Discrimination Law Association

Briefings 307-319

Volume 21

February 2004

Editorial *Integration is fine – but how is the law to be laid down to those who will not listen?*

Nobody should be in any doubt where the DLA stands on litigation to enforce equality rights. **It is necessary, progressive and should be better supported.** Why do we have to say this? Because the debate about the Commission for Equality and Human Rights (CEHR) is in severe risk of going off the rails. The EOC has only the most limited case load and there are worrying signs that the CRE, which for financial reasons, has stopped supporting cases and might give up on litigation altogether. Thus the newly appointed Chair of the CRE recently criticised his own organisation saying their cases could be divided into those

> *so weak they should never have been given backing and those that were reasonable cases but would have been better dealt with by other bodies, such as trades unions and Citizens Advice Bureaux, because they 'don't help us advance the cause that we are here for'.*

If the CEHR Task Force thinks that they can create a Commission which does not have litigation support at its heart they will have forgotten the lessons of history. Consider age discrimination. In 1999 the Government published its voluntary Code of Practice for Age Diversity in Employment to encourage employers to remove unnecessary age limitations. To what effect? According to the Employers Forum on Age very little on the way employers are running their businesses. Even the Government's own research shows that the Code is widely ignored.

The case against litigation is easily argued. Litigation seems expensive, often uncertain in outcome and confrontational. It is messy, reacting to complaints rather than being driven by Committee decisions to pursue a policy initiative. The National Audit Office don't like the economics. They have rarely been able to understand that test cases don't fall into neat financial years but have to be funded over several years and several courts.

But look a little further and we can see that real benefits flow from litigation and not just for the litigant. Nothing is as effective as contested litigation for understanding why in a specific instance an equality dispute has emerged. Cases have frequently led to real insight about the nature of the problem.

When in the 1980s the CRE bravely funded the first case brought by a black serving police officer they did not know how long the case would run for or what they would find. But success followed a year of litigation and the Home Secretary called in every Chief Constable and demanded that equal opportunity policies were put in place. Rules for promotion to CID were changed and equality training moved miles up the agenda.

When the EOC started acting for Mrs. Marshall no one thought that the cap on compensation for sex discrimination damages would be removed. The case did not start as a test case.

Litigation exposes work or business practices to independent, public, judicial scrutiny. It provides new insights as to how inequality happens, and so, how policies and practices can be framed to remedy such problems. It compels a particular person/body to look very closely at his/her working or commercial policies, procedures and practices. It acts as a deterrent. The respondent faces financial cost, inconvenience and perhaps adverse publicity. Other employers or service providers not sued are prompted to eradicate similar discriminatory practices.

Above all it enables highly effective follow-up work by the Commissions. Litigation led to action by the Commissions by formal investigations into Hackney, the Prison Service, the CPS and the Royal Mail.

But there is another broader issue – simple access to justice. Research over the years has consistently demonstrated that without skilled legal representation applicants to courts and tribunals are far less likely to succeed, and more likely to waste the courts time taking bad points.

So what enforcement powers should any new Commission have? The CEHR needs to be guided by the principle of non-regression. There must be no diminution in the existing powers available to any new Commission as compared to those available to the CRE, EOC and DRC. For the new strands, the powers should not be less stringent or comprehensive than those available in respect of race, sex and disability discrimination. The establishment of a new Commission offers the opportunity to look at other ways of enforcing the law that go beyond any of the existing powers.

This leads to the big question as to how much power there should be to enforce human rights that are interconnected with equality rights. On this the DLA is clear. Unless the CEHR has power to enforce human rights whenever they are interlinked with equality rights the new CEHR will be stillborn. And it should be able to intervene in cases, and bring cases in its own name. If not it will be a waste of effort, and an opportunity lost.

Planning to do more encouragement is fine but the CEHR task force should never forget that equality has to be won. As the saying goes: 'Fine words butter no parsnips.'

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

Briefings Published by the Discrimination Law Association. Sent to members three times a year. **Enquiries about membership to** Discrimination Law Association, PO Box 6715, Rushden, NN10 9WL **Telephone** 01933 412 337 **E-mail** info@discrimination-law.org.uk
Editor: Gay Moon Designed by Alison Beanland (020 7394 9695) Printed by The Russell Press

Race Equality Schemes reviewed

Introduction

It is now more than two years since the Race Relations Act 1976 (Statutory Duties) Order 2001 came into force and 31 May 2004 will mark the second anniversary of the deadline for each public authority listed in the Order to complete and publish its Race Equality Scheme (RES). Two surveys of RES's have been conducted in the period following the deadline, our own published in Croners Workplace Equality and Diversity News in March 2003, and the Schneider-Ross survey commissioned by the CRE in July 2003. Disappointingly, both studies found widespread failures to comply with the terms of the legislation.

In this article we summarise the findings of our survey, compare them with those of Schneider-Ross, suggest reasons for the largescale non-compliance, and ask what this means for the future – bearing in mind that the production of an RES which complies with the 2001 Order can only ever be the beginning of eliminating discrimination and ensuring equality.

The legal requirements

With effect from 2 April 2001, s.1 of the Race Relations (Amendment) Act 2000 (RRAA) inserted into the Race Relations Act 1976 s.19B, rendering all public authorities liable for race discrimination (and susceptible to claims alleging the same in the County or Sheriff Court). The requirement to produce an RES is borne out of the 'positive' side of the RRAA, which at s.2 (1), inserted a new s.71 into the RRA, and imposed a general duty on a large number of listed public authorities. This duty requires those authorities to have due regard to the need to eliminate unlawful racial discrimination; promote equality of opportunity and good relations between persons of different racial groups.

In order to ensure better performance by those authorities of their general duty, under the new s.71 (2) the Secretary of State has power to impose specific duties on them. This was done by the 2001 Order.

Specific duties: policy and service delivery

The aim of an RES is to make a public authority set out how it is going to go about taking steps to ensure it can comply with the general duty. Under the terms of the 2001 Order, an RES must cover:

- the functions, policies and proposed policies of the public authority which are relevant to the performance of the general duty, a list which should be reviewed at least every three years beginning 31 May 2002;
- arrangements for assessing and consulting on the likely impact of proposed policies on the promotion of race equality;
- arrangements for monitoring policies for any adverse impact on the promotion of race equality;
- arrangements for publishing the results of those assessments, consultation and monitoring;
- arrangements for ensuring public access to information and services provided by the public authority;
- arrangements for training staff in connection with the general duty; and
- arrangements for meeting the authority's employment duty if it applies (see below).

Specific duties: employment

The specific duty on employment applies to most of the public authorities to which the general duty applies. These public authorities should have had arrangements in place by 31 May 2002 to monitor their workforce by ethnicity and should have put these arrangements into practice as soon as reasonably practicable.

The duty is to monitor, by reference to the racial groups to which they belong, the numbers of employees and applicants for employment, training and promotion. Where the public authority has 150 or more full time staff, it must in addition monitor, by reference to the racial groups to which they belong, the numbers of employees who receive training; benefit or suffer detriment as a result of its performance assessment procedures; are involved in grievance procedures; are the

subject of disciplinary procedures; or cease employment.

The public authority is obliged to publish the results of this monitoring annually.

Our survey

The survey looked at 100 randomly selected RES's across 10 different sectors including local and central Government, health, transport, criminal justice and media. We gave each RES a score out of 100 based on the following three criteria:

- did the RES comply with the minimum requirements of the legislation? (maximum score 20 points)
- what was the *quality* of the compliance? (maximum score 60 points)
- did the RES deserve any bonus points for, clarity, brevity, or some other feature showing initiative? (maximum score 20 points).

An RES must be published and it is therefore a public document. In conducting our survey we approached public authorities as would any member of the public. We did not ask the public authorities to respond to a questionnaire, nor did we contact those tasked with writing the RES and monitoring its implementation. Instead, our survey used reasonable endeavours to obtain an authority's RES using telephone and internet enquiries.

Our immediate finding was that RES's were completely unavailable to the public in 14% of cases. The reasons for this are likely to range from a total failure to comply with the legislation to a failure to publish the RES in an accessible location and educate staff dealing with public enquiries. In one case, the authority was very reluctant to hand over a copy of its RES, treating it like valuable intellectual property that others might want to copy, which is hardly in the spirit of the legislation. 8% of those RES's that were available were still marked 'draft.'

Perhaps the most surprising finding though was the large percentage of RES's that failed to comply with the minimum requirements of the legislation (96%). Doing what the legislation says should be the easy part. Doing it well is what requires the effort.

The vast majority (91%) of RES's that failed to comply with the minimum requirements of the legislation did so because they failed to identify the functions, policies and proposed policies that the authority had assessed as relevant to the performance of the general duty. This is, in our view, the most important step in the process and, without it, any action plan is likely to lack focus and direction.

Many RES's merely stated that the authority **would** take steps to identify relevant functions, policies and proposed policies. The legislation however, required authorities to have **completed** this assessment so that the results could be included in the RES before the 31 May 2002 deadline.

Ideally, i.e. in addition to the minimum requirements of the legislation listed above, an RES should address what the authority has done to:

- identify and list each of its functions (i.e. the full range of its duties and powers);
- prepare a statement of the aims of each function;
- assess whether race equality is relevant to each function. This may involve identifying those functions that involve or affect the public, and eliminating those that are purely technical in nature (the CRE Code of Practice on the Duty to Promote Race Equality, identifies traffic control and weather forecasting as being possible examples of the latter);
- consider what information is available as to how different racial groups are affected by the function as employees or users of services;
- consider whether the way in which a function is carried out has a negative impact on race equality, and, if so, consider what steps could be taken to avoid that; and
- consider giving priority to those functions where race equality is most relevant.
- this process should be repeated for policies and for proposed policies with the result of each analysis reported in the RES.

Even where some attempt had been made to address the issue of functions, policies and proposed policies, our survey found very little evidence that authorities had approached functions, policies and proposed policies as three separate things. Some authorities chose to deal with these issues on the basis of 'core functions,' a process conducted at such a high level as to be meaningless. One authority in the health sector stated that it had '212 functions' without any obvious source for this figure or analysis of how those functions were relevant to the general duty.

Our survey found a similar lack of detail in relation to the various arrangements for monitoring, training and public access to information. Many RES's merely stated that 'arrangements would be put in place' without saying

what they were, or whether they had been. Action plans were also noticeably missing from many RES's, or were too vague to provide any real direction.

An RES should also be accessible in the sense of clarity, and practically accessible to a wide range of racial groups. It is likely to be of interest to members of the public for whom English is not a first language. The survey therefore gave bonus points to RES's that were clear and concise (more than 50 pages lost 2 points), and available in languages other than English, which was relatively rare.

The Schneider-Ross survey

This survey combined a quantitative and qualitative approach. The first element was a questionnaire based survey of 3,338 public authorities and educational institutions, including 1,105 schools and a shortened questionnaire for a sample of 102 parish councils. Overall the response rate was 47% i.e. 1,568 returned questionnaires. Schneider-Ross's experience suggests that the response rate was 'relatively high for this type of survey.' On the negative side, the response rate for schools was only 20%. The authors also recognise the limitations of a questionnaire based survey, stating that 'it is possible, given the statutory nature of the public duty, that those that feel they have made most progress are more likely to have responded' and 'in their answers to the questionnaire, respondents may have been over optimistic in their [self] assessment of progress.' It is also worth noting that respondents did not always complete the entire questionnaire.

The second element of the survey was an analysis of a random sample of 143 RES's and policies, assessed against the recommendations of the CRE Code and guidance (a similar approach to our survey). The overall assessment was graded into four categories: 'needs developing;' 'partly developed;' 'mainly developed' and 'fully developed,' with each category colour coded to produce an easy to read 'traffic-light-style' table. The survey looked at RES's and, also, race equality policies produced by educational bodies under Article 3 of the 2001 Order (a sector that we did not cover in our survey). The main statistical findings drawn from the tables produced by the authors were:

- local government: 24% need developing; 36% partly developed; 28% mainly developed and 12% fully developed;
- health sector: 35% need developing; 30% partly developed; 30% mainly developed and 5% fully developed;
- central government: 14% need developing; 43% partly developed; 43% mainly developed and 0% fully developed;
- inspectorates: 0% need developing; 60% partly developed; 40% mainly developed and 0% fully developed;
- criminal justice and policing: 27% need developing; 40% partly developed; 20% mainly developed and 13% fully developed;
- schools: 60% need developing; 10% partly developed; 20% mainly developed and 10% fully developed;
- further education colleges: 50% need developing; 9% partly developed; 36% mainly developed and 5% fully developed;
- higher education: 17% need developing; 33% partly developed; 33% mainly developed and 17% fully developed;
- overall: 28% need developing; 33% partly developed; 31% mainly developed and 8% fully developed.

Therefore while our survey found that 96% of the RES's reviewed failed to comply with the 2001 Order, the Schneider-Ross survey avoided that stark statistic, concentrating instead on a more encouraging message, but basically came to a similar conclusion.

The survey contains the following metaphor that aptly illustrates the concept of 'mainstreaming:'

> *it is about institutional change – getting the concept of inclusion into the bloodstream of an organisation so that it reaches every part of the body – and therefore everything it does.*

Interestingly, the survey revealed that this is most likely to occur i.e. RES's were most likely to be fully linked to wider corporate plans and strategies, when lead responsibility for the RES was at CEO or board/governing body level rather than with an HR or equality specialist.

Possible explanations for failure

Our survey found that RES's varied considerably. The best scoring RES was given 91% and the worst scored 19%, with non-compliance obviously scoring 0%. This range of quality and approach is not surprising as authorities had little in the way of precedents from which to work and little time for sharing experiences. As time moves on these excuses carry considerably less weight.

Another possible explanation is that those drafting the

RES's did not pay enough attention to the legislation itself relying instead on summaries and guidance. Whilst some of this material is very helpful, such as the Code of Practice and guidance produced by the CRE, it is possible to miss the basic legal requirements without reference to the legislation. This may suggest that lawyers were not generally included in the teams preparing RES's.

The Schneider-Ross survey commented that another factor in non-compliance '… may be the design of the statutory instrument that does not clearly link the employment duty specifically to the requirements for RES's.' We agree. Article 2(1) of the 2001 Order states that an RES is a scheme showing how the authority 'intends to fulfil its duties under section 71(1) of the Race Relations Act and this Order.' The reference to 'and this Order' captures the employment duty i.e. the RES must include details of the arrangements the authority has put in place to comply with the employment duty. Unhelpfully, the particular matters to be included in an RES, listed in Article 2(2), make no mention of the employment duty and the CRE Code states at paragraph 4.7 that '… authorities may find it useful to include the arrangements they make to meet their employment duties in their RES's,' confusing the requirements of the legislation with good practice guidance. For these reasons we specifically removed the employment duty from the minimum requirements test in the first part of our survey, including it instead in the final bonus point section.

Another contributory factor is likely to be the CRE's delay in finalising the Code of Practice and guidance. It is probably true that the timeframe was too ambitious. The legislation came into force on 3 December 2001 and required the production of RES's by 31 May 2002. The CRE set about drafting a Code and four specific guidance documents (dealing with education, schools, monitoring and a general guide for public authorities), and then consulted on the drafts. In fact, the Code was not finalised until immediately before the 31 May deadline, giving any public authority that had waited for the final version, almost no time to prepare its RES. Once again, as time moves on, this excuse carries considerably less weight.

The questionnaire element of the Schneider-Ross survey specifically asked authorities to state what, if any, barriers they had encountered in implementing the duty. Overall, 'resource allocation' and 'moving it into the mainstream' were the most frequently cited obstacles with 59% and 58% authorities quoting these reasons respectively. 'Establishing leadership' was the least cited reason with 19%.

The future

Many of the authorities responding to the Schneider-Ross questionnaire said they would welcome further advice and guidance on specific elements of the public duty. However, the 2001 Order is itself intended to guide authorities in their implementation of the general duty in the 2000 Act: the CRE Code of Practice provides guidance on the Order; and the four CRE Guidance documents provide more specific assistance on the Code. It seems to us that it is not only guidance that is needed but a concrete example, with the CRE producing a model RES in co-operation with a chosen authority. Of course this would need to be prefaced with a heavy caveat, as a precedent is only the starting point and needs to be adapted to suit the particular circumstances. However, a well-written model scheme could help to crystallise what are currently broad principles into tangible actions, particularly in the process of analysing functions, policies and proposed policies for relevance to the general duty.

The Schneider-Ross survey recommends, amongst other things, that the CRE conduct a specific review of the 'public duty' (i.e. the general and specific duties) in 2004 and commission an independent review in 2005. More importantly for persistently failing authorities, the authors state that 'whilst, in general, we believe that a key role for the CRE is to advise and promote – and this is clearly appropriate for these early stages of the public duty – where public authorities and institutions continue to remain in non-compliance of their statutory obligations, the CRE will need to focus on its enforcement role.' The CRE, after all, was specifically given the power under the 2000 Act (by ss.71D and 71E inserted into the 1976 Act) to take enforcement action against those authorities who fail to comply with the specific duties (by issuing a compliance notice, and if necessary applying to the County or Sheriff Court for an order mandating compliance).

Moreover the obligations in relation to RES's are growing. The Race Relations Act 1976 (Statutory Duties) Order 2003 came into force on 31 December 2003 and extends the list of authorities to which the

specific duty to produce an RES applies. The deadline for compliance for those authorities is 31 May 2004.

An important question for the future is whether general and specific duties will be brought in for other equality 'strands' (gender, disability, sexual orientation, religion and belief and eventually age). There is no logical reason why race discrimination should be seen as more worthy of a public duty than these other 'strands.' Indeed, some legislation already creates such a broad obligation; for example, section 404 of the Greater London Authority Act 1999 imposes upon the Greater London Authority, the Metropolitan Police Authority and the London Fire and Emergency Planning Authority a duty, when exercising their functions, to have regard to the need to:

- promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion;
- to eliminate unlawful discrimination; and
- to promote good relations between persons of different racial groups, religious beliefs and sexual orientation.

One element of RES's that gives us some cause for concern is the concept of including 'outcomes.' Some authorities, for example, have stated a clear vision for the ethnic breakdown of their workforces. Authorities must be careful that in stating such outcomes and creating action plans to achieve them, they do not cross the clear line between permissible positive action and direct race discrimination.

Finally, we understand that the Audit Commission is due to report on the implementation of the Race Relations (Amendment) Act 2000 generally, which should include RES's. However, it is worth noting that the Audit Commission RES was included in our survey and the Commission was not one of the 4% of authorities assessed as having managed full compliance with the terms of the 2001 Order!

Richard Kenyon
Partner, Field Fisher Waterhouse
Richard.Kenyon@ffw.com

Henrietta Hill
Doughty Street Chambers
www.doughtystreet.co.uk

RRA duty on public authorities: institutionalising race equality

Public procurement as a useful example

On 29 January 2004 the Audit Commission published 'Journey to Race Equality'[1] a national report on how local public agencies were responding, at a strategic level, to their new duties under the Race Relations Act (RRA). Their study looked at three sectors – health, local government and criminal justice – and they used focus groups, workshops and reviews of other data to assess the views of service users. Their report states clearly that black and ethnic minority people still experience multiple inequalities and discrimination and have a right to expect improved access to better-quality services. They found that race equality is often viewed by local agencies as a negative issue, requiring extra work and resources separate from their mainstream business. They summarised the two major challenges that local public sector agencies are facing in responding to their new obligation under the RRA as:

- Mobilising staff and members/non-executive directors to develop a clear, locally specific vision of the outcomes that need to change; and
- Understanding and tackling the institutional behaviours that obstruct progress.[2]

The Audit Commission report includes a number of examples of action taken by local public agencies to ensure their services are appropriately targeted to meet the needs of black and ethnic minority communities in their areas and examples of measure to improve employment opportunities for people from black and ethnic minority communities.

As the Audit Commission was looking at local public authorities at a strategic level it was not necessary in their report to scrutinise how public authorities are, in practice, carrying out their various functions. From a perspective nearer to ground-level, it is impossible to ignore the fact that public authorities, both local and national, are increasingly using private and voluntary sector organisations to provide services on their behalf. Overall, a rough estimate is that public authorities in the UK spend well in excess of £50 billion every year in non-military contracts with private and voluntary sector organisations.

This short article looks at public procurement and its interface with the duty on public authorities to promote race equality. It indicates how promotion of race equality can be taken into consideration throughout the procurement process and how, by doing so, public authorities can raise race equality standards in the private sector. A second aim of this article is to exemplify how, in relation to a function shared by all public authorities, they can meet the challenges identified by the Audit Commission and can 'institutionalise' the promotion of race equality.

Public procurement refers to the purchase by a public authority of goods, works or services from an external provider; it covers contracts for routine purchase of supplies, short-term contracts for provision of front-line services or maintenance of plant or equipment and major private finance initiative (PFI) agreements.

The duty on public authorities is set out in s.71 (1) of the amended RRA

> *Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need –*
> *a) to eliminate unlawful discrimination; and*
> *b) to promote equality of opportunity and good relations between persons of different racial groups.*

Schedule 1A is a comprehensive list of statutory public authorities, either individually named, for example, the Housing Corporation or the British Transport Police, or described generically, for example, a government department or a health authority. Schedule 1A does not include, directly or indirectly, private or voluntary organisations that, under contractual or other arrangements, carry out the functions of a public authority. Therefore the responsibility to ensure compliance with s.71 (1) in

1. See www.audit-commission.gov.uk

2. Page 21

carrying out such functions remains with the public authority. As a consequence, it is incumbent on public authorities to ensure that where a contract is relevant to its RRA duty, it makes best use of the procurement process, specification and contract conditions to build appropriate race equality measures into the contractual obligations of the contractor, and through the monitoring and management of the contract to secure effective performance of such measures.

The CRE, recognising the significance of procurement for all public authorities, published in July last year two guides on race equality and public procurement.[3] These guides assist public authorities to incorporate race equality concepts or requirements into each stage of their procurement process while complying with other relevant UK and European law. They also contain a second section with guidance for private and voluntary sector suppliers. I have relied on the CRE guides in the preparation of this article.

EC procurement rules

One of the perceived barriers to incorporating race equality into public procurement is the obligation on public authorities to comply with EC procurement rules – the principles laid down in the EU Treaty, the procedural requirements of the EC procurement directives (transposed as UK procurement regulations), and decisions of the ECJ. The EC procurement directives apply to any contract with a total value greater than the current thresholds.[4] They require objective standards, transparency and timeliness at each stage; reinforcing the basic principle of free movement of goods and labour, the directives require non-discrimination in public procurement between contractors from different EU member states.

An interpretative communication of the European Commission[5] provides guidance on how certain social issues, for example, high rates of local unemployment, that were significant to the public authority concerned, could be taken into account at particular stages of the procurement process.

The EC Race Directive required all EU member states, by 19 July 2003, to have laws or regulations prohibiting discrimination on grounds of racial or ethnic origin in employment and in access to goods and services.[6] This has meant that, from last July, for a public authority to ask for evidence of race equality in employment (or provision of services) from potential contractors would not constitute discrimination between UK and non-UK suppliers.

Value for money

A second perceived barrier, that has inhibited some public authorities from any real incorporation of race equality into contract specifications or selection criteria, is the duty under both EC law and UK law/policy to base all public procurement on value for money[7], which is defined as 'the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the customer's requirements'.

As local authorities had been subject to a form of race equality duty under the original s.71 of the RRA, some local authorities already have an understanding of what is required and practical procedures to meet their race equality duty in carrying out procurement. Other public authorities, for example, central government or the NHS, are only very gradually coming to appreciate that their RRA duty applies to procurement, as it does to their other functions, and that promoting race equality is not inconsistent with EC requirements and can positively contribute to the achievement of value for money.[8]

Outcomes of procurement strategy or policies

To meet the RRA duty a public authority needs to look at its overall procurement strategy or policies with a

3. 'Race Equality and Procurement in Local Government' – for local authorities, police authorities, fire authorities and other authorities subject to the 'best value' duty imposed by the Local Government Act 1999 and the Local Government in Scotland Act 2003- and 'Race Equality and Public Procurement' – for other public authorities including central government departments, governments of Scotland and Wales, NHS institutions and educational institutions..

4. See www.ogc.gov.uk/index.asp?id=397 for thresholds applying from 1 January 2004.

5. Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement COM(2001)566 final, 15.10.2001

6. Article 3, EC Directive 2000/43/EC sets out the full list of activities to which the Directive applies.

7. See, for example, Chapter 22, *Government Accounting, HM Treasury* or ODPM Circular 3/2003

8. '… responding to concerns of all black and minority ethnic communities will mean that services improve overall' *Journey to Race Equality*, Audit Commission, page 15

good understanding of the needs, expectations and opportunities of ethnic minorities as users or potential users of goods or services, as contractors or potential contractors and as employees or potential employees. Looking at outcomes rather than processes, is there evidence that the strategy or policies may have an adverse impact on particular racial groups in any of these capacities? Are there other ways to approach procurement that can make a greater difference in terms of race equality? What would need to change? How can the impact on race equality be monitored?

If the outcome of a public authority's procurement policies and procedures is that ethnic minority businesses are not competing, or are not winning, contracts, does the authority know why? Is this a result of the authority's decisions regarding scale or the packaging of contracts, or how and where they advertise and/or provide information to potential contractors? Or is it due to lack of knowledge, experience or confidence of ethnic minority businesses? A public authority must never give an advantage to a particular supplier at any stage of the procurement process. However, comparable to positive action in employment permitted under the RRA, it would be possible to offer training, or introduction to supplier networks, for local small businesses including ethnic minority businesses, and to provide better information about future contracts to a wider audience, in order to improve the opportunities for ethnic minority businesses to compete on equal terms with more experienced suppliers. There are some good examples of projects along these lines at local authority level and within the NHS.

Stages in the procurement process

a) Planning

From the outset a public authority will want to be clear about what it is proposing 'to buy' – what is the intended outcome: council houses repaired; uniforms supplied; school dinners cooked and served; leaflets published and distributed. It will want to consider whether the carrying out of the works or the provision of the goods or services could have a differential impact on different racial groups? Current or past experience in relation to the same or similar goods or service may indicate possible discrimination or disadvantage. Is there monitoring data that shows differential use/participation by different racial groups? What can be learned from consulting relevant community groups? Could the carrying out of the works or the provision of the goods or services be a way positively to promote race equality? Is the relevance to race equality sufficient for the authority to need to include race equality requirements in the contract? Are there workforce implications?

b) Selecting tenderers: advertising and short listing

Most major public contracts are awarded in a two-stage process: a first stage to select suppliers that, in terms of past record, financial standing and technical capacity, appear to be suitable, and a second stage in which the short listed suppliers submit tenders showing how they will meet the specification at what price and the public authority awards the contract to the tenderer whose tender offers best overall long-term value for money.

The EC procurement directives regulate quite strictly the advertising and short listing process to ensure that it is open, objective, fair and non-discriminatory and that only specified matters are taken into consideration. There are both negative matters – grounds for disqualification – and positive matters – suitability on the basis of economic and financial standing and technical capacity – that can be taken into consideration. A standard questionnaire can ensure that the same information is received from all interested suppliers.

Among the grounds on which suppliers can be disqualified is grave misconduct in the conduct of their business, and breach of the RRA. Breach of equivalent laws in other member states could amount to such misconduct. The CRE guidance advises that a finding of unlawful discrimination should not lead to disqualification if the supplier can provide evidence of action taken to prevent discrimination after any such finding.

Where a public authority has assessed the contract as highly relevant to meeting its RRA duty race, then in assessing technical capacity it can ask for information about suppliers' race equality employment policies and practice. For example, the standard questionnaire could ask about compliance with the CRE employment code of practice, race equality policies, training, instructions for recruitment, and supporting evidence. Consistent with the CRE code of practice for employment, a public authority could take the size of a supplier organisation into account in assessing technical capacity, since smaller firms may not have the resources and administrative systems to have formal race equality policies and procedures.

c) Writing the contract specification

The specification is the public authority's formal description of what the contractor will be required to do. If the authority considers that the object of the contract – the services to be provided or the goods to be supplied – is relevant to its compliance with the duty to promote race equality, then it will be in the interests of the authority to ensure that the contract is performed in a way that ensures such compliance. It may be appropriate for the specification to require the contractor to carry out arrangements similar to those set out in the authority's race equality scheme, for example, to consult and to monitor for any adverse impact on the promotion of race equality. Where the public authority is aware of historic patterns of discrimination or disadvantage, it could specify a timetable for the contractor to achieve greater equality of outcomes. Generally it is recommended that public contracts should specify outcomes (for example, increased rates of attendance by Gypsy women at ante-natal and post-natal clinics) or outputs (for example that ethnic minority communities should be consulted) rather than processes (for example how consultation should be carried out). Where goods are to be supplied (for example meals, uniforms, prosthetic devices) then the specification could require that they must be suitable for end-users, leaving it to the contractor to identify particular needs and to find an appropriate way to meet those needs. In some contracts for services a public authority may decide to specify certain relevant workforce matters, for example, that the workforce will be suitably trained to provide a service that is sensitive to ethnic, cultural or religious differences.

d) Drafting contract conditions

The EC interpretative communication makes clear that EC rules are not concerned with how a contract is carried out and therefore do not regulate what can be included in contract conditions, provided they are not used as basis for any selection or award decisions. As a minimum, to ensure it is not funding race discrimination, a public authority will want to include conditions in every contract that the contractor will not contravene the RRA and will impose a similar obligation on any sub-contractor. This adds enforcement through the contract to any enforcement action that an individual or the CRE might choose to bring.

The CRE guides suggest that, where contractors' staff are expected to work alongside staff of the authority, the authority can require the contractor to adopt authority's race equality policies. In a contract for services, where staff of a local or other 'best value' authorities[9] will transfer to the contractor under TUPE, the contract must include a code of practice requiring contractors to confirm that staff will transfer on their existing terms and conditions and that new staff recruited to perform the contract will be offered no less favourable terms and conditions.[10] Although not likely often to be the case, where any equal opportunities protection could be said to form part of a public authority worker's terms and conditions then that protection would continue to apply under a TUPE transfer and, where the code of practice applied, newly recruited workers should have at least comparable protection.

Many local authorities include as a condition of contract that the contractor should comply with the race equality employment standards that were applied at selection stage, which include written policies, training, ethnic monitoring and, where appropriate, use of permitted positive action where there is evidence of under-representation.

e) Inviting tenders

The EC procurement directives require a public authority to inform tenderers of the criteria, including any weighting, that it will use to award the contract. While the basic criterion must be best overall value for money,[11] a public authority is likely to have determined certain 'sub-criteria' they intend to use to assess value for money, and these must be made known to all tenderers.

Where the public authority has assessed that promoting race equality is an essential element of a proposed contract then it will need to make sure that tenderers are aware of

9. Police, fire, waste disposal, passenger transport authorities in England and Wales and the London Development Agency; comparable guidance is due to be issued for authorities in Scotland.

10. Annex D, ODPM Circular 3/2003, *Best Value and Performance Improvement*

11. The EC procurement directives also permit award on the basis of lowest price, but there is little evidence that UK public authorities award any, or any major, contracts solely on the basis of lowest price.

the weight it proposes to give to any race equality factors at the award stage. To ensure maximum transparency and to avoid any possibility of discrimination against non-UK suppliers, a public authority could use the invitation to tender stage to inform tenderers of their RRA duty and the implications for the particular contract. It may be relevant to provide information about the authority, its catchment area or target population and its racial composition (where relevant) as well as any lessons to be learned from the race equality outcomes of previous arrangements for the works or goods or services in question.

f) Awarding the contract

Contracts must be awarded on the basis of an evaluation of the tenderers' submissions against the basic criterion of value for money. The weight given to race equality as an evaluation sub-criterion must be proportionate to the significance of promoting race equality to the contract as a whole. As stated above, the contract conditions should not be used in evaluating tenders, but an authority could expect tenderers to indicate that, if awarded the contract, they will comply with the contract conditions.

g) Monitoring and managing performance of the contract

A useful lesson can be learned from HM Treasury model conditions of contract[12] that have been issued and re-issued for use by central government departments for more than 25 years. These include as a condition for all contracts that the contractor shall not unlawfully discriminate within the meaning and scope of the RRA relating to discrimination in employment. The contractor is required to take all reasonable steps to secure that all servants, employees or agents and all sub-contractors do not unlawfully discriminate. The Treasury guidance on contract management[13] refers to default arising from failure, *inter alia*, to comply with legislation. While it is assumed that most contracts contained the non-discrimination condition, there is no evidence that contractors were required to demonstrate compliance or that where contractors were found to have discriminated unlawfully any action to enforce this condition was ever taken.

The above is merely to emphasise the crucial importance of effective monitoring and management of contracts. I believe that if a contractor's performance of services on behalf of a public authority was held to be discriminatory or if there was evidence that it was reinforcing inequalities the contract was intended to redress, a public authority could not avoid allegations of non-compliance with its duty under s.71 (1) by producing a large bundle of well-intentioned contract documents.

Changing attitudes and perceptions: training is essential

Procurement involves decisions at many levels within a public authority, and decisions can be strategic, policy or practical, they can involve the content of specifications or contract conditions, or selection of tenderers or final award, or enforcement of faulty contract performance. The Audit Commission's study identified that the major challenges in meeting the duty to promote race equality (see above) were not necessarily finding new resources, but mobilising people to have a different vision and understanding and to be willing to change. There are some outstanding examples of public authorities that appreciate the potential and use their purchasing power to achieve greater equality of outcomes for black and ethnic minority communities. There are, however, a large number of public authorities where this does not happen. And, from discussions with procurement officers, equality officers and front line service providers, I consider that this is unlikely to happen until people in leadership positions within an authority are publicly committed to ensuring that it does. For members/non-executive directors and staff who cannot identify race equality outcomes in the context of procurement, or the particular aspect of the procurement process or contract monitoring in which they are engaged, there is an urgent need for appropriate training.

Public procurement as a lever for change in the private sector

In March 2003, the Cabinet Office Strategy Unit published its report on *Ethnic Minorities in the Labour Market*, which recognised the role that public

12. HM Treasury Central Unit on Procurement No 59D Documentation: Model Conditions of Contract, condition 30

13. HM Treasury Central Unit on Procurement No. 61 Contract Management, paragraph 6.10

procurement could play in improving the employment prospects for black and ethnic minority communities. In 1999, before public authorities had a statutory duty under the RRA, the Better Regulation Task Force, in a review of anti-discrimination legislation recommended against further statutory regulation of employers but urged public bodies to use their purchasing power to achieve better equality practice in the private sector:

> *We urge the Government to use its purchasing and funding muscle to promote equality practices among contractors and suppliers to the public sector. If the public sector has a duty to set high standards in ensuring equality of treatment and opportunity, we believe it has an equivalent responsibility as a purchaser of goods and services. Public sector purchasers should be ensuring that their suppliers and contractors conform to the requirements in equality legislation, particularly with regard to employment provisions.* [14]

There is good evidence from the United States of the impact of federal contract compliance measures on private sector employers.

While much is said about the 'business case' for equality in employment, a clearer business case will arise as public authorities properly apply their duty to promote race equality in their purchase of goods, works and services from private sector organisations. If a private sector organisation is required to demonstrate no recent findings of discrimination to be considered for potentially lucrative contracts, and if, having been awarded certain types of service contracts the organisation is required to comply with contract conditions prohibiting discrimination and requiring compliance with the CRE Code of Practice and ethnic monitoring of their workforce, the organisation may well conclude that in addition to other real benefits, like lower turnover, higher productivity, good race equality practice has become a crucial factor in achieving their main objective – to make a profit.

Barbara Cohen
Independent Discrimination Law Consultant
barbara.cohen@blueyonder.co.uk

14. Better Regulation Task Force, Review of Anti-Discrimination Legislation, May 1999, p.25

309 Briefing 309

Draft Disability Discrimination Bill

The government has published the long-awaited draft disability bill, which will implement a number of the remaining Disability Rights Task Force recommendations. In particular, the bill will

- Deem anyone who is HIV positive, has multiple sclerosis or cancer, to be disabled (although there are provisions to regulate to determine at what stage someone with cancer will be covered).
- Extend the duty to make reasonable adjustments to landlords. The taskforce recommendation that landlords be prohibited from unreasonably withholding consent for tenants to physical alterations to property is not included in the bill, as the government states that this is already provided for in the Landlord and Tenant Act 1927.
- Remove the exemption for transport from Part III (although this will be done primarily by means of regulations). At present, anything so far as it consists of the use of a means of transport is excluded from Part III of the Act, which covers goods, facilities and services. This means that if a bus driver refuses admission to a disabled person, they will have no claim under disability discrimination legislation.
- Impose a 'disability equality duty' on public bodies, similar to that relating to race and contained in the Race Relations (Amendment) Act 2000.
- Prohibit discrimination by public bodies in the exercise of their functions.
- Prohibit discrimination by private clubs with 25 or more members.

A joint parliamentary scrutiny committee has been established, and this will be receiving evidence (both written and oral) on the bill. It is expected to report in April. DLA has submitted written evidence, but those wanting to contact the committee directly are encouraged to do so at scrutiny@parliament.uk

Catherine Casserley
Disability Rights Commission

310 Briefing 310

Children have rights too

Jean-Paul Sartre rebuked Marxists for ignoring children,

> *Marxists are concerned only with adults; reading them, one would believe that we are born at the age when we earn our first wages.*[1]

Children are becoming more visible, though serious discrimination persists. The Government has this year the opportunity to change three laws that directly discriminate against the young.

The **minimum wage** was introduced in April 1999 and is one of this government's success stories. From the start, though, there was a category of people totally excluded from minimum wage protection – children.

Thirteen to 15 year-olds are legally entitled to work part-time; formal education ends at 16, when full-time employment can begin. The minimum wage applies from the age of 18; the full rate only applies to those aged 22 and over.

In 2002, the exclusion of children from minimum wage protection was criticised by two international human rights bodies – the UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child. The Low Pay Commission is due to report on the matter in February 2004; and the Government is expected to extend protection to children. However, it is likely to introduce a lower rate for child workers, much to the dismay of children's and youth organisations and the GMB union, which is actively campaigning on the issue.

The **voting age** is currently under consideration by

the Electoral Commission. It was last reduced in January 1970, from 21 to 18 years. The Children's Rights Alliance for England has published a pamphlet arguing the case for lowering the voting age to 16 years. We argue,

> *The lives of the UK's one and a half million 16 and 17 year-olds are as rich and varied as any other age. What unites them is an inability to vote – not because they don't understand, or cannot be bothered, but because adult society has not yet acknowledged them as real citizens.*[2]

There is now a thriving coalition pushing for reform (www.votesat16.org.uk); members include the Liberal Democrats, the Green Party, the Scottish Nationalist Party and Charter 88. In December 2003, Blair's *Big Conversation* consultation document was launched with a question on the voting age. Significantly, the Welsh Affairs Select Committee has just come out in favour of votes for 16 and 17 year-olds.[3]

Perhaps the biggest example of discrimination against children is the **'reasonable chastisement'** defence. This is based on the 1860 *R v Hopley* case heard by Lord Chief Justice Cockburn where a teacher beat to death a 13 year-old pupil. It gives parents a special defence when appearing in court on an assault or ill-treatment charge – the prosecution not only has to prove the parent assaulted or ill-treated the child, but also that the assault was 'unreasonable'.

In December 2003, the Deputy Secretary General of the Council of Europe called for a Europe-wide ban on all corporal punishment of children. Maud de Boer-Buquicchio explained:

> *There is no more symbolic demonstration of the low status of children in many European States than the persisting legality and prevalence of corporal punishment… Just as the Council of Europe has effectively eliminated the use of the death penalty across the 45 Member States, now we must move quickly to eliminate this unjust and dangerous practice of corporal punishment of children. I challenge the UK and others across Europe to stop defending – or disguising as discipline – deliberate violence against children.*[4]

A Bill will soon be published, to carry out the reforms in child protection and welfare proposed by the *Every Child Matters* Green Paper. This followed the Victoria Climbié Inquiry. Eight year-old Victoria was tortured by her aunt and her aunt's partner, finally dying in February 2000. Carl Manning, the aunt's partner, said in his police statement that their brutal treatment of Victoria started with slaps and then quickly escalated into punches and torture. A social worker was told that Victoria stood to her aunt's attention. The social worker was not concerned since she assumed obedience to be a normal part of child-adult relationships in African-Caribbean families.

Slapping children is a characteristic of British family life, though 'tapping' and 'smacking' are the preferred euphemisms. The social worker that heard about Victoria being degraded could have acted to protect her, but didn't. Now, the Government can use the Children Bill to protect the dignity and fundamental human rights of all our country's children.

England's 11 million under 18 year-olds will soon get a Children's Commissioner, though it is not yet clear whether s/he will have a human rights remit. There are already Commissioners in Wales and Northern Ireland, with an imminent announcement of an appointment in Scotland. That an independent children's champion is finally on its way is not an excuse for sidelining children in broader equality and human rights developments. The Government has established a task force to guide the development of the new Commission for Equality and Human Rights. There are three organisations on this task force specifically representing older people; there are none representing children. An oversight or a deliberate exclusion?

Children are not a separate species. The public task of improving their lives and status cannot simply be left to benevolent education, health and welfare experts. They need strong human rights and equality protection as much as any other marginalised group. Indeed, babies and children probably present the toughest intellectual and practical challenges to creating an equal world, if only more big people would take the time to notice.

Carolyne Willow
National Co-ordinator of the Children's Rights Alliance for England
cwillow@crights.org.uk

1. Sartre, J-P (1963) *Search for a Method*. Random House
2. Children's Rights Alliance for England (2000) *The REAL Democratic Deficit. Why 16 and 17 year-olds should be allowed to vote.*
3. House of Commons Welsh Affairs Committee (January 15 2004) *The Empowerment of Children and Young People in Wales.*
4. Full speech at http://**www.coe.int/T/E/Com/press/News/2003/20031201_disc_sga_kilbrandon.asp**

Transsexual's entitlement to a survivor's pension

KB v (1) National Health Service Pensions Agency and (2) Secretary of State for Health

ECJ 7.1.2004 unreported

Facts

KB was employed by the National Health Service (NHS) for twenty years and had contributed to the NHS pension scheme. The scheme provided for a pension to be payable to a member's surviving spouse. KB's partner, R, with whom she had an emotional and domestic relationship for a number of years, was born a woman but became a man following gender re-assignment surgery. Transsexuals like R could never be treated as validly married to woman since section 11 of the Matrimonial Causes Act 1957 expressly provides that marriages can only be valid where the parties are respectively 'male' and 'female'. KB brought proceedings claiming that she was the victim of pay-related sex discrimination contrary to Article 141 EC and the Equal Pay Directive. The CA referred the question of whether the exclusion of a transsexual partner from a pension scheme limiting the dependant's benefit to her widower constituted sex discrimination in contravention of Community law to the ECJ.

European Court of Justice

The ECJ ruled that benefits granted under a pension scheme relating to employment, including a survivor's pension, came within the scope of Article 141 of the EC Treaty. It held that to set compliance with the Matrimonial Causes Act as a precondition for a survivor's pension must be regarded as incompatible with Article 141. The Court determined that it was for the national court to determine whether or not KB could rely upon Article 141 in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.

Comment

In this decision, the ECJ followed the ECHR decision in *Goodwin v UK*, reinforcing a Europe-wide movement towards full legal recognition of the acquired gender of transsexual persons. The Court boldly refused to treat the exclusion of transsexuals from spousal benefits as a non-discriminatory measure falling within the domestic legislature's 'margin of appreciation'. Whereas the Court found that the marriage requirement was not discriminatory *per se* in the sense that it affected both men and women (i.e. male and female transsexuals) equally, it held that there was an inequality of treatment relating to the capacity to marry which was the necessary precondition for the grant of the pension in question. This inequality of treatment in respect of heterosexual couples made the legislation in issue incompatible with the requirements of Article 141.

Whilst the decision is welcome and its conclusion correct, the analysis by the court is not entirely clear. The ECJ does not explain, having found that there was no prima facie sex discrimination, how it is that the relevant legislation does fall foul of the relevant treaty provisions which are directed specifically at sex equality. One is left to assume that the Court accepted KB's argument that the unfavourable treatment – the failure to recognise the marriage of a person who has undergone gender reassignment – was based upon gender reassignment and therefore constitutes direct discrimination contrary to Article 141 and Directive 75/117. This case closes the door on discrimination against transsexuals and will provide some incentive for the government to give parliamentary time to the Gender Recognition Bill (GRB), intended to rectify the incompatibilities between domestic and Convention law, in this session. The GRB will establish a scheme for recognising 'acquired gender' and will permit marriages between persons of a particular acquired gender and those of the opposite of that gender. The changes proposed in this Bill, together with those proposed in relation to Civil Partnerships will largely bring the UK in line with the rest of the EU in relation to the law affecting transsexuals.

Ulele Burnham
Doughty Street Chambers
u.burnham@doughtystreet.co.uk

ECJ rules on equal pay for agency staff

Allonby v Accrington and Rossendale College and others [2004] ECJ 13.1.04 unreported

Implications

This case concerns a claim for equal pay and access to the Teachers Superannuation Scheme (TSS) by an agency worker. There are two important issues determined by the ECJ judgment in *Allonby*. Firstly, that the definition of worker for the purposes of Article 141 EC is a community wide one and the test laid down in *Lawrie-Blum*, an Article 48 case, is applied with the result that an agency worker whose contract with the agency states she is self employed is a worker for the purposes of Article 141 if her independence is notional. Secondly, that the direct effect of Article 141 extends to indirect discrimination arising from national legislation without the need for a comparator doing work of equal value in the same employment. As argued below it is likely that this also applies to sector wide pension schemes and collective agreements.

The facts

From 1990 to 1996 Ms Allonby(A) was employed as a part-time lecturer by a college on a series of one-year contracts. In 1996 the college decided, for cost-saving reasons, to terminate the contracts of all its hourly paid part-time lecturers and retain their services as subcontractors. Of the 341 part-time lecturers made redundant, 110 were men and 231 were women. 55 of the full time lecturers were men, 50 women. A and the other part-time lecturers were told that they could only work for the College in the future if they signed up with the Agency, ELS, with whom the College had come to an arrangement for this purpose. Having registered with ELS, A's pay became based on a proportion of the fee agreed between ELS and the college and her income fell. She also lost a number of benefits, including membership of the Teachers' Superannuation Scheme (TSS). She brought equal pay claims against, the College, ELS, and in respect of her reduced benefits and denial of membership of the TSS, the Secretary of State for Education and Employment. As an agency worker she was denied access to the scheme which was restricted to teachers employed under a contract of service. A's contract with ELS was a contract for services. Her claim for unfair dismissal and discrimination against the College was settled after a judgment in the CA ([2001] IRLR 364).

The questions referred to the ECJ

The CA referred the questions:

1. Whether A could rely on Mr Johnson (J), a full time worker employed by the College, as a comparator in respect of her claim against ELS and the College for equal pay, and in respect of her pension claim.
2. If she could not rely upon J, whether in respect of her pension claim against ELS and the Secretary of State she required a comparator at all, or whether it was sufficient that she could establish that excluding teachers with a contract for services from the pension scheme was indirectly discriminatory against women as there were a higher proportion of women with such contracts that among those with a contract of service. Although statistics on the proportion of men and women teachers on different contracts were before the ET, it did not determine this issue.

The outcome of the equal pay claim.

The ECJ noted that according the CA there is no doubt that, if a comparison with J is to be made, the inequalities are numerous: he has, but she has not, security against unfair dismissal and dismissal for redundancy, and rights to sick pay. A did not argue that her right to equality with J extends beyond occasions when ELS allocates A to work at the College. But if the argument succeeds there, it should succeed – or at least be available – in relation to other establishments which obtain her services through ELS.

The issue was whether two people working in the same service or establishment, albeit under contracts with different employers, must nevertheless be regarded as working in the same employment for the

purposes of Article 141 EC, at least where the work is done for the purposes and benefit of the employer whose establishment it is. The ECJ commented that it is clear, first, that A's contract is not with the College but with ELS and, second, that ELS and the College are not associated employers within the meaning of section 1(6)(c) of the EqPA. J is not then employed by the same employer at the same establishment within the meaning of that provision. He is employed by the College, albeit at the same establishment.

It held that there is nothing in the wording of Article 141(1) EC to suggest that it only applies to situations in which men and women work for the same employer. It referred to Case 43/75 *Defrenne* II [1976] ECR 455, paragraph 40, and Case C-320/00 *Lawrence and Others* [2002] ECR I-7325, paragraph 17 as establishing that Article 141 may be invoked before national courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public.

However, the ECJ then followed *Lawrence* in holding that where the differences identified in the pay of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC. As the facts were that J is paid by the College under conditions determined by the College, whereas ELS agreed with A on the pay which she would receive for each assignment, the fact that the level of pay received by A is influenced by the amount which the College pays ELS is not a sufficient basis for concluding that the College and ELS constitute a single source to which can be attributed the differences identified in A's conditions of pay and those of the male worker paid by the College.

Therefore, the answer to the first question was that Article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer.

The Pension Scheme claim

The ECJ noted that the Secretary of State administers the TSS, governed by the Teachers' Superannuation (Consolidation) Regulations 1988 and the Teachers' Superannuation (Amendment) Regulations 1993. The terms confine membership to employment under a contract of employment, whether full-time or part-time. Although the TSS is a scheme for persons employed by public bodies in the teaching sector it has been extended to certain categories of employees in the private sector including employment agencies under a procedure which the employer applies in order to be accepted as a participating employer. It was therefore open to ELS to contribute to the TSS in respect of teachers employed by it.

The concept of worker within the meaning of Article 141(1) EC

As Article 141 EC only applies to women and men who are workers within the meaning of that Article the Court considered whether A was a worker as a preliminary issue. It noted that the term worker within the meaning of Article 141(1) is not expressly defined in the EC Treaty. It took into account the importance of the principle of equality for men and women, which as the ECJ held in *Defrenne II*, forms part of the foundations of the Community. Accordingly, it held that the term worker used in Article 141(1) cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively.

The definition the ECJ gave was that a worker was a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration. Thus adopting the definition given in relation to free movement of workers, in particular Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17, and *Martínez Sala*, paragraph 32.

As Article 141 provided that pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer, it was clear that it was

not intended that the term worker should include independent providers of services who are not in a relationship of subordination with the person who receives the service.

However, provided that a person is a worker within the meaning of Article 141(1), the nature of his legal relationship (e.g. the type of contract) with the other party to the employment relationship is of no consequence.

The ECJ expressly held that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) if his independence is merely notional, thereby disguising an employment relationship.

In the case of teachers who are, vis-à-vis an intermediary undertaking (that is ELS, the employment agency), under an obligation to undertake an assignment at a college, it was necessary to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context. While not expressly finding that A was a worker, applying the guidelines to her working conditions, which gave her no more freedom than when she had been employed by the College, would suggest that she and the other agency teachers were workers.

Was a comparator required?

The ECJ first considered the scope of the comparison for the purpose of proving indirect discrimination. It held that when it is necessary to consider whether a set of rules conforms with the requirements of Article 141(1), it is the scope of those rules which determines the category of persons who may be included in the comparison.

The ECJ then distinguished a pension scheme which only applied to workers in a particular company in which case the comparison had to be within the company, see (Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 103). On the other hand, in the case of national legislation, in Case 171/88 *Rinner-Kühn* [1989] ECR 2743 (paragraph 11), a case of indirect discrimination arising from exclusion of part-time workers from a statutory sick pay scheme, the ECJ based its reasoning on statistics for the numbers of male and female workers at national level.

Applying that approach to A's claim, the ECJ held that:

> *in order to show that the requirement of being employed under a contract of employment as a precondition for membership of the TSS – a condition deriving from State rules – constitutes a breach of the principle of equal pay for men and women in the form of indirect discrimination against women, a female worker may rely on statistics showing that, among the teachers who are workers within the meaning of Article 141(1) EC and fulfil all the conditions for membership of the pension scheme except that of being employed under a contract of employment as defined by national law, there is a much higher percentage of women than of men.*

If that is the case, then the difference of treatment concerning membership of the pension scheme at issue must be objectively justified. It added that no justification can be inferred from the formal classification of a self-employed person under national law.

Legal consequences and liability of the employer – ELS

If A succeeds on the statistical issue and on justification, the ECJ held that the condition of membership to TSS confining it to those teachers employed under a contract of service had to be disapplied in view of the primacy of Community law (see, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24). Any finding of indirect discrimination would also be binding on ELS despite there being no workers admitted to the pension scheme employed by ELS and therefore no comparators. This is because the source of the discrimination was national legislation.

Implications

It was disappointing that *Lawrence* was followed on the issue of whether a comparator employed by the College should be permitted for the purpose of the equal pay claim. There was strong evidence in this case that whole scheme was set up by the College and other Colleges to avoid the requirement in Article 141 not to discriminate against part-time workers. It was because the College decided the cost of providing equal treatment was too high, including the pension contributions, that A and others were made redundant and only re-hired if they became agency workers. The worry is that this decision will be seen as a red light to

312 such avoidance tactics undermining the effectiveness of Article 141.

On the other hand, the adoption of a wide definition of workers may be important for a number of other cases. For example, trainee midwives are currently claiming that failure to pay them an adequate allowance when on maternity leave is a breach of the Pregnant Workers Directive and Article 141. A preliminary point is whether they are workers and this decision will be helpful to their case.

The ruling that a comparator in the same employment is not necessary in cases of indirect discrimination arising from national legislation could have wide implications, for example, in the part-time pension cases. As the ECJ was applying *Defrenne II* it is likely that the same approach is true of sector wide non-statutory pension schemes and collective agreements. The scope of the comparison would be those covered by the scheme or agreement and not just those in the same employment.

Tess Gill
Old Square Chambers
gill@oldsquarechambers.co.uk

313 # Briefing 313

The proper test for determining compensation

Laing Ltd v Essa [2004] EWCA Civ 02 unreported

Implications

The issue in this appeal concerned the determination of what is the proper test for determining compensation under the RRA and (because the compensation provisions are materially the same), the SDA and the DDA. Prior to this decision of the CA there were apparently conflicting decisions as to whether the test to be applied was 'a reasonable foreseeability test' or a simple 'causation' test.

Section 57 (and by reference Section 54) of the RRA addresses compensation by providing that any claim in discrimination 'may be made the subject of civil proceedings in like manner as any claim in tort'. The SDA and the DDA contain materially the same terms.

Facts

Mr Essa (E) was a Somali national origin and was employed on a building site operated by Laing (L). He was actually employed by another company but he was provided by them to work on a Laing site and accordingly they were liable for any discrimination suffered by him on site because of the 'contract worker' provisions of the RRA (section 7).

E complained that he had been subject to racial discrimination whilst working on the site.

Employment Tribunal

The ET found that E had been subject to one incident of racial abuse. The ET found this remark was 'grossly offensive'. E suffered very considerable distress and significant psychiatric injury. The ET concluded, however, that L was only liable for such reasonably foreseeable loss as was directly caused by the discriminating act.

> *'We find that the direct cause of Mr Essa's departure on 5 August 1999 was the incident of 28 July, in that his distress was such that it rendered him so over-sensitive to the reasonable reprimand given him by Mr Rogers, his employer, that he was unable to continue working on the site. Had he not left prematurely he would have been there for a further three weeks until the end of August, when all Mr Rogers' workers finished on site. The respondents might well have reasonably foreseen that the incident would lead to distress and premature departure but they could not have reasonably foreseen the extent of Mr Essa's reaction to it and his subsequent failure to look for other work. We therefore confine compensation for loss of earning to three weeks at £189.92 per week that is £569.76 less £75 benefit received at £50 per fortnight, totaling £519.76 [sic]. …We have no doubt that Mr Essa has suffered hurt and humiliation as would any reasonable person in a*

similar situation. We bear in mind that the award for injury to feelings depends not so much on the seriousness of the discrimination as on the nature of Mr Essa's reaction to that discrimination. Mr Essa's reaction however was extreme. It was so extreme as to have been irrational.'

The ET also stated that they kept in mind that it was a 'one-off' incident and not a prolonged or continuing act of racism. E appealed the decision on compensation arguing that the ET applied the wrong test in determining compensation in asking whether the loss and damage he suffered was reasonably foreseeable. He argued that the proper test was only whether such loss and damage was 'caused' by the discrimination.

Employment Appeal Tribunal

The EAT found that the ET had applied the wrong test. The EAT stated:

'In our opinion the case should be remitted to the Employment Tribunal to re-consider questions of compensation having regard to such findings as they might make and to what extent Mr Essa's psychological injury was a direct cause of the racial abuse he suffered on 28 July 1999.'

The EAT went on to state that the ET would have to consider whether there was any intervening cause of damage, including by a failure to mitigate.

Court of Appeal

L appealed arguing that a test of reasonable forseeability should be applied in deciding whether compensation was recoverable for any particular loss or damage. They argued that this was an appropriate 'control mechanism'.

The CA (by a majority) concluded that the proper test was a simple causation test. The CA acknowledged (Pill LJ) that a foreseeability test did not provide a simple answer to the problems which arise in discrimination cases.

Its establishment, as a pre-requisite, does not eliminate the complex questions of causation which may arise.... It would add a dimension to the resolution of the dispute between the parties.

Pill LJ noted that the 'reasonable foreseeability test' was one which usually applied to non intentional torts such as negligence but that the facts in E's case were similar to the torts of assault and battery in that there was deliberate conduct towards and in the presence of the victim, though the abuse was verbal and not physical. Perhaps a little worryingly Pill LJ added that 'It is possible that, where the discrimination takes other forms, different considerations will apply'. However, Clarke LJ concluded simply that:

in order to be entitled to compensation for unlawful racial discrimination under section 56 of the 1976 Act it is not necessary for the claimant who has been discriminated against to show that the particular type of loss was reasonably foreseeable.

Clarke LJ analyzed the question by having regard to the purposive approach to the construction of the Act adopted by Waite LJ in *Jones v Tower Boot Co Ltd* [1997] ICR 254 at 261-3 and by Templeman LJ in *Savjani v Inland Revenue Commissioners* [1981] QB 458 at 466-7 and that 'although those cases were concerned with a different problem, they do not support a suggestion that a restricted approach should be adopted to compensation for unlawful racial discrimination.' Clarke LJ held that:

As Templeman LJ put it in a well-known phrase, the Act was brought in to remedy a very great evil. In these circumstances, it seems to me that it should be sufficient if the claimant shows that the particular type of injury alleged was caused by the act of discrimination. Both Miss Moor and Miss Monaghan rely upon the fact that the wrong created by the statute is an intentional wrong in the sense that it cannot be committed accidentally. As Pill LJ has observed, the act or omission must be deliberate and in that sense intentional.

In these circumstances I entirely agree with the approach of Stuart-Smith LJ in Sheriff v Klyne Tugs Ltd [1999] ICR 1170:

In my judgment that language is clear. And the principle must be that the claimant is entitled to be compensated for the loss and damage actually sustained as a result of the statutory tort.

This case is important. It clearly decides that there is no need for a complainant in a race discrimination case to show that an employer or other discriminator could have 'reasonably foreseen' the damage suffered for compensation to awarded in respect of it. It is only necessary to show that the damage was caused by the discrimination.

313

Comment

It is always important for advisors to remember that even with a causation test, actual causation will have to be proved and this is not easy. Medical evidence will usually be required where psychiatric injury has been sustained. In addition, an Applicant will have to show that they have mitigated their loss (by taking medication; looking for work etc) if compensation for all losses caused are to be recovered.

Although the CA did not address specifically the test under the SDA or the DDA, because the wording under these Acts matches that under the RRA, it can be properly supposed that the 'causation' test will apply in all discrimination cases (including cases under the new Religion or Belief and Sexual Orientation Regulations which are similarly worded).

It is notable that in this case, for the first time, all three Commissions (the CRE, EOC and DRC) intervened to put arguments before the court that the proper test was a causation test.

Karon Monaghan
Matrix Chambers
karonmonaghan@matrixlaw.co.uk

314

Briefing 314

RRA has jurisdiction over the award of legal aid contracts

Yvonne Patterson v Legal Services Commission [2004] IRLR 153 CA

Implications

This case concerned an allegation of discrimination in relation to the granting of a legal aid franchise. It has important ramifications not only in respect of RRA claims, but also those under the SDA and the DDA, which will cover qualification bodies for the first time from October this year.

Facts

Ms. Patterson (P) is the sole principal in a firm of solicitors called Patterson Sebastian and Co. She is of black Afro-Caribbean origin, and established her firm in a deprived area of Wembley in 1997 in order to provide legal aid advice. 98% of the firm's work was publicly funded. In 1999, all the staff was of black Afro-Caribbean or Asian origin, with the firm consisting of P as sole practitioner and principal, five qualified fee earners, two trainee/paralegals and two administrative staff. At the time to which these proceedings related, the firm was a Provisional Franchisee in the areas of family, welfare benefits, housing and immigration. A Pre-Franchise Audit had been carried out on 23 March 2000, but P had subsequently been informed that she and her firm would not be given a franchise. It followed, in accordance with the process by which the Legal Services Commission (LSC) awards contracts, that she would not be given a three-year contract. For some time after that, the firm was in a state of 'limbo', and operating under the one-year contract.

P brought a claim of racial discrimination against the LSC, alleging racial discrimination in relation to employment (s.4 RRA) and/or racial discrimination by a qualifying body (s.12 RRA).

Employment Tribunal

The ET held that it did not have jurisdiction to consider the complaint under either s.4 or s.12, in that P was not in the employment of the LSC within the meaning of s.78 of the Act (in particular because the General Civil Contract is not a 'contract personally to execute any work or labour', within the meaning of the extended definition of employment in s78 RRA); and that the LSC was not a qualifying body within the meaning of s.12 (in particular, because the Legal Aid Franchise Quality Assurance Standard (LAFQAS) and the award of a franchise were not sufficiently person in character to come within section 12). P appealed to the EAT.

Employment Appeal Tribunal

They allowed the appeal, on the basis that there was jurisdiction under both s.4 and s.12. The LSC appealed to the CA.

Court of Appeal

The CA allowed the LSC's appeal with regard to section 4 RRA, holding that the ET had no jurisdiction to entertain P's claim in so far as it was based on the allegation that she was in the employment of the LSC, as defined in s.78. However, it upheld the EAT decision in regard to s.12, holding that the ET had jurisdiction to consider the complaint under s.12.

In considering the s.4 issue, the CA considered the definition of employment in s.78, whereby 'employment' means 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour…'. LJ Clarke stated that *Mirror Group v Gunning* [1986] 1 WLR 546, is authority for the proposition that, under section 4, the questions to be determined are:

i. Who was the contracting party or who were the contracting parties?
ii. Was any obligation imposed under the contract upon a contracting party to personally carry out work or labour?
iii. If so, was that obligation personally to carry out work and labour the dominant purpose of the contract?

Thus the questions in the present case to be answered were:

i. Would P have been a party to a three-year contract? The answer to this was clearly yes,
ii. If so, was any obligation imposed upon her under such a contract personally to carry out work or labour?

The answer to this was no. The court considered the various documentation – the One Year or Three Year Contract, the Schedule, the Contract Standard Terms, the Specification, LAFQAS, and any Bid Documents. It reached the conclusion that the contract as a whole does not impose personal obligations upon P as the contractor personally to carry out the work. Clause 2.6 of the contract emphasises that P alone is the contractor, and that she cannot sell or assign any of its rights or sub-contract any of the contractor's obligations under the contract. However, it also states that the contract 'does not prevent you from instructing Approved Representatives in accordance with normal practice and in compliance with this contract and with the Act and regulations'. Under this contract, P was wholly responsible legally for the work, but she was not obliged to carry it out personally. Whilst the role of Supervisor and Franchise Representative were also important, it was clear from the LAFQAS provisions that an organisation may have more than one Franchise Representative. It may also have more than one Supervisor, and the court could see no provision in the contract which obliged or would have obliged P to act as a Supervisor herself. The ET was correct to conclude that P was not required to participate in the operation of the franchise because, although she was the Franchise Representative and Supervisor, she could at any time appoint new ones in her place without the consent of the LSC.

iii. The third question was whether, if there was an obligation to personally carry out work or labour, the obligation was the dominant purpose of the contract.

The CA held that if, contrary to their view, it were thought that P owed personal obligations to carry out the functions of Franchise Representative and Supervisor, they did not believe those obligations to be the dominant purpose of the contract in the sense identified in the Mirror Group Newspapers in the case, because the dominant purpose of the contract was to enable P to provide publicly funded legal services to her clients, in accordance with standards laid down by the LSC.

In relation to section 12, P argued that in granting a franchise, and thus the right to display its logo, and in effect, the right to do publicly funded work on behalf of her clients, the LSC confers an authorisation on an applicant such as P which facilities her engagement in the solicitor's profession. When considering this aspect of the claim, the CA referred to Templeman LF in *Saavjani v Inland Revenue Commissioners* [1981] QB 458 at pp 466:

> *the 1976 Act was brought in to remedy a very great evil. It is expressed in very wide terms and I should be very slow to find that the effect of something which is humiliatingly discriminator in racial matters falls outside the Act.*

The CA distinguished the cases of:

- *Ali v McDonagh* [2002] ICR 1026 concerning the selection of candidates for local government

314

elections, as the labour party was not a body which 'can confer an authorisation or qualification which is needed for, or facilities engagement in a particular profession' and was not the type of body to which the section was intended to apply.

- *Tattari v Private Patients Plan Ltd* [1988] ICR 106, where it was held that PPP was not an authority or body within the meaning of s.12, where Beldam LJ stated that s.12 ' does not refer to a body which is not authorised to or empowered to confer such qualification or permission but which stipulates that for the proposes of its commercial agreements a particular qualification is required.'

The CA stated that the LSC is a very different type of body from either PPP or the Labour Party. It is a public body charged with public functions. When it grants a franchise to a solicitor on the ground that LAFQAS has been satisfied, and thus enables a franchisee to display the logo, it grants an authorisation to do so. Further, since the grant of the franchise is an essential pre-condition to the making of a three-year contract, it could in the courts opinion fairly be said to be conferring on the franchisee an authorisation to perform publicly funded legal services for its clients. In support of this was the fact that the LSC stated in its IT3 that the contract 'operates as a form of licence …to perform publicly funded work', with the OED defining a licence as a formal permission from a constituted authority to do something – it is thus a form of authorisation.

The question then to be considered was whether the franchise 'is needed for, or facilitates, engagement in' the profession of solicitor. The expressions 'is needed for' and 'facilitates' are disjunctive – it is thus sufficient if the authorisation 'facilitates engagement' in the profession. In the court's opinion it does. The franchise facilitates the carrying out of the profession of solicitor because it makes the carrying on the profession by the franchisee easier.

The CA also distinguished the facts of the case from that of *Kelly v Northern Ireland Housing Executive* [1999] AC (where the HL held that 'qualification' did not cover the appointment of a duly qualified professional man to carry out remunerated work on behalf of a client). In granting a franchise, the LSC is not simply selecting a solicitor to perform services which he or she is already qualified to perform, but satisfying itself that the applicant meets the LAFQAS standard, for the services which he or she will perform for his or her clients.

With regard to the issue of whether the award of the franchise and the logo was sufficiently personal to P, the CA held that it clearly was. Whilst the franchise Certificate will be issued for an office, the requirements are those with which 'you' must demonstrate compliance and continue to comply. Equally the Franchise Certificate includes a statement of the Devolved Powers which 'you' are approved to exercise. 'You' is the contractor and applicant, who in this case was P.

Catherine Casserley
Disability Rights Commission
Catherine.Casserley@drc-gb.org

315

Briefing 315

Upper age limit for redundancy and unfair dismissal protection is not indirectly discriminatory

Secretary of State for Trade and Industry v (1) Rutherford and (2) Bentley (No 2) [2003] IRLR 858 EAT

Implications for practitioners

The EAT has held that the provisions of the Employment Rights Act 1996 (ERA) that prevent an employee over the age of 65 claiming unfair dismissal and a redundancy payment (sections 109(1) (b), 156(1) (b), 119(4) and 162(4)) are **not** indirectly discriminatory on the grounds of sex contrary to Article 141 EC and reflect a legitimate aim of social policy that is unrelated to discrimination based on sex. This overrules the ET decision of the 22 August 2002 (see DLA Briefing 265) reported at [2002] IRLR 768.

However, permission to appeal to the CA has been

granted in both cases and the appeal has been listed for the 24 and 25 March 2003. Although as the law stands, employees aged over 65 cannot claim Unfair Dismissal and Redundancy, practitioners should consider lodging claims for clients within three months of the date of their dismissal in order to preserve their right to bring claims pending the resolution of this litigation.

Facts

Mr Rutherford (R) was an employee dismissed after his 65th birthday who claimed unfair dismissal in the ET. Mr Bentley (B) was an employee made redundant after his 65th birthday who claimed a redundancy payment in the ET. Both were prevented from claiming due to the above provisions of the ERA that prevent an employee aged over 65 from claiming in the ET. R and B argued that because there were larger numbers of males in employment, looking for work or would like to work over the age of 65 than females in the same position; the provisions should not be applied as they were indirectly discriminatory contrary to Article 141 EC and were not objectively justified. The Secretary of State intervened and was a party in both the ET and the EAT.

Employment Tribunal

The ET agreed with R and B and disapplied the relevant provisions. It considered a range of different comparisons of the statistics and concluded that the provisions were indirectly discriminatory against males. In doing so, it rejected the Secretary of State's contention that the comparison that should be made was of those males and females between 16 and 64 who had 1 year or 2 year's continuous service against the combined age group of 16 to 79. Instead, it focused its consideration on the group of employees 'for whom retirement by the age of 65 has some real meaning'. It further decided that the Secretary of State had failed to prove that the provisions were objectively justified. It decided that the reason for the provisions was 'tainted with sex discrimination'.

The Secretary of State appealed against the findings of the ET in relation to disparate impact and objective justification.

Employment Appeal Tribunal

The EAT allowed the appeal on both grounds and dismissed their cases.

On the issue of disparate impact, the EAT held that the ET selected the wrong pool for comparison, and even if the pool selected was the correct one, its rejection of the pool proposed by the Secretary of State without any proper form of reasoned analysis was an error of law sufficient to vitiate its decision. The EAT agreed with the Secretary of State that the correct pool to be examined is the entire workforce. To deal with any particular segment of it on the basis that it represents those 'for whom retirement has some real meaning' is to introduce a subjective element which was capable of being expanded or reduced without the application of any measurable criteria. The EAT stated that this does not mean that it would be wrong, in appropriate cases, to consider the disadvantaged group. The EAT held that the wider pool shows clearly and unequivocally no disparate impact.

On the issue of justification for the provisions, the EAT found that the ET was wrong to decide that the default provisions were inextricably linked to the State retirement age. The EAT accepted that the policy arguments advanced by the Secretary of State constituted reasonable policy objectives that reflected legitimate aims of the State's social policy. The EAT held that the policy aims were not related to any discrimination based on sex and were not 'tainted with sex discrimination' as had been found by the ET. The EAT added that the ET failed to give any weight to the consultation process currently under way in relation to age discrimination and to allow the government a reasonable margin of appreciation when striking the balance between the need to legislate and the need to ensure that proper processes have been gone through before legislation is placed before Parliament.

Paul Troop
Tooks Court Chambers
paul.troop@tookscourt.com

Justification in equal pay claims

Parliamentary Commissioner for Administration and another v Fernandez
[2004] IRLR 22 EAT

Summary

The Equal Pay Act 1970 (EqPA) allows employers to justify pay differentials between a man and a woman, or a class of men and a class of women in some limited circumstances. In the case of a man and a woman employed on like work, a pay variation may be justified only if the employer proves that the variation is

'genuinely due to a material factor which is not the difference of sex' and further, that the factor relied upon is a material difference between the woman and the man's case. (see section 1(3) EqPA 1970)

The question for the EAT in this case, was whether the decision of the ECJ in *Brunnhofer v Bank Der Oesterreichischen Postspakasse AG* [2001] IRLR 571 alters the test to be applied in considering whether an employer has made out such a defence. Specifically, does the decision give authority to the proposition that an employer can only succeed with a material factor defence if the material factor relied upon can be objectively justified?

Of course, it makes sense in policy terms, if the objective of pay equality is to be actively pursued, that employers should not be allowed to rely on reasons which, although real in the sense of being applied in fact, do not actually achieve the objective, such as retaining staff in hard to recruit areas of work or promoting or rewarding better performance.

However a minority of the EAT argued that there is no requirement of objective justification either in UK or European law, unless it is a case of indirect discrimination. Leave to appeal was granted but the case was settled.

Facts

Mr Fernandez (F) claimed equal pay with Ms Moulder (M), a white woman, and also claimed that the pay differential between them was discrimination on the grounds of his race contrary to the RRA.
His claim was based on three differentials:

i. On appointment to the Parliamentary Ombudsman as a case worker, his starting salary was lower than that of M's starting salary. She started work on the same day, but for the Health Service Ombudsman. She had asked for a higher salary prior to commencement and this had been agreed.
ii. F had not received a recruitment and retention allowance, and M had. She had pressed for a pay increase, and the allowance was the result.
ii. F had received a lower salary increase, following a performance assessment, based on box scores, in which he had scored 3 and M had scored 2.

It was common ground between the parties that the two jobs were of equal value. The employer did not call any of the people responsible for making the decisions about pay, but referred to the reasons for the differences, and relied upon the material factor defence.

The ET found that there was a failure on the part of the employer to objectively justify the difference between the pay of the two employees and found in favour of F. In addition, they found that F had been discriminated against on the grounds of his race, in respect of the performance pay. The ET held that, since in their opinion, the employer had failed to objectively justify the pay differential; they had failed to offer a reasonable or innocent explanation for it. There was, they found, nothing to suggest that, had F been white, he would still have received the lower grading.

The EAT unanimously found that this formulation of the burden of proof in a race claim was incorrect, placing as it did the burden of proof onto the employer. Since this case was heard prior to the changes in the burden of proof in race claims, this was an error of law.

Equal Pay

On the question of equal pay, the EAT were divided. The majority decided that, unless an applicant argues

that the material factor is itself indirectly discriminatory, there is no requirement for the employer to objectively justify the reasons put forward. This, they said was clear both from the domestic law and from the jurisprudence of the ECJ.

The EAT was unanimous in deciding that the decisions of the UK courts establish that, in a case where an employer has to show the reason for the lack of equality, they must show the factor they rely upon is genuine and material. This means the factor must be significant but it does not mean in addition that it must be objectively justified.

HHJ Peter Clark, presiding, referred to the decision of Mummery P in *Tyldesley v TML Plastics Ltd* [1996] IRLR 395 EAT, a decision which was subsequently approved by the HL in *Glasgow City Council v Marshall* [2000] IRLR 272. In that decision, Mummery P had specifically considered the case of *Yorkshire Blood Transfusion v Plaskett* [1994] IRLR 74, in which the EAT had overruled the ET and stated that there was no necessity for objective justification in UK law.

The logic of the decision rested in part on the acceptance of the proposition that if an employers objective justification of a difference in pay can be based upon a genuine but mistaken belief, such a belief cannot the be capable of objective justification, since any attempt would show the reason relied upon to be flawed.

However, in considering the position under European law, the EAT were divided. The majority of the EAT were of the view that the decision of the ECJ in *Brunnhofer* (see above) does not require an employer to objectively justify the factor relied upon. Mr Bleiman, the minority, considered that it did and placed emphasis on the references by the ECJ to the requirement for objective justification, throughout their judgement. For example, they state that the employer's grounds must:

> *correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end*

The appeal succeeded by a majority, and the case was remitted back to a different tribunal for reconsideration. Since then the case has been settled.

Comment

This decision is controversial. It is likely that F would either have won his case or it would have been referred to the ECJ for a ruling. The employer's concession after leave to appeal was granted that they could not win on either argument has deprived the CA of a chance to settle this area of law. Meanwhile Mr Bleiman's minority judgement is worth re-visiting.

Catherine Rayner
Tooks Court Chambers
Catherine.Rayner@crlh22.demon

Women on maternity leave must not be forgotten by employers

Visa International Service Association v Paul [2004] IRLR 42 EAT

This case emphasises the importance of employers keeping women on maternity leave informed of developments in the workplace, such as a re-organisation or a job opportunity. This applies even if the woman would not have been eligible for short listing for the job in question. Failure to do so may result in a claim for constructive dismissal under the SDA and s99 Employment Rights Act (ERA) and a detriment under s47C ERA. Further, in these circumstances the employer may not be able to recoup contractual maternity pay.

Facts

While Mrs Paul (P) was on maternity leave, the company reorganised the department in which she worked and created two new posts. P complained that she was not told about one of the posts and should have been given the opportunity to apply. The employers argued she had been told of the post by a work colleague and that, in any event, she did not have the necessary experience for the post.

After raising a grievance, unsuccessfully, P resigned and claimed unfair dismissal, wrongful dismissal, pregnancy-related detriment, pregnancy-related dismissal and sex discrimination. The employers brought a counterclaim for recoupment of enhanced maternity benefits as the contract provided that if she chose not to return to work the company could recover monies paid during maternity leave in excess of statutory maternity pay.

Employment Tribunal

The ET found, as matter of fact, that the applicant had no chance of obtaining the post. However, she should have been informed of the new job and that in failing to keep her informed of developments and job opportunities in her department during her maternity leave, the employers were in fundamental breach of the implied term of mutual trust and confidence, entitling the applicant to treat herself as constructively dismissed. The dismissal was automatically unfair under s99 ERA as it was for a reason related to maternity leave. It was also unfair under s98 (4) ERA. The company's failure to notify P of the position was a deliberate act amounting to a detriment for the purposes of s47C ERA. In addition, she was entitled to four weeks' pay in lieu of notice. At a review hearing the ET also upheld the claim of direct discrimination on the basis that there was a failure to inform P of developments because she was on maternity leave.

The counterclaim for recoupment of contractual maternity pay was dismissed on the basis that P left the employment in circumstances amounting to constructive dismissal and not of her own accord. The ET also held that issuing the counterclaim was an act of victimisation under the SDA and upheld that complaint on the grounds that two other women who left following maternity leave, who had not brought proceedings, had not been pursued for enhanced maternity pay.

Compensation of £25,943.73 plus interest was awarded, consisting of £12,943.73 in respect of loss for sex discrimination, £8,000 injury to feelings and £5,000 for victimisation. No separate award was made for unfair dismissal or wrongful dismissal.

EAT decision

The EAT upheld the ET's finding of constructive dismissal, detriment and victimisation. There was no appeal in relation to automatically unfair dismissal (s99) nor ordinary unfair dismissal (s98).

a. Constructive dismissal

The EAT held that the complaint was not that P had not been informed of a job opportunity which turned out to be illusory. It was that she believed she was suitable for the post and the company's failure to notify her of that opportunity fatally undermined her trust and confidence. The ET's decision was consistent with the formulation of the implied term of trust and confidence.

b. Detriment under s47C

s47C provides that an employee has the right not be subjected to any detriment by any act, or any deliberate failure to act, for a reason which related to 'pregnancy, childbirth or maternity', 'ordinary, compulsory or additional maternity leave'. The EAT held that the word 'deliberate' was inserted in the section to distinguish from an inadvertent or accidental failure to act. The ET found that there had been an intentional, not inadvertent, act so this claim was upheld.

c. Victimisation

This claim was also upheld. The EAT noted that the 'but for' test set out by the Court of Appeal in *Chief Constable of West Yorkshire v Khan*, and followed by the tribunal, had been overruled by the House of Lords. The HL held that the issue in a victimisation claim was whether the fact that the applicant brought proceedings was a reason why he was treated less favourably. This was not the same as the 'but for' test. Although the EAT considered there may be a tension between the HL authorities in *James v Eastleigh Borough Council* [1990] IRLR 288 and *Nagarajan v London Regional Transport* [1999] IRLR 572 on the one hand, and *Khan* on the other, as it had not been raised in the appeal this argument was not allowed.

d. Sex discrimination

This was upheld as the ET had found that the effective cause of the failure to inform P was her absence on maternity leave.

e. Remedy

The EAT held that the applicant should have been awarded a basic award for unfair dismissal. There was no overlap between the compensation for sex discrimination and unfair dismissal in relation to the basic award. This highlights the need to claim for both unfair dismissal and sex discrimination as the remedies are different.

Camilla Palmer
Palmer Wade; www.palmerwade.com
cpalmer@palmerwade.com

Briefing 318

Seniority and Justification: ECJ reference needed?

Health and Safety Executive v Cadman [2004] IRLR 29 EAT

Implications

This case concerned a seniority-based payment system which disadvantaged a higher proportion of women than men doing work of equal value. The issue was whether the employer had to objectively justify the resulting differences in pay. ECJ judgments on the direct effect of Article 141 suggest that justification was required. However, the EAT held that the ECJ in *Danfoss* had held that no justification was required, and allowed an appeal by the employers. The EAT expressly declined to follow the later *Nimz* line of cases, saying that these were restricted to discrimination between full-time and part-time women. Leave to appeal to the CA has now been granted. They will be asked to refer the question to the ECJ when they hear the case in July 2004.

Facts

Bernadette Cadman (C) was a principal inspector with the Health and Safety Executive (HSE) and completed her training 7 years prior to her application. Her four comparators who were also principal inspectors in the same grade all had longer service than her, though one of them had only been promoted to principal inspector a year before she had. It was conceded that she was doing work rated as equivalent to that of her comparators by virtue of a job evaluation study. At the date of her application, C was paid £35,129, her comparators pay ranged from £39,125 to £44,183.

The reason for the differences in salary was almost entirely the longer service of the comparators. Over the years the pay system had changed. There had been a system of automatic service based annual pay increments. From 1992 pay increments became

performance related, and then from 1995 incremental increases ceased and pay awards over inflation were by way of equity shares. The amount of the equity shares was determined by performance. An individuals pay was affected both by service in the current job and pay band and by prior service which resulted in starting at a higher salary in the next pay band. Three of the comparators had reached the band maximum many years before but the pay maximum changed from time to time and C was still well short of it.

When the incremental system was replaced by equity shares there was little movement towards the band maximum for those lower down the pay band, including C. There was growing concern at lack of convergence and from the 2000 pay agreement the pay system was adjusted to increase convergence which had some effect, though marginal, on the narrowing of differentials.

The statistics showed that men had on average substantially longer service than women and before the ET it was conceded that the pay system had a disproportionate impact as between male and female principal inspectors.

The legal issues

It was conceded that C was doing work rated as equivalent to her comparators. However, the HSE argued that the pay difference between C and her comparators was genuinely due to material factor which was not a difference of sex: EqPA s1 (3). In *Enderby v Frenchay Health Authority* [1993] IRLR 591, the ECJ said such differences in pay would normally require the employer to show that the pay system which gave rise to the difference in pay was based on objectively justified factors unrelated to any discrimination on grounds of sex. In addition, applying the principle of proportionality, the ET could find that although some differential was justified, the actual differentials were excessive and required the pay system to be adjusted. While accepting these general principles, the HSE relied upon *Danfoss* [1989] IRLR 532, as establishing that seniority linked benefits were an exception to the general rule and required no specific justification. C relied upon the *Nimz* line of cases to counter *Danfoss* and argued that the court no longer took the view that justification of seniority criteria was not required. Alternatively, it was argued that C's case should be distinguished as while in *Danfoss* it was current service that was being rewarded so that all employees were being treated equally, in C's case the HSE had ceased rewarding service by way of increments in 1995 so that those with shorter service were being discriminated against and it seemed likely on the payment system at the date she made her application, could never achieve equal pay with that of her comparators.

Danfoss

In *Danfoss*, the ECJ considered a number of criteria for awarding merit based pay supplements to the basic pay of a group of workers doing work of equal value. There were statistics showing that on average women received lower payments than men. The system was non-transparent in that it was not possible to identify what proportion of any payment was attributable to what criteria. The criteria included skill, responsibility and quality of work, and under a second set of supplements, payments were made for training and length of service. While for the other criteria the court held that the employer may justify the differentials by showing that it was of importance to the specific tasks entrusted to the employee, in respect of seniority the court held that:

> *since service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward him without having to establish the importance it has in the performance of specific tasks entrusted to the employee.*

This finding was particularly surprising as the court had recognised that:

> *it is also not to be excluded …that it may involve less advantageous treatment of women than of men in so far as women have entered the labour market more recently than men or frequently suffer an interruption of their career.*

Nimz

In *Nimz* the ECJ held that a service qualification for promotion which only counted half the years of service of those working less than three quarters of the normal working hours and so, it was said, discriminated against part-time workers, had to be objectively justified and made reference to the relationship between the duties performed and the experience afforded by the performance of those duties after a certain number of

working hours had been worked. *Nimz* has been followed in other cases concerning service linked discrimination against part-time workers and job sharers. In each case the ECJ said that the measure had to be objectively justified, see *Gerster v Bayern* [1997] IRLR 699 and *Hill v Revenue Commissioners* [1998] IRLR 466.

The EAT ruling

The EAT found that *Danfoss* remained good law in cases of full-time workers and no specific justification of a service criterion is required in a case where the employer is distinguishing between full-time workers. The *Nimz* line of cases related to hours worked as a criterion where the discrimination relied upon was between full-time and part-time workers.

Implications

This case is one of a series of cases arising from the ET decision in *Crossley v ACAS*, (No. 1304744/98) in which the ET held that the ACAS pay system which, as in the HSE, paid long service employees more arising from the past incremental system was indirectly discriminatory. There was subsequently a settlement which included amending the pay system to allow progression to the top of the pay scales within a few years. Many other pay systems in the civil service and public sector agencies have been adjusted in a similar fashion. In a subsequent case to *Cadman*, *Wilson v HSE*, the tribunal found itself bound by *Cadman* to rule against the Applicant but would otherwise have found in her favour, although finding a five year progression to the top of the pay scale justifiable. An appeal has been lodged with an application for a stay until *Cadman* has been decided.

When these cases have come before tribunals they have consistently found that the continuing reward of past service in a pay system to be not justified although some service requirement to reach the pay maximum may be. The EAT judgment in *Cadman* commented:

> *the industrially-experienced members of this division of the EAT think it likely (although there was no evidence in this case, as we understand it) that generally women change jobs more often than men, not only by reason of career breaks and that, if that is so women of wholly equal competence to men may be disadvantaged by a pay system based on rewarding length of service.*

It would indeed be surprising if there was a general exception for service linked benefits which had a discriminatory impact from the requirement to justify. No such exception is to be found in Article 141 or in either the EqPD or the ETD. As the ECJ has consistently recognised women are likely to have shorter service either because they enter what may have been a male dominated occupation at a later date than men or because of service breaks associated with child care or other caring responsibilities. The EOC Code of Practice makes this point in paragraph 23(a) and was found to be persuasive with the *Wilson* tribunal. If no specific justification is required then however great the service requirement and the discriminatory impact no challenge could be made. The issue is also relevant to age discrimination where consideration is being given to express exceptions for service related criteria.

Tess Gill
Old Square Chambers
gill@oldsquarechambers.co.uk

Less favourable treatment of part time workers

Matthews and ors v Kent and Medway Towns Fire Authority and ors [2003] IRLR 732 EAT

Facts

12,000 part time fire fighters, members of the Fire Brigades Union, brought claims under the Part-time Workers Regulations, alleging that they had been less favourably treated than full time fire fighters. They complained that they had different terms from the full time workers and were excluded from the Fireman's Pension Scheme. Test cases were selected for the hearing.

Law

Reg 5(1) of the Part-time Worker Regulations provide that:

> *'a part time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full time worker.'*

Reg 2(4) sets out that:

> *'a full time worker is a comparable full time worker in relation to a part time worker if, at the time when the treatment that is alleged to be less favourable to the part time worker takes place –*
>
> *a) both workers are:-*
>
> *(i) employed by the same employer under the same type of contract, and*
>
> *(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience…'*

Reg 2(3) provides that that the following shall be seen as being employed under different types of contract –

> *'a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship…*
>
> *f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.'*

Employment Tribunal

The ET concluded that they were not employed under the 'same type of contract' as their full time worker comparators. They concluded that the full time workers were employed under a contract falling within reg 2 (3) (a) whereas the part time workers were employed under a contract falling within reg 2 (3) (f). They alternatively held that full time and part time workers did not do the 'same or broadly similar work' within reg 2 (4) (a) (ii).

The ET stated that if it was wrong in these two conclusions then it would find that the part time fire fighters had been treated 'less favourably' as regards pension benefits, and in some cases, sick pay and pay for additional duties. This less favourable treatment was on the grounds of their part time status and was not 'objectively justified'. The ET rejected the view that the fairness of the totality of the package would amount to objective justification.

Employment Appeal Tribunal

The EAT found that the ET had been right to conclude that the part time firemen were not employed under the 'same type of contract' as the full time firemen within the terms of reg 2. They considered what other types of contract could fall within s2 (3) (f) if this type of contract did not and concluded that there were none and thus the clause would be redundant. HHJ Birtles said:

> *reg 2 (3) (f) contains no limitation on the criteria by which types of contract can be differentiated and only makes sense if the differentiation can be made by reference to the contractual working pattern of the workers (amongst other factors).*

The EAT concluded that, in this case, there was ample material from which the ET could conclude that the two different sorts of firemen were employed under different types of contract and that it was reasonable for the employers to treat them differently. That evidence related to the full time firemen doing more community

safety work, and in some cases have better qualifications.

The ET was also right to conclude that the part time firemen did not do the 'same or broadly similar work' as the full time firemen within reg 2 (4) (a) (i), they had 'a fuller wider role and the higher level of qualification and skills…'

However, the EAT also found that the ET's findings in the alternative were correct. Namely, that the part time firemen were treated less favourably in respect of pension benefits and in some cases sick pay and pay for additional duties. They were also correct to conclude that each term in the respective contracts should be compared rather than assessing the overall favourableness of the employment packages. They were also entitled to use the 'but for' test for causation and correct in concluding that this less favourable treatment was 'on the ground that the worker is a part time worker'.

The ET was correct to conclude, in the alternative, that the employers had not shown that this less favourable treatment was objectively justified.

Comment

This case gives a very narrow interpretation to the Part Time Workers Regulations which appears to undermine the underlying purpose of the regulations. So long as employers employ their part time workers on different contracts from their full time workers, and have no full time workers employed on the same contract they will not need to grant equal treatment to their part time workers. The case is being appealed, it can only be hoped that it will be overturned by the CA.

Gay Moon
Editor

House of Lords consider that age is a primary cause of discrimination

The House of Lords Select Committee on Economic Affairs has just published **'Aspects Of The Economics Of An Ageing Population'**[1] an important contribution to the debate on Age Discrimination. It noted that '… large numbers of older people believe they have been discriminated against in the labour market because of their age.' The Committee cited the Chartered Institute of Personnel and Development (CIPD) survey of ageism conducted in 2001 which found that 10 per cent of respondents aged 45-54 believed they had been rejected for a job they had applied for in the previous 12 months because they were considered 'too old'. At the other end of the age range, 7 per cent of respondents aged 16-24 had been told explicitly that they were 'too young' for a job they had applied for, while a further 6 per cent suspected age was the reason they were rejected.

A subsequent survey conducted for the CIPD in February 2003 found that 40 per cent of persons interviewed believed they had been discriminated against at work. Significantly, age appeared to be the primary reason for discrimination, and was cited by one third of all respondents who believed they had experienced discrimination, compared to 14 per cent who cited gender, 5 per cent who cited disability and 2 per cent who cited race.

The Committee noted that few employers operate overtly ageist recruitment and retention policies (except in so far as they use fixed retirement ages). They considered age discrimination is frequently the unconscious outcome of an employer's more general human resource management policy and procedure.

The Committee was scathing in its criticism of Government for not acting faster and further:

> *'6.12. … the Government's track record in countering age discrimination within the public sector is, at best, mixed. Retirement at age 60 is still the norm within the Civil Service, although the Government have stated that the normal retirement age for public employees should increase from 60 to 65 for new entrants, with protection for those who are within 10 years of retirement... The Secretary of State for Work and Pensions noted that 'in many respects the public sector has not been as flexible on these matters as the more enlightened people in the private sector' …'*

The report came out firmly against default normal retirement ages:

> *6.42. We … recognise the legitimacy of arguments for retention of a normal retirement age, but on balance we believe that any such retirement age may impose restrictions on the efficient functioning of the labour market in our ageing society. We believe it is for firms and their employees to devise their own retirement systems, and we further believe that these systems should be based on performance criteria rather than chronological age. We have taken note of the fact that in both the United States and Australia the introduction of legislation on age discrimination has proscribed the use by employers of a normal retirement age, yet this has had only a marginal impact on the employment patterns and retirement behaviour of older workers.*
>
> *6.43. We therefore recommend that the Government should not permit the continued use of a [default] normal retirement age by employers, whether at age 65 or 70 or 75, unless the employer can provide a reasoned and objective justification for the use of age rather than performance criteria in the determination of employability. We further recommend that the Government set an example of good practice by explicitly removing upper age limits in all public-sector employment in advance of the implementation of the forthcoming legislation on age discrimination.*

The report ended with a warning:

> *6.44. We are concerned… that the implications of the legislation on age discrimination have yet to be fully appreciated by most employers and most workers in the United Kingdom. The proscription of the use by employers of age as a criterion for recruitment, promotion, training, redundancy or retirement will have a profound impact on employment practice.*

Robin Allen QC
Cloisters Chambers ra@cloisters.com

1. Published as the 4th Report of the Select Committee on Economic Affairs and available at http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeconaf/179/17901.htm

Taskforce considering the new Commission for Equality and Human Rights

This was set up in December 2003 to consider the structure, powers and duties of the proposed new Commission for Equality and Human Rights (CEHR). Since then it has met twice monthly to consider the best ways for the CEHR to 'promote an inclusive agenda, underlining the importance of equality for all in society as well as working to combat discrimination affecting specific groups'.

A Task Force made up of experts from current equality commissions, relevant organisations, trade unions, business and academia. Despite the DLA's representations that we should have a place on the Taskforce as we had unique experience of discrimination across all the strands, we are not one of the organisations represented.

The Government website says:

> *As well as providing their own views, we anticipate the members of the Task Force will undertake a programme of consultation with those in their area of interest and feed in their views as it meets over the coming months. This will inform a White Paper to be published in Spring 2004.*

As the DLA was concerned about the issues relating to the enforcement powers of the Commission in relation to casework and formal investigations we arranged a meeting with the Women and Equality Unit to put our views. We also prepared a Briefing Paper for the members of the Taskforce which is available, on request, from **info@discrimination-law.org.uk**

A woman's right to breastfeed?

Juliette Nash from North Kensington Law Centre reports:

If you read press reports of the decision in *MOD v Williams* EAT/0833/ZT you would think that women had 'lost the right to breastfeed' at work.

Not necessarily. In fact, the EAT overturned the ET decision that there was a *free-standing right* for a woman returning from maternity leave to breastfeed.

The EAT has now sent the case back to a different ET to decide if a refusal to permit Mrs Williams to breastfeed is either direct or indirect discrimination. The argument on indirect discrimination may well centre on the question of justification – which will be different in every case.

If preventing a woman from breastfeeding does not constitute direct discrimination, we have starkly contrasting levels of protection enjoyed by new and expectant working mothers. An expectant mother has 'armour-plated' protection on health and safety. If her work endangers her or her baby's health, the employer must move her to safer work and if necessary send her home on full pay, not sick pay. Any resulting dismissal is automatically unfair and direct sex discrimination. A breastfeeding mother, by contrast, would have to rely on indirect discrimination.

There is overwhelming evidence that breastfeeding is good for a baby's health. Recent scientific theories suggest that long term breastfeeding may have a significant protective effect on the mother as well.

Whatever happens on Mrs William's case, employers who refuse to permit or facilitate their employees' breastfeeding, especially without good justification, are risking discrimination and perhaps health and safety claims.

Ryanair wheelchair fee ruled unlawful in landmark case

An £18 wheelchair charge levied on Ryanair's disabled passengers is unlawful, the Central London County Court has ruled. This judgement follows a test case taken by Bob Ross, a disabled man from London supported by the DRC.

The DRC is now considering a class action against the airline. The DRC wants Ryanair to pay compensation to 50 disabled people who have complained about paying the wheelchair charge.

The Judge ruled that Ryanair were under a duty under the DDA to make reasonable adjustment for Mr Ross, by providing him with a free wheelchair so that he could get to the plane. The court has awarded Bob Ross £1,336 in compensation. Mr Ross has cerebral palsy and arthritis. He is unable to stand for any time and needs to use a wheelchair when moving through the crowds and queues, and over the long distances, at the airport.

Bert Massie, Chairman of the DRC said:

> *This is good news for disabled travellers. I hope that Ryanair will ensure that wheelchairs are now provided free to disabled people, just as other airlines do… It beggars belief that a company with £165.23 million annual profits last year should quibble over meeting the cost of providing disabled people with a wheelchair. Perhaps before counting their pennies, Ryanair should have considered the cost to their reputation and the distress caused to disabled people, by acting in such a discriminatory way.*

Ryanair have reacted by imposing a 50p wheelchair surcharge for all new passengers thus maximising the bad publicity following their discriminatory actions.

Contents

Briefings

Notes and news

Abbreviations

CA	Court of Appeal	ECHR	European Convention on Human Rights	GRB	Gender Recognition Bill
CRE	Commission for Racial Equality	ECJ	European Court of Justice	HC	High Court
CS	Court of Session	ED	Employment Directive	HL	House of Lords
DDA	Disability Discrimination Act 1995	EOC	Equal Opportunities Commission	HRA	Human Rights Act 1998
DRC	Disability Rights Commission	EqPA	Equal Pay Act 1970	PFI	Private Finance Initiative
EAT	Employment Appeal Tribunal	ERA	Employment Rights Act 1996	RD	Race Directive
EC	Treaty establishing the European Community	ET	Employment Tribunal	RES	Race Equality Scheme
		ETD	Equal Treatment Directive	RRA	Race Relations Act 1976
				RRAA	Race Relations (Amendment) Act 2000
				SDA	Sex Discrimination Act 1975
				UN	United Nations