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Editorial *New boots for the sleeping giant?*

Soon after you read this, DLA members could be puzzling over the latest proposals for a new Single Equality Body (SEB). Several key questions will need to be asked. Are the proposals a gain for equality, or, do they entail a loss of focus? Is cost cutting the main agenda or will amalgamation loosen up precious resources for more incisive enforcement and campaigning?

We can only speculate now on the answers to these questions, but it is worth looking at the experience from Northern Ireland. The changes brought about there with the amalgamation of the various Commissions into the Equality Commission for Northern Ireland (ECNI) have lead to some very exciting cross – cutting work. The work of the ECNI on the possibilities for a new single Equality Act has received widespread approval across the different NI communities. It forms an impressive body of work, and the ECNI is to be congratulated on their determination to press for a single Equality Act on an inclusive and imaginative basis. This must be the central aim here too if the new SEB is to have any justification at all.

But the ECNI has also suffered acutely from stretched financial resources and a consequential retrenchment on the legal front. The ECNI inherited powers from three very diverse bodies each with its own individualistic approach. There have been judicial reviews from disappointed applicants as the ECNI has had to manage down expectations to meet their budgetary constraints. No doubt it will be said that the situation is different in GB; yet our starting point is a CRE with its legal budget slashed and an EOC that funds very few cases. It would be terrible if the ECNI were to provide a pattern for GB, in that respect.

One of the most interesting questions will be the extent of any human rights role for this new SEB. Over the last year, as campaigners for human rights have watched the possibility of a human rights commission become more and more remote, they have pressed for at least some human rights input into the SEB. The Northern Ireland Act not only established the ECNI but also set up a separate Human Rights Commission for NI, so this question did not arise there in the way that it does here.

At the moment it seems unlikely that the new SEB will be given general powers to *take on* or to *fund* new human rights cases other than those that are primarily discrimination cases. More human rights litigation is not viewed by government as welcome at all. However there is a chance that this lobbying will be successful in a different way. A power enabling the new SEB to carry out *formal investigations* into human rights abuses would not mean more front line litigation, but could provide a logical bridge with equality law.

This would be a very exciting development. Formal investigation powers are the sleeping giant of British discrimination law, feared in a distant sort of way yet too rarely stirred into action. When they are, as the CRE has found, widespread change can be achieved. If this idea is allowed to develop then the giant might well be more active. Additionally, such an approach might provide some coherence between equality and general human rights law. Lack of coherence is one of the key complaints made about UK law. So such a power would be very welcome. And as the SEB in enforcing the Race, Equal Treatment and Employment Directives will have to look to the European Charter of Fundamental Rights, it makes good sense to provide some formality for this connection in the new SEB.

The final question is one of the most important and yet perhaps the most difficult to predict. What line will the DRC take on the proposals? There seems to be a general fear that they are being asked to give up a deeply valued and hard won resource for the disability community with no promise of any real gain. The promise of legislation in the disability field will no doubt be offered as a sop for the Commissioners. Yet if the disability community do not like these proposals the Government will be in for a very rocky ride before implementation. The disability community are doughty campaigners, and the DRC has been very successful.

For a quick impression of the prospect for implementation of the proposals the person to watch most in the next few weeks might just be Bert Massie!

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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New Regulations on Race Discrimination

Introduction

The Government's stated aim in implementing the European Race and Employment Directives[1] was to make domestic equality legislation 'more coherent so that rights and obligations are easier for individuals and employers to understand', and its proposals were 'designed to make equality legislation more coherent and easier to use'.[2]

Unfortunately the Government has not seized the opportunity that implementation of the Directives offered to create a seamless and effective system of protection from discrimination, and so the scheme which will result when all the Regulations come into force at the end of the year will present an even more complex patchwork for lawyers and advisers. This paper concentrates on the implications of the **Race Relations Act 1976 (Amendment) Regulations 2003** SI 2003/1626 ('the Race Regulations') which aim to implement the Race Directive.[3]

It is important to note that the manner in which the Government has chosen to implement the Directive (in exercise of its powers under the European Communities Act 1972, s.2(2)) means that the Race Regulations make the minimum changes to the RRA necessary to implement the Directive. This has two key consequences which pervade the Regulations.

Firstly, **all the important changes only relate to those cases alleging discrimination on grounds of race, ethnic or national origins and *not* colour or nationality.** Secondly, the changes only apply to limited spheres of discrimination which are within the scope of the Directive, and which are narrower than current domestic discrimination provision, as set out in the new s.1 (1B). For example, the new changes do not affect all claims of discrimination by public authorities under s.19B of the RRA (inserted by the Race Relations (Amendment) Act 2000, with effect from 2 April 2001), but only those s.19B claims which also fall within the scope of the Directive. Some discrimination claims against the police, for example, may well fall outside the Regulations.

Main pillars of the Race Directive

The Race Directive has three key elements:

- The principle of **equal treatment** between persons irrespective of racial and ethnic origin which must be established in national law (Article 1);
- The principle of **minimum standards** for protection from discrimination, meaning that Member States are prohibited from falling beneath these standards (Recital 25 and Article 6); and
- The principle of **non-regression**, meaning that Member States are prohibited from reducing existing levels of national protection when implementing these proposals, even if the national standard is higher than that required by the Directive (Article 6).

Commencement date

The Race Regulations came into force on 19 July 2003, the due date for implementation of the Directive. Practitioners should note, though, that the changes in relation to the burden of proof (Regulations 41 and 43) apply to proceedings commenced before 19 July 2003, provided such proceedings have not yet been determined (Regulation 2(2)). Therefore applicants or claimants in all hearings after 19 July 2003 will have the benefit of the new burden of proof. The transitional provisions also make clear that the changes in relation to the time limit for answering questionnaires (Regulation 47) do not apply to questions served on respondents before 19 July 2003 (Regulation 2(3)).

Outline of the Race Regulations

The main aims of the Race Regulations are to:

- Transpose the provisions of the Race Directive into domestic race relations legislation; and
- Remove exceptions to the Race Relations Act 1976 (RRA) that are contrary to the principle of equal treatment.

The key parts of the Regulations which implement the Directive:

- Provide a new definition of indirect discrimination;
- Provide a new statutory definition of harassment;
- Extend the protection from harassment to non-employment activities such as education and service provision;
- Extend the protection from discrimination, harassment and victimisation to include such actions after the end of the relationship between the victim and the discriminator;
- Provide for a new burden of proof; and
- Provide for a new genuine occupational requirement and repeal the old genuine occupational qualifications in s.5 RRA.

The key provisions of the Regulations which amend RRA in order to comply with the principle of equal treatment:

- Repeal the small dwellings exception (save where the tenant shares facilities with the landlord) (Regulation 24, amending s.22(1) RRA);
- Repeal the private household employment exception (Regulation 6, amending s.4 of RRA);
- Repeal the exception for partnerships of 6 or less (Regulation 12, inserting a new s.10(1A) into the RRA);
- Repeal the exception for acts done under statutory authority (but with limited effect in immigration cases) (Regulation 35); and
- Broaden the territorial application of the RRA to cases where the employer has a place of business at an establishment in Great Britain, where the work is for the purposes of the business carried on at that establishment; and where the employee is ordinarily resident in Great Britain at the time when he applies for, or is offered, the employment, or at any time during the course of the employment (Regulation 11, inserting a new s.8 (1A) into the RRA).

The key changes

New definition of indirect discrimination

Regulation 3 inserts a new s.1 (1) definition of indirect discrimination, which provides that:

A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,

(b) which puts that other at that disadvantage, and

*(c) which he cannot show to be a proportionate means of achiev*ing a legitimate aim.

It can be seen from the new definition that the trigger for indirect discrimination is now a **'provision, criterion, or practice'** – a broader and more flexible definition than a 'condition or requirement', which had on occasion been interpreted restrictively, as requiring a 'must' (see *Perera v Civil Service Commission* [1983] IRLR 186). Moreover discrimination can be made out if the provision, condition or practice would have the effect in question meaning that the new definition can extend to practices that tend to discriminate (and so may well cover practices such as word-of-mouth recruitment etc). The test for disparate impact is now that the provision, criterion, or practice, puts others at a **'particular disadvantage'**, rather than that the condition or requirement could be complied with by a considerably smaller number of persons from a different racial group. It may or may not be significant that the 'justification' test in the Regulations only requires that the means are being used to achieve a legitimate aim and are proportionate, not that they are 'appropriate and necessary' as the Directive requires.

However, the new definition of indirect discrimination only applies to a limited sphere of cases, as listed in the new s.1 (1B). It extends to employment cases under Part II of the RRA, education cases under s.17 to 18D, public authority claims under s.19B (introduced by the Race Relations (Amendment) Act 2000 with effect from 2 April 2001) but only so far as they relate to (i) any form of social security; (ii) health care; (iii) any other form of social protection; and (iv) any form of social advantage (concepts drawn straight from the Directive, which will await interpretation by domestic courts) and are not covered by s.20; goods, facilities and services claims under s.20 to 24; claims against barristers and advocates under ss.26A and 26B; claims in relation to government appointments and officer holders under s.76 and 76ZA; and claims under Part IV (instructions/pressure to discriminate etc), in its application to the provisions referred to above.

Statutory definition of harassment

This is defined at Regulation 5, by inserting a new s.3A into the RRA, providing that:

3A. – (1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1(1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of –

violating that other person's dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect.

It is notable that this definition reflects the existing British case law rather than the Directive's more restrictive test of harassment (the 'or' between (a) and (b)). However the concerns raised during the consultation process that the new definition reflect the domestic law where harassment could be 'related to' one of the prohibited grounds is not made explicit.

Discrimination by harassment can be made out not only in employment and against contract workers (Regulations 6 and 10) but also in relation to partnerships (Regulation 12), trade unions etc (Regulation 13), qualifying bodies (Regulation 14), vocational training (Regulation 15), employment agencies (Regulation 16), Training Commissions etc (Regulation 17), by bodies in charge of educational establishments (Regulation 18), by local education authorities (Regulation 19), by public authorities in those areas which fall within the scope of the Directive (see the similar limitation above in relation to the burden of proof) (Regulation 20), the provisions of goods, facilities and services (Regulation 22), the disposal or management of premises (Regulation 23), in relation to the granting of consent for assignment or sub-letting (Regulation 26), barristers and advocates (Regulations 27 and 28).

New burden of proof

Regulation 41 inserts a new section 54 into the RRA, providing that:

54A. – (1) This section applies where a complaint is presented under section 54 and the complaint is that the respondent –

(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in section 1(1B)(a), (e) or (f), or Part IV in its application to those provisions, or

(b) has committed an act of harassment.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –

(a) has committed such an act of discrimination or harassment against the complainant, or

(b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant,

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

Regulation 43 makes similar provision in relation to County Court cases.

Applicants and claimants have previously had the benefit of the informal shifting of the burden of proof established by *King v Great Britain China Centre* [1992] ICR 516 and *Glasgow City Council v Zafar* [1998] ICR 120 (as considered more recently in *Anya v University of Oxford* [2001] IRLR 377 and *Wheeler v Durham City Council* [2001] EWCA Civ 844) but Regulation 41 formalises this. The change is subtle but nevertheless important. It is likely that Tribunals and County Courts will follow the approach set down in *Barton v Investec* [2003] IRLR 332 (see *Briefing* 283) which considered the similar shift in the burden of proof in sex discrimination claims (implemented by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 SI 2001/2660 with effect from 12 October 2001).

Again, the new provisions only apply to cases based on race or ethnic or national origins, and those spheres listed within the new s.1 (1B) (see above in relation to the new definition of indirect discrimination).

New Genuine Occupational Requirements

Regulation 7 repeals the list of Genuine Occupational Qualifications ('GOQ"s) in s.5 of the Race Relations Act 1976 and replaces them with a much broader, general Genuine Occupational Requirement ('GOR'),

providing for both an objective and subjective element. It does this by inserting a new s.4A into the RRA, they key part of which provides that:

…where, having regard to the nature of the employment or the context in which it is carried out –

(a) being of a particular race or of particular ethnic or national origins is a genuine and determining occupational requirement;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either –

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it...

This is a potentially significant change in that it applies, in theory, to all forms of employment, and at s.4A(c) (ii) affords employers a substantial discretion in determining that someone does not meet the GOR (providing that the decision is a reasonable one to reach). Again it only applies to provide a defence to discrimination on grounds of race or ethnic or national origins.

Relationships which have come to an end

Regulation 29 addresses the difficulties which had previously applied in race cases as a result of *Adekeye v Post Office* [1997] ICR 110 and *D'Souza v Lambeth Borough Council* [2001] EWCA Civ 794 by inserting a new s.27A into the RRA. This provides that in cases of discrimination on grounds of race or ethnic or national origins, and which are within the new s.1(1B), it is unlawful for the relevant party to discriminate against or harass another party 'where the discrimination or harassment arises out of and is closely connected to that relationship'. By Regulation 29(3) such discrimination can be made out where the 'relevant relationship' has ended before 19 July 2003. Similar provisions have been made in relation to the FDA, see Briefing number 292 in this issue.

Questionnaires

Regulation 47 may well be one of the most practically beneficial to advisers in that it amends s.65 (2) (b) of the RRA to the effect that where the question relates to discrimination on grounds of race or ethnic or national origins, or to harassment, the respondent should reply within 8 weeks beginning with the day on which the question was served, rather than simply a 'reasonable period'.

Conclusions

The risk inherent in the structure of the Regulations is that what will develop is a two-tier system of protection – where applicants or claimants alleging discrimination on grounds of race or ethnic or national origins, which falls within the scope of the Directive, will be better protected than those whose claim is colour or nationality based, or which otherwise falls outside the Directive. It may be that careful pleading by advisers is required to ensure that the maximum benefit can be obtained from the Regulations in terms of the new definition of indirect discrimination, the shift in the burden of proof, the ability to show discrimination after the end of a relevant relationship and the stricter time limit for replying to questionnaires.

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1. 'The Race Directive': Council Directive of 29 June 2000, 'implementing the principle of equal treatment between persons irrespective of racial or ethnic origins' (2000/43/EC); The Employment Directive': Council Directive of 27 November 2000, 'establishing a general framework for equal treatment in employment and education' (2000/78/EC)

2. *Equality and Diversity, The Way Ahead: The Proposed New Anti-Discrimination Regulations*, at paras. 4 and 9

3. 'The Race Directive': Council Directive of 29 June 2000, 'implementing the principle of equal treatment between persons irrespective of racial or ethnic origins' (2000/43/EC)

New Regulations on Religion or Belief and Sexual Orientation Discrimination

Two sets of regulations implementing the new EC Employment Equality Directive (ED)[1] have now been passed: the **Employment Equality (Sexual Orientation) Regulations 2003 no 1661** (EE (SO) R) and the **Employment Equality (Religion or Belief) Regulations 2003 no 1660** (EE (RB) R).[2] They come into force on December 1st and 2nd 2003 respectively. There are several documents useful to read to understand the likely interpretation to be given to these regulations. The **Explanatory Memorandum and Notes on Regulations** were published with each set of Regulations, but do not form part of them. These were published to 'assist the reader in understanding the regulations.' It is likely than the ET will be referred to and take note of them. ACAS has also drafted **Guidance** to supplement the new regulations and assist in their interpretation.[3] The Guidance documents have been the subject of a consultation exercise that has just finished. It is expected that the final versions will be published by the date that the regulations come into force. The Guidance is clear and gives a number of examples helpful both to employers and employees.

These provisions are built on the existing structure of discrimination law in the fields of sex and race. There are a number of standard provisions that apply to both fields, however because of concerns raised by religious lobby groups there are some provisions that only apply to situations involving religion and belief.

It is worth remembering that Jews and Sikhs already have protection under the RRA, as they constitute an ethnic group as well as a religious group. That protection is wider than that provided by these new regulations as it protects access to goods, facilities and services, education and housing as well as the employment field.

What is 'Religion or Belief'?

The term 'religion or belief' is not defined in the **Directive** although it is likely that the European Court of Justice will give it a similar scope to that of the term 'religion or belief' in Article 9 of the ECHR. The right protected by Article 9 is not only the right to belong to a defined, traditional, recognised and established religion but also the right not to believe or the right to hold unconventional beliefs that are not subscribed to by others. Thus the European Court of Human Rights held in *Kokkinakis v Greece:* –

> *As enshrined in Article 9, freedom of thought conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, sceptics and the unconcerned.*[4]

In *Campbell and Cosans v UK* the Court stated that: 'the term, 'beliefs'. . . denotes a certain level of cogency, seriousness, cohesion and importance.[5]

The **Regulations** define it to mean 'any religion, religious belief, or similar philosophical belief'.[6] The Note on Regulations says that this does not include philosophical or political belief unless that belief is similar to a religious belief. The Note also indicates a variety of factors that may be taken into account in deciding what is a 'religion or belief' they are:-

- Collective worship,
- Clear belief system,
- Profound belief affecting way of life or view of the world.

The Guidance has a useful Appendix that sets out all the main religions and beliefs in Britain together with their main customs, needs and festivals. However, the scope of the regulations is not limited to these religions;

1. Council Directive 2000/78/EC
2. See http://www.hmso.gov.uk/stat.htm for the regulations.
3. See http://www.acas.org.uk/art13.html
4. (1994) 17 EHRR 397, para 31.
5. (1982) 4 EHRR 293, para 36.
6. EE (RB) R 2003 reg 2(1).

they cover any religion so they are likely to encompass fringe religions and cults. Scientologists, Druids, the Krishna Consciousness Movement, Moonies and Seventh Day Adventists will be included.[7]

Parliament intended that it would include non-belief, but this is not absolutely clear on the face of the Regulations. The DLA in its consultation response (see Briefing no. 266) suggested the specific inclusion of 'the absence of any, or any particular religion'. This suggestion was ignored. During the debate on the Regulations the Government spokesman, Lord Sainsbury said, 'It is clearly the intention that where people have strongly held views, which include humanism, or atheism or agnosticism, they would be covered under the phrase "or similar philosophical belief"'. The draft Guidance says 'it is as unlawful to discriminate against a person for not belonging to a specific religion or belief as it is to discriminate against someone for actually belonging to or subscribing to a particular religion or belief'.

In contrast to the position in Northern Ireland, these regulations are not intended to cover political belief. So they are not likely to be held to cover affiliation to a political party. However, difficulties are likely to arise in the areas where political beliefs come close to religious beliefs, and both pacificism and vegetarianism might come into this category.[8] Rather more difficult problems arise as to whether fascism or a belief in the importance of eugenics is in scope. Probably they are not. Many anti-racist organisations might want to restrict access to members wishing to espouse these views.

What is 'Sexual Orientation'?

Once again this is not defined in the **Directive**. The **Regulations** have defined it as 'a sexual orientation towards persons of the same sex; persons of the opposite sex or persons of the same sex and of the opposite sex.' The Notes on Regulations published with the regulations as an aid to their interpretation say that these do 'not extend to sexual practices and preferences (e.g. sado-masochism and paedophilia).' The DLA in its response to the consultation on the regulations (see Briefing no. 266) said that we considered that the expression 'sexual orientation' was sufficiently clearly understood not to require further definition, and that further definition would be likely to reduce its scope in an undesirable way. The DLA still consider this to be the case and the exclusion of sado-masochism is one illustration of this, which may be an incorrect and unduly limited implementation of the Directive.

Who is covered?

The Directive itself applies only in the field of employment and vocational training; however, it gives a very wide definition to employment. The Regulations have interpreted this to cover job applicants, employees, contract workers, office holders, Police, Barristers and their clerks, partners in a partnership, membership of a trade organisation, qualifications bodies, providers of vocational training, employment agencies, career guidance agencies and those assisting people to obtain employment and institutions of further and higher education. Significantly, volunteers are not specifically included, although the Directive scope is to cover 'employment **and occupation**', arguably this should include volunteers, so this could give rise to litigation in the future.

What discrimination is covered?

Direct discrimination

This is defined as occurring when a person 'A' treats another person 'B' less favourably than he treats or would treat another person **on grounds of** religion or belief/sexual orientation. This is similar to the definition of direct discrimination found in the RRA and SDA.

The use of the term 'on grounds of' is useful because it will encompass situations when a person is subjected to discrimination because of his/her perceived religion or belief or sexual orientation or that of his/her family, friends or partner. This means that an applicant does not have to prove that they hold the religion or belief in question or are of the alleged sexual orientation, they only have to show that the detrimental treatment was a result of the discriminator's belief that they did. This

7. It is worth noting that all these religions have been accepted as being a religion or belief for the purposes of Article 9 ECHR, see *Iskcon v UK (1994) 76A DR 90; Omkarananda* and *the Divine Light Zentrum v Switzerland* (1981) 25 DR 105; *X and Church of Scientology v Sweden* (1979) 16 DR 68; *A.R.M. Chappell v UK* (1987) 53 DR 241; *X v Austria* No 8652/79, 26 DR 89 (1981).

8. Both pacificism and veganism have been accepted as beliefs for the purpose of Article 9 ECHR see *Arrowsmith v UK* (1978) 19 DR 5 and *X v UK* (Commission) Appl 18187/91 (10 February 1993).

will encompass situations where an employer makes incorrect assumptions about the religion or belief/sexual orientation or its consequences. So that if an employer refuses to employ a Muslim because s/he assumes that the prospective employee will refuse to work on a Friday, this will be direct discrimination. It will also cover situations where an applicant suffers discrimination because s/he has friends or associates of a particular religion or belief/sexual orientation. Situations where someone refuses to follow an employer's instructions to discriminate will also be covered.

It is worth noting that the comparison is with the way another person is treated, or **would be treated**, so that a comparison can be made both with a real comparator or a hypothetical one.

As with direct discrimination under the other discrimination Acts the discriminators intention is irrelevant and direct discrimination cannot be justified except by a genuine occupational requirement (see below).

In the case of religion or belief, the reference to religion or belief does not include A's religion or belief, so that the only situations that are covered are those where A treats B less favourably because of B's belief. Thus, where a Christian employer treats another person less favourably on grounds of religion or belief, it is not the alleged discriminator's faith which is the relevant ground, but the faith or absence of faith attributable to or connected with the person suffering the discrimination.

Indirect discrimination

Indirect discrimination arises when a person 'A' applies to 'B' a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief/sexual orientation as B, which

- Puts, or would put, persons of the same religion or belief/sexual orientation as B at a particular disadvantage when compared to other persons,
- Which does put B at that disadvantage, and
- Which cannot be shown to be a proportionate means of achieving a legitimate aim.

This is the same as the definition of indirect discrimination for race discrimination under the new Race Relations Act 1976 (Amendment) Regulations 2003.

Indirect discrimination is activated where it can be shown that a 'provision, criterion or practice' is applied, this is a broad and flexible test. It includes not only requirements that are compulsory, but also those that are seen as 'desirable' or even practices that unintentionally prevent people getting access. Moreover discrimination can be made out if the provision, condition or practice *would* have the effect in question meaning that the new definition can extend to practices *tend* to discriminate (and so may well cover practices such as word-of-mouth recruitment etc). The test for disparate impact is now that the provision criterion, or practice puts others at a **'particular disadvantage'**, rather than that the condition or requirement could be complied with by a considerably smaller number of persons from a different racial group. It may or may not be significant that the 'justification' test in the Regulations only requires that the means are being used to achieve a legitimate aim and are proportionate, not that they are 'appropriate and necessary' as the Directive requires.

Harassment

Harassment on grounds of religion or belief[9] or on grounds of sexual orientation[10] is defined to occur when a person 'A' subjects another person 'B' to unwanted conduct which has the purpose or effect of:-

- Violating B's dignity; or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct will be regarded as harassment only if in the light of all the circumstances, including the perception of B it should reasonably be considered as having that effect.

This definition is the same as that applying to race discrimination under the new Race Regulations: see section 3A of the Race Relations Act 1976 as amended by the Race Relations Act 1976 (Amendment) Regulations 2003.

Victimisation

Victimisation occurs when a person discriminates against another person if he treats that person less favourably than he treats or would treat other persons in the same circumstances, and he does so because that person has:-

- Brought proceedings under these Regulations,
- Given evidence or information in connection with proceedings under these Regulations,

9. EE (RB) R, reg 5.

10. EE (SO) R, reg 5.

- Otherwise done anything under or by reference to these regulations, or
- Made allegations of a contravention of these Regulations, or
- Is believed to intend to do so or is suspected of such an intention.[11]

It is important to recognise that victimisation does not occur if the allegation, evidence or information given by that other person was false and not made in good faith.

This provision is similar to the equivalent provisions under the SDA and RRA and serves to protect those who bring or threaten to bring a discrimination case or assist others to do so.

Genuine Occupational Requirements

The **Directive** permits provisions for genuine and determining occupational requirements to be made.[12] These provide a potential defence (i.e. justification) of what would otherwise be direct or indirect discrimination. National legislation can provide for an exception where the occupational activity or the context in which it is carried out means that a particular characteristic is a genuine and determining occupational requirement, this can be permitted providing that the objective is legitimate and the requirement is proportionate.

There is also a specific exception in the case of employment by an organisation which has an ethos based on a particular religion or belief. In relation to churches and other public or private institutions whose ethos is based on a particular religion or belief, Member States may maintain existing legislative provisions, or introduce new legislation based on existing national practices, to permit such organisations to discriminate in their occupational activities on the basis of religion or belief, but only where the nature of those activities, or the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.[13] This exception will not permit organisations with a particular religious ethos to discriminate on grounds of age, disability or sexual orientation.

In addition, churches and other public and private organisations whose ethos is based on a particular religion or belief may lawfully require individuals working for them to act in good faith and with loyalty to the organisation's ethos.[14]

The Government have provided for this by one provision that is substantially the same for both religion or belief and for sexual orientation, followed by two further provisions which are specific to organisations with a particular religion or belief or an ethos based on a religion or belief.

The common provision provides that where, having regard to the nature of employment, or the context in which it is carried out, being of a particular religion or belief/sexual orientation is:-

- A genuine and determining occupational requirement,
- It is proportionate to apply that requirement to that particular case, and
- **Either** the person concerned does not meet the requirement or the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that the person meets it.[15]

This will enable religions to appoint clergy who comply with their religion, religious schools to appoint head teachers or teachers of religion from the same religion.

In the case of an employer who has an ethos based on religion or belief, where, having regard to that ethos and the nature of the employment, or the context in which it is carried out, s/he only has to show that it is a genuine occupation requirement, it does not have to be a **determining** characteristic.[16]

Organised Religion

The sexual orientation regulations then have a further provision for circumstances when the employment in question is for purposes of an organised religion.[17] There is no definition of the term 'organised religion' but the Explanatory Note says – 'this applies to employment in a church or temple, for example, but does not necessarily apply to any employment which is (or is claimed to be) of a religious character'. Here the employer may apply a

11. EE (RB) R, reg 4, EE (SO) R, reg 4.
12. ED, article 4(1).
13. ED, article 4(2).
14. ED, article 4(2).
15. EE (RB) R reg 7(2), EE (SO) R reg 7(2).
16. EE(RB)R reg 7(3)
17. EE (SO) R reg 7(3).

requirement related to sexual orientation **either**, so as to comply with the doctrines of the religion, **or**, because the nature of the employment and the context in which it is carried out requires it, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religions followers, and the person in question does not comply with it, or the employer is not satisfied, and it is reasonable for him not to be satisfied, that the person meets it.

There have been a number of criticisms of this provision that was added after the final consultation exercise and just before the finalisation of the Regulations. Its criteria are extremely uncertain and imprecise – what constitutes a significant number of followers? Are they to be calculated from national membership of the religion in question or just the local congregation? How is an employer to become 'satisfied' that a person does or does not meet the criteria set by a significant number of followers? Are three rumours enough or should it be ten? Or do private detectives need to be employed?

However, the most telling criticism is that it must be contrary to the provisions of the Directive itself which, in article 4(2), sets out the terms on which a genuine occupational requirement on grounds of religion or belief is permissible, subject to the proviso:-

> *This difference of treatment shall be implemented taking account of … the general principles of Community law, and* ***should not justify discrimination on another ground.***

So despite the EU making it absolutely clear that this exception applies to religious and belief discrimination only, the government have inserted at the eleventh hour an exception that specifically allows discrimination on another ground – sexual orientation. Not surprisingly this provision has provoked deep hostility and resentment and is likely to be the subject of a judicial review.

Employer's liability

An employer will be responsible for the actions of his employees done during the course of their employment, whether or not the actions were done with his knowledge or approval. However, it will be a defence if he can show that he did take such steps as were reasonably practicable to prevent the employee from doing such actions.[18]

Aiding unlawful acts

Any person who knowingly assists another person to do an act which is made unlawful by these regulations will also be liable for that breach.[19]

Relationships that have come to an end

Where the relationship, which has given rise to the discrimination or harassment, has ended it is still unlawful to discriminate against or harass the former employee.[20]

Procedure

The same procedural rules will apply to cases of discrimination on grounds of religion or belief and sexual orientation as currently apply to race cases in the employment field under the new Race Regulations. In particular, the new burden of proof (see Briefing no. 290 above), the Questionnaire procedure and the same remedies will be applicable in the ETs.

Exceptions

Positive Action: the Regulations make limited provisions for permitting positive action when providing facilities for training for particular work or opportunities for doing particular work where it prevents or compensates for disadvantages suffered by people because of their religion or belief/sexual orientation.[21]

Marital status: in the case on sexual orientation *only* there is an exception which provides that these Regulations will not render unlawful anything which prevents or restricts access to a benefit by reference to marital status. The TUC is challenging this provision as being beyond the scope of the Directive.[22]

Challenges

The TUC has launched a judicial challenge to the legality of two of the provisions in relation to marital status and also in relation to the special treatment of discrimination on grounds of sexual orientation by organised religions.[23]

Gay Moon
Editor

18. EE (RB) R, reg 22, EE (SO) R, reg 22.
19. EE (RB) R, reg 23, EE (SO) R, reg 23.
20. EE (RB) R, reg 21, EE (SO) R, reg 21.
21. EE (RB) R, reg 25, EE (SO) R, reg 26.
22. EE (SO) R, reg 25.
23. See http://www.tuc.org.uk/equality/tuc-7115-f0.cfm

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New sex discrimination regulations to protect employees after employment has ended and for police officers

The Sex Discrimination Act 1975 (Amendment) Regulations 2003 (S. I. 2003 No. 1657)

These regulations came into force on the 19th July 2003. They amend the Sex Discrimination Act 1975 so as to give effect to the decision of the ECJ in *Coote v Granada Hospitality Ltd* (Case C-185/97, judgment of 22 September 1998) so as to enable persons who have ceased to be employed, to bring cases against their former employers. This important protection covers by amendment largely the same ground as the decision of the House of Lords in *Relaxion Group plc v Rhys-Harper* [2003] UKHL 33. Additionally they amend the 1975 Act so as to reverse the decision in *Chief Constable of Bedfordshire Police v Liversidge* [2002] ICR 1135, and bring the 1975 Act into line with the Race Relations Act 1976 as amended by the Race Relations Amendment Act 2000.

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Disability Equality: Making it happen

The Disability Rights Commission's (DRC) first review of the Disability Discrimination Act 1995 (DDA), contains proposals for future law reform to strengthen the civil rights of disabled people. In 1997 the Government recognised the flawed nature of the DDA when they established the Disability Rights Taskforce, to advise how to provide comprehensive and enforceable civil rights for disabled people. The Taskforce Report, *Towards Inclusion* (1999) provided the Government with a significant legislative reform agenda.

The DRC takes the outstanding reform proposals – extending full disability rights to housing, transport and public functions, and placing a positive duty on the public sector to promote equal opportunities for disabled people – as its priority but also makes further recommendations for change to the legislation. Its main proposals include:

- Prohibiting questions about an applicant's disability prior to job selection, other than in limited circumstances
- The tribunal should have the power to order re-instatement in DDA cases
- There should be an anticipatory duty to make reasonable adjustments in the employment sphere (as opposed to individually based adjustments)
- All discrimination claims, be they goods and services or employment, should be heard in the employment tribunal
- The trigger for a claim of failure to make reasonable adjustments in goods and services should be where the claimant is put at a substantial disadvantage (as opposed to where it makes it impossible or unreasonably difficult to use a service)
- The requirement that a mental impairment be "clinically well-recognised" in order for it to be a disability within s.1 of the Act should be removed.

Copies of *"Disability Equality: Making it Happen"* are available from the DRC helpline on 08457 622 633 or online at **www.drc-gb.org**

ECJ reiterates automatic protection from less favourable treatment on grounds of pregnancy

Busch v Klinikum Neeustadt GmbH & Co Betriebs-kg, C-320/01 [2003] IRLR 625 ECJ

Facts

Ms Busch (B) took parental leave in June 2000. It was supposed to be for 3 years. In October 2000, she became pregnant again. On 30 January 2001 she asked to return early to full-time work as a nurse and her employer agreed. The day after her return, 9 April, she told her employer she was 7 months pregnant. Her maternity leave was due to start on 23 May 2001, 6 weeks before the expected date of birth. Her employer rescinded its consent to her returning to work, on grounds of fraudulent misrepresentation and mistake as to an essential characteristic – i.e. her pregnancy.

It was clear that B wished to end her parental leave so that she would receive a maternity allowance, which was higher than payments during parental leave.

Decision

The ECJ held that:

a) since the employers may not take the employee's pregnancy into consideration for the purpose of her working conditions, she is not obliged to inform the employer that she is pregnant.
b) Discrimination on grounds of sex cannot be justified by the fact that a woman is temporarily prevented, by a legislative prohibition imposed because of pregnancy, from performing all of her duties.
c) An employee cannot be refused the right to return to work before the end of parental leave due to temporary prohibitions on performing certain work duties; this would be in breach of the Pregnant Workers Directive and Equal Treatment Directive.
d) Discrimination on grounds of sex cannot be justified on grounds relating to the financial loss for an employer.
e) The fact that B returned to work in order to receive a maternity allowance higher than parental leave allowance, could not legally justify sex discrimination in relation to working conditions.

Implications

This decision emphasises the absolute and automatic protection given to a woman from less favourable treatment on grounds of pregnancy. A pregnant employee applying for a job is not obliged to tell her prospective employer of her pregnancy and the employer should not ask if she is or intends to become pregnant. Any less favourable treatment of a woman on grounds of her pregnancy will automatically be discrimination, however expensive or inconvenient to her employer.

Further, there is nothing to stop an employee, who is on maternity leave and becomes pregnant while on leave, from returning to work in order to benefit from statutory maternity pay, provided she complies with the conditions relating to SMP. This will mean she needs to receive sufficient pay in the 8 weeks/2 months immediately prior to the 15th week before the expected week of childbirth.

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Justifying discriminatory retirement provisions

Kutz-Bauer v Freie und Hansestadt Hamburg, Case C-187/00 [2003] IRLR 368

Background

The full statutory old age payment for Germans was payable at 60 for women and 65 for men. A collective agreement in the German public service allowed employees aged 55 and over to work part time and the employee is paid at least 83% of their net full time salary until they reach the age at which they become entitled to an old age pension at the full rate (normally 60 for a woman and 65 for a man). This scheme was financially supported by the Federal Labour Authority, their support ceased when the employee became entitled to a full retirement pension, and, it was conditional on the employer in question recruiting an unemployed person to work the remaining hours released by the person working part time.

Ms Kutz-Bauer (KB) was employed by the City of Hamburg, when she reached the age of 60 she applied to take advantage of the part time work scheme until she reached the age of 65. She was refused on the grounds that the collective agreement provided that her employment automatically ended when she reached 60 and she then became entitled to the full retirement pension. KB brought proceedings in the Labour Court to challenge this decision. She claimed that this refusal of part time work was indirect sex discrimination contrary to the EC Equal Treatment Directive (ETD) as a man in her position would have been allowed to work part time until he was 65. The Labour Court referred the case to the ECJ.

The German Government contended that this part time work scheme was covered by the Social Security Directive 79/7 (SSD) rather than the ETD.

European Court of Justice

The ECJ concluded that the ETD was the relevant Directive, rather than the SSD, because the scheme adjusted the working time of the workers and thus established rules relating to working conditions within the terms of article 5(1) ETD. The fact that the intention of the scheme was to provide a smooth transition to retirement for older workers and to bring in some unemployed workers did not bring it within the SSD.

The part time work scheme applied only until the date of entitlement to a full retirement pension, those entitled at 60 were almost entirely women, whereas those entitled at 65 were almost entirely men. Hence, the scheme discriminated against female workers and was contrary to the ETD unless the discrimination could be shown to be justifiable by objective factors unrelated to any sex discrimination.

In assessing whether the action was justified the national court must:

> *ascertain, in the light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, whether such aims appear to be unrelated to any discrimination based on sex and whether those provisions, as a means to the achievement of certain aims, are capable of achieving those aims.*

Member States do have a broad margin of discretion in employment matters; however, this cannot be permitted to have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal treatment for men and women. They said that:

> *mere generalisations are not enough to show that the aim of the disputed provisions is unrelated to any discrimination based on sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen are or could be suitable for achieving that aim.*

Budgetary considerations, such as the additional burden associated with allowing female workers to take advantage of the scheme while they were over 60 and under 65, could not be allowed to justify indirect discrimination on the grounds of sex. They concluded that to rule otherwise:

> *would mean that the application and scope of a rule of Community law as fundamental as that of equal*

treatment between men and women might vary in time and place according to the state of the public finances of Member States…Nor can the City of Hamburg, whether as a public authority or as an employer, justify discrimination arising from a scheme of part time work for older employees solely because the avoidance of such discrimination would involve increased costs.

Comment

This ruling limiting justification by reference to budgetary considerations and costs will provide welcome guidance to discrimination practitioners and it is further supported by the next case of *Steinicke*.

Gay Moon
Editor

Briefing 296

More on justifying discriminatory retirement provisions

Erika Steinicke v Bundesanstalt für Arbeit

Case C-77/02 ECJ, 11 September 2003, Unreported[1]

Background

This case concerned the increasingly important interrelationship between gender and retirement. In Germany public servants in receipt of a salary may be authorised, at their request, to work part time for half of normal hours, but to be subject to a pay supplement, where this request covers the period prior to their retirement, subject to certain conditions. Ms. Steinicke (S) wished to take advantage of this benefit. She had worked full time until 1976 when she took maternity leave. After the birth of her baby, her working hours were reduced, at her request, to half normal working hours from 19 November 1976. In the period 1 February 1985 to 13 April 1986 her normal weekly working hours were reduced to 30 hours. Since 14 April 1986, S had as a general rule worked part-time. However, she was refused benefits and she complained of a breach of the Equal Pay and Equal Treatment Directives (ETD). The matter was referred to the ECJ by the German Labour Court. The ECJ determined that the key question was whether Articles 2(1) and 5(1) of the ETD 76/207 must be interpreted as precluding a provision, such as the provision at issue, by virtue of which part-time work for older employees may be authorised for public servants only if they have worked full-time for a total of at least three of the five years preceding such part-time working, when significantly more women than men work part-time and are consequently excluded by that provision from the scheme of part-time work for older employees.

European Court of Justice

The ECJ noted that since only persons who have worked full time for at least three of the five years preceding part-time working on grounds of age were authorised to join the scheme of part-time work for older employees provided for by the provision at issue, that in Germany more women work part-time than men, and that about 90% of part-time workers in the German public sector are women. It held there was prima facie discrimination 'since the group excluded from that scheme consists mainly of women.' This was contrary to the ETD unless the difference of treatment found to exist between the two categories of worker were justified by objective factors unrelated to any discrimination based on sex (see, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 12; Case C-457/93 *Lewark* [1996] ECR I-243, paragraph 31; *Hill and Stapleton*, paragraph 34; Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29, and *Kutz-Bauer*, cited above, paragraph 50).

The ECJ further held that a justification based on budgetary considerations could not justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex since the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women could not vary in time and place according to the state of the public finances of Member States (Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 36, and *Kutz-Bauer*, paragraph 60).

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Comment

There are two significant aspects of this case which will strengthen the approach to indirect discrimination law. Firstly, the emphasis of the ECJ was on the fact that the excluded group were predominantly women. Secondly and importantly, the ECJ was not impressed with a justification based on cost. While it must be remembered that this case concerned a public service provision and therefore the issues in relation to justification are not the same as those found in a private sector case, the ECJ was very clear that the protection of equal treatment should not differ across time according to budgetary considerations.

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1. Available at http://curia.eu.int/en/content/juris/index.htm

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Briefing 297

Sexual Orientation Discrimination is not Sex Discrimination

Macdonald v Advocate General for Scotland and Pearce v Governing Body of Mayfield House School [2003] IRLR 512 HL

The question of whether the Sex Discrimination Act 1975 (SDA) could be interpreted so as to provide a remedy for to men and women who complain of discrimination at work, because of their sexuality has been determined in the negative, by the House of Lords (HL).

Facts

Mr MacDonald (M) served in the Royal Air Force from 1989 until March 1997, when he was dismissed following his admission that he was sexually attracted to men. At the time, the policy of the UK government was that homosexuality was incompatible with service in the armed forces.

M had served with exemplary service when, in March 1996, he received a posting which required a security clearance interview, which would involve in depth questions about his personal life. He attended an interview in which he admitted that he was a practising homosexual. A second interview followed in which he was asked a series of personal and intrusive questions about his sexual activities both past and present. As a result of this interview and his admission of homosexuality his security clearance was withdrawn completely and his service with the RAF terminated.

Ms Pearce (P) was employed as a science teacher from 1975. From about 1991 onwards she was subjected to homophobic abuse from pupils. She made a series of complaints to her head teacher, and although some pupils were spoken to others continued to abuse P. In 1994 she had a period of absence from the school with stress. She was encouraged to return to work but no specific steps were taken to deal with the abuse, which continued. In 1996 her application for retirement on the grounds of ill health was accepted, and P left the school.

The Proceedings

M's claim of sex discrimination was based on a discriminatory dismissal and a claim that the second interview to which he was subjected was unlawful sexual harassment.

P claimed sex discrimination on the basis of both the school's failure to protect her from the treatment, and the treatment itself. She argued that she had been subjected to sexual harassment, which the school were responsible for and had failed to prevent.

The applicants had three fundamental arguments in common. Firstly, they both argued that the word "sex" in the SDA could and should be read to include sexuality. This argument was dismissed by the Court of Session in M's case, and the Court of Appeal in P's case.

The Correct Comparator

The second argument put forward by both applicants, and fundamental to their claims, concerned the identification of the correct comparator.

Section 1(1)a of the SDA provides that

a person discriminates against a woman in any circumstances relevant for the purposes of this act if :-
(a) on the grounds of her sex he treats her less favourably than he treats or would treat a man
and section 5(3) of the SDA provides
a comparison of the cases of persons of different sex…under section 1(1)a …must be such that the relevant circumstances in the one case are the same or not materially different , in the other

Both applicants argued that when making the statutory comparison, the correct comparator was a person of the opposite sex to them, who was not homosexual.

Put simply, both applicants argued that they were treated less favourably because of their own gender, coupled with the gender of their choice of sexual partner. The correct comparator for P was a man who is attracted to women and the correct comparator for M was a man who is attracted to women.

If a comparable woman, who was attracted to men, would not have been dismissed, or subjected to intrusive and offensive questioning about his sex life, as happened to M, then discrimination, because of his gender would have taken place. Similarly, if a man who was attracted to women, would not have been subject to harassment and dismissive management by the school, as happened in P's case, she would have been discriminated against because of her gender.

The HL disagreed, on the basis that the sexuality of the applicants was itself a material factor for the purposes of section 5(3) SDA. There is, they say

…no escape from the conclusion that the appropriate comparator where the reason for the treatment was the woman's homosexuality is a man who shares the same distinct characteristic – a man who like her is homosexual. All one has to do where a man is the claimant is reverse the genders .The characteristic of homosexuality, which is the critical circumstance, remains the same. (Lord Hope of Craighead at para 66)

Sexual Harassment

As an additional claim, both applicants had argued that they were subject to sexual harassment. Since their treatment was sexually specific, and referred to their gender, it was discrimination, without the need to prove more, following the decision in *Strathclyde Regional Council v Porcelli* 1986 ICR 564.

The HL did not agree. They pointed out that the SDA 1975 does not specifically name sexual harassment as a class of discrimination. It is a form of detriment, and as such, will be unlawful only if a person of the opposite gender, in the same or materially similar circumstances, would not have been so treated.

The HL specifically rejected the argument that, because sexual harassment is gender specific, there is no need for a comparator. Whilst they recognise that in some cases, such as unwanted physical contact, the cause of the treatment will obviously be the person's gender, the comparison must still be made.

Taking the need for the comparison as a starting point, the HL concluded that the M's treatment was not discriminatory, since a lesbian would have been treated in the same way. Further, whilst the offensive language and abuse complained of by P referred to her being a lesbian, and would not have been used in respect of a man, the HL consider that equally offensive, although different language would have been used towards a homosexual male teacher. Thus again, there was no difference in treatment and no discrimination.

Employers liability

The final issue which the HL considered was the question of the liability of an employer under the SDA 1975 for the actions of third parties. P argued that whilst it was pupils who had abused her, her employers were liable for the discriminatory actions of the pupils because they had failed to take steps to protect her, in circumstances where they could have done so.

Whilst the school clearly had a responsibility to P, and a responsibility to ensure good behaviour of the school children, the HL considered that there was no liability for any discriminatory acts of the children. *Burton & Ruhle* was simply wrongly decided and could not be relied upon.

In *Burton & Rhule v De Vere Hotels Ltd* [1997] ICR 1 the EAT considered that where a third party harasses an employee on the grounds of their race or gender, the liability of the employer for that action is determined by asking

whether the event in question was something which was sufficiently under the control of the employer that he could by the application of good employment practice have prevented the harassment or reduced the extent of it. If such is their finding the employer has subjected the employee to the harassment. (Smith J)

The HL disagreed. An employer does not 'subject' a person to discrimination, within the meaning of the RRA or the SDA, by failing to control the actions of a

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third party. An employer can only be said to subject an employee to a detriment, if the conduct of the employer itself is discriminatory. A failure to prevent another's discriminatory action cannot be discrimination unless it can be demonstrated that the employer would have prevented similar treatment of another person in the same or similar circumstances and that such a failure was on the grounds of the race or gender of the complainant.

Conclusion

The decision of the HL clearly brings an end to the hopes of gay men and lesbians suffering workplace discrimination for a remedy under the SDA 1975.

However, the introduction of the Employment Equality (Sexual Orientation) Regulations 2003 in December will provide a long overdue remedy for sexuality discrimination in many cases (see Briefing no. 291). Unfortunately, there are no additional provisions in the Regulations in respect of the liability of employers for the actions of third parties.

The reversal of *Burton* is very much to be regretted, however as held in *Baskerville* (Briefing no. 299 in this issue) it may be possible to mount an agency argument where previously *Burton* was applied.

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Briefing 298

Post–Termination Discrimination

Rhys-Harper v Relaxion Group, D'Souza v London Borough of Lambeth Jones v 3M (and three other actions) [2003] IRLR 484 HL

Background

All these cases concern the question of whether ETs have jurisdiction to consider complaints of discrimination (whether on grounds of sex, race or disability) where the discriminatory acts complained of occurred after the termination of employment. Some background is needed to understand them fully.

S.6(2) SDA provides (as relevant):

'It is unlawful for a person, in the case of a woman *employed by him* at an establishment in Great Britain, to discriminate against her…'

S.4(2) of the RRA is in substantially the same terms, but the equivalent DDA provision (s.4(2)) is slightly different:

'It is unlawful for an employer to discriminate against a disabled person *whom he employs…*'

In *Post Office v Adekeye* [1997] ICR 110 (an earlier race case), the discriminatory act concerned the (post-termination) handling of an internal appeal. The CA held that the words 'employed by him' must be given their ordinary meaning, 'who *is* employed by him,' it could not mean 'who *has* been employed by him.' The ET had no jurisdiction under the RRA to hear a complaint in relation to a discriminatory act which occurred post-termination.

In *Coote v Granada Hospitality* (an earlier sex case) the employer refused – after the termination of C's employment – to provide her with a reference. She brought a complaint of victimisation against her former employer, relying in part on the ETD. The EAT referred the question to the ECJ for a ruling, which held:

> *the answer to the question put by the national court must be that article 6 of the [Equal Treatment] Directive requires member states to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of the Directive.*

As a result of the ECJ decision, the EAT in *Coote* held that the ET did have jurisdiction to hear C's complaint of victimisation under s.4 SDA.

It was widely anticipated that *Adekeye* might be revisited in the light of *Coote*, and a general principle established that the termination of the employment relationship did not mark a cut-off point, after which no discriminatory act would fall within the ambit of the SDA and RRA.

However, in these subsequent appeals, the EAT and the CA took a narrow approach, and, prior to this decision of the HL the only post-termination act of

discrimination which an ET had jurisdiction to hear was an act of victimisation under the SDA. All other claims were excluded.

The HL has now comprehensively reviewed this area and, to the surprise of many practitioners, greatly expanded the scope for claims of post-termination discrimination. They adopt a similar approach to all three Acts and the key question becomes whether, at the time of the alleged discriminatory act, the 'employment relationship' continued in a relevant way, even though the employment itself had been terminated. The test is not a contract test but a broader, fact-sensitive test which will leave much to the discretion of ETs.

Although the HL judgment concerns the old, pre-Employment Directive law, there will undoubtedly be a great many post-termination cases which will have been stayed over the last two or so years pending this decision and which will now start to work their way through the system.

It should be stressed that this appeal was solely on the question of whether an ET, in principle, has jurisdiction to hear these complaints. They have now been remitted to the ET for fresh consideration.

What kind of acts might now be covered?

A summary of the acts of discrimination alleged by the various applicants gives some indication of the variety of complaints which might now be made:

Rhys-Harper (SDA): the employer's failure properly to investigate a complaint of sexual harassment made after employment had been terminated.

Jones (DDA): the employer failed to return the ex-employees business cards, his personal property, when asked to do so over a year after his dismissal.

Angel/Kirker (DDA): it was alleged that the employers victimised the applicants by providing adverse references or failing to respond in good time for a request for a reference.

Bond (DDA) was also a complaint about an adverse reference. It was also alleged that the employer had given false information in reply to enquiries by insurance companies.

Other possible factual situations arising post-termination were alluded to by their Lordships. In each of these situations, an employer will now have to be careful not to discriminate against his former employee, whether by failing to afford him a 'benefit' or by 'subjecting him to a detriment':

- *where an employee has an entitlement (contractual or otherwise) to an internal appeal or grievance procedure in respect of his dismissal. If the employee has been summarily dismissed, for example, she will necessarily have to exercise that entitlement post-termination. See Lord Scott: 'In these cases the appellant will, if the appeal succeeds, be re-instated as an employee as though he or she had never been dismissed. How can Parliament have intended that an employer, in reaching a decision as to whether an employee's dismissal should stand or should be set aside, should be free from the restraints on discrimination imposed by the Act? It seems to me that once the question is asked there can be only one answer. Of course Parliament must have intended the Acts to apply to such cases.'* [1]
- *where an employer has continuing obligations regarding pension rights or bonus payments to former employees;* [2]
- *where the employer permits ex-employees to continue to use sports and other facilities, he must do so in a non-discriminatory way;* [3]

One factual situation which will not be covered is the one which arose in *D'Souza* (RRA), the only appeal to be dismissed. The employee succeeded in a claim for unfair dismissal and the ET made an order for his reinstatement. The employer did not comply with the order and the employee claimed that the failure to comply was an act of discrimination. The HL held that the benefit acquired by an employee from a re-instatement order cannot form the subject of a claim of discrimination as it does not arise from the employment relationship, it derives from an order of the ET. It is a discretionary statutory remedy, rather than a 'benefit'.[4]

The same approach under all three Acts

It was anticipated that the difference in wording between the DDA and the other two Acts might prove fatal to claims under the DDA, 'whom he employs' suggesting present employees only, whilst 'employed by him' (RRA and SDA) leaving the door open for those 'who *are* employed by him' or 'who *have* been employed by him'.

In the event, the HL set no great store by this point, Lord Nicholls dismissing it as 'a distinction without a difference'[5] and Lord Hope commenting that he saw 'no rational grounds' for adopting a different approach as between the three Acts.

Which claims are covered?

The key question is no longer: was the employee still

employed at the date of the alleged discriminatory act? It is now: was the act complained of an incident of the employment relationship?

The starting point must be Lord Nicholls at para 37:

it would make no sense to draw an arbitrary line at the precise moment when the contract of employment ends, protecting the employee against discrimination in respect of all benefits up to that point but in respect of none thereafter

The feature which triggers the employer's obligation not to discriminate is the existence of the 'employment relationship':

This is the connection between two persons which Parliament has identified as requisite for these purposes. Once triggered, the obligation not to discriminate applies to all the incidents of the employment relationship, whenever precisely they arise.[6]

Whether or not the act complained of is an incident of the employment relationship will be for determination according to the facts of each case.[7] However, in view of Lord Scott's forceful dicta (in a partly dissenting opinion) at para 197, it will be difficult for the employer to argue that anything which occurs during the currency of an internal appeal will not be caught:

The relationship that is brought into existence when an employee enters an employer's service is not, in my opinion, wholly terminated so long as the internal appeal procedure is on foot. And, in my opinion, the reference to a woman 'employed' in the 1975 Act, to a person 'employed' in the 1976 Act and to a person whom the alleged discriminator 'employs' in the 1995 Act can and should be given a purposive construction so as to cover dismissed employees during the currency of an internal appeal process.

Lord Hobhouse expresses the test in a slightly different way, asking whether there is a 'substantive and proximate connection between the conduct complained of and [the applicant's] employment by the alleged discriminator':

In assessing whether the requisite connection exists, a starting point is to ask whether the same conduct during the currency of the employment would be unlawful. Likewise it is relevant whether or not a legitimate expectation of the benefit, or the contractual right to it, has continued and whether other former employees do in the same circumstances enjoy the benefit or suffer the detriment. For example, if other employees are permitted to continue to enjoy the use of the employee's social club after they have retired, but the complainant is not, that will come within the expression 'any other detriment' and, if she has been discriminated against on grounds of her sex, she will be entitled to complain.[8]

A complaint of post-termination discrimination is not confined to matters which arise out of the employer's strictly contractual obligations to his former employee:

The employee is intended to be protected against discrimination in respect of all the benefits arising from that relationship … whether as a matter of strict legal entitlement or not.[9]

Lord Rodger puts this eloquently:

Employment is just as much about opportunities as about rights. Not for nothing was the body which was set up under the 1975 Act called the Equal Opportunities Commission. Employees do not have a contractual right to promotion, but they should have an opportunity to earn it. Similarly, certain types of training, with the prospect of a better job, may only be available to employees selected by the employer. The selection should be made fairly. The employer may run a social or recreational club which employees can apply to join. Again everyone should have an equal opportunity to join if they want to. If an employer were free to discriminate in these areas, which do not involve contractual rights as such, then those affected would be marginalised and unable to achieve their full potential.[10]

But careful consideration must be given to the correct comparator where the former employee is relying on a non-contractual benefit. The comparator (actual or hypothetical) must be another ex-employee:

But I stress this is not to say that an employer's practice regarding current employees is to be treated as equally applicable to former employees. This is emphatically not so. The two situations are not comparable. What is comparable is the way the employer treats the claimant former employee and the normal way he treats or would treat other former employees in similar circumstances.[11]

Lord Hobhouse expands on this:

[the employee] will have to show that other former employees would, in the same circumstances, not have been subjected to the detriment – would have enjoyed the benefit denied to her.

An example is given by Lord Nicholls:

if it is not the employer's practice to give references for former employees, for example, after the lapse of a certain time, then refusal of a reference after that time cannot

give rise to a well-founded discrimination claim. In such a case there would be no question of the employer subjecting the former employee to a detriment;[12]

The passing of time may be a relevant factor in a more general sense, as Lord Hobhouse explains:[13]

The further removed the conduct is in time from the employment, the greater the likelihood that the conduct is too remote and that the employment has become merely a matter of history. This not a resurrection of the Adekeye test; it involves no cut-off point but is simply a recognition that, as time passes, it may become more difficult to show that the conduct complained of had a sufficient connection with the employment and a sufficient similarity with the other conduct falling within subsection (2).

Undecided areas

Two of their Lordships[14] made a point of commenting that one cause of action did not fall to be considered amongst the present cases: a claim alleging breach of the s.6 DDA duty to make reasonable adjustments. They declined to say whether such a claim relating to an act post-termination would be permissible.

There is at least one appeal on foot to the EAT (stayed pending the decision in the HL) in which this issue will come up. In the meantime, potential applicants in the ET should argue strongly that there is no reason why a post-termination 'reasonable adjustments' DDA claim should, alone, be excluded. It would be an absurd anomaly if it were unlawful for an employer to treat a disabled person less favourably whilst an 'employment relationship' subsisted, but could discriminate with impunity by failing to make reasonable adjustments during the same period.

All the claims in the present appeals were either of direct discrimination or victimisation. What is the position as regards indirect discrimination post-termination? Again, it should be argued that, once it has been established that the 'employment relationship' subsisted at the material time, then it must be unlawful for the employer to discriminate in any way whatsoever, directly, indirectly or by failing to make reasonable adjustments.

Support for this may be found in Lord Nicholls' own handling of the position regarding victimisation at para 34:

For the purposes now in hand, it is not possible to differentiate between victimisation and other forms of discrimination. Section 6(2) of the Sex Discrimination Act, containing the phrase 'employed by him', is a single provision governing all forms of discrimination prohibited by that subsection. The proper interpretation of section 6(2), whatever it may be, applies equally to ***all forms of discrimination prohibited by that subsection****, sex discrimination as defined in sections 1 and 2 as well as victimisation as defined in section 4. The position is the same under section 4(2) of the Race Relations Act and section 4(2) of the Disability Discrimination Act' (emphasis added).*

Given this unambiguous view, it is hard to see how the exclusion of any form of discrimination could reasonably be argued.

The future

The HL's approach is similar to that which applies/will apply as the new Regulations made under the Employment Directive come into force. These provide that an employee may bring a complaint of post-termination discrimination where the discrimination or harassment 'arises out of and is closely connected to' the employment relationship. This will apply to all grounds of discrimination. The SDA and RRA have already been amended by regulation. The sexuality and religion/belief regulations come into force in December 2003. However, the DDA will not be amended by regulation until October 2004.

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1. Para 187
2. Para 36
3. Para 114
4. Para 51
5. Para 35
6. Para 44
7. per Lord Hope at para 115
8. Para 141
9. Lord Nicholls (para 37)
10. para 210
11. Para 45
12. Para 42
13. Para 139
14. Lord Nicholls at para 46, Lord Rodger at para 215

Liability of Police Commissioners finally clarified

Chief Constable of Kent County Constabulary v Baskerville

Times Law Reports 10/9/2003 EWCA

Background

There are numerous cases in which police officers have complained of discrimination. The position is now much easier for them to complain since the RRAA and the SDA changes (see Briefing no. 292 in this issue). However, for old cases (many of which have still not come to trial) the judgment of the CA in *Chief Constable of Bedfordshire Police v Liversidge* (see Briefing no. 236) [2002] ICR 1135 seemed to make it very difficult to establish liability since it was held that the Chief Constable could not be made constructively liable as an employer for the acts of fellow officers which were discriminatory against a complainant officer. Following that decision many cases were amended to claim that the Chief Constable had actually acted against the complainant or was generally responsible to prevent discrimination in the workplace following the judgment of the EAT in *Burton & Rhule v DeVere Hotels* [1996] IRLR 596. There were many attempts by Chief Constables to get cases struck out this became more difficult after the decision of a different CA in the case of *Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96 (see Briefing no. 273). The case of Ms. Baskerville (B) is a sequel to those decisions.

B worked as an officer in the Kent Constabulary. She claimed that she had suffered a series of sex discriminatory acts by fellow and superior officers, but not by the Chief Constable himself. She went sick with acute symptoms of stress and commenced proceedings against the Chief Constable as being responsible for these officers. The Kent Police sought to strike out the proceedings on a number of grounds. The appeal to the EAT was heard earlier this year after the decisions of the CA in *Liversidge* and *Hendricks*. The EAT by its judgment dated 14 April 2003 held that notwithstanding *Liversidge* her case should not be struck out. B could hold the Chief Constable liable on the basis of the decision in *Burton & Rhule*, or on the basis of an extended reading of the SDA as a result of the application of the ETD. The EAT also considered that it was arguable that even though the Chief Constable could not be treated as an employer of fellow officers so that he was made constructively liable for their acts he could be considered as a principal and therefore liable for the acts of his police officers as his agents. The Chief Constable sought an expedited appeal to the CA.

Court of Appeal

The CA held that the ET had been correct to refuse to strike out the B's claim under the SDA. Although following the decision of the HL in *Macdonald v Advocate General for Scotland: Pearce v Governing Body of Mayfield School* [2003] IRLR 512 (see Briefing no. 297 in this issue), it was not possible to rely on the decision in *Burton & Rhule*, and the decision in *Liversidge* prevented a Chief Constable from being held liable for the acts of subordinates in the same way that an employer can be held constructively liable, nevertheless the ET had been correct not to strike out the claim. Whilst s.41(2) of the SDA did not create a relationship of agency but merely described the circumstances in which it would exist, on a proper construction of the legislation s.41(2) of the SDA applied to the provisions making Chief Constables the employer of other officers. Thus if acts were done by police officers as agents of the Chief Constable, those acts were to be treated as done to the complainant by the Chief Constable. It was not necessary to consider the ETD. Moreover, Parliament must have intended that the decisions of chief officers of police could be delegated to sub-ordinates in the interests of administrative convenience. It was not the court's function to determine whether the particular acts in the instant case had been performed by officers acting as agents for the Chief Constable that would have to await the determination of the tribunal on the facts. The CA was not in a position at this stage to say that s.41(2) of the SDA could not apply.

Comment

This case should make it relatively easy for all the old cases of discrimination brought against Chief

Constables as being responsible for the acts of subordinate officers to proceed. It will be necessary to review the way that the case is put to ensure that the matters which are the subject of complaint are capable of being said to fall within the relationship of principal and agent. There will be some matters which do not fall within this relationship. Thus if a fellow officer of the same rank acts in a way which is sexually or racially offensive, but the act is quite outside any delegated authority from the Chief Constable and is not in the presence of, or reported to a senior officer, it will be difficult to assert agency. However, where such harassment happens in front of a more senior officer, or there is a complaint to such an officer and no disciplinary action is taken, it is likely that the Chief Constable will be liable for the acts of the more senior officer in failing to address the harassment.

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Briefing 300

Guidance on transsexuals in transition

Croft v Royal Mail Group Plc
[2003] IRLR 592 EWCA

In this case female employees objected when Ms. Croft (C), a male to female transsexual requested to use the female toilets at work. Royal Mail refused her request.

Employment Tribunal

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

Employment Appeal Tribunal

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

Court of Appeal

The CA analysed the less favourable treatment alleged to have occurred and looked at the perspectives of all concerned.

Both parties failed in their primary arguments. The CA rejected C's argument that an employer in the Respondent's situation should only be concerned with the sex the employee presents herself as and not her biological sex. She argued that sex discrimination occurs where a transsexual employee is denied the right to be treated in her chosen gender.

The Post Office said the CA had to decide whether the employee was male or female (based on whether final gender reassignment surgery had taken place) and then decide whether the employee was treated less favourably than others of that sex. It submitted there was no sex discrimination in not permitting C to use the female toilets since she was pre-operative and therefore in law still a man. This argument was dismissed, rather than following the EAT the CA concluded:

- S.2A defined a category of persons who should not be discriminated against, and this included persons at all stages of gender reassignment;
- The protection given by S2A did not mean that all those covered by the definition in s2A were **immediately** entitled to be treated as members of the sex to which they aspired.

- It was lawful to require the use of separate facilities at the time when C was embarking on the 'real life test',
- Employers and Tribunals must make the judgment as to when a male-to-female transsexual becomes a woman and is entitled to the same facilities as other women. This judgment depends on 'on all the circumstances'.
- C had not been discriminated against
- compared with other men at work, as she had not been treated less favourably than male employees, who could not claim to use the female toilets, nor
- compared with female employees, as her presentation as a female did not necessarily entitle her to use the female toilets, nor
- when compared with her true comparators: non transsexual employees, as use of the disabled toilet was not 'less favourable treatment' – rather it was sufficient and she only objected to its label.
- The employers had taken such steps as were reasonably practicable to prevent the employees from harassing C.

Comment

The CA confirmed that a refusal of access to single sex facilities at work **solely** because the individual in question was pre-operative and therefore considered legally male would be in breach of section 2A of the SDA. This section was inserted by the Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999/1102 and provides that a person discriminates against another if he treats that other:

> *less favourably than he treats or would treat other persons, and does so on the ground that [that other] intends to undergo, is undergoing or has undergone gender reassignment.*

Yet falling within this definition did not give an immediate right to use the facilities of the new gender

> *there had to be a period during which, in relation to lavatories, the employer was entitled to make separate arrangements for those undergoing the change.*

No doubt both employers and transsexual workers will wonder how long such a period will last? The answer to that question depends upon:

- the stage reached in treatment (this must include how long the individual has been living the real life test),
- how the employee presents, and
- the views of other employees (employers may take into account but must *'not to be governed by, the susceptibilities of other members of the workforce*).

Another relevant circumstance would surely be how frequently the single sex facility was actually used. The question of how long the employee in question had worked for the employer is also pertinent. This could both assist and harm the Applicant's case – the longer the length of service, the greater the implied duty of mutual trust and confidence owed to the worker to find a satisfactory solution. But a long period of employment might understandably make female workers more opposed to sharing single sex facilities with someone they had known as a male colleague for many years.

When making this judgment as to when same sex facilities can be used, the ET must have regard to *'the applicant's self-definition and cannot be determined by the views of other employees'*. (Pill LJ at para 47). The self-definition is underpinned by the dicta of earlier cases: the need to respect the dignity and freedom of the employee (*P v S*, paragraph 22) and the requirement upon the employer to enable the employee 'to live in dignity and worth' (*Goodwin*, paragraph 91).

The employee's self-definition was less important when single sex facilities were concerned, due to the requirement set down in the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004) that separate changing rooms and toilets must be provided for male and female workers.

Now that the draft Gender Recognition Bill has been published it is clear that even those who have not undergone full gender reassignment will be able to apply for legal recognition in the acquired gender once they have been living in their new gender for two years. Yet it cannot be ignored that one consequence of this case, even after the Bill becomes law, is anyone undergoing gender reassignment is unable to completely live the 'real life' test to the extent that they are able to use single sex spaces, be they changing rooms, hospital wards or toilets.

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No asylum for Czech Roma

R v Immigration Officer at Prague Airport and others
[2003] IRLR 577 EWCA

Facts

In 1999, in order to reduce the flow of asylum seekers, Parliament authorised a scheme enabling the UK immigration service to operate abroad not merely at UK ports of entry. In 2001 an initial scheme was set up at Prague airport in order to reduce the number of Czech Roma who were seeking asylum within the UK. The Applicants in this case were the European Roma Rights Centre, an NGO based in Budapest devoted to the protection of the rights of Romani people in Europe, together with six Czech Roma who were refused leave to enter the UK by immigration officers at Prague. Five of the six were intending to seek asylum in the UK, three had stated that this was their intention, two had initially tried to conceal their intention to seek asylum the sixth person said that she was simply intending to visit her granddaughter.

Legal background

The Applicants claimed that the scheme was in breach of the UN Convention relating to the Status of Refugees 1951 Article 33 which provides:-

> *No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

The Vienna Convention on the Law of Treaties provides that a treaty must be performed 'in good faith' and 'in the light of its object and purpose'.

The second limb of the case concerned the RRA, whether this treatment was direct discrimination and whether it was in breach of section 19B(1) which says:-

> *It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.*

The Applicants argued that the Roma were treated less favourably than the non-Roma as the questioning of the Roma was longer and more intrusive, Roma were treated with more suspicion and were expected to meet a higher standard of proof. The statistics showed that most Roma were refused while Czech nationals were largely allowed through, between late January and late April 2002 0.2% of Czech nationals were refused compared to 87% of Roma.

High Court

The High Court rejected the applications on all the grounds.

Court of Appeal

They concluded that a pre-clearance immigration scheme, such as the one in question, was consistent with the UK's obligations under Article 33 of the Geneva Convention relating to the Status of Refugees. They drew a crucial distinction between a state preventing an aspiring asylum seeker from gaining access to its country and the returning of such a person to his/her home country once they have left. Article 33 was only concerned with the non-return of refugees, thus the Home Secretary was entitled to take steps to prevent the arrival of an asylum seeker.

They also concluded, by a majority, that the Immigration Officers at Prague airport had not treated the Roma applicants for leave to enter the UK less favourably on racial grounds than non-Roma contrary to the RRA. The fact that the Immigration Officers were more sceptical of a Roma applicant's true intentions compared to a non-Roma applicant and therefore questioned Roma people more intensively and for longer was not less favourable treatment. The policy was not to refuse all Roma applications but rather to refuse those who cannot satisfy the immigration officer that they will not claim asylum on arrival in the UK hence they question them more closely. Discrimination case law has repeatedly held that an employer must not make stereotypical assumptions about a person but rather must question them in order to establish whether they are capable of meeting the necessary requirements. Hence an

301 employer interviewing for a job that entails heavy lifting must not assume that a woman cannot do it, rather he is permitted to question a woman more rigorously in order to establish what her capacity for heavy lifting is. Thus the CA concluded that the Roma Applicants were not being treated less favourably than others on racial grounds, but because they were more likely than the non-Roma to wish to claim asylum.

Lord Justice Laws disagreed with this section of the judgement holding that Roma had been treated less favourably because they were more likely to wish to seek asylum and thus more likely to put forward a false claim to enter as a visitor. This treatment was on racial grounds because the Immigration Officer applied a stereotype, even if it was likely to be accurate. The application of a racial stereotype was direct discrimination. It is well established that direct discrimination cannot be justified; the Immigration Officer's reason for his action is irrelevant.

Comment

It seems likely that in the long run Lord Justice Laws dissenting judgement will be the more important one. This is a typical case in which the general antipathy to asylum seekers has persuaded the Judges to make bad law. The stereotyping of the Roma was overt. The detriment palpable. The Roma suffer unacceptable levels of racial discrimination and oppression in the Czech Republic, this action by the UK government in preventing asylum seekers from making a claim for asylum should be a cause for shame.

Gay Moon
Editor

302 Briefing 302

Indirect discrimination in equal pay claims

Nelson v Carrillion Services Limited [2003] IRLR 428

Facts

Nelson (N) was employed by Carrillion Services (CS) on 22 June 1998 as a steward on the Chelsea Wing of the Chelsea and Westminster Hospital. She was paid £5.00 per hour, in accordance with the CS's standard terms and conditions. CS had taken over an existing contract to provide services at the hospital on 1 April 1997. TUPE Regulations applied to the change of contractor and therefore CS was obliged to maintain the pay and conditions of some 300 employees who were transferred (including 4 men and 2 women all employed as stewards on the Chelsea Wing). One of these was D, whose pay on 22 June 1998 had increased through routine annual pay increases to £6.11 per hour. The transferred employees also received a food allowance and double time if they worked on bank holidays. In July 1998, CS employed a man, S, as a steward on the wing. S's terms and conditions were identical to those of N. In 2000 N brought an equal pay claim, naming D as her comparator. He was then receiving £6.38 per hour compared with her hourly rate of £5.22.

Employment Tribunal and Employment Appeal Tribunal

N argued that CS's arrangements were indirectly discriminatory against women because of the stewards working on the Chelsea Wing, 80% of the men (the four employees transferred) were protected by TUPE compared with 66.66% of women (the two women transferred). The ET found that a pool for comparison of only eight employees was not appropriate, given that the balance of the sexes over the whole hospital might be considerably different. It stated that the onus was on N to show, on the balance of probabilities, that there had been indirect discrimination and that no sufficient or appropriate evidence had been produced to show this. Accordingly, the ET concluded that the pay differential was not on grounds of her sex, either directly or indirectly. N's appeal to EAT was dismissed on the grounds that the ET was entitled to find that the statistical comparison, based on the pool selected by N, was accidental rather than significant.

Court of Appeal

The CA held that the ET had not been wrong in finding that the onus of proof in section 1(3) of the EqPA 1970 was on N to establish that the employers' explanation for the variation between her pay and that of her male comparator was indirectly discriminatory against women. Here the explanation was that CS was required by TUPE to honour the terms and conditions under which the comparator was transferred.

Since the statistical comparisons made by the applicant were not appropriate, the pay differential could not be held to be due to reasons of sex. The ET was entitled to make this finding.

However, the CA gave useful guidance on matters relating to the onus of proof. The complainant has the burden of proving, on the balance of probabilities, that the matter complained of has had a disproportionate adverse impact in a case of indirect discrimination under section 1(3) EqPA.

It was argued for N that the onus under section 1(3) lies on the employer throughout section 1(3). N argued that the claimant in an indirect discrimination case has therefore to advance no more than a credible suggestion of disproportionate adverse impact. This was rejected as irreconcilable with the principles set down in CA and HL in *Barry v Midland Bank plc*[1998] IRLR 138 CA; [1999] IRLR 581 HL.

The CA held that it is for the claimant to provide the necessary statistics, seeking if necessary the relevant information from the employer. The CA then went on to say that the burden of proof in indirect discrimination cases must be approached identically in all cases whether brought under Article 141 of the Treaty, under the SDA or under the EqPA.

The CA regarded The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (introducing s64A into the SDA 1975) as codifying rather than amending the pre-existing law concerning the burden of proof. The burden of proving indirect discrimination remains on the complainant. The complainant must prove facts from which the tribunal *could* conclude that he or she has been unlawfully discriminated against "in the absence of an adequate explanation" from the employer. Unless and until the complainant establishes that the condition in question has had a disproportionate adverse impact upon her sex, the ET may not, even without explanation from the employer, conclude that she has been subjected to unlawful discrimination.

Implications

This case illustrates the importance of careful thought about obtaining evidence about disparate impact from the employer in equal pay cases where it is suggested that there is a material factor defence. The CA insists that there must be more than just a credible suggestion that an explanation put forward by an employer for unequal pay is tainted with indirect discrimination before the employer must give an innocent explanation for that disparate impact. That evidence may be obtained using further and better particulars, written answers, and the questionnaire system. Identification of such matters is rendered much easier by The Equal Pay (Questions and Replies) Order 2003. The approach to the question of burden of proof is to be the same no matter what vehicle of challenge the claim is brought under. In the light of *Barton v Investec Henderson Crosthwaite* [2003] IRLR 332 it appears therefore that the question of whether the explanation for unequal pay is tainted with sex discrimination will be a matter of the complainant proving facts which *could* give rise to an inference of discrimination (disparate impact), but it is then for the employer to produce cogent evidence that this conclusion is incorrect.

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Disability and the need to assess whether reasonable adjustments are required

Mid Staffordshire General Hospitals NHS Trust v Cambridge
[2003] IRLR 566 EAT

An employer's failure to conduct a proper assessment of the potential for adjustments for a disabled employee may itself amount to a breach of the s.6 duty to make reasonable adjustments.

Facts

Mrs Cambridge (C) was employed by the hospital (H) as a team leader for reception services. She arrived for work one day to find that a wall in her reception area was being demolished. After a while, she noticed that the air had become extremely dusty and that her throat was dry. Her symptoms worsened and she was signed off work. She had tests and was diagnosed as suffering from a bowing of the vocal cords and tracheitis. In due course she was certified fit to return to work for up to two hours a day, but she found it difficult to use public transport or to avoid using her voice at work, and found scents like perfume and air fresheners worsened her condition.

H gave no consideration to making reasonable adjustments under the DDA to C's working arrangements. There was some internal guidance on making adjustments for disabled employees, but it was not applied in practice.

Eventually, management was informed that it would be at least 12 months before C was likely to make a full recovery. Her managers decided that unless she could return to full-time working within a reasonable time, they would recommend that she be dismissed. When C heard about this she was extremely upset and was signed off work for a further lengthy period. Some months later disciplinary action was instigated against her. C was unable to attend the hearing and was dismissed on grounds of incapacity due to long-term ill-health.

Employment Tribunal

The ET found that she had been unfairly dismissed and that she had been unlawfully discriminated against on grounds of her disability (less favourable treatment and failure to make reasonable adjustments).

The ET considered the 'reasonable adjustments' aspect of the claim. They concluded that the duty to take such steps as is reasonable to prevent the employee from being at a disadvantage, compared to people without her disability, included taking such steps as would enable the employers to decide what steps would be reasonable to prevent her from being at such a disadvantage. These steps included obtaining a proper assessment of

- her condition and prognosis;
- the effect of her disability on her;
- the effect of her disability on her ability to perform the duties of her post;
- the effect of the physical features of her workplace on her and her ability to perform the duties of her post; and
- the steps which might be taken to reduce or remove the disadvantages to which she was subjected.

Since the employers had failed to seek, obtain or act on a full and proper assessment of C's position, they had failed to comply with their duty of reasonable adjustment.

Employment Appeal Tribunal

The employers appealed against the finding of unlawful discrimination under the DDA. The EAT upheld the ET's findings. A proper assessment of what is required to eliminate a disabled person's disadvantage is a necessary part of the duty imposed by s.6(1), since that duty cannot be complied with unless the employer makes a proper assessment of what needs to be done.

H had argued that this approach added a preliminary step which was not suggested by the wording of the DDA and imposed a duty which Parliament had not intended. The section 6 duty to make reasonable adjustments, it was argued, referred to the actual making of the adjustments, not to the consideration about whether they should be made in the first place.

The EAT rejected this argument. The making of a proper assessment cannot be separated from the duty imposed by s.6(1), because it is a necessary precondition to the fulfilment of that duty and is therefore part of it. There must be many cases in which a disabled person has been placed at a substantial disadvantage in the workplace, but in which the employer does not know what it ought to do to remove the disadvantage without making inquiries. To say that a failure to make those inquiries would not amount to a breach of the duty imposed on employers by s.6(1) would make s.6(1) practically unworkable in many cases. That could not have been Parliament's intention. The employer's appeal was dismissed.

Comment

This is an important case for Applicants in DDA cases. It is not uncommon for employers to fail entirely to address the question of reasonable adjustments with their disabled employees. Since the EAT's decision in *Callagan v Glasgow City Council* [2001] IRLR 724, this will not prevent the employer from arguing, retrospectively, a defence of justification for any failures. However, this new case provides the employee with the means to challenge the failure to apply its mind to adjustments itself and to argue that this is a separate breach in its own right.

A note of warning, however, is sounded by the EAT when it comes to compensation for any such breach. Compensation for such a breach must take account of the fact that, in some cases, if an assessment of the type described above had been undertaken, it might have revealed that no adjustments could reasonably have been made to remove the disadvantage. Thus compensation will have to be discounted to reflect that possibility.

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Briefing 304

The Tribunal's obligation to interpret the unfair dismissal test in accordance with Convention rights

X v Y [2003] IRLR 561 EAT

Facts

Y was a charity promoting personal development among young offenders and young people at risk of offending. In 1998, X was employed by Y to work as a development officer. As part of his duties, X was required to work with this group of young people. In early January 2001, outside the hours of X's employment, he entered a public toilet and engaged in consensual sexual acts with another man. Both men were discovered by a police officer and arrested. X was not charged with gross indecency but received a caution for the offence. Although X was gay, he had not told anyone at work. Following the arrest in January, X decided not to disclose the incident or the caution to Y.

Y subsequently became aware of the January incident in mid-July 2001and suspended X. Following a disciplinary hearing held by Y on 27 July 2001, X was summarily dismissed. His employers relied, in part at least, on the argument that the offence in question was one which attracted 'public opprobrium'. X brought a claim for unfair dismissal in the ET.

Employment Tribunal

At the ET hearing X's representative specifically asked the Tribunal to have regard to its obligations under the Human Rights Act 1998 (HRA). The argument was clearly run on the basis that the ET was obliged by s.3(1) HRA to interpret the law of unfair dismissal so as to be consistent with X's Convention rights. It was argued that, given that gross indecency is an offence which can only be committed by gay men, to dismiss on the basis of a caution for that offence would be indirectly discriminatory and would amount to a breach of X's Article 8 right to privacy, read together

with the Article 14 non-discrimination provision.

The ET did not engage with the 'interpretative obligation' argument at all, simply stating that that X could not bring a free standing claim under the HRA in the ET. Further, it was held that the ET did not have the jurisdiction to make any declaration of incompatibility. It therefore considered that it did not have to consider the HRA at all.

The ET found that the reason for X's dismissal was for a potentially fair reason, namely X's conduct and that the reason was fair in all the circumstances. In deciding whether the dismissal fell within the range of reasonable responses open to Y, the ET followed the orthodox approach in the Court of Appeal decision of *Foley v Post Office* [2000] IRLR 827. The ET set out that in dismissing X, Y was concerned with the fact that he had committed a criminal offence which was not trivial and was of direct relevance to his employment. In addition, Y had focused on the fact that X had deliberately decided not to inform them of the offence and that the actual offence would have great potential to embarrass Y.

Employment Appeal Tribunal

The EAT was directed in particular to the test of fairness under s.98 (4) of the ERA and Article 8 (establishing a right to respect for private life) and Article14 (prohibiting the discriminatory application of the Convention Rights on any grounds).

In the EAT, the indirect discrimination argument was again put forward. It was also argued that the 'range of reasonable responses' test in unfair dismissal (*Foley v Post Office* [2000] IRLR 827) must be read consistently with Convention rights and, when a dismissal is explicitly based on public prejudice, it could not fall within the range of reasonable responses, since the reasonable employer must be taken to be the non-bigoted employer.

The EAT accepted that the question that needed to be addressed by the EAT was whether s.98(4) had been interpreted in such a way that was compatible with the Convention Rights and specifically Articles 8 and 14. In doing so, the EAT had to decide whether X's Article 8 and Article 14 rights were engaged and whether a breach of these Convention Rights had occurred. The EAT referred to the cases of *ADT v United Kingdom* [2000] 9 BHRC 112 ECHR and *Theakston v MGN Ltd* [2002] All ER (D) 182 (Feb) HC and concluded that there was a distinction to be drawn between private and public sexual acts.

The EAT held that consensual sexual acts between adult men in a public toilet were not covered by Article 8 as they concerned sexual activities that were 'genuinely' in public. In reaching its conclusion the EAT focused on the fact that the public had access to the toilets in which the acts took place. As the conduct of X did not fall within the protection guaranteed by Article 8, the EAT was not required to go on to consider whether its application was discriminatory on the grounds of X's sexual orientation. The EAT concluded that there was no incompatibility between the finding of fair dismissal and X's Convention rights under the HRA.

The EAT also held that the ET had not erred in finding that X had been fairly dismissed. In the circumstances and for the reasons set out by the ET, the dismissal fell within the range of reasonable responses available to the reasonable employer. It was accepted that Y expected X to act as a type of role model to the young people with whom he was employed to work. Y was entitled to take into account the fact that X had committed a criminal offence, which X acknowledged was relevant to his employment. The EAT also found that the decision to dismiss X was not based on his sexual orientation.

Comment

The case is an important one in that it is the first case to state in terms that the interpretative obligation under s.3(1) applies in the ET as between private parties and that the test of fairness in s.98 of the Employment Rights Act must be interpreted to take account of human rights principles.

Although, in the present case it was decided that Articles 8 and 14 were not engaged, the EAT concluded that in an appropriate case, the test under s.98(4) of the ERA must be read, so far as is possible, so as not to conflict with Convention rights. In reaching its decision, the EAT also observed that as a result of the HRA, decisions such as *Saunders v Scottish National Camps* [1980] IRLR 174 EAT would require revisiting. In *Saunders*, the Applicant was employed by the Respondent to work as a handyman at a children's camp. He was dismissed on the grounds that he engaged in homosexual activities which the Respondent claimed rendered him totally unsuitable

for employment in a camp for young people. He had not committed a criminal offence, he was simply dismissed for being gay. The EAT upheld the Industrial Tribunal's decision that dismissal on the grounds of the Applicant's homosexual activities was fair. However in a post-Human Rights Act era combined with the absence of evidence indicating that an individual poses a real risk to children or has committed a relevant criminal offence, the dismissal of the Applicant in *Saunders* could, arguably, be said to conflict with his Article 8 right to respect for private life. An important development in this case is undoubtedly the EAT's acknowledgement that a dismissal purely on the grounds of an individual's sexuality interferes with that individual's right to respect for private life. This welcomed observation highlights the positive impact of the Human Rights Act upon unfair dismissal law.

As to the question of whether the Article 8 right is engaged at all, this case, arguably, provides an unduly restrictive interpretation of what constitutes 'private life' and could be seen to conflict with earlier decisions which suggests that a person's sexual identity and sexual activities will, inevitably, be an aspect of his private life, whether those activities occur in private or in public.

An application for permission to appeal to the Court of Appeal has been lodged and will be heard in March 2004

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Briefing 305

Reporting restrictions re-examined

X v Stevens [2003] IRLR 411 EAT

Facts

Ms X applied to the Metropolitan Police Force for a job. She was turned down and she claimed that this was because she was a post-operative male to female transsexual. She made a complaint to the ET. The Police denied that this was the reason, they alleged that the reason for her refusal was a strong suspicion that she had committed serious sexual assaults prior to her gender re-assignment

A preliminary issue arose about whether she could request a restricted reporting order (RRO) and/or a register deletion order (RDO) in order to protect her identity. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 rule 16 provides that:

> *in any case which involves allegations of sexual misconduct the tribunal may…make a restricted reporting order.*

Rule 15(6) of these rules permits the ET to make a register deletion order when a case appears to involve 'allegations of the commission of a sexual offence'. A RDO means that:

> *the tribunal or the Secretary shall omit from the register, or delete from the Register or any decision, document or record of the proceedings, which is available to the public, any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation.*

Employment Tribunal

The ET concluded that it had no power to make either order as it was not alleged that there had been any sexual misconduct or the commission of a sexual offence. X argued that if this was correct then the ET was in breach of Article 6 of the EC Equal Treatment Directive (ETD) as transsexuals like her would be reluctant to bring claims in an ET if the likely consequence was intrusive publicity about their transsexual status.

Employment Appeal Tribunal

The ET had been wrong to conclude that they had no power to make a RRO or a RDO in this case. X's case did involve allegations of the commission of a sexual offence and/or allegations of sexual misconduct, which would necessarily be referred to in the course of the hearing. The allegations do not have to be the basis of the cause of action, nor be central to the decision making, in order to constitute the involvement of such

305 allegations. The ET did have power to make a RRO or a RDO in this case.

Usefully the EAT went on to consider the ET's position if there had been no allegations of sexual offences or sexual misconduct in this case. X had argued that if she was not able to have the protection of an order restricting publication of her name or identity then she would not feel able to seek a remedy in the tribunal. The EAT considered this in the light of the terms of article 6 ETD:

> *Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3,4 and 5 to pursue their claims by judicial process…*

This duty applies directly to emanations of the state, so it will apply directly to the Police Force, but as the tribunal itself is an emanation of the state it also will apply directly to the ET and the EAT. Thus the existing rules should be interpreted in the light of the provisions of the ETD.

They also considered rule 15(1) of the Employment Tribunal Rules which provide that 'a tribunal may regulate its own procedure' and section 30(3) of the Employment Tribunals Act which provides that the EAT 'has power to regulate its own procedure'.

They concluded that where an applicant would be deterred from seeking a remedy under the SDA but for the protection of an order restricting publication of her name or identity then the ET and EAT had power to make such an order.

Comment

The judgment only considered this question in relation to claims under the SDA, however, parallel provisions to those of Article 6 ETD exist in both the new Race Directive and the new Employment Directive. Hence, a similar argument should now be available in a race case, and for cases involving religion and belief and sexual orientation after December 2nd 2003.

This is not the first case to establish this point, *Chief Constable of the West Yorkshire Police* [2000] IRLR 465 (Briefing no. 196) reached a similar conclusion. I commented then:

> *This is a welcome decision, as concern over the consequences of publicity can deter potential claimants. The High Court has jurisdiction to make a similar order (RSC Part 39.2), so it is hard to see why the ET cannot use its wide powers to determine its own procedure to protect claimants from unwelcome press interest.*

Gay Moon
Editor

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Test for reasonableness under the DDA

Murray v Newham Citizens Advice Bureau Ltd [2003] IRLR 340

Many may remember the above parties appearing before the EAT in a decision relating to volunteers, and in particular the employment status or otherwise of Mr. Murray (EAT no. 1096/990). This further appeal relates to the ET's rejection of his substantive claim. The decision addresses what has recently become the vexed issue of excluded conditions, as well as looking at the extent of investigations to be carried out by employers when taking on a new employee.

Facts

Mr. Murray (M) wanted to work as a volunteer at Newham CAB. He had a pre-selection interview at which he disclosed that he had been in prison for stabbing a neighbour with a knife in 1993, at the time having been diagnosed as a paranoid schizophrenic. Subsequent to this incident, he received treatment and appropriate medication.

At the interview which M had with the CAB manager, SY, he was advised of the stresses which volunteers might be subjected to and it was suggested that he might like to consider starting in a less stressful environment that a CAB in Docklands. M maintained that his psychiatrist had assured him that stress was not

a material factor in his illness. He was not offered a post and made a claim of disability discrimination. Prior to the interview, SY had discussed the matter with a regional development officer of NACAB, and was advised, inter alia, that she could ask for consent to contact M's GP and ask for his opinion on risks that might be posed by the employment of M as a volunteer.

Employment Tribunal

The ET dismissed the claim. It held that he had been refused the offer of a post because of concern that he might react in a violent way to stress; this reason related to the previous incident of stabbing someone and not to M's paranoid schizophrenia. Although the tribunal acknowledged that the stabbing was as a direct result of the paranoid schizophrenia, it held that M's "tendency to violence" was a condition which fell within the exclusions contained in the Meaning of Disability Regulations 1996, specifically the exclusion concerning 'a tendency to physical or sexual abuse of other persons'.

The ET also considered justification, in the alternative, and found that the CAB was justified in refusing to offer M the post. M appealed to the EAT.

Employment Appeal Tribunal

The reason for his treatment

The EAT held that it was clear that M suffered from a disability within the meaning of s.1. 'Conditions' within the meaning of para. 1(2)(b) of the DDA refer to freestanding conditions, and not to those conditions that are the direct consequences of a physical or mental impairment, within the meaning of s.1(1). Where a person such as M suffers from a recognised illness, such as paranoid schizophrenia, a consequence of which is a tendency to violence, a potential employer may only treat him less favourably than other persons if he can justify that discrimination under s.5(1)(b) of the Act.

Justification

The EAT reviewed the leading cases on this and held that an employer must make such inquiries as are appropriate in the circumstances of the case.

> *It must be borne in mind that a prospective employer may have to deal with numerous applications and clearly cannot be expected to carry out any form of detailed checks or seek medical evidence in respect of every applicant.*

However, the EAT went on to say

> *In our opinion, having regard to the authorities which we have cited, it is insufficient for an employer who has to justify less favourable treatment to say 'This is the reason for the less favourable treatment. It is justified on the evidence before the tribunal'. A prospective employer must, if he seeks to rely upon the defence of justification, show that the justification was based on material that it had before it at the time it took the relevant decision. An employment tribunal should only interfere where the prospective employer's investigations are outside the reasonable range of responses by a reasonable prospective employer, in the circumstances. In the case of an employer who has failed to carry out reasonable investigations, an employment tribunal may hold that the reason was insufficient and the less favourable treatment unjustified. In a case where the employer failed to obtain the appropriate information which may, in the event, have justified its decision, that evidence cannot provide ex post facto justification, but might be relevant to the question of compensation.*

The EAT agreed with the ET in their conclusion that the issue of whether a potential volunteer had a propensity to inflict violence is material to the circumstances of the particular case and, in the context, substantial. However, the issue in this case was not whether the reason was capable of being material and substantial, but whether or not the respondent had sufficient material and had carried out adequate inquiries to justify its decision.

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The Discrimination Law Association lobbies the UN

During August 2003 the United Nations Committee on the Elimination of Racial Discrimination ('CERD') reviewed the state of race relations in a number of states from across the world including the United Kingdom for compliance with the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). Its Concluding Observations measured the state of race relations in the United Kingdom against United Nations' standards and were published on the 18th August 2003.

A large delegation of NGOs, including a representative of the Discrimination Law Association, attended the meeting in Geneva and made submissions particularly reflecting growing concerns about the effects of *September 11th, government policy on asylum and immigration, the position of Gypsies and Travellers, confusion in the legislative protection of race relations* and the position of the Ilois (or Chagos Islanders), the displaced inhabitants of the British Indian Ocean Territory.

Gay Moon with Mr A Shahi, the Pakistani representative and Ms January-Bardill the South African Ambassador to Switzerland at the presentation of the Shadow Report on Discrimination in the UK

- **Changes to the Press Complaints Commission:** CERD expressed its concern about 'the increasing racial prejudice against ethnic minorities, asylum seekers and immigrants reflected in the media and the reported lack of effectiveness of the Press Complaints Commission to deal with this issue.' The Committee recommended that the UK 'consider further how the Press Complaints Commission could be made more effective and could be further empowered to consider complaints received from the Commission for Racial Equality as well as other groups or organizations working in the field of race relations.'[1]
- **Legislation against Incitement to Religious Hatred:** CERD was particularly concerned by 'Islamophobia' following the September 11th attacks, and called for 'the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities.'[2]
- **An end to the Home Secretary's License to Discriminate in Immigration Control:** CERD considered that section 19D of the Race Relations Act which enables the Home Secretary to write his own license to discriminate against persons of a specific nationality or ethnicity in immigration control was contrary to international law and urged the UK to re-formulate or repeal Section 19 D 'in order to ensure full compliance with the Convention.'[3]
- **An end to Negative Stereotypes of Asylum Seekers:** CERD expressed its concerns in relation to negative publicity in relation to asylum seekers and others and called for action 'promoting positive images of ethnic minorities, asylum seekers and immigrants, as well as measures making the asylum procedures more equitable, efficient and unbiased.'[4]
- **An end to indefinite detention without charge or trial, pending deportation, of non-UK nationals who are suspected of terrorism-related activities.** CERD was 'deeply concerned about provisions of the Anti-Terrorism Crime and Security Act' which permit this treatment.[5]
- **A National Strategy for Gypsies: CERD called for substantial changes in relation to the treatment of Gypsies and Travellers.** The Committee noted the 'higher child mortality rate, exclusion from schools, shorter life expectancy than the population average, poor housing conditions, lack of available camping sites, high unemployment rate, and limited access to health services' experienced by Gypsies and called for a national strategy to improve the situation of the Gypsies and

Travellers 'against discrimination by State bodies, persons or organization.'[6]

- **Action for the Chagos Islanders:** At its last meeting to consider the position in the UK, CERD had called for information in relation to the position of the citizens of the last remaining colonies. In its report to this meeting the UK made gave no mention at all in relation to the peoples of the British Indian Ocean Territories, known as the Ilois or Chagos Islanders, who were displaced by the UK to enable the US to set up a military base at Diego Garcia. CERD specifically criticised the UK for not providing 'information on the implementation of the Convention in the British Indian Ocean Territory (BIOT)' and required the UK in its next report to the Committee to provide 'information on the measures taken … to ensure the adequate development and protection of the Ilois for the purpose of guaranteeing their full and equal enjoyment of human rights and fundamental freedoms in accordance with article 2, paragraph 2, of the Convention.'
- **Comprehensive Race Legislation:** CERD noted that the current race discrimination laws in the UK are complex and fail to give full coverage to discrimination on grounds of colour and nationality. It called for the introduction of 'a single comprehensive law consolidating primary and secondary legislations, to provide for the same protection from all forms of racial discrimination'[7] so as to comply with international law.
- **A Human Rights Commission:** CERD called for a Human Rights Commission to enforce the Human Rights Act 1998.[8]

1. See Paragraph 13
2. See Paragraph 20
3. See Paragraph 16
4. See Paragraph 15
5. See Paragraph 17
6. See Paragraph 22
7. See Paragraph 15
8. See Paragraph 21

Update on the Rutherford case

John Rutherford and Samuel Bentley, both over 65 years old, have lost their case claiming employment rights for pensioners (see Briefing no. 265). The EAT has just ruled that the upper age limits for claiming unfair dismissal and/or statutory redundancy payments are compatible with European law. The EAT overruled the ET saying that the ET's decision was wrong both in relation to disparate impact and in relation to objective justification. On the issue of disparate impact the EAT found that the ET had selected the wrong pool for comparison. The correct pool was the entire workforce. On the issue of objective justification the EAT concluded that the ET had been wrong to find that the default provisions were inextricably linked to the State retirement age. It is believed that the employees are likely to appeal this decision to the CA.

Age Discrimination Protection

The Employment Directive provides that the Government must introduce provisions to protect against age discrimination in the field of employment by 2006. It has therefore issued a consultation document, *Age Matters*, seeking views on its proposals for implementing this part of the Directive. Responses have to be in by October 20th 2003. The Discrimination Law Association will be sending in a response after our consultation with members on October 9th.

European Monitoring Centre on Racism and Xenophobia launches a new Internet Guide

The EUMC have launched a comprehensive Internet Guide which contains a broad selection of websites from organisations and institutions active in the field of combating racism, xenophobia, anti-semitism or Islamophobia on an international and/or national level in all EU member states.

The Internet Guide is freely accessible to everyone and can be found on the EUMC website at:
http://eumc.eu.int

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