1991 to November 1998. Following a reorganisation and reduction in the number of area sales manager employed, the geographical area that P was expected to cover increased. In early October 1997, she was signed off sick. She was drinking heavily by then, and she remained off work until her dismissal on November 4th 1998. It was not disputed that, during the period between October 1997 and November 1998, P was both depressed, and was drinking heavily. Both parties adduced expert evidence before the tribunal from consultant psychiatrists; they agreed that P suffered from depression and abused alcohol, and tried to identify which came first.

Employment Tribunal

The ET held that P had failed to show that she was a disabled person within the meaning of s.1 of the Act. The tribunal relied upon reg 3(1) of the Disability Discrimination (Meaning of Disability) Regulations 1996, which provides that addiction to alcohol, nicotine or any other substances is to be treated as not amounting to an impairment for the purposes of the DDA. The ET, both majority and minority, indicated that there was a conflict between the Regulations and the Guidance on Matters to be Taken Into Account in determining questions relating to the definition of disability, which provides at paragraph 11,

> 'It is not necessary to consider how an impairment was caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment'.

The majority held that the Regulations should be given greater weight than the Guidance. The ET stated that the core issue in this case was 'did the applicant become clinically depressed and turn to drink, or did these events lead to alcohol addiction producing depression'.

Employment Appeal Tribunal

The EAT upheld the appeal on the first ground of appeal relating to the Regulations. It held that both the minority and the majority of the ET were wrong to consider that there may be a conflict between the Guidance and the Act. Additionally, the EAT held that it is not material to a decision as to whether a person is suffering from a disability within the meaning of the Act to consider how the impairment from which they are suffering was caused.

What is material is to ascertain whether the disability from which they are suffering, at the material time, is a disability within the meaning of the Act or whether, where it is relevant as in this case, it is an impairment which is excluded by reason of the Regulations from being treated as such a disability.

The second and third grounds of appeal, relating to the applicant's panic attacks were not upheld, as the applicant had given no evidence to the tribunal of the effect of her panic attacks upon her ability to carry out normal day to day activities.

The case was remitted for rehearing on the preliminary point as to whether she fell within the definition of disability.

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Guidelines for taking time off for dependants

Qua v John Ford Morrison Solicitors [2003] IRLR 184 EAT

Facts

Ms Qua(Q) started to work for a firm of solicitors, JFM, as a legal secretary on January 5th 2000. Q is a single mother with a son born in 1996. He had medical problems and as a result she was absent from work for 17 days in nine months and consequently she was dismissed on October 27th 2000. Of the 17 days there were 2 days when she was only away for an hour or two, another day she was away from work for five hours but for the remaining days she was away for the whole day. There were five 'blocks' of absence when she was away for two or more days. Whether she had given her employers any or adequate notice of the length of and reason for her absences was in dispute.

Q claimed that her dismissal was automatically unfair because the reason for it was that she had taken time off for a dependant as provided for by s57A of the Employment Rights Act.

Employment Tribunal

The ET dismissed her complaint having found that she failed to comply with her obligation to inform her employer 'as soon as reasonably practicable...how long she expected to be absent'. They found that on a number of occasions she did not contact them, on several occasions she made some contact but did not specify with any sort of precision her anticipated length of absence and did not update the position on subsequent days. It was argued that the ET should consider each absence separately and then decide whether each absence was 'reasonable'. However, they concluded that their criteria should be to 'consider the whole picture on the one hand of the absences of the employee and on the other hand the disruption to the respondent's business'. They concluded that her dismissal was not automatically unfair.

Employment Appeal Tribunal

The EAT noted that the right to statutory time off for dependants in s57A ERA was a right to take 'reasonable' time off to 'provide assistance' to deal with a variety of sudden or unexpected events affecting their dependants. It does not enable employees to take time off in order for themselves to provide care for a sick relative. S57A enables a carer to provide temporary assistance. An employee can take a reasonable amount of time off to deal with a child who 'falls ill', but they cannot take unlimited amounts of time off work even if they do give their employer the appropriate notice and take a reasonable amount of time on each occasion. Once it is clear that the dependant is suffering from an underlying medical condition, which is likely to give rise to regular relapses, the situation no longer falls within s57A.

In determining what amounts to a 'reasonable amount of time off' the disruption or inconvenience to the employers business are not relevant factors and should not be taken into account.

The EAT ruled that in determining questions under s57A the ET should ask the following questions:

1. Did the applicant take time off or seek to take time off from work during her working hours? If so, on how many occasions and when?
2. If so, on each of those occasions did the applicant
   a) as soon as reasonably practicable inform her employer of the reason for her absence; and
   b) inform him how long she expected to be absent;
   c) if not, were the circumstances such that she could not inform him of the reason until after she had returned to work?

If the ET finds that she has not complied with these requirements then the right to time off work does not apply, the absences would be unauthorised and the dismissal would not be automatically unfair.

3. If the applicant had complied with these requirements then the following questions arise
   a) did she take or seek to take time off work to deal with one or more of the five situations

listed at paragraph (a) to (e) of subsection (1)?

b) If so was the amount of time off taken, or sought to be taken, reasonable in the circumstances?

4. If the applicant has satisfied questions 3(a) and (b) was the reason or the principle reason that she had taken/sought to take that time off work?

If the applicant satisfies this question as well then she will be entitled to a finding of automatic unfair dismissal.

In this case the ET had been wrong to dismiss her claim without making clear findings on each of these questions. It was necessary for the ET to apply these questions to each occasion of absence. The ET were wrong to suggest that the employee needed to report to her employers on a daily basis, but there is a duty to tell her employer about the reason for her absence and, except where she is unable to do so before she returns, how long she expects to be absent. There is no continuing duty to update the employer. The ET had been wrong to consider the disruption caused to the employers business by the time off when considering the question of whether a reasonable amount of time had been taken.

The case was remitted to be heard by a differently constituted tribunal.

Comment

This is thought to be the first case on the interpretation of the new right to time off for dependants. It sets a very clear set of criteria for employers, employees and ETs to apply in interpreting this important right.

Gay Moon
Editor

Notes and news

House of Lords refuses leave to appeal in Hendricks case

Leave to appeal has been refused in the case of *Joy Hendricks v Commissioner for Police for the Metropolis* (see Briefing no 273). This means that the Court of Appeal's ruling stands. There are two major implications of this decision. Firstly, it will be easier to argue that there has been a continuing act where there has been a hostile working environment. Secondly, it will make it easier for police officers to complain of discrimination arising from a hostile working environment notwithstanding the decision in *Liversidge*.

EAT follows Hendricks and allows case to proceed

In *Chief Constable of Kent v Baskerville* (EAT/839/02/SM) judgment 10th April 2003 the EAT followed Hendricks and allowed a police officers case to proceed notwithstanding *Liversidge*. This case is likely to be appealed and will be discussed further in the next issue. It can be found at http://www.employmentappeals.gov.uk/

Race Discrimination in the UK Report

The European Network against Racism has commissioned a report on Racism and Race Relations in the UK during 2002. It is available to be downloaded on their website www.enar-eu.org/en/national/uk.shtml#report2002 and has been written by your editor.

Equality Bill

This has now been passed successfully through the House of Lords, it will be taken in the House of Commons by Angela Eagle and Vera Baird QC. Although it is not expected to be successful in the House of Commons Angela Eagle is keen to continue to work for such a bill to replace our existing web of discrimination laws.

For further information contact the Odysseus Trust www.odysseustrust.org

New Race Regulations update

Both the House of Commons and the House of Lords approved the Race Regulations on June 11th, despite a number of concerns about them expressed by the CRE. They will take effect on July 19th 2003, the next issue of Briefings will analyse the changes that they will make to the RRA.

Court of Appeal approves Prague Airport entry clearance system

The flow of asylum seekers to the United Kingdom over recent years has raised much controversy. The Government has sought to control the problem by imposing visa regimes upon those states from which most asylum seekers come. Parliament, in 1999, authorised the Home Secretary to introduce a scheme enabling the immigration rules to be operated extra-territorially rather than simply at UK ports of entry. Intending asylum seekers would in this way be refused leave to enter the UK by immigration officers operating abroad and so be unable to travel to the UK to claim asylum here. Such a scheme was duly introduced and under it, by agreement with the Czech Republic, pre-entry clearance immigration control has been operated at Prague Airport since 18 July 2001. It is aimed principally at stemming the flow of asylum seekers from the Czech Republic, the vast majority of these being of Romani ethnic origin (Roma). The European Roma Rights Centre, with the assistance of Liberty, have sought a judicial review of the system in order to challenge its legality.

The CA have concluded that entry clearance system in Prague did not:

(i) violate the UK's international obligations under the Geneva Convention (1951) and Protocol (1967) relating to the Status of Refugees and under customary international law;

(ii) constitute direct race discrimination. The UK was permitted to take such active steps to prevent those seeking refuge from persecution from leaving their own state.

This decision is highly controversial because of the approach to proof of discrimination. It is expected that an appeal will be pursued. The report is available at www.bailii.org/ew/cases/EWCA/Civ/2003/666.html

Major Disability Rights Commission Conference

This conference *Disability Rights from Europe: From Theory to Practice* will be held at the University of Leeds on September 25-26th 2003. Speakers include Luke Clements, Theresia Degener, Sandra Fredman, Caroline Gooding, Art Hendricks, Richard Howitt MEP, Nick O'Brien, David Ruebain, Gerard Quinn, Lisa Waddington and Richard Whittle.

For further details see www.disability-europe.info/lawconference

International Covenant for the Elimination of all forms of Racial Discrimination (ICERD)

The UN Committee with responsibility for reviewing each member states compliance with this Covenant will be considering the UK Government's report in Geneva on August 6th-7th. A number of UK non-governmental organisations are preparing a shadow report and a delegation will present it to the committee. The next issue of Briefings will report on the committee's findings.

Settlement reached for harassed civil servant

Janet Stewart, a civil servant who made allegations of sexual harassment against Graham James, operational head of the immigration service, has withdrawn her complaint after the Home Office agreed to pay her £100,000 compensation. Mr James vigorously denied the allegations.

Ontario permits same –sex marriages

On the 10th June 2003, in one of the most important decisions for gay rights, the Supreme Court of Ontario held in *Halpern v Attorney-General for Canada* that the classic common law definition of marriage, based on the formulation of Lord Penzance in *Hyde v Hyde* and *Woodmansee* (1866), L.R. 1 P. & D. 130 at 133 as 'the voluntary union for life of one man and one woman, to the exclusion of all others', breached the Canadian Charter of Rights and Freedoms, because it excluded same sex couples. For the judgment see http://www.canlii.org/on/cas/onca/2003/2003onca10314.html

Challenging Racism: Using the Human Rights Act

Edited by Barry Clarke

Lawrence and Wishart, 2003, £14.99.

This long awaited text grew out of the 'Making Rights Real' conference held in October 1998. Aimed primarily at lay advisers and community activists it takes a systematic and practical approach to explaining how the Human Rights Act 1998 can be used to tackle racism in areas as diverse as housing, education and immigration.

The book begins with a clear overview of the mechanics of the Human Rights Act, and a summary of the other relevant legislation which can be used to challenge racism, including the Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000, and the criminal law. What then follows is a series of concise chapters, each written by specialist practitioners in the field, explaining the pre- and post-Human Rights Act position in criminal law, education, immigration, freedom of expression, social welfare, housing, actions against the police and employment. It ends with a highly practical chapter on obtaining funding and legal assistance for discrimination claims, including a list of useful contacts, and creative chapters on using the Human Rights Act in campaigning and how best to deploy the media to challenge discrimination.

'Making Rights Real' rightly prides itself of being written mainly for those without a legal background, and it meets that aim well. Each chapter is written in a deliberately straightforward style, with legal jargon and references to caselaw and legislation kept to a minimum. Clear headings such as 'Who is liable?', 'Who can claim?' and case studies at the end of each chapter make this a completely accessible and practical text for the lay adviser, and a useful starting point for the lawyer needing a quick reference work.

As discrimination rarely exists in a vacuum, there is frequently a need for advisers to be able to assist clients with a range of issues in their lives, even on a preliminary basis. This book is unique in drawing together the various strands of life in which discrimination exists, and can be challenged. It will be an invaluable addition to any law centre or advice bureau's library, and provide a useful addition to a specialist practitioner's bookshelf. At £14.99 it is probably the most cost effective preliminary reference book on challenging racism on the market.

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Equal Pay: a Practical Guide to the Law

by Sara Leslie, Sue Hastings and Jo Morris

The Law Society, 2003, £29.95

Much of the struggle for pay equality is a struggle for recognition of the problem. The publicity and debate generated by the Kingsmill Report and the work of the EOC Equal Pay Taskforce have helped with that recognition. The new questionnaire procedure, the recent cross-employer comparison cases of Morton and Lawrence and the EOC Equal Pay Review Kit, have all contributed to a resurgence of interest in the subject. This book is therefore in the right place at almost the right time. 'Almost', because the book went to print before the questionnaire procedure was finalised and therefore, although it contains a helpful anticipatory section on questionnaires, the book does not contain a copy of the form.

An up to date book which does more than regurgitate the law is welcome since understanding equal pay involves an understanding of pay systems and practices. This book makes an important contribution in this regard with helpful chapters on, for example, the equal pay principle in practice and equal pay reviews. However, at 223 pages including appendices, the book has a lot to say in too little space. It has the feel of a book twice its length that has been edited down. As such, I felt that I never quite got enough from the authors' experience of pay in practice that would really have distinguished this book and made it invaluable.

Structurally the book is divided into two halves with chapters 1 – 5 dealing with practical aspects of equal pay such as job evaluation and reviews and chapters 6 – 16 dealing with the legal framework i.e. equal pay claims. The book leads with prevention rather than cure, taking it beyond merely a book on the law. In practice, both prevention and cure are intertwined: for example, an equal pay review is about identifying and resolving a problem, and an understanding of 'work rated as equivalent' requires an understanding of 'job evaluation'. The book solves this problem with well marked chapter cross references although it still seems a little odd to leave the definition of 'pay' until the seventh chapter.

Generally I found the book easy to read and understand. I liked the key points summary at the beginning of each chapter and there are some good explanations of complicated areas such as indirect discrimination and practical tips on completing a Tribunal application.

The book's subheading, 'A Practical Guide to the Law,' confirms its content of law and practice. In the view of Lord Lester QC, in his foreword, it is '…invaluable as a practical guide for employers, trade unions, lawyers and ordinary women and men..' However, I suspect that anyone without a working knowledge of law, would still find this book intimidating, with its case and statute references, despite some of its practical content. This is largely a question of structure rather than content. For individuals, a chapter on 'What to do if you think you are being paid unfairly' would be helpful. This could draw together existing content on gathering information and procedure. It could also deal with practical matters such as employers raising data protection arguments in response to a questionnaire.

Boxed out sections with interesting snippets of information, much favoured by websites and travel guides, are a feature of the introductory chapter but are then not carried through in the chapters that follow. This is a shame as such snippets could be used to insert regular reminders of what this all means to employees in practice.

In summary, this book provides a worthwhile, up to date, and useful overview of equal pay in practice and in law. I hope that there will be a second edition and that this will expand upon the practical issues: with more snippets please!

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