Discrimination Law Association

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Editorial *Time to make the invisible, visible*

It is a scandal, but not untypical, that Gypsies and Travellers were not included as an ethnic group in the 2001 census. The result is that we have no accurate estimate of their numbers, although the CRE has estimated that there are 200,000 to 300,000 in England. Obscuring the true number of Gypsies and Travellers is only part of the problem. To many they do not have rights.

A year ago, a 15 year old Traveller, Johnny Delaney, was beaten to death in Merseyside. In the Gypsy and Traveller community his death was as significant as the murder of Stephen Lawrence, but it has engendered little public concern.

The racism, prejudice, discrimination and disadvantage suffered by the Gypsy and Traveller community in the UK are unparalleled, yet their needs have been largely ignored.

Every indicator shows the gravity of their disadvantage.

- Gypsies and Travellers experience worse health than any other sector of the population,
- Gypsies and Travellers life expectancy is 10 years lower for men and 12 years lower for women compared to the rest of the UK population,
- Gypsy and Traveller infant mortality rates are 3 times the national average,
- 80% of Gypsy and Traveller children leave school functionally illiterate. They have great difficulty getting school places, and they are disproportionately likely to be excluded from school,
- Only 20% of Traveller children attend school in key stage 3, and less in key stage 4.

But Gypsies and Travellers do have rights. Most of the Gypsies and Travellers in England are 'Romany Gypsies' who have been recognised by the courts as a racial group covered by the RRA. 'Irish Travellers' are also recognised as a racial group under the RRA. Thus measures by public authorities to implement their Race Relations (Amendment) Act 2000 duties should include provision for Gypsies and Travellers; however, most central and local government processes do not measure or monitor their needs, so they are likely to remain marginalised or excluded from mainstream service provision.

For Gypsies and Travellers, real housing rights must be the key to making any real gains in countering deprivation and social exclusion. Without a secure stopping place they are unable to register for education, health or other social services. 18% of the Gypsy and Traveller population are technically homeless compared to 0.6% of the settled population. Many have felt forced to accept permanent accommodation, which they do not regard as a satisfactory solution.

Currently there are about 8,000 local authority sites and 4,500 private sites. Worryingly 26% of sites are situated next to motorways, 13% next to runways, 8% next to commercial and industrial sites, 12% next to rubbish tips and 4% next to sewage farms. It is therefore not surprising that their health is so poor. The CRE estimate that an extra 3,000 to 4,500 extra pitches on sites will be needed in the next three years.

Historically, the Caravan Sites Act 1968 required local authorities to provide public sites, although many local authorities found ways to avoid doing so. The Criminal Justice and Public Order Act 1994 lifted the legal obligation on local authorities and withdrew central government funding. As a result, some local authorities privatised or closed many of the legal stopping places, forcing families back into a cycle of trespass and eviction.

The 1994 Act was supposed to encourage Gypsies and Travellers to buy sites and obtain planning permission. This has not happened and it is not an appropriate way to meet their housing needs. Further, there is clear evidence of discrimination within the planning system. Planning applications normally have an 80% success rate, whereas only 10% of Gypsy and Traveller applications are initially successful. This has led many to set up sites without permission creating additional community tensions. The Government response has been further oppressive provisions, such as the power to remove trespassers in the Anti-Social Behaviour Act 2003.

The UK is not alone; the pattern is repeated throughout Europe and the accession states. Reports abound of Roma people being excluded from schooling and housing as people continue to consider it acceptable to abuse them in a way that would not be acceptable for any other group. NGOs are finding legal routes to challenge the treatment of Roma, in the European Court of Human Rights and under the Collective Complaints Protocol to the European Social Charter. The EC Race Directive offers scope for action across the EU. The time is right for this racism to be confronted and eradicated from our society.

At last something seems to be happening, the Office of the Deputy Prime Minister has begun an Inquiry into Gypsy and Traveller sites, which should confront some of these problems. Additionally, the Commission for Racial Equality have just announced a Gypsy and Travellers Strategy; it suggests a range of measures that could help counter the discrimination that is so much a part of the daily lives of Gypsies and Travellers. This is very welcome.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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Psychiatric Injury and Damages in Discrimination Cases: Practical Considerations

This short article is based on a presentation to the Practitioners Group on March 24th 2004. The original presentation had a number of useful materials attached to it – a draft schedule of loss, and extracts from the Ogden tables, the Code of Guidance on Expert Evidence, extracts from the cases of *De Keyser Ltd v Wilson* and *Kingston upon Hull City Council v Dunnachie* and from the Practice Direction to the Civil Procedure Rules supplementing Part 35. Members wishing to receive an email copy of the full presentation together with the attached materials can ask the Discrimination Law Association office to email a copy to them.

Preliminary Points

Judges in the County Court and High Court are experienced in assessing medical evidence relating to personal injuries. Employment Tribunals (ET) do not generally have the same level of experience or expertise. So the presentation and cross-examination of expert evidence in ETs requires considerable care as it is vital to awards of general damages. Arguments about ability to work and related loss of earnings issues which can form the major part of an Applicant's losses.

The use of medical experts in Tribunals (including letters of instruction) was considered in *De Keyser v Wilson* [2001] IRLR 324 a case involving allegations of a depressive illness caused by stress at work. Amongst other things the guidance produced by Mr Justice Lindsay recommended the use of a joint expert save in special circumstances. But in high value cases there are some advantages in obtaining a report from your own selected expert, if the funding of the case allows it. With conditions such as depression the range of professional opinion as to the type, seriousness and implications can vary significantly. Further, with your own expert it is possible to have a one to one conference which can significantly assist with the understanding and focus of the evidence concerned. You are then unlikely to be in a position where you ask a question of your expert to which you don't know the answer. When dealing with a joint expert the system of written questions and answers is one which poses risks of getting answers that are unexpected. In retrospect you may have preferred not to have asked the question at all. When appointing an expert it is beneficial to consider whether the person concerned is employed in treating patients as opposed to being engaged simply in the production of medico-legal reports.

It is also important to be familiar with the contents of the relevant parts of the Civil Procedure Rules dealing with expert evidence and reports: see the Practice Direction supplementing Part 35 CPR together with the Code of Guidance on Expert Evidence. Those provisions give excellent guidance on the duties of experts and the contents of their reports. Letters of instruction are discoverable and it is thus very important to ensure that it is suitably phrased and avoids encouragement of any particular diagnosis.

Knowledge of the requirements and role of expert witnesses can be of assistance when cross-examining them. They are expected to be co-operative and informative rather than partisan. Thus examples of one-sided or unbalanced assessment of issues can prove to be a fertile area to look at in detail. For a cross-examination to be successful it is important that the cross-examiner has some knowledge of the expert's field of specialism. As with all cross-examinations, careful preparation and attention to detail combined with some research about the specialism concerned is an essential feature.

General Damages

There are two essential authoritative sources that should be researched and relied upon to support a claim for general damages arising from psychiatric injury (or indeed any injury): The Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases which sets out the bracket of damages that is appropriate for particular levels of seriousness of the injury concerned. Currently the sixth

edition is available. It is relatively cheap (£20) and is widely accepted by the Courts as an essential starting point to a fair assessment.

In addition, it is vital to consult Kemp & Kemp as it is the source to which personal injury practitioners always turn. It contains the facts of decided cases in all injury areas together with details of the damages awarded in them. A broadly comparable case or cases should be identified and used to support the submission made on behalf of the Applicant as to the amount of damages that it is suggested it would be just to award. Kemp & Kemp is a more expensive source which runs to a number of volumes of loose leaf materials. It is extremely useful both concerning general damage but also in respect of other heads of loss which can be claimed related to injuries (see below). If funds are in short supply most libraries stock a copy.

Schedules of Loss

A well constructed schedule of loss is a central element in maximising the damages which are awarded.

The third important authoritative source which should be relied on is the Facts and Figures Tables for the Calculation of Damages produced by the Professional Negligence Bar Association. It contains essential extracts from the Ogden Tables (and explains how they are to be used) together with a wide range of other helpful information including comparable earnings statistics taken from the New Earnings Survey (HMSO).

The use of the Ogden Tables for assessment of compensation in unfair dismissal cases has been considered by the EAT in *Kingston upon Hull City Council v. Dunnachie* (No.3) [2003] IRLR 843. In summary, the EAT (Mr Justice Burton) held that their use in calculation of unfair dismissal compensation for future loss of earnings should be rare and that they should only be applied where it is established that there is a prima facie career-long loss. Notwithstanding the guidance in *Dunnachie,* in discrimination cases involving psychiatric injury there is often argument that the discrimination has brought about such career/promotion prospects losses. Furthermore, the Ogden Tables are very helpful in addressing the issue of pension loss which, again, is often a lifetime loss.

In addition to the usual considerations of loss of earnings and pension benefits it is also important to consider such matters as an award for handicap on the labour market. The award is a type of general damage and involves an assessment of the added difficulty that an applicant faces in obtaining work as a result of the injury suffered. The relevant evidence (which should be included in an applicant's witness statement when dealing with remedy) is the extent to which their existing job (if they have one) is secure and anticipated difficulties that the injury will pose in competing with others in the labour market who are not hampered by any such injury or adverse medical history. It is not unusual to obtain damages of a year's pay for such handicap on the labour market. It is appropriate to make such an award only where there is a partial loss of earnings award. If a full loss of earnings award is made there is no loss of earnings remaining and thus a handicap award would amount to double recovery. Further, career loss and/or lack of promotion or progression in a particular field of employment should be given careful consideration. To demonstrate loss consideration should be given to evidence dealing with comparator(s) in a similar position to the applicant (save for the discrimination) and what has happened to or is likely to happen to them as compared to the applicant.

Turning to the Schedule of Loss the elements to be covered are: a summary of the central facts of the applicant's case; past loss of earnings; future loss of earnings; loss of pension benefits; costs of medical treatment including travelling to and from such treatment if applicable; costs of care if care has had to be provided. Where possible, if particular sources are being relied on which the calculations are based they should be attached. Loss of pension entitlements often amount to significant losses. Where such loss occurs it is often a lifetime loss and Ogden Tables are an appropriate source of calculation. There are a variety of Tables (Nos 11 to 18) which set out multipliers to be applied to loss of pension related to the age at which the pension would have been obtained. Rough and ready calculations based on loss of contributions should be avoided as they don't reflect the real loss of benefits that is actually involved.

For completeness (and to assist the parties in addressing the issue of loss) it is sensible, particularly for applicants funding their own proceedings, to include in the schedule details of the applicant's claim for general damages; injury to feelings and handicap on the labour market (if any).

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Muslims in the UK Labour Market

Ethnic minorities currently make up eight per cent of the UK population. The ethnic minority population has grown from 3 million in 1991 to 4.6 million in 2001. Between 1999 and 2009, ethnic minorities will account for half the growth in the working-age population. At three percent, Muslims account for almost 40 per cent the UK's ethnic minority population. 42 per cent of Muslims are Pakistani, 17 per cent Bangladeshi and eight per cent Indian. The ethnic classifications in the census did not provide a separate category for Afghans, Arabs, Iranians, Turks, Kurds, North Africans and those from Eastern Europe. This may explain the 12 per cent who identified themselves as White and eight per cent identified themselves as Black on the census form.

There are wide variations in the labour market achievements of different ethnic minority and religious groups. Pakistani and Bangladeshi Muslims experience significantly higher unemployment and lower earnings than Whites. Census statistics show that Muslims as a whole are by far the most disadvantaged faith community. Their unemployment rates are three times the national average and twice the level of any other minority faith community, they have the lowest economic activity rate of any group and the highest economic inactivity rate. They represent, proportionately, the youngest age cohort in the UK. The two largest Muslim ethnic minority groups, Pakistani and Bangladeshi, will account for a quarter of the growth in the working age population between 1999-2009.[1] Making the best use of their skills will be a challenge for Government and employers, as well as for ethnic minorities themselves. Inaction will continue to bring economic costs but also potential threats to social cohesion. Evidence from the past two decades suggests that the continued economic recovery alone will not tackle the labour market disadvantage faced by Muslims. If no intervention is made, their position will at least stay the same if not worsen and further reinforce social exclusion. The failure to address the labour market disadvantage faced British Muslims will impact on other government policies such as reducing child poverty and anti-social behaviour. The Open Society Institute report on the position of UK Muslims in the labour market, to be published later this year, argues for targeted policies interventions that reach Muslim communities, and considers how this can be achieved.

A central obstacle in an examination of the labour market position and experience of British Muslims is the lack of data collected on the basis of religion. Ethnic data can be used to identify the experiences of the Pakistani and Bangladeshi groups, who make up 60 per cent of the UK Muslim population. This of course will leave unexamined the experiences of the remaining 40 per cent of Muslim communities, including Arab, Afghan, Turkish, Kurdish, North African, Nigerian and Somali Muslims. An analysis comparing the employment rates of Pakistan and Bangladeshi Muslims (38.3 and 36.7 per cent respectively) with the Muslim group as a whole suggests that the employment rate for the remaining Muslim communities is not significantly better at around 40.7 per cent. This chimes with anecdotal evidence from mosques and other Muslim groups suggesting that other Muslim groups face similar levels of socio-economic disadvantage as Pakistani and Bangladeshi Muslims.

We do not have a clear understanding of how cultural and religious values of the Pakistani and Bangladeshi Muslims influence their labour market choices. These 'influences' can be wide ranging, from community and family expectations, which can be different for males and females, prejudices about employers either through negative experiences or assumptions and more general preference of 'working from home' or working alongside

1. D. Owen and A. Green, *Minority Ethnic Participation and Achievements in Education, Training and the Labour Market*, Centre for Research in Ethnic Relations and Institute for Employment Research, University of Warwick, 2000, pp. 16-7.

other ethnic minority groups. These factors may also vary between first and second generations. In order to create effective policies, policy must be informed by the role of religious values and cultural values, where they differ and correspond.

It may be that the impact of religion or faith identity is different for different faith communities. Furthermore, a difference in the impact of faith background on employment may differ according to the extent to which group membership is visible or requires accommodations. For Muslims accommodations in the workplace include space for prayers, allowing time for prayer, especially on Fridays and being flexible around the Islamic month of Ramadan. Other barriers may be subtler, such as the avoidance of after work drinks that can play an important role in building networks within organisations and with company clients.

Laws prohibiting religious discrimination in work in Britain only came into effect in December 2003. Until then there was no requirement for employers to be aware of or accommodate the needs of Muslims. Further research is needed to understand the influence of religious and cultural issues in shaping the employment choices made by Muslims. There is also a knowledge gap in our understanding of the nature and shape of religious discrimination encountered by Muslims. We do not know the differences in the experience of those who are visibly Muslim or assert a Muslim identity to those who do not.

Religious values and principles can be an important resource used by Muslims to challenge cultural values. In relation to Muslim women anecdotal evidence from voluntary organisations suggests it is not always culturally acceptable for them to be in active employment outside the home. This is not a religious issue, as Islamic law does not forbid a woman's right to work. It is accepted however, that some in the Muslim community are either unaware of this or choose cultural preference over Sharia to justify non-employment integration. Religious values therefore could be used to promote economic integration and challenge cultural values of non-integration. However, cultural sensitivity and preference should be respected and no alternate value structure imposed. Therefore any policy response should incorporate the views of Muslim organisations on this issue.

A study of the experiences of first generation Bangladeshi women in Tower Hamlets identified several factors that explain the complexity of the issue of non-employment for this group:

- One third of women were caring for someone in the home;
- Only one third said they could read and write English;
- Those who had difficulty in language fluency expressed frustration at their inability to attend classes due to their caring responsibilities and/or resistance to do so within their own families.

We do not know the degree to which Pakistani and Bangladeshi Muslim female unemployment is a result of cultural values of a preference for the female to remain in the home and look after the children. We do know that for those born in the UK, the second generation, preferences are changing. The study also found some females in the younger aged cohort were determined to find ways in which to manage childbearing combined with a career while others felt they were unable to find paid work due to insufficient qualifications.

However, there is no cultural gender preference for Pakistani and Bangladeshi Muslim men to 'work from home'. After disaggregating for human capital and other key explanatory variables, the male level of unemployment for these groups cannot be explained.

Data by religion has only recently become available. The level of disadvantage faced by Muslims is between two and three times that of any other religious group. The Cabinet Office Strategy Unit report, Ethnic Minorities and the Labour Market, did mention this level of disadvantage but did not put forward policy recommendations in response, as the remit of the report was ethnicity and not religion. It stated that culture or religious attributes might also influence the labour market position of ethnic minorities. The risk of unemployment was found to vary significantly by religion.[2] Even controlling for a range of factors, Indian Sikhs and Indian Muslims remain almost twice as likely to be unemployed as Indian Hindus. Pakistani Muslims are more than three times as likely as Hindus to be unemployed. Sikhs, Pakistani and Bangladeshi Muslims were found to experience particular under-representation in professional employment, with this area showing higher concentrations of Hindus and Indian Muslims. In relation to earnings, Muslim men and women were

2. M. Brown, 'Religion and Economic Activity in the South Asian Population' Ethnic and Racial Studies, Vol. 23, No. 6, 2000, p. 1045.

321 ECONOMIC ACTIVITY BY RELIGION (%)

	Unemployed	Economically Active	Economically Inactive
ALL PEOPLE	5.0	66.5	33.5
Christian	4.3	65.5	34.5
Buddhist	7.9	63.0	37.0
Hindu	5.4	66.9	33.1
Jewish	3.8	66.1	33.9
Muslim	14.6	48.3	51.7
Sikh	6.9	66.2	33.8
Any other religion	8.4	67.8	32.2
No religion	6.1	75.2	24.8
Religion not stated	6.4	65.0	35.0

Source: Census 2001, ONS

found to be over-represented in the lowest income band, with almost a quarter earning less than £115 per week, compared to around one in ten Sikhs and Hindus. Despite over-representation among low earners, Indian Muslims recorded the highest share within the highest income band.

Even when differences in educational attainment are accounted for, all ethnic minorities, especially Muslims, experience significant labour market disadvantage. This shall be referred to as the residual possible 'Muslim penalty'. Due to the variance in outcomes between Pakistani and Bangladeshi, and Indian Muslim groups it is difficult to suggest the Muslim penalty has a blanket negative effect. The degree to which the variance in outcomes within Indian groups (Indian Hindus, Muslims and Sikhs) and between Indians, Pakistanis and Bangladeshis is a result of their varying human capital levels is uncertain.

Such persistent disadvantage makes it clear that at the very least direct policy interventions are needed for Pakistanis and Bangladeshi Muslims if any improvement in their immediate and long-term employment levels is to be seen. More targeted initiatives are needed to facilitate and encourage labour market entry for those unemployed and inactive. In-work support and work-force development is also required for those concentrated in the low skills sector who are under-employed.

From this limited and complex picture it is clear that Indian Muslims are very different from Pakistani and Bangladeshi Muslims in their labour market achievements. Suggesting rather crudely, that Pakistani and Bangladeshi Muslims require the greatest level of policy intervention, initially, to facilitate their labour market entry and retention. Limitations in data availability must be addressed to ascertain whether, with the exception of Indian Muslims, all Muslim communities encounter the same levels of labour market disadvantage as Pakistanis and Bangladeshis. The focus of policy on Pakistani and Bangladeshi Muslims has been premised on the assumption that they suffer particular levels of disadvantage not necessarily shared by other Muslim communities. The relative success of Indian Muslims was seen as evidence of this. However, a comparison of the data on the employment rate of all Muslims with the equivalent figures for Pakistani and Bangladeshi Muslims suggests that the non-Pakistani and Bangladeshi Muslims groups suffer similar levels of economic disadvantage with an employment rate of 40.7 per cent. If this is born out by further research then policy interventions need to move beyond Pakistani and Bangladeshi Muslims and target intervention at Afghan, Arab, Kurdish, North African, Somali, and Turkish Muslims.

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This is article is drawn from material prepared for the forthcoming Open Society Institute report on UK Muslims and the Labour Market.

Maternity leave is not a holiday

Gomez v Continental Industrias del Caucho [2004] IRLR 407, ECJ

Implications

A woman must be able to take her annual leave during a period other than the period of her maternity leave. Thus, where her maternity leave coincides with a compulsory period of annual leave fixed by a collective agreement for the whole workforce, she is entitled to take holiday outside this period, whether before or after her leave.

In *Gomez* the collective agreement provided that all staff had to take leave during one of two specified periods, i.e. between 16 June to 12 August **or** 6 August to 2 September. Exceptionally, some could take leave in September but this option was not open to Ms Gomez (G) because priority was given to workers who, unlike G, had not been able to choose their holiday period the previous year. G, who was on maternity leave between 5 May to 24 August 2001, asked to take her holiday from either 25 August to 21 September or 1 September to 27 September and was refused.

European Court of Justice

The ECJ said that:

1. The entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations.
2. A worker must normally be entitled to actual rest with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that an allowance may be paid in lieu of paid annual leave.
3. The Pregnant Workers Directive provides that the rights connected with the employment contract of a worker, other than pay, must be ensured in a case of maternity leave.
4. The same principles apply where the Member State provides for more than the minimum period of holiday laid down by the Working Time Directive (which is 20 days per annum).

What about fixed holidays such as half term holidays for teachers?

The effect of this case may be that teachers and other workers who lose out on paid holiday being taken by colleagues because they are on maternity leave (often lower paid or entirely unpaid) during these holiday periods will be entitled to take paid time off at other times. Previous UK case law has looked at whether a woman on maternity leave should be entitled to be paid for such periods and the answer has usually been that she should not because she cannot compare herself to a man or woman actually at work. However, this case looks at the entitlement to time off from a health and safety perspective and so the argument may be successfully revived.

What about contractual holiday?

One unanswered question is whether this ruling applies to contractual holiday. Unlike statutory holiday which accrues throughout maternity leave, this accrues during ordinary maternity leave (ie the first 26 weeks) but not additional maternity leave. Arguably, after *Gomez* a woman should accrue her contractual holiday during the whole of her maternity leave. As the ECJ said, the Directive provides that the rights connected with the employment contract, other than pay, must be ensured in a case of maternity leave. Therefore, that must be the case so far as the entitlement to both statutory and contractual paid annual leave is concerned.

What if there are no fixed holidays, but holiday has not been taken?

It may not be possible for a woman to take her holiday before maternity leave because, for example, her maternity leave commences early in the holiday year and she is entitled to 52 weeks off or she is too busy to take the holiday before her maternity leave begins. Arguably, she should be able to carry it forward to the next holiday year, as she has been unable to take it because of her maternity leave. The facts in *Gomez* only deal with the

322 situation where there is a fixed holiday period in that particular holiday year which a woman is unable to benefit from because of maternity leave. However the ECJ does say that

> *'a worker must be able to take her annual leave during a period other than the period of her maternity leave, including [my emphasis] in a case in which the period of maternity leave coincides with the general period of annual leave fixed for the whole workforce.'*

Thus, it seems clear that the ECJ envisages carry over in these circumstances if that is the only way to ensure that holiday is actually taken.

Carry over of holiday to the following holiday year

Under the Working Time Regulations a worker cannot carry over annual leave from one year to the next. Arguably, this is inconsistent with the right of a woman on maternity leave to take her holiday (see above). Statutory holiday of 20 days accrues throughout maternity leave and the woman should be able to carry over her holiday to the next holiday year if, because of maternity leave, she cannot take it before.

Paid holiday during maternity leave

The decision in *Kigass Aero Components Ltd v Brown* [2002] IRLR 312 on holiday during sick leave appears to envisage a woman being able to take her holiday during and concurrently with unpaid maternity leave, provided she books it. Thus, she could effectively have a further period of paid maternity leave. It is not clear if *Gomez* envisages this or only that she can have paid holiday outside her leave. Arguably, she should be given the choice, as to restrict her entitlement to paid holiday during maternity leave may in itself be discrimination.

Holiday must be requested

Kigass says that the worker must request holiday before she can be regarded as having been refused it. Thus, a woman should make a specific request for holiday.

Payment in lieu

There is nothing in *Gomez* which requires the employer to pay a worker in lieu of holiday. However, if she does not return from maternity leave, she can ask for holiday either during the unpaid part or at the end of leave.

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Transsexuals in the Police Force

A v Chief Constable of West Yorkshire Police [2004] UKHL 21

Implications

The House of Lords hold that a man who had undergone gender reassignment to be a female transsexual should be treated as a person in their reassigned gender for the purposes of the Equal Treatment Directive (ETD). Accordingly, the rejection of her application for employment as a female police constable on the basis of a genuine occupational qualification that she could not carry out the full searching duties of a police constable, was unlawful sex discrimination on the grounds of sex under the SDA.

Facts

A is a trans person. She had undergone male to female gender reassignment surgery. In 1998, she applied to join West Yorkshire Police as a police constable. Her application was refused on the grounds that as a transsexual she could not lawfully carry out her full searching duties. Section 7(2)(1)(c) SDA provides that being a man is a genuine occupational qualification for the job where the job needs to be held by a man to preserve decency or privacy because it is likely to involve physical contact with men in circumstances where they

might reasonably object to its being carried out by a woman. Section 54(9) of the Police and Criminal Evidence Act 1984 (PACE) provided that a constable carrying out a search 'shall be of the same sex as the person searched.' The problem in this case was that if A was still legally a man, she could not lawfully search a woman under section 54(9) of PACE. Conversely, if for all intents and purposes she was a woman, a man might reasonably object to her carrying out a search on him and accordingly the Chief Constable could rely upon the genuine occupational defence.

A succeeded in the ET, lost in EAT and won in the CA. The CA relied upon the ECJ decision in *Goodwin v United Kingdom* (2002) 35 EHRR 447 which held that that the refusal of English law to recognise a person in terms of their reassigned gender was, in the absence of significant factors in the public interest, a breach of their of rights under Articles 8 and 12 ECHR. The CA held that if, in the light of *Goodwin*, the Chief Constable was bound to treat A as a female, then it was not open to him to discriminate against her on the grounds that she was a transsexual, or to invoke the genuine occupational defence.

House of Lords

The problem with the ECJ decision in *Goodwin* was that it was prospective in nature, not retrospective. A's treatment took place in March 1998. The existing relevant domestic law was *Corbett v Corbett* (1971) P 83 which held that, for the purpose of the law of capacity to marry, the sex of a person was fixed at birth. The decision in *Corbett* was affirmed by the HL in *Bellinger v Bellinger* (2003) UKHL 21 who refused to recognise the validity of a marriage between a man and a male to female trans person. Until the Gender Reassignment Bill currently before Parliament became law, this was the domestic law which should be applied until it was disapproved.

The HL dismissed the appeal. In the main judgment given by Lady Hale, it was held that there were good policy reasons for distinguishing the decision in *Corbett* which had been correctly decided on its facts. That case concerned marriage and should rightly be regarded as a special case. What needed to be considered here was the rights of a trans person under the ETD in March 1998, rather than domestic law or the impact of the *Goodwin* decision. Lady Hale held that the ETD should be

interpreted as requiring that trans people be recognised in their reassigned genders for the purposes of the ETD. She cited from the opinion of Advocate General Tesauro in *P v S and Cornwall County Council* [1996] IRLR 347, saying:

> *'The opinion of Advocate General Tesauro was emphatic that 'transsexuals certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by the directive, having regard also to the above-mentioned recognition of their right to a sexual identity'. The 'right to a sexual identity' referred to is clearly the right to the identity of a man or a woman rather than of some 'third sex'. Equally clearly it is a right to the identity of the sex into which the trans person has changed or is changing…In gender reassignment cases it must be necessary to compare the applicant's treatment with that afforded to a member of the sex to which he or she used to belong…Thus for the purposes of discrimination between men and women in the fields covered by the directive, a trans person is to be regarded as having the sexual identity of the gender to which he or she has been reassigned.'*

Accordingly, for the purposes of carrying out the duties of the post, A was to be recognised as a person in her reassigned female gender, unless as recognised in *P v S*, there were strong public policy reasons to the contrary. The Chief Constable's public policy arguments regarding physical contact during searches were rejected. In doing so, Lady Hale said at paragraph 59:

> *' There are many occupations which involve physical contact with members of the opposite sex. Although these are not usually in the circumstances of compulsion entailed in a section 54 search, they are often not truly voluntary – as for example in hospital wards where there are doctors and nurses of both sexes. And there are some, such as compulsory hospital patients, who have no choice. We generally depend upon the professionalism of the individual, backed up by the ordinary law and complaints mechanisms, to protect people's sensibilities. Those sensibilities may be rational as well as real. For example, it may well be rational to object to being nursed by a heterosexual person of the opposite sex. It may also be rational to object to being nursed by a homosexual person of the same sex. But it would not be rational to object on similar grounds to being nursed by a trans person of the same sex.'*

Implications

The HL ruling ensures that transsexuals who have undergone reassignment are protected from discrimination suffered in their reassigned gender. This case has wide ranging implications for jobs involving physical contact. Employers will no longer be able to rely upon the genuine occupational defence when refusing posts involving physical contact to transsexuals, unless there are strong public policy reasons for doing so. The prospects of such arguments succeeding after the HL decision in this case, are slim. In any event, the Gender Recognition Bill is currently before Parliament. Once implemented, a person's reassigned gender will be valid for all legal purposes unless specific exception is made. It will no longer be a genuine occupational qualification that the job may entail the carrying out of searches. What of the situation involving a person who has not successfully achieved the required transition to the acquired gender? Until the Gender Recognition Bill provides a definition, it will be for ETs to make that judgement in appropriate cases. Readers will be familiar with the CA decision in *Croft v Consignia* (Briefing no 300). That case involved a pre-operative transsexual who was refused access to a female toilet. The CA, in dismissing the claim of sex discrimination held that a judgement needs to be made 'in all the circumstances of the case' when a male to female transsexual becomes a woman.

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Failure to make reasonable adjustments cannot be unreasonable but justifiable

Collins v Royal National Theatre Board Ltd [2004] IRLR 395 EWCA

Implications

A key problem faced by applicants in disability discrimination cases, where justification is in issue, is what level of proof is required by the employer to satisfy the statutory test. The test in respect of discrimination contrary to the DDA s 5(1) has been considered by the CA in *Jones v Post Office* [2001] IRLR 384, which decided that an employer seeking to rely upon the defence of justification in a direct discrimination case, need only demonstrate that the reason was both material and substantial and that what was material and what was substantial was for the employer to decide, the tribunal's only duty being to decide whether the decision fell within the range of reasonable responses to the known facts.

This case concerned the test of justification for discrimination contrary to the DDA s5(2) where it had been established that the employers had failed to make a reasonable adjustment.

The DDA 1995 contains separate sections for justifying the two types of discrimination (see section 5(3) and 5(4)) but the relevant wording of the two sections is identical. The question considered in this case, was whether the tests for justification are therefore necessarily the same in each section?

If they are, then there is an inherent dilemma, because of the difference between direct discrimination and discrimination by a failure to make a reasonable adjustment. As Sedley LJ puts it at the start of his judgement,

> *'Can an employer's failure to make adjustments to accommodate a disabled employee be unreasonable but justified?'*

The CA unanimously decided that it could not, and that the test in the two sections could be different. This decision brings into question whether *Jones v Post Office* was correctly decided. It may not have been.

Facts

Mr Collins (C) was employed as a semi-skilled carpenter's labourer in the National Theatre's (NT) carpentry shop. On 11 February 2000 he lost about a third of his right ring finger when he used his hand to flick away an off cut from a powered bench saw. Whilst his hand healed, it remained painful, and left him clumsy and far slower than previously.

The NT set up a series of controlled tasks to assess C's capability, with particular regard to safe working. These led to what were found by the ET to be 'genuine and appropriate concerns' that C could no longer work efficiently or safely. Medical advisors suggested that surgery had a strong chance of improving his hand, but C refused. Following a further meeting under the theatre's long-term sickness procedure, it was concluded that, without surgery, there was no job to which he could return, and C was dismissed.

The ET found that the dismissal was unfair and discriminatory. They considered that the NT's focus had been on what C could not do, and that it 'could have done significantly more in the direction of seeing what adjustments could be made to accommodate' him and enable him to 'grow back into the job'

Law

Both direct discrimination under section 5(1) DDA 1995 and discrimination by a failure to make a reasonable adjustment under section 5(2) DDA 1995 can, under existing legislation, be justified by an employer,

> *'if, but only if, the reason for the treatment is both material to the circumstances of the particular case and substantial.' (sections 5(3) and (4) DDA 1995).*

In *Jones*, the CA only considered the interpretation of the justification clause in the context of direct discrimination. It specifically did not consider justification of discrimination by a failure to make a reasonable adjustment. The low threshold of the *Jones* test is problematic for applicants, but it poses particular problems in the context of discrimination by a failure to make a reasonable adjustment.

If the arrangements for work, or the physical features of the workplace place the disabled person at a substantial

disadvantage, the employer has a duty, by section 6 DDA,

'to take such steps as it is reasonable in the all the circumstances of the case, for him to take in order to prevent the arrangements or features having that effect.' Section 6(1) DDA 1995.

Court of Appeal

The CA considered the nature of justification in the context of reasonable adjustments. Because the section 6 DDA 1995 test of reasonableness is an objective one, the ET have already considered the employers failure to make the adjustment, and found that it is objectively unreasonable, before considering the question of justification. The CA asked

'If, however, justification under subsection (4) has the same threshold as this court ascribed to subsection (2) in Jones, it will be a sufficient answer if the employer had a reason for the failure which he himself considered, without irrationality but erroneously, to be material and substantial. .....can an employer resurrect as a justification for his non-compliance a ground for not accommodating his disabled employee which the tribunal have already rejected as unreasonable?'

The court decided that this could not be correct and that the only workable construction of section 5(4) DDA 1995, is that:

'...it does not permit justification of a breach of s.6 to be established by reference to factors properly relevant to the establishment of a duty under s.6. In other words, the meaning of the closely similar words in the two adjacent subsections is materially different. In s.5(4), what is material and substantial for the purposes of justifying an established failure to take such steps as are reasonable to redress disadvantage cannot, consistently with the statutory scheme, include elements which have already been, or could already have been, evaluated in establishing that failure. That this departs significantly from the meaning and effect of s.5(3) is fully explained by the fact that justification under s.5(3) starts from a form of discrimination – less favourable treatment – which is established without the need of any evaluative judgment.'

Comment

The impact of this decision will be relatively short lived, since the amended legislation coming into force later this year will remove the defence of justification in failure to make reasonable adjustment cases. Of course, there are many cases already started in which this kind of discrimination is alleged.

The real problem faced by many applicants is the low level of the test in justification for direct disability discrimination. Whilst *Collins* concerns only section 5(4) justification and not 5(3) justification, and did not therefore impact directly upon the decision in *Jones*, Sedley LJ points out that since the question of the meaning and application of section 5(4) was not itself considered by the CA in *Jones*, there may be room for further consideration of the test in direct discrimination in the light of the *Collins* decision.

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Briefing 325

When aggravated damages are appropriate

British Telecommunications v Reid [2004] IRLR 327 EWCA

Facts

Mr Reid (R), a black man of Afro-Caribbean descent, worked on a shift with Mr Edwards (E) and Mr Scott (S). There were a number of acrimonious disputes between them. This culminated on November 5th 2001 when E said threateningly to R ' I will get someone to put you back in your cage.' R then left work in a state of distress. The next day R did not return to work and consequently disciplinary proceedings were taken against him. R then took out grievance proceedings for racial harassment against E. After investigation the disciplinary proceedings were closed and the grievance was not upheld. R was then transferred to another location on the recommendation of the occupational health service. R launched an unsuccessful appeal against the dismissal of his grievance against E. Meanwhile both E and S were promoted.

Employment Tribunal

The ET found that E's remark to R had been discriminatory on grounds of race. They awarded R £6,000 for injury to feelings because he had had 'a very unpleasant time after the 5 November incident and had to suffer the indignity of a disciplinary investigation, which was totally unjustified' and because of the length of time that he had had to wait before his grievance was resolved. In addition, the ET awarded a further £2,000 aggravated damages because E had not been punished but rather had remained in his post and then been promoted. BT appealed against the amount of the award.

Employment Appeal Tribunal

The EAT did not consider that the injury to feelings award was excessive. In relation to the award of aggravated damages they said;

'What the employment tribunal clearly found was a weak approach by BT management in dealing effectively with the transgressor when there was clearly sufficient evidence to indicate race discrimination occurring. In particular, by imposing no sanction whatsoever on Mr Edwards, that clearly exacerbated the situation and added to Mr Reid's distress.'

So they upheld the award.

Court of Appeal

The CA concluded that the ET were correct in considering that an award for injury to feelings could take into account the fact that as a consequence of the racially abusive remark R had been subjected to disciplinary proceedings, transferred to another location and had to wait for a long time for his grievance to be resolved. These were all factors relevant to the assessment of the injury to his feelings.

The CA also upheld the award of aggravated damages saying that the ET were:

'entitled to take account of the fact that the transgressor was, as a matter of fact, not punished and remained in post. The striking fact is that Mr Edwards was promoted even though the charges against him had not been determined. I am far from laying down any principle that an employer cannot promote an employee whilst disciplinary proceedings are hanging over his or her head, but it can, in the particular facts and circumstances of a particular case, be a material factor demonstrating the high handedness of the employer'

Gay Moon
Editor

Narrow interpretation of reasonable adjustments

Archibald v Fife [2004] IRLR 197 CS

Implications

The duty to make reasonable adjustments is the cornerstone of the DDA. It has been the subject of some extremely positive decisions by the courts – in particular, and quite recently, those of *Paul v National Probation Service* (see Briefing no 330), and *Collins v National Theatre Ltd* (see Briefing no 324). Both of these cases took a purposive approach to the legislation and ensured that the duty supported disabled people in relation to applications for and retention in employment.

The case of *Archibald*, however, saw the Scottish Court of Session (CS) take an extremely narrow view of the duty to make adjustments, and one that is likely to have significant ramifications should it not be overturned by the HL.

Firstly, it makes the duty to transfer to another vacancy, which is specifically cited in the DDA as an example of the steps that might be required by the reasonable adjustment duty, redundant.

Secondly the interpretation of 'arrangements', which trigger the duty to make adjustments, was so narrow as to eliminate the effect of the duty where an individual is no longer able to carry their existing duties. This is particularly damaging when a transfer to a new job is one of the areas which the last research on the DDA indicated is one of the most heavily relied upon by applicants (Monitoring the Disability Discrimination Act, Phase 2, Sarah Leverton, IDS, February 2002).

Law

Section.6 of the Act states as follows:

> *'Where (a) any arrangements made by or on behalf of an employer or (b) any physical feature of premises occupied by the employer, place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect'.*

Section 6(2) provides:

> *'subsection (1)(a) applies only in relation to – (a) arrangements for determining to whom employment should be offered (b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded'.*

Section 6(7) provides:

> *'subject to the provisions of this section, nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others'.*

Facts

The appellant, Susan Archibald (A), worked as a road sweeper for Fife Council (FC). However, after some minor surgery she experienced a complication which led to her having a mobility impairment. She was unable to walk without the aid of sticks and thus could no longer continue in her duties as a road sweeper. Her employer considered redeployment. A applied for over 100 alternative posts. As she was on an industrial grade structure, and as the posts for which she applied carried slightly higher salaries than her post as a road sweeper, she had to under go competitive interviews. She failed to obtain any of the alternative jobs. In March 2001, FC dismissed her, having considered that the redeployment procedure had been exhausted, that she had been off for a considerable time, and that she would be unable to return to work as a road sweeper in the foreseeable future.

Employment Tribunal

A brought a claim of disability discrimination before the ET. She claimed that she should not have had to compete for other posts, and that provided that she could show that she could perform the duties and responsibilities of the post, she should have been put into an alternative post. This would amount to a 'reasonable adjustment'.

The ET dismissed the claim. It held that not requiring competitive interviews would be contrary to s.6 (7), which provides that 'nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others'.

Employment Appeal Tribunal

A appealed to the EAT. Although the parties had not disputed that a duty to make adjustments arose in this case, the EAT said otherwise. The EAT dismissed the appeal on the basis that the 'arrangements' made by or on behalf of an employer, comprise either a formal arrangement or informal working practice, and go beyond 'the mere fact that a person in a certain job has become disabled'. It was held that this was not an 'arrangement' made by an employer: the 'arrangement' in this case was the employers' policy of competitive interviewing; and this did not place the applicant at a disadvantage because it applied to everyone.

Court of Session

The CS dismissed A's appeal. It held that the employers had not failed to comply with the duty to make reasonable adjustments. Although three separate opinions were given on the case, their Lordships were in agreement that no duty arose on the part of the employer in this case. In this case, there was nothing that the employer could do to prevent A from being placed at a substantial disadvantage in her job. Lord Macfadyen stated that:

> *'when the applicant became disabled and thus unable to perform the duties of a road sweeper, she was placed at a substantial disadvantage in comparison with persons who are not disabled not by a term, condition or arrangements which the employers had chosen to attach to the job, but by the intrinsic requirement of the job of road sweeper, that the person employed in that job be physically fit to walk'.*

Lords Macfayden and Hamilton both agreed, in addition, that the duty to make reasonable adjustments could not extend to the substitution of a wholly different job, rather than adjustment of the terms, conditions or arrangements of the existing job.

Lord Macfayden also stated that the Code of Practice could not be used to interpret the DDA as it was only intended to give practical guidance. He said 'the Act does not require the court in interpreting s.6 as a matter of law to have regard to the terms or examples found in the code'. Lord Macfayden did observe, though, (obiter) that s.6(7), which refers to there not being a requirement to treat a disabled person more favourably, would not stand in the way of his doing so, as a result of the caveat at the outset of the section – 'subject to this section' .

Comment

A has appealed the decision to the HL, supported by the DRC. In view of the critical issues at stake, the hearing has been expedited. It was heard on 26th and 27th May. It is to be hoped that the appeal will be upheld, in order to ensure that such a vital part of the DDA – as well the positive decisions which the courts have reached on this unique part of the legislation – is not considerably undermined.

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Human Rights and the right to privacy in the ET

XXX v YYY & anor [2004] IRLR 471 EWCA

Facts

X worked as a nanny for Y and Z's son from September 1997 until May 2000 when she resigned. In July 2000 she put in a claim for sex discrimination and constructive dismissal. She alleged that the father, Y, had made unwelcome and improper sexual advances towards her. Y and Z responded that X had been involved in a consensual sexual relationship with Y without the knowledge of Z. Unknown to Y and Z, X had secretly made a video recording in the family kitchen which recorded sexual advances made by X. However, the child, J, was shown in much of the footage.

Whether this video recording could be used in evidence was raised as a preliminary issue.

First Employment Tribunal

The ET concluded that the rights of Y and Z to a private and family life under article 8 of the ECHR had been infringed by this secret filming, however, that interference was justified by the fact that Y and Z's home was also X's place of work. The interference was justified because article 8(2) permits such an interference when it can be shown to be 'necessary in a democratic society in the interests of …the protection of health or morals, or for the protection of the rights and freedoms of others.' Y and Z appealed against this ruling.

First Employment Appeal Tribunal

The EAT allowed the appeal and remitted the case for a re-hearing because the ET had not considered the Convention rights of the child, J.

Second Employment Tribunal

The ET saw the video in private. It concluded that 'publishing' the video by playing it in public at a tribunal hearing would be an infringement of J's Convention rights; however, this interference was justified. They said that:

> *'It cannot be a breach of confidence to show a video on which J happens to feature as an 'incidental' character, any more than it would be to publish videos of a street taken by close circuit television which happened to feature passers-by.'*

They went on to find that the video had no probative value, so it was not necessary for it to be shown to protect X's rights. The ET concluded that the video was wholly consistent with Y's case that they had had a consensual sexual relationship. All the parties appealed against this decision.

Second Employment Appeal Tribunal

The EAT criticised the conclusions of the ET saying that the public showing of the video could be described in the press and this could be seriously damaging to J as he grows older. They said:

> *'A more obvious infringement of his right to respect for his private life is hard to envisage.'*

They concluded that it was quite different from a video recording made by closed circuit television in the street.

The Article 8 rights to privacy of J (as well as Y and Z) had to be balanced against the Article 6 rights to a fair hearing for X. The ET is a 'public authority' under section 6 of the Human Rights Act 1998 (HRA). The public showing of the video would infringe the right of J (as well as possibly Y and Z), this meant that the exception to the Employment Tribunal rules that all hearings had to be in public could be used. This provides that an ET can sit in private for the purpose of hearing evidence which could not be disclosed without 'contravening a prohibition imposed by or by virtue of any enactment…' The public playing of the video would contravene the HRA, therefore the video should be viewed by the ET in private.

The EAT also criticised the ET's conclusion that the video was not relevant to the hearing of the substantial allegations in the case. They noted that the relevance of the video recording was decided on the basis of passages

from the notice of appearance. These do not make it clear when the alleged relationship ceased and the conduct shown in the video may have occurred after it stopped. Until the ET has established this on the basis of the evidence it is impossible for the ET to reach a conclusion about the relevance of the video evidence. The case should therefore be remitted to be reheard by a different ET.

Court of Appeal

The decision on the HRA point was not appealed, although the decision on the relevance of the video evidence was appealed. The CA concluded that the pleadings showed a stark dispute about whether the relationship was consensual; they nowhere suggested that the relationship started in one form and then changed to another. Hence, the CA could not see the relevance of whether the video took place after the date on which the consensual relationship is said to have terminated. Secondly, in relation to the comments on the demeanour and actions of Y, the ET had seen the video and concluded that the video did not assist X's case. There were no grounds for going behind that decision. If X wished to challenge the perception of the ET on the video this should have raised specifically as a ground of appeal and the EAT should have been asked to view the video itself in order to determine this question. Since the video had been ruled to be irrelevant, it was not evidence in the case at all, so no considerations in relation to the HRA arose. The CA added however, that if the case did take a different turn and the ET considered that video was now relevant the CA's judgement here should not prevent the ET from viewing the video in the prescribed way.

Comment

The most significant aspect of this case was dealt with by the EAT, and not considered by the CA, it concerns the inter relationship of the HRA with discrimination law. The right balance between the right to a fair trial (article 6) and the right to a family and private life (article 8) is always going to be important. The EAT's conclusion that an ET should sit in private in order to hear evidence from any person which is likely to consist of 'information which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment' is certainly controversial and runs contrary to the principle that tribunal cases should be open to the public. However, for many harassment claims or discrimination claims by trans people this new development will be welcome.

Gay Moon
Editor

Briefing 328

The Definition of an Employee in discrimination cases

Mingeley v Pennock & Ivory t/a Amber Cars [2004] IRLR 373 EWCA
SE Sheffield CAB v Grayson [2004] IRLR 353 EAT

The RRA, SDA and the DDA protect job applicants, apprentices, employees, former employees, contract workers and those working on a contract personally to execute any work in relation to employment at an establishment in Great Britain. Hence the definition of 'employment' is broader than the Employment Rights Act and is extended to 'a contract personally to execute any work or labour' (RRA s.78(1), SDA s.82(1)). The definition at s.68(1) of the DDA is materially the same. The question of how broad this definition of an employee is has been the subject of debate which both these cases attempt to deal with.

Mingeley v Pennock & Ivory t/a Amber Cars

In this case the CA considered the scope of s.78(1) of the RRA in relation to a contractual arrangement between a taxi driver and a taxi hire firm. It is common practice for taxi hire firms to allocate customers to drivers in return for a regular fee. The question before the CA was whether the taxi driver was employed under 'a contract personally to execute any work…'.

Facts

For a period of four years Mr Mingeley (M), a taxi driver, had a contract with a taxi firm called Amber Cars (AC). Under this contract M used his own car. He had the responsibility of obtaining the requisite licence from the local authority which listed AC as the vehicle operator. M paid a weekly fee of £75 in return for which AC allowed him access to its computer system through which its customers were allocated.

Under the contract M could decide what hours and the number of hours he worked. There was no requirement to give notice for taking holidays, for periods of sickness or for any other absences. He did not have to make any further payments in relation to the fares he collected.

AC did not monitor M's hours or the number of customers he was allocated. However there was a stipulation that he could not allow another person to drive his taxi during the working week unless an additional fee of £75 was paid. He was also required to charge customers according to the firm's scale of charges and wear a uniform whilst on duty. The firm had a code of conduct and could order drivers to refund fares to customers who had made complaints.

Employment Tribunal

When his contract with AC was terminated M brought a race discrimination claim against them. At the ET, the firm argued that the tribunal had no jurisdiction to hear the claim because M had not been 'employed' within the meaning of s.78(1) of the RRA. The tribunal sought to answer the question of whether the agreement between M and the firm was a 'contract to execute any work or labour' and therefore within s.78(1) RRA.

The ET referred to the case of *Mirror Group Newspapers Ltd v Gunning,* [1986] IRLR 27, which dealt with the corresponding provision in the SDA. In that case the CA stated:

> *'…what is contemplated by the legislature in this extended definition is a contract the dominant purpose of which is the execution of personal work or labour'.*

The ET found that it had no jurisdiction to hear M's claim as he had been under no obligation personally to execute any work or labour. The ET held it was not relevant that in reality M had to work to recoup the £75 weekly payment and to earn a living. The key test was a contractual one. The ET held that the fact 'a party is free to work or not work as he wishes, free to take holidays as and when he wishes [without notice] …and free to work whatever hours he wishes…without any sanction of any sort on the part of the 'employer' is inconsistent with there being an obligation to execute work or labour.

Even if M's contract did place him under an obligation to personally execute any work or labour, the ET held that his claim would still fail because this was not its 'dominant purpose'. The tribunal's view was that the dominant purpose of the contract was the provision of an efficient private hire service to customers.

The EAT upheld the tribunal decision stating that the contract between M and the taxi hire firm lacked the mutual obligations required by s.78(1).

Court of Appeal

The CA pointed out that the test set out in *Mirror Group Newspapers v Gunning* was supported by the decisions in *Patterson v Legal Services,* [2004] IRLR 153 and *Kelly and anor v Northern Ireland Housing Executive,* [1998] IRLR 593.

The CA agreed that based on the wording of s.78(1) and established case law, the tribunal was correct in finding that in order to bring himself within the ambit of the s.78, M had to establish that the taxi firm had placed him under an obligation 'personally to execute any work or labour'.

As M's only obligation was to pay £75 per week for access to the firm's computer system, there was no obligation to execute any work. The CA also held that the reach of s.78(1) could not be extended to include M's obligations to execute work for passengers directed to him by the firm. This work was incidental to his contract with the firm.

South East Sheffield CAB v Grayson

This case provides guidance on whether a volunteer worker falls within the definition of 'employee' under s.68(1) of the DDA. Section 68(1) defines employment as:

> *'employment under a contract of service or of apprenticeship or a contract personally to do any work'.*

Facts

Ms Grayson (G) was employed by the Citizens Advice Bureau (CAB) as an outreach worker. After termination of her employment she brought a disability

discrimination claim. The CAB argued that the ET did not have jurisdiction to hear the claim on the basis that the CAB had fewer than 15 employees and was therefore not covered by the DDA by virtue of s.7. (Although the small employer exemption no longer applies after 1 October 2004, this case provides guidance on the status of volunteers in discrimination cases).

It was accepted that that the CAB had only 11 paid employees. However G argued that additional volunteer advisers were 'employees' as defined by s.68(1).

The volunteer advisers were unpaid. However they were engaged under a 'volunteer agreement' and placed on rotas. The volunteer agreement contained clauses relating to hours of work. It stated that 'the usual minimum weekly commitment is for six hours including interviewing and writing up case records. In addition you will need reading time to keep up to date and to attend workers meetings and training sessions. We will be flexible about when you work within the constraints of drawing up the rota.' Apart from removal from the rota there was no other sanction available if a volunteer adviser failed to keep to the rota. The agreement included provisions for the repayment of expenses, imposed a duty of confidentiality, required 'as much notice as possible' to be given if leaving the CAB and indemnified volunteers for negligence. It also specified an expected retirement age of 70.

The ET considered the issue of whether or not the volunteer advisers were 'employees' under the DDA as a preliminary issue.

Employment Tribunal

The ET found that the volunteer advisers were employed under a contract of service. The tribunal pointed out that there was no clause in the volunteer agreement indicating that the parties did not intend to create legal relations. It took into account the fact that if an adviser did not comply with the minimum weekly hours requirement s/he was in danger of losing his/her 'post'. It found that there was an obligation to undertake work in return for payment of expenses, the provision of training, the opportunity to gain experience and the acceptance of legal liability by the CAB for work done by volunteer advisers. In these circumstances the tribunal found that there was a contract between the CAB and volunteer advisers and that this binding agreement was a contract of employment.

Employment Appeal Tribunal

The EAT found that the ET had been wrong in law to find that the volunteer advisers were 'employees' working under a contract of service within the meaning of s.68(1) DDA.

The EAT stated that the ET had erred in finding that the 'usual minimum weekly commitment' provision in the volunteer agreement imposed a commitment on a volunteer to provide time to the CAB. The EAT argued that there was no obligation to work such hours. It also found that the tribunal had erred in finding that the consideration for giving such time was the provision of training, supervision, the acquisition of experience and an indemnity against liability for negligence.

The EAT held that for a volunteer to be an 'employee':

> *'it is necessary to be able to identify an arrangement under which, in exchange for valuable consideration, the volunteer is contractually obliged to render services to or work personally for the employer'.*

The key question, in the EAT's view, was whether the volunteer agreement imposed a contractual obligation on the CAB to provide work and upon the volunteer to do such work. In this case there was no such obligation. The CAB provided training for its volunteers and expected a commitment from them to work for it. However that work was expressed to be voluntary and unpaid. The volunteer agreement merely set out the CAB's expectations and it was open for either party to withdraw at any time with no contractual remedy for either of them.

The EAT also held that the fact that there was a contractual obligation to provide expenses and indemnity against negligence if a volunteer did any work did not amount to a contract of service as it did not impose any obligation to actually do any work.

Comment

The Court's decision in *Mingeley v Pennock and Ivory* confirms established authority on what constitutes 'a contract personally to execute any work or labour' and therefore the definition of an 'employee' under anti-discrimination legislation. An employee must be able to establish that his/her contract placed him/her under an *obligation* to execute such work or labour. Even where a contract places such an obligation on a person, but it is not the 'dominant purpose' of that contract, then that person is not an employee under s.78 RRA, s.82(1)

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SDA or s.68(1) DDA.

The Court expressed reservations about the dominant purpose test in that it is often difficult to ascertain the 'main' purpose of a contract. There is no provision for such a test in s.78 RRA or the corresponding provisions in the SDA or DDA. It narrows down the classes of persons that can pursue claims of unlawful discrimination. However the test has been read into the legislation by case law.

The Court also questioned whether Parliament had intended to exclude from the Act situations similar to that of Mr Mingeley where the reality of the situation was that there was a contractual relationship upon which he was reliant to earn a living. Both the Race Directive (RD) and the Employment Directive (ED) include protection against discrimination in a wide range of situations including 'conditions for access to employment…self-employment or to occupation'. Neither Part II of the RRA (as amended) nor the Employment Equality Regulations 2003 encompass fully either self-employment or occupation. Had the Directives been fully implemented persons such as Mr Mingeley would be protected from unlawful discrimination.

South East Sheffield CAB v Grayson provides guidance on whether a 'volunteer' worker falls within the definition of an 'employee' under the DDA. An agreement which includes a clause about a 'usual minimum weekly commitment' does not impose a contractual obligation on a volunteer to do work. The clause did not state that the volunteer must work those hours. The work expected of the volunteer was expressed to be voluntary and there would be no breach of contract claim if the employee terminated the arrangement without notice. In such circumstances a volunteer is not an 'employee' under anti-discrimination legislation. This position would seem to contradict the RD and ED which require broad protection against discrimination in employment and occupation. It is arguable that this includes 'volunteers' and the lack of their inclusion in legislation may mean that the UK is non-compliant with the directives.

In effect these cases demonstrate that the UK's failure to implement the RD and ED has denied whole classes of persons from being able to pursue unlawful discrimination claims. Given that they make positive contributions to society and the economy, there can be no principled reason for this. It is indicative of the Government's piecemeal approach to discrimination legislation and highlights the need for comprehensive primary legislation.

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Briefing 329

Dress codes: tribunal asks the wrong question when deciding whether it is sex discrimination to require men to wear ties

Department for Work and Pensions v Thompson [2004] IRLR 348 EAT

Facts

Mr Thompson (T) worked for the DWP as an administrative assistant for JobCentre Plus (an agency of DWP). He worked in Stockport and did not have direct contact with members of the public. In April 2002, Jobcentre Plus introduced a new dress code which required all staff to dress 'in a professional and businesslike way'. This meant that men had to wear a collar and tie although this could be varied during the hot weather at the management's discretion. Female staff were asked to 'dress appropriately and to a similar standard'. T refused to comply with the new dress code and later received a formal warning for his failure to comply. He then complied with the dress code but under protest. T complained of sex discrimination contrary to s1 (1) (1) (a) of the SDA.

Employment Tribunal

The ET found that the requirement for male employees to wear a collar and tie was discriminatory. The ET also

found that he had been subjected to two types of detriment. Firstly, by being forced unnecessarily to change the way he dressed, he suffered less favourable treatment as there was no one mandatory piece of clothing that had to be worn by female employees. Secondly, he had been disciplined. The ET awarded him £1,000 in compensation.

Employment Appeal Tribunal

The DWP rejected the ET's reasoning that they had subjected T to a detriment and that they had treated him less favourably. The EAT emphasised that s1 defines discriminatory treatment as 'less favourable treatment' and if treatment is 'different', it is not necessarily less favourable or discriminatory. The EAT held that the ET were wrong in law and the real question to be asked was whether the required level of smartness could only be achieved by requiring men to wear a collar and tie. If that level could be achieved by dressing otherwise, then the mandatory dress code would suggest that men were being treated less favourably than women because women were not forced to wear any particular item of clothing. The issue should be resolved by asking whether an equivalent level of smartness to that required of women could only be achieved in the case of men by requiring them to wear a collar and tie.

The EAT also held that the ET had wrongly interpreted the case of *James v Eastleigh Borough Council*. This case had applied and established a test set out by the HL and decided that 'but for' the fact that T was male, he would not have been required to wear a collar and tie. The correct approach to *James v Eastleigh BC* and the application of it to T's case should have been to apply the test once less favourable treatment had been established. The 'but for' test was not to be used to actually determine if less favourable treatment had occurred, but to look at the reasons for the treatment once less favourable treatment had been established.

The ET also misunderstood the approach taken by Philips LJ in *Smith v Safeway plc* [1996] IRLR 456 where less favourable treatment was determined by looking at the overall context of the dress code. Lord Justice Philips had then stated:

> *'This is not to say that when applying the test, the requirement of one particular item of a code may not itself have the effect that the code treats one sex less favourably than the other. But one has to consider the effect of any such item in the overall context of the code as a whole'.*

The EAT allowed the appeal and set the original decision of the ET aside. The case has been remitted to be heard by a fresh Tribunal.

Comment

This is a case for employers to watch out for, especially those requiring male employees to wear suits or a collar and tie to create an image of 'smartness', as it will still leave them open to potential discrimination claims.

Kavita Bachada
Free Representation Unit

Briefing 330

Looking beyond the Occupational Health Expert's Report

Paul v National Probation Service [2004] IRLR 190 EAT

Facts

Mr Paul (P) had a chronic depressive illness for which he was being treated by a consultant psychiatrist. He had not done a paid job since 1994 although he had undertaken voluntary work and self employed work. In November 2001 he applied for a one day a week post as a community service supervisor with the National Probation Service (NPS). The duties of the post would entail organising and supervising groups of convicted offenders sentenced to undertake community work. At the interview he gave details of his depressive illness. He was offered the job subject to receiving a satisfactory occupational health report.

His occupational health questionnaire was sent to an occupational health adviser and she asked for a report from his GP, but not from his psychiatrist. The report from his GP led her to consider that the post of community service supervisor would be particularly

stressful for him as she was aware of people who had to take sick leave from this post because of its challenging and stressful nature. She considered that it would not be fair on P to put him in such a stressful job. She recommended that he should be offered the stress free job of handyman for which he had also applied and then his progress could be reviewed in three months time to see if the community service supervisor job could be offered to him. The NPS then withdrew the offer of the community service supervisor job. P then put in a claim for disability discrimination to the ET.

Employment Tribunal

The ET decided that the arrangements for deciding to whom to offer a job would discriminate against a disabled person because all job offers were made subject to occupational health clearance. However, they decided that NPS were justified in withdrawing the offer of employment. The ET accepted that there were a number of different ways in which the occupational health advisor could have approached her task of assessing P's health. However, directing themselves in accordance with the CA in *Jones v Post Office* [2001] IRLR 384 the ET concluded that 'we must respect the respondent's opinion if it is not unreasonable and if the reason given is material and substantial'. The ET also noted that the NPS had offered him the job as a handyman and said that if he was able to carry out this role satisfactorily for a three month period they would reconsider their position in relation to the community service supervisor post.

Employment Appeal Tribunal

The EAT ruled that the ET had been wrong to dismiss P's case because they had wrongly identified the employers requirement that all posts should be offered subject to occupational health clearance as the arrangement that placed him at a disadvantage. In many cases having a disability would not adversely affect an occupational health assessment and lead to a refusal of a job. So the existence of a disability does not of itself disadvantage the disabled person who is subject to this requirement.

The substantial disadvantage arose essentially from the occupational health advisor's assessment of the job as being a 'challenging and stressful' one for which P would be unfit. In reaching this conclusion she had considered the information on the questionnaire, the GP's report and P's lengthy absence from paid work. This assessment was part of the arrangements for determining to whom employment should be offered, and it put P at a substantial disadvantage compared to persons who did not have a disability.

It was necessary for the NPS to consider what reasonable steps they could take to prevent P being disadvantaged. Having misidentified the 'arrangement' as being the need for an occupational health assessment they could not see what reasonable adjustments could be made to this requirement apart from abolishing the requirement altogether, which they considered was not justified. What they should have done is to scrutinise the report with care. They should have considered whether they could have got specialist advice from P's consultant on his fitness for the post. They should have discussed the report with P and discussed what steps could be taken in relation to the report's conclusions and they should have considered making adjustments to the job by perhaps changing the period of induction and/or increasing the training and supervision that he received.

Implications

This case shows how the duty to make reasonable adjustments requires more penetrating thought than employers have hitherto brought to bear. The reasoning of the EAT emphasises that the employer has to think beyond the mere report of the occupational health experts as to how difficulties might be overcome. This point is well made in paragraph 5.24 of the Code of Practice that says that merely because the Occupational Health Expert says that the disabled person is not fit to work is not the last word on the matter. The employer has to see what steps can be taken to overcome the difficulties.

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Equal Pay for Part–time Workers

Preston v Wolverhampton Healthcare NHS Trust (No. 3) [2004] IRLR 96 EAT

Issues

This case concerns the claims by about 60,000 people that they had been unlawfully excluded from occupational pension schemes because they were part time workers. Preliminary points in relation to the claims have already been litigated at length. They concerned time limits for bringing claims and how far back from the claim could arrears of pay or pension contributions be made. This decision concerned some new important points in relation to equal pay for part-time workers and also some points on transfer of undertakings. There were six issues of law that were decided by the ET and on appeal to the EAT. The important equality law decisions can be summarised as follows.

Is there a breach of the Equal Pay Act 1970 (EqPA) where pension scheme membership is compulsory for full-time staff but part-time staff are excluded? Answer there is a breach.

Is there a breach of the EqPA where pension scheme membership is compulsory for full-time staff and optional for part-time staff? Answer there is no breach.

Is there a breach of the EqPA where an employer has failed to inform staff of the removal of a barrier to scheme membership? Answer only where there is a policy of failing to inform, which has a disparate effect on women.

Implications

The first point and third points set above are likely to be the most significant. In the first case differential treatment of full time and part time workers in relation to the provision of pension benefits is likely to be discriminatory and therefore to breach Article 141 EC. Most pension schemes will now avoid falling into this trap but where it remains it is important that it is challenged as soon as possible. Where an amendment is made it may not always be brought to the attention of staff that will not always be a breach of the EqEPA unless of course there is disparate treatment in the way that information is provided. Of course, the employee may also have a claim in breach of contract if the contractual provisions in relation to pensions are so obscure that they are almost impossible to follow: *Scally v Southern Health and Social Services Board* [1991] IRLR 522 HL.

The second point is fairly straight forward. If the part time employee has an option whether or not to take the benefit of the scheme but decides not to there is no breach of Article 141 EC or the EqPA. This is really common sense.

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Sexual Orientation Regulations Challenged

R (on the application of Amicus and others) v Secretary of State for Trade and Industry and Christian Action Research Education and others
[2004] IRLR 430 EWHC

Background

The High Court has now decided on the applications made by a number of Trade Unions for the annulment of certain of the Regulations in the Employment Equality (Sexual Orientation) Regulations 2003/1661 ('the Regulations') on the grounds that they are incompatible with the Employment Directive (ED) and Convention Rights. The ED required Member States to prohibit direct, indirect sexual orientation discrimination (and victimisation) in the employment and related fields by December 2nd 2003.The 'recitals' to the ED made it plain the rationale for the Directive is based upon concepts of fundamental human rights and equality (Recitals (1) and (4)).

The ED provides for an exception for 'Occupational Requirements' so that that a difference of treatment which is based on sexual orientation

> *'shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.*

A wider 'genuine occupational requirement' (GOR) exemption exists in relation to religious organizations but only in respect of discrimination on *grounds of religion or belief.*

Additionally, the recitals to the ED acknowledge that some exceptions to the principle of equal treatment might be permissible. In particular, Recital 22 provides that

> *'[t]his Directive is without prejudice to national laws on marital status and the benefits dependent thereon'.*

The Regulations purport to transpose the Directive into domestic law. Because the government transposed the Directive under the European Communities Act 1972 the Regulations must fairly mirror the Directive if they are to be valid.

The Regulations provide for two exceptions which were the subject of major complaint in this case. Firstly, Regulation 7(3) provides for an exception where:

> *'a) the employment is for purposes of an organised religion;*
> *b) the employer applies a requirement related to sexual orientation –*
> *(i) so as to comply with the doctrines of the religion, or*
> *(ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; and*
> *c) either –*
> *(i) the person to whom that requirement is applied does not meet it, or*
> *(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.'*

Regulation 7(3), concerns only employment for purposes of an organized religion.

Secondly, Regulation 25 provides that nothing in the Regulations

> *'shall render unlawful anything which prevents or restricts access to a benefit by reference to marital status'.*

This means that an employer might lawfully provide (as is common) spousal benefits for example but only to married partners. Of course, same sex couples are unable to marry and so will always be deprived of such benefits.

Thirdly, there was a point about Regulation 7(2). For Regulation 7(2) to apply being of a particular sexual orientation must be 'a genuine and determining occupational requirement' and *'it must be proportionate to apply that requirement in the particular case'*. The Claimants contended that Regulation 7(2) did not contain a requirement that any discriminatory requirement meet 'a legitimate objective' as required by the Directive and it was also therefore defective.

Claims

The Claimants claimed that Regulation 7(3) went wider than the permissible GOR exemption in Article 4 ED because it exempted sexual orientation discrimination without any requirement that being of a particular sexual orientation:

- pursues a legitimate objective;
- constitutes a genuine and determining occupational requirement; or
- is legitimate and proportionate.

It was argued that this was inconsistent and allowed for a wider exemption than the ED permitted.

The Claimants were concerned that it would allow for a wide range of religious institutions to discriminate on grounds of sexual orientation against a wide range of workers and, in particular, for faith schools to discriminate against teachers on grounds of sexual orientation.

In addition, the Claimants argued that there was nothing in the substantive (binding) provisions of the ED which allowed for the exemption in Regulation 25 and the provision was discriminatory. This is because same sex couples cannot by law marry and therefore a provision which allows discrimination based on married status is directly or indirectly discriminatory against same sex partners.

The Claimants relied on Article 8 (right to respect for private life) and Article 14 (right to non discrimination in the enjoyment of the Convention rights) to support their arguments that the Regulations were invalid.

A number of religious organizations intervened and argued that the rights of religious organisations were relevant to the arguments in the case and that Regulation 7(3) was lawful and struck an appropriate balance. Their evidence indicated that that a very wide interpretation would be pursued.

Decision

Richards J dismissed the claims. In relation to Regulation 7(3) he concluded that the exception was intended to be 'very narrow' and 'on its proper construction' was 'very narrow'. Firstly, the expression 'for purposes of an organised religion' is *narrower* than 'for purposes of a religious organisation' so that, for example, employment of a teacher in a faith school is not likely to be 'for purposes of an organised religion' so that Regulation 7(3) would not apply to it.

Secondly, the condition in Regulation 7(3)(b)(i) that the requirement must be applied 'so as to comply with the doctrines of the religion' is not to be read as a subjective test but requires that it be shown *objectively* that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion' and '[t]hat is very narrow in scope'.

As to the alternative condition in Regulation 7(3)(ii) that the requirement is applied *'because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'*, this too imposes an *objective* test. This again, according to Richards J, 'is going to be a very far from easy test to satisfy in practice'. The reference to 'a significant number of the religion's followers' rather than to all or most of its followers allows for the fact that there may be differing bodies of opinion within a particular religion's followers and

> *'it is legitimate to allow for a relevant requirement even if the convictions in question are held only by a significant minority of followers'.*

As to Regulation 25, Richards J concluded that although he 'had not found this issue as easy to resolve as at first blush' the Respondents arguments 'concerning the scope of the Directive should prevail. To hold otherwise would be to frustrate the legislative intention as it appears in Recital (22)', and accordingly Regulation 25 'reflects a limitation in the scope of the Directive itself'. Accordingly Regulation 25 was also valid. He also concluded that Regulation 25 was not discriminatory (and thus was not incompatible with Articles 8 and 14) because married partners are not in a comparable position to same sex partners.

Finally, contrary to the Claimants' arguments, Richards J also held that the Government was entitled to include an exemption such as was in Regulation 25 in national legislation, even if discriminatory, so long as it was a justified exemption, rather than requiring justification of such discriminatory provision on a case by case basis. He concluded that the exemption was justified having regard to the costs of extending benefits based on marital status to same sex partners (amongst other things).

Richards J concluded, on Regulation 7(2), that a 'legitimate objective' requirement was implicit in the words 'genuine and determining' and inherent in the test of proportionality in Regulation 7(2). He

concluded that if a requirement for a 'legitimate objective' added anything of substance a court or tribunal could imply such a requirement in pursuance of its obligation to construe the Regulations in a way that is compliant with community law.

Richards J rejected the arguments that the Regulations in question were incompatible with Articles 8 and 14 ECHR.

Implications

The proper construction of Regulation 7(3), according to Richards J, is such that it 'substantially limit[s] the range of circumstances in which the exception could be relied upon.' It does then have very narrow reach.

This clarity, of course, is to be welcomed. As is clear, though the Claimants failed to prove that the Regulation was invalid, they lost only on the basis that the Regulations should be given a very narrow interpretation indeed. As the court makes clear it is unlikely that it adds anything very much of significance to Regulation 7(2) (which provides for the standard GOR applicable throughout employment, whether or not for the purposes of an organised religion). Richards J indicates that it is unlikely to apply to the employment of teachers in faith schools and it only gives effect to Article 4(1) so necessarily cannot go wider than that if it is to be, as has been held, valid.

As to Regulation 25, if the judgement stands it will allow employers to continue to provide pension and other benefits to married couples while excluding (because they are not married) such benefits same sex couples in otherwise equivalent relationships. This would seem not to be permitted by any of the substantive provisions of the ED.

The Claimants (except NATFHE and NUT) are appealing the decision on Regulation 25. They contend that the ED does not permit the exemption. In addition they are contending that whilst the ECtHR has held that unmarried opposite sex couples are not in analogous circumstances to married couples and therefore cannot be proper comparators, the situation of unmarried opposite sex couples is not comparable to gay and lesbian couples because they are entitled to marry.

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Pre-legislative scrutiny of the draft Disability Discrimination Bill

On 3 December 2003 the Government published the Draft Disability Discrimination Bill and referred it to a joint committee for pre-legislative scrutiny by a committee of both Houses of Parliament. The Joint Committee on the Draft Disability Bill has completed this task and the Committee's Report was published on 27 May 2004.

This bill is intended to implement many of the outstanding recommendations of the Disability Rights Task Force. It amends the Disability Discrimination Act 1995 (DDA), building on the amendments that come into force on 1 October 2004. It includes a duty on public authorities to promote disability equality similar to the duty under the RRA. It would prohibit discrimination and require reasonable adjustments by public authorities in carrying out any functions not already within the scope of the DDA, again reflecting provisions in the RRA. The draft bill also covers discrimination by transport services, membership associations and landlords, and extends protection to elected members of local authorities. It would amend the DDA to deem as disabled anyone diagnosed as having HIV, MS or cancer.

The Committee received more than 140 written submissions (two from the DLA) and held 9 public meetings to receive oral evidence from witnesses, including the Minister for Disabled People, the DRC, the Disability Charities Consortium, MIND, the CRE and the ECNI. As the report indicates, many of the witnesses raised issues concerning disability discrimination that went beyond the draft bill; some of these issues feature in the Committee's recommendations.

The report sets out 75 recommendations. Some recommendations directed to the DRC or to the Government are not dependent on new legislation. For example, the Committee recommends that the DRC consider and consult on how the law in future could better reflect the social model of disability; the Government is urged to review access to legal redress under Part 3 of the DDA.

Most of the Committee's recommendations involve amendments to the draft bill, either to add new elements or to delete conditions or exceptions. Some are concerned with process and some with content. In seeking to clarify who should be protected under the DDA, the Committee recommend that all progressive conditions should be covered from the point of diagnosis, that the requirement that mental illnesses be 'clinically well recognised' should be removed and that, for proper transposition of the EC Employment Directive, the DDA should protect people who are associated with a disabled person or perceived to be disabled.

With reference to the proposed duty on public authorities to promote disability equality, the Committee recommend that the bill should apply the duty to a list of public authorities, as in the RRA, rather than to 'public authorities' as defined under the HRA, although this should be kept under review to assess whether, at a later stage, the duty should be applied to bodies based on their public functions. The Committee recommends that public authorities should also be required to have due regard to the need to promote good relations between disabled and non-disabled persons, and that the DRC should have wider powers to enforce compliance.

The Committee recommend that government should issue a non-statutory code of practice on volunteers while also inserting into the bill a power to bring volunteers within the DDA if the non-statutory approach is not effective. There are also recommendations to prohibit discriminatory advertisements in relation to goods and services under Part 3 (as well as employment) and to give employment tribunals powers in DDA cases to order reinstatement or re-engagement.

The Government has reaffirmed its intention to introduce a Disability Discrimination Bill in this Parliament, and has said it will respond to the Committee's report as soon as possible. Baroness Hollis, Parliamentary Under-Secretary of State, told the House of Lords on 29 April that the speed with which the Government would respond 'depends on how substantial, dramatic, surprising or worrying the committee's recommendations may be'.

White Paper on proposed new Commission for Equality and Human Rights

This was published on May 12th 2004. The White Paper sets out the proposed vision, functions, powers and governance arrangements for the new Commission for Equality and Human Rights (CEHR). It is proposed that the CEHR will bring together work on all the different strands of equality (sex, race, disability, religion or belief, sexual orientation and age) and human rights. The Government is seeking responses by **August 6th 2004.**

There will be an open meeting for DLA Members in order to establish a working group to co-ordinate our response. This meeting will be held on June 23rd at 6.30pm at Matrix Chambers, Griffin Building, Gray's Inn, London WC1R 5LN. Please come!

Copies of the report are available from the web at **www.womenandequalityunit.gov.uk** *Additional copies can also be ordered from DTI Publications Orderline, ADMAIL Publications, London SW1W 8YT, telephone no 0870 1502 500.*

New Draft CRE Code of Practice

The CRE is consulting on a revised statutory Code of Practice on Racial Equality in Employment. It is now twenty years since the current statutory code of practice came into force. Since then, there have been a number of important amendments to the *Race Relations Act 1976*, as well as new EU legislation governing racial equality in the workplace.

To reflect these changes, revisions have been made to the new code, including:

- greater accessibility, in terms of language and style;
- an accurate reflection of current legislation and the modern world of work;
- more real-life employment tribunal case studies; and
- detailed guidance on topics such as positive action, ethnic monitoring and racial equality policies.

The code aims to give practical guidance to employers, recruitment agencies, trades unions and individual employees on how to meet their obligations under the Race Relations Act. It will have statutory status; this means that any of its provisions can be referred to in an employment tribunal.

The consultation paper is available on the CRE website. Consultation closes on Friday, 6th August 2004. The DLA will be putting in a response.

http://www.cre.gov.uk/gdpract/employment_code.html

Update on the Ryanair wheelchair case

Louise Curtis from the DRC reports:

The legal challenge to Ryanair's policy of charging for wheelchair use is continuing. Ryanair have appealed to the CA, mainly on factual grounds, it is their view that BAA are the actual service provider and therefore should be liable to pay for the use of temporary wheelchairs at Stansted Airport. To protect Mr Ross's position the DRC have lodged a cross-appeal stating that if the CA find for Ryanair the Judge erred in finding that BAA did not discriminate against Mr Ross.

It is likely that the case will be heard in November this year.

Alabaster v Woolwich Building Society & Secretary of State for Social Security

The ECJ has ruled that a woman who receives a pay rise at any time before the end of her maternity leave must receive the benefit of this in the earnings related part of her maternity pay. Failure to do so is a breach of the equal pay provisions of European law. The ECJ said: '*to deny such an increase to a woman on maternity leave would discriminate against her since, had she not been pregnant, she would have received the pay rise*'.

The ECJ held, any pay rise awarded between the beginning of the reference period and the end of maternity leave must be reflected in the maternity pay. A full report will be included in the next issue of *Briefings*.

Lesbian and Gay Employment Rights

It is disappointing that on the 30th April 2004, Lesbian and Gay Employment Rights (LAGER) ceased operations. This was largely due to a massive cut in core funding which coincided with a tremendous increase in the demand for services. Despite hard and persistent efforts to secure additional core funding, LAGER were unsuccessful.

It is ironic that LAGER should be forced to stop working so soon after the legislation to prohibit discrimination in the workplace on grounds of sexuality has been introduced.

The Management Committee of LAGER are committed to maintaining a presence in the sector, and are looking at the possibility of providing an employment rights organisation for lesbians and gay men in some other form if sufficient funding can be found. **For information, please email info@lageradvice.co.uk**

BOOK REVIEW

Local Authorities and Human Rights edited by Richard Drabble Q.C., James Maurici and Tim Buley, Oxford University Press, 2004. £45.00

The power of the state can have its most direct impact through the small everyday decisions that are made by officials and civil servants working in local authorities across the country. The decisions they make and policies they adopt stretch from planning application for new developments and organising local education provisions through to granting licences for new bars and restaurants. The most vulnerable in society are often the most reliant on the collective provision of public services by local authorities. Their daily lives can include regular contact with benefit workers, housing officers, community workers, social workers, health visitors, probation officers and advice workers. While such contacts can be supportive, the vulnerable lack control and power over these relationships and the judgements and decisions made in the course of them. Can human rights law provide greater a mechanism for accountability of such decisions?

Local Authorities and Human Rights, examines the impact the Human Rights Act cases have had on the actions of local authorities in relation to planning, the environment, compulsory purchases, housing, homelessness, possession proceedings, social services, education, licensing, and taxation.

The overview of the convention rights regarded as the most relevant to local authorities acknowledges that the discrimination provisions of article 14 are of 'very considerable importance' but thereafter article 14 and discrimination are only mentioned in passing. This is not surprising given the weaknesses of article 14 as an ancillary rather than a free standing right which has led Strasbourg judges too often to skip over article 14 claims and move directly to an examination of the substantive right. The subsequent lack of Convention jurisprudence from Strasbourg has made domestic courts equally uncertain in their handling of article 14 especially when compared to the more defined anti-discrimination legislation, on race, sex and disability. The authors briefly cover the attempts by *Brooke* LJ in *Michalak v London Borough of Wandsworth* [2003] 1 WLR 617 to provide a more structured approach to article 14 and highlight see how the courts are grappling with the question of what status constitutes 'other status'. Without clear judicial precedent and jurisprudence the discussion of discrimination in relation to the Article 2 Protocol 1 right to education remains speculative as to what could be its implications in this area.

Most of the focus is on article 6, the right to a fair hearing in determination of civil rights and on article 8, the right to respect for private and family life, home and correspondence. Article 6 plays an important role in putting in place procedural safeguards to ensure that human rights issues are taken into consideration. It has also led to reviews of the nature and independence of local authority bodies that make determinations of civil rights. Given the important role of local authorities in the care of elderly, disabled and other vulnerable persons the introductory coverage of Convention rights would have benefited from the inclusion of article 2 and 3.

In surveying the case law, one of the key underlying questions the authors return to, is whether the HRA has added anything to the existing structure of duties on local authorities. In relation to housing we see that once a local authority provides housing article 8 is engaged. However, the case law in housing suggests that HRA litigation has not led to fundamental or far reaching changes in the ways local authorities are required to discharge their housing functions. Is this because there are no human rights problems to address here or does it reflect weaknesses in the legislation?

The Human Rights Act was meant to generate cultural change in public authorities re-directing them towards a human rights based approach and understanding of issues. The analysis here suggests there are clear limits to a litigation strategy in generating such a human rights culture in local authorities. These limitations are the limitations of the judiciary in its ability to scrutinise the actions and decisions of local authorities on issues of judgement involving the balancing of different rights and interests. The courts using the HRA have forced local authorities, in making their decisions, to take human rights issues into account. For example, the protection of property interests in Protocol 1 has meant that the compensation to be received for a compulsory purchase order must be regarded as material, in principle, in determining the proportionality of expropriation as against private rights.

This book provides a clear overview of the law and where recent case law has taken us. It has shown how human rights considerations do impact on all aspects of local authority work. But at the same time it shows that a duty to comply with the Convention that is left to the courts alone to enforce is limited in its potential for generating the positive human rights culture in public authorities that the HRA envisaged. Here the lessons from discrimination law suggest that a move towards positive duties to promote human rights may be needed.

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Notes and news

Abbreviations

CA	Court of Appeal
CRE	Commission for Racial Equality
CS	Court of Session
DDA	Disability Discrimination Act 1995
DRC	Disability Rights Commission
EAT	Employment Appeal Tribunal
EC	Treaty establishing the European Community
ECNI	Equality Commission for Northern Ireland
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ED	Employment Directive
EOC	Equal Opportunities Commission
EqPA	Equal Pay Act 1970
ERA	Employment Rights Act 1996
ET	Employment Tribunal
ETD	Equal Treatment Directive
GOR	Genuine Occupational Requirement
HC	High Court
HL	House of Lords
HRA	Human Rights Act 1998
PACE	Police and Criminal Evidence Act 1984
RD	Race Directive
RRA	Race Relations Act 1976
RRAA	Race Relations (Amendment) Act 2000
SDA	Sex Discrimination Act 1975
UN	United Nations