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Editorial *The UN and the UK: how international pressure works to improve discrimination laws*

The DLA, with others, made representations to the United Nations' Committee for the Elimination of All Forms of Race Discrimination (CERD) when, in August 2003, it reviewed the UK's 17th periodic report under the Convention (see Notes and News Briefings Vol. 20). These representations led CERD to make two key recommendations. The first was that the UK:

> *… give early consideration to the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities.*

DLA Briefings had been advocating this since our first editorial following 9/11. So the Home Secretary's announcement on July 7th that he does intend to introduce legislation is very welcome. The next stage is the consultation on the form – whether it should cover religion only, or both religion and belief.

The second CERD recommendation was that immigrant religious minorities should enjoy the same level of protection as that which Jews and Sikhs currently enjoy:

> *The Committee notes that the State Party recognizes the intersectionality of race and religious discrimination as illustrated by the prohibitions of discrimination of an ethnic nature against such communities as Jews and Sikhs and recommends that religious discrimination against other immigrant religious minorities be likewise prohibited.*

CERD's recommendation was not limited only to employment, but extended to all areas including access to goods, facilities and services. So again, it is good news that the 2004 Labour Party Conference heard a promise of future protection against discrimination on the grounds of religion and belief in this area. We understand that this will be enacted within the Bill to create the CEHR, which is itself expected in the next Queen's Speech.

But, as always, the good news is mixed with the less good. Rumour has it that the proposal is for a limited extension, if so, that will only serve to complicate the law yet again. We believe that it is vital that the new provisions should, to the greatest possible extent, match those in existing discrimination law. The existing complexity of legal provisions in this field already creates significant difficulties for victims, service providers and advice givers. So the DLA urges the Government to ensure that the new legislation on goods facilities and services should *mirror* existing provisions in respect of employment. This means: the same definition of religion or belief and protection from direct and indirect discrimination, victimisation and harassment, matching the Employment Equality (Religion or Belief) Regulations 2003.

It is also important that any new legislation includes equivalent provision to section 19B of the Race Relations Act 1976, making it *'… unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination'*. We see absolutely no justification for providing less protection in the provision of goods, facilities and services than in the field of employment.

There is another point. Since these provisions are to be included in the CEHR Bill, there is scope to correct an existing anomaly which is the cause of potential injustice. It is inconsistent that British race legislation should provide those claiming discrimination on the grounds of race or ethnic or national origins with a better standard of protection compared to those whose claim rests on their colour or nationality. Apart from the impact on individual cases, this adds to the complexity of the law. As a result the guidance in the CRE's proposed 'Code of Practice on Racial Equality in Employment' is quite unwieldy limiting the ability of organisations and individuals to understand and comply with the law.

When the amendment regulations were passed the Government said there was insufficient Parliamentary time to introduce new consistent legislation. In 'Equality and Diversity: The Way Ahead' (October 2002) it said implementing the EU Race Directive by regulation meant that its provisions could not be applied to colour and nationality, but assured that it would *'rectify any inconsistencies that occur in the amended Race Relations Act… when an opportunity arises.'* Now is the time to implement this promise. The CEHR Bill provides the opportunity to remove this anomaly, so confusing for employers and the general public.

There is another opportunity for consideration of the CERD report as the Joint Parliamentary Committee on Human Rights has now called for evidence to help it review the steps taken by the UK in response to this report, and consider ways in which the UK's obligations under CERD could be more effectively met. For further details see Notes and News on page 33.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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Who decides?

Appropriate Courts for decisions on access to goods, facilities and services

The Discrimination Law Association wishes to give further consideration to the best venue for the hearing of discrimination cases in the fields of goods, facilities and services. In this article Catherine Casserley of the Disability Rights Commission sets out their concerns and suggests a remedy. We hope that this will be the start of a debate within the wider membership in order to reach a conclusion on the best approach.

There is a great deal happening at present in the discrimination field: the extension of non-discrimination provisions in relation to religion and belief and sexual orientation, with age to follow in 2006; the amendments to the Disability Discrimination Act (DDA) employment and occupation provisions, as well as the implementation of the final phase of the goods and services duties in that Act, and the provisions contained within the forthcoming Disability Bill; the proposed goods and services duty in relation to religion and belief, as well as the moves now being made towards a Commission for Equality and Human Rights, and the prospect of a single equality act moving further up the agenda. Yet little concern appears to have been given to how those rights are to be enforced. Effective enforcement is essential if rights are to be realised – and the present system is far from effective, particularly in relation to enforcement of goods facilities and services claims.

The UK Review of Anti-Discrimination Legislation[1] looked in some detail at the enforcement of claims of discrimination. Evidence given to the review by a wide range of groups indicated widespread dissatisfaction with county courts and sheriff courts in relation to all types of discrimination cases. The EOC argued that the rarity of cases brought to county and sheriff courts since 1975 results from 'the formality, cost and protracted nature of the county court process'. RADAR, (Royal Association of Disability and Rehabilitation) argued that county courts were the 'biggest barrier' facing individuals wishing to take up cases under Part 3 of the DDA. The CRE, although having in the past proposed transferring jurisdiction in such cases to the employment tribunal, suggested that time should be allowed for greater experience of bringing Race Relations Act cases and to learn from cases under the wider scope of the Act once the Race Relations (Amendment) Act 2000 had come into force.

Judicial statistics for the number of cases heard under the anti-discrimination statutes are not collected, and so it is difficult to be certain about exactly how many such cases are actually heard by the courts. In relation to disability discrimination claims, there have been a number of research projects considering the implementation and operation of the DDA which can give some indication of numbers of claims and of the experiences of those bringing them. This research reveals that, compared to the thousands of employment cases, there have been very few cases involving the provision of goods and services; approximately 50 cases taken in the first 4.5 years of its operation.[2] This figure has not increased significantly: it is still thought that less than 100 claims have been issued in the county courts.

The reason for this lies, in the view of the Disability Rights Commission,[3] neither in the absence of discrimination by service providers, nor in disabled people's lack of concern about such discrimination. There is evidence that disabled people are widely discriminated against in the provision of services and the readiness of disabled people to challenge discrimination in this area is attested to by the volume of complaints received by the DRC Helpline (the helpline takes over 100,000 calls a year, and at least a third of those relate to discrimination in the provision of goods facilities and services). Part of the explanation lies in the fact that, from DRC casework experience, it is believed that Part 3 cases are more easily resolved without resort to court than employment cases. However, it is also the DRC's experience that a significant proportion of complainants are deterred from going to court by the complexity and cost of proceedings. The Commission's caseworkers have regular experience of applicants who simply cannot

proceed with a case without the commission's support, because of the risk and fear of costs.

The report *'Monitoring the Disability Discrimination Act 1995'*,[4] looked at the claims brought under the Act and included a wide range of interviews with legal and other experts involved in the Act's implementation. Applicants and potential applicants under Part 3 and their advisers all spoke of the difficulties caused by the formality and complexity of the court system; judges' inexperience with the Act and low awareness of discrimination issues; and the lack of accessibility and facilities in courts.

The Royal National Institute of the Blind report, *'The Price of Justice'* (2000),[5] argued that the cost and complexity of bringing proceedings in the county or sheriff court is deterring disabled people who have experienced discrimination from pursuing their claims. Whilst there is no fee for initiating an employment claim in the tribunal, a fee of up to £240 is payable in county and sheriff courts. There is also a much greater risk that an applicant who loses their claim will have to pay the legal expenses of the service provider-which maybe hundreds (or even thousands in complex cases) of pounds. Although legal aid is sometimes, in theory, available, in practice it is very rarely awarded and in any event the financial criteria for the granting of legal aid are so stringent as to make its award a rarity on this ground alone.

Whilst arguments might be made for retaining these cases in the county courts – in particular, that the judiciary need to gain experience in such areas – there is a more pressing problem of the complexity and expense of the process, which is unlikely to change.

An alternative enforcement process was proposed in the Independent Review referred to above – the establishment of 'equality tribunals'. The report of the review stated that non employment cases, whether arising from employment, services or housing, raise common legal themes, and sensitivities in relation to drawing inferences from primary facts which Judges or Sheriffs will have little experience in.

The review acknowledged that there is usually more in common between employment and non employment discrimination cases than between these cases and other county and sheriff courts jurisdictions, whilst recognising that some claims of racial or sex discrimination may be part of a set of claims more appropriately dealt with in the civil courts – an example of this would be a claim of false imprisonment or malicious prosecution against the police where racial discrimination is also alleged. This led the review to propose that while all discrimination claims should commence in the employment tribunals, there should be a power to transfer cases to the county court or sheriff court. Where the tribunal hears a non-employment case, confusion might be avoided be designating it as an 'equality tribunal' for this purpose. The full recommendations of the review in relation to this matter were as follows:

All discrimination cases should be commenced in the employment tribunals.

Where the matter does not relate to employment, the tribunal should be designated as an 'equality tribunal'. The lay members should be called to hear cases having regard to their knowledge and experience of the relevant field. If necessary, additional members should be appointed with relevant knowledge in respect of education and consumer affairs. The president of tribunals or a regional chairman should have the power to transfer a matter to the county court, either on application by a party or on his/her own motion. Equivalent provisions should be made for the transfer of cases to the sheriff court in Scotland.

The criteria for transfer should include:

- whether it would be more convenient or fair for the hearing to be held in that court, having regard to the facts, legal issues, remedies and procured,
- the availability of a judge specialising in this type of claim,
- the facilities available at the tribunal and at the court where the claim is to be dealt with and whether they may be inadequate because of the disabilities of a party or a potential witness, and
- the financial value of the claim and the importance of the claim to the public in general.

Lord Lester's Equality Bill included provision for goods and services claims to be heard in the employment tribunal (designated an equality tribunal), along the lines of the proposals in the Independent Review. The current consultation on the Northern Ireland single Equality Bill proposes such tribunals as one of the options for enforcement. The Northern Ireland Equality Commission supports these proposals, as does the DRC, and many of the disability-specific organisations (such as the Royal National Institute of the Blind). In fact, employment tribunals have had jurisdiction in relation to some of the Part 3 (goods and services) provisions of the

DDA since 1st October this year. In particular, claims in relation to employment businesses, falling under Part 3 of the Act and which were previously heard in the County Court, are now heard in tribunals – thus tribunals will already be dealing with some 'goods and services issues'.

Whatever the outcome of the current discussions on a single equality act in the UK, enforcement should be given the highest priority – and the DLA open meeting on this issue, to be held in the Spring, should assist in the thinking on this issue.

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1. Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti Discrimination Legislation, Hepple et al, 2000
2. Leverton S., (2002) Monitoring the Disability Discrimination Act 1995 (Phase 2), London: Department for Work and Pensions
3. see Disability Equality: Making it Happen – review of the Disability Discrimination Act, DRC, April 2003
4. Meagre N., Doyle B., Evans c., Kersley B., Williams M., O'Regan S and lackey N. (1998) Monitoring the Disability Discrimination Act 1995, London: Department for Education and Employment
5. 'The Price of Justice' RNIB 2000

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The Problems with Pools:
The *Rutherford* litigation and adverse impact

The Court of Appeal in the case of *Rutherford and Bentley v Secretary of State for Trade and Industry* (see *Briefing* no 343) has upheld the judgment of the EAT that the upper age limits for Unfair Dismissal and Redundancy do not have an adverse disparate impact against men within the meaning of Article 141 of the European Treaty. The relevant provisions of the Employment Rights Act 1996 that prevent workers over the age of 65 from claiming those employment rights are not, therefore, contrary to European Law. The judgment will no doubt be a disappointment to workers approaching and above the age of 65 and a relief to their employers.

The *Rutherford* litigation[1] culminating in the CA judgment has also highlighted potential difficulties faced by Applicants when using 'pools' to persuade tribunals of the presence of adverse impact.

The approach to be followed by ETs

The basic approach to using pools is to define the overall pool of men and women by reference to whom the 'provision, criterion or practice' (PCP) applies. This pool is divided into groups by gender and by those who benefit from and those who are disadvantaged by the PCP (the 'advantaged' and 'disadvantaged' groups). Finally a comparison of the four groups is made to see if the difference between the genders is considerable.[2]

Previously, ETs enjoyed a broad margin of discretion when selecting pools for comparison. *Kidd v DRG Ltd* [1984] ICR 405 set the test as similar to a perversity test. However, the CA has more recently stated that a more formulaic approach is to be followed by ETs. Lord Justice Sedley in *Allonby v Accrington and Rossendale College* said:

> *…once the impugned requirement or condition has been defined there is likely to be only one pool which serves to test its effect. I would prefer to characterise the identification of the pools a matter neither of discretion nor of fact-finding but of logic…*[3]

If an ET fails to identify the correct pool, a successful challenge in the EAT is inevitable.

Problem of the 'snapshot' pool and possible solutions

A serious difficulty when using pools is that in certain circumstances the comparisons produced tend to minimise the impact of the PCP. A pool traditionally amounts to a 'snapshot' taken at a specific time. Although appropriate for a 'one-off' requirement such as recruitment, pools may not be appropriate for other PCPs that have been in place for some time. An example of the latter is a requirement to work specific hours that has been in place for perhaps years prior to the

complaint. This can be inappropriate where it has been affecting workers' behaviour for some time prior to the complaint. Individuals who were previously in the workforce but who have left as a result of being unable to comply with the PCP will not appear in the pool or in the disadvantaged group and this will tend to minimise the apparent adverse impact. This was recognised by Mr Justice Lindsay in *Harvest Town Circle v Rutherford*:

> *… these figures throw no real light on the impact of sections 109 and 156 of the Employment Rights Act 1996 as they look only at those who have survived to 65 and have remained in or have taken up employment. All men and women unfairly dismissed or made redundant upon their attaining 65 will not appear in these figures. Those who retired because they knew that they might otherwise be dismissed will not appear in the figures. One is thus attempting to judge the impact of the legislation by looking only at those upon whom it has not, at the time of the statistics, had an impact but upon whom it might later have an effect. One is leaving out those upon whom its effect has, by the same date, perhaps already been crucial.*[4]

This leaves an Applicant in a difficult position. Obtaining such statistics may a difficult or impossible task. The statistics that the EAT suggested ought to be obtained in *Harvest Town Circle* were as follows:

> *…those put at a disadvantage by the primary legislation in issue would consist of or would need to include all those who, on arriving at age 65, would have wished, and would have been physically and mentally able, to continue in employment properly-so-called but who either were then dismissed or made redundant by reason of the relative freedom which the legislation conferred upon their employer or who were so fearful of that freedom being exercised against them that they accepted retirement…*[5]

At the time of the judgment, it was not known whether such statistics were available. Many commentators believed that they were not. Fortunately, the annual Labour Force Survey is sufficiently detailed to allow such statistics to be collated, although it is a time consuming task that requires the assistance of an expert.

The alternative to such a course of action is to seek to persuade an ET to adopt the approach taken in the case of London *Underground v Edwards* [1999] ICR 494. In that case the EAT upheld the ET decision that there was considerable adverse impact despite a marginal difference in figures of 95.2% of women and 100% of men who 'could comply'. Key to the reasoning was the evidence of the comparatively small size of the female group, amounting to 21 out of 2,044 train operators. This indicated that it was difficult and/or unattractive for women to work as train operators and that the percentage of women unable to comply was likely to be a minimum rather than a maximum figure. However, a risk in this approach is that ETs may be unwilling to find adverse impact where the figures are marginal unless there is persuasive evidence.

The CA considered this issue in *Rutherford*. However, the court took the view that:

> *The proportions of men and women who could satisfy the requirement to be under 65 at the relevant time were still very much the same even when the statistics related to the expanded pool … rather than to those with qualifying periods of service.*[6]

Consequently, the court gave limited further consideration to the issue.

Comparison of advantaged or disadvantaged groups?

An issue that was thought settled has been resurrected following the recent CA judgment in *Rutherford*. This is the question of whether the comparison of the groups within the pool requires a comparison of the advantaged group or the disadvantaged group. The CA held in *Rutherford* that the correct comparison was of the advantaged groups.

Prior to amendments to the Sex Discrimination Act 1975 (SDA), the statutory test to be followed required a comparison of the 'qualifiers' (although the *Rutherford* case was brought under Art 141 of the European Treaty rather than the SDA). This was the approach undertaken by domestic courts and tribunals and, according to the CA, by the ECJ in *R v Secretary of State for Employment*, ex parte *Seymour-Smith and another* [1999] ICR 447. However, other ECJ cases appear to have taken a different view of the *Seymour-Smith* judgment.[7]

Although probably a rare occurrence, qualifiers are not necessarily the same as the advantaged group. Arguably, a 'requirement or condition' could be positive (conferring an advantage) or negative (creating a disadvantage). However, following amendments to the SDA, the issue seems to be no longer relevant.

The amendments to the SDA were made because of the UK's obligations under the Burden of Proof

Directive,[8] Article 2 of which requires a comparison of the *disadvantaged* groups. The wording is reflected in the amended SDA.

In many cases, a comparison of the advantaged or disadvantaged groups will achieve the same result. This will be the case where the advantaged and disadvantaged groups are of similar sizes. In these circumstances the comparison is often of the percentage difference between the groups. Using the figures discussed by the ECJ in *Seymour-Smith*, 77.4% of men and 68.9% of women qualified. Little difference is made to the result if these figures are instead expressed as non-qualifiers: 22.6% of men and 31.1% of women.

But if the relative difference between the two groups is massive, then the different possible comparisons become crucial. This could be a PCP such as in the *Rutherford* litigation that applies to the entire workforce where the vast majority of the workforce is in the advantaged group or a PCP that applies to a single employer. The CA gave the example of a PCP that 99.5% of men are advantaged by and that 99% of women are advantaged by and stated that comparison of the disadvantaged groups could produce 'seriously misleading' results:

> *If the focus is … shifted to the proportions of men and women who cannot comply (i.e. 1% of women and 0.5% of men), the result would be that twice as many women as men cannot comply with the requirement. That would not be a sound or sensible basis for holding that the disputed requirement, with which the vast majority of both men and women can comply, had a disparate adverse impact on women.*[9]

Limited reasoning was provided by the CA for this conclusion. Also, a question remains as to the correct approach to figures at the other end of the scale. Consider instead a PCP that disadvantages 99% of men and 99.5% of women. In these circumstances is the correct comparison 1% against 0.5% or 99% against 99.5%?

A further factor to consider is the effect of the Burden of Proof Directive on the reasoning in *Seymour-Smith*. The CA in *Rutherford* relied heavily upon the case of *Seymour-Smith* in the ECJ, although *Seymour-Smith* was decided prior to the implementation of the Burden of Proof Directive in the UK. The CA resolved the apparent difficulty as follows in a passage which many will find uncompelling:

> *The definition of indirect sex discrimination in Article 2 of the Directive focuses on an apparently neutral provision, which has unjustified disadvantages for a substantially higher proportion of the members of one sex. The definition describes when a certain state of affairs (i.e. indirect discrimination) exists: it does not, however, prescribe the methodology for assessing the statistical evidence in order to determine whether or not that state of affairs exists. No methodology has been laid down in the Treaty or in any directive or in national legislation. It has been left to the national courts and tribunals, which hear and assess the evidence and find the facts, to work out from case to case a satisfactory method for assessing whether or not there is disparate adverse impact in the particular case. It is a matter of applying considerations of logic, relevance and common sense to the raw material of the statistical evidence in order to determine the existence or otherwise of the objectionable state of affairs.*[10]

Summary

Pending the outcome of the *Rutherford* litigation, large numbers of cases before the ETs were stayed. This judgment confirms the judgment of the EAT and has the effect that the approximate 300,000 workers over the age of 65 cannot bring a claim for unfair dismissal and redundancy where there is no 'normal retirement age'. In addition, the various judgments during the course of the litigation have served to highlight difficulties faced by Applicants in using pools before the ETs.

An appeal is being considered. It remains to be seen whether the issues will be further considered by higher courts such as the House of Lords or the ECJ.

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1. See also *Rutherford and Bentley v Secretary of State for Trade & Industry* [2002] IRLR 768, *Gidella and others v Wandsworth BC & Another* [2002] 3 CMLR 37 and *Harvest Town Circle Ltd v Rutherford* [2001] IRLR 599, [2002] ICR 163.
2. See, for example, *University of Manchester v Jones* [1993] ICR 474.
3. [2001] IRLR 364 at page 368.
4. [2002] ICR 123 at page 132.
5. At page 135.
6. At paragraph 16.
7. See for example: *Schonheit v Stadt Frankfurt am Main and Becker v Land Hessen* (Cases C-5/02 and C-4/02).
8. 97/80/EC.
9. Paragraph 28.
10. Paragraph 35.

Burden of proof: Barton revisited

In this short practice note addressing the new provisions on the burden of proof Robin Allen QC and Rachel Crasnow consider the cases of *University of Huddersfield v Wolff* [2004] IRLR 534, *Chamberlin Solicitors v Emokpae* [2004] IRLR 592 and *Sinclair Roche & Tenperley v Hurd* [2004] IRLR 763.

Last year in *Barton v Investec Henderson Crossthwaite Securities Ltd* [2003] IRLR 332 (Briefing No 283) the EAT gave key guidance on the proper approach to the burden of proof in direct sex discrimination claims after new provisions created a reversal of the burden of proof. There is no doubt that these guidelines have assisted tribunals to give proper effect to the reversal of the Burden of Proof. To assist recall here they are again:

1) Pursuant to s.63A of the Sex Discrimination Act 1975, it is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents have committed an act of discrimination against the applicant which is unlawful by virtue of Part II or which by virtue of s.41 or 42 SDA is to be treated as having been committed against the applicant. These are referred to below as 'such facts'.
2) If the applicant does not prove such facts he or she will fail.
3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
5) It is important to note the word is 'could'. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.
6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) SDA: see *Hinks v Riva Systems* EAT/501/96.
7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts pursuant to s.56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
8) Where the applicant has proved facts from which inferences could be drawn that the respondents have treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.
9) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.
10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since *'no discrimination whatsoever'* is compatible with the Burden of Proof Directive.
11) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.
12) Since the facts necessary to prove an explanation would normally be in the possession of the

respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Since then, these guidelines have been considered again by the EAT on a number of occasions.

In *Chamberlin Solicitors v Emokpae* [2004] IRLR 592 HHJ McMullen held that *'cogent'* was the right word in guideline 12. That makes it clear that what is needed is persuasive evidence from the employer. When addressing discrimination issues human resource departments should be assisted by this guideline and realise how important the need is for them thoroughly to consider such matters.

However one contentious issue of debate has centred on the word *'whatsoever'* in guideline 10 and another has been the extent to which proper reasoning should identify what it is that the employer has to disprove.

The EAT in *Chamberlin* noted that before the change to the burden of proof brought in following the Burden of Proof Directive and enshrined in section 63A SDA, it had already been decided in *Nagarajan v London Regional Transport* [1999] IRLR 572 that there may be a range of causes contributing to discrimination. There Lord Nicholls had said:

Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.

The EAT went on to state in paragraph 35 of its decision that:

When transposing the Burden of Proof Directive into section 63A of the Sex Discrimination Act, Parliament did not intend to change the forms or the definitions of discrimination. The change in the burden of proof in direct discrimination, at least, is designed to remove some of the obstacles in the way of applicants. In the 1976 Directive the forms are direct and indirect (Article 2), and victimisation (Article 7). In the Act, they include discriminatory practices, instructing and pressurising others to discriminate, aiding discrimination and constructive and vicarious liability for others' discrimination (sections 37-42). Directive 2002/73 amends the 1976 Directive. In it, the forms and definitions include harassment, sexual harassment and instructions to discriminate. It must be transposed into our law by 5 October 2005. In both the earlier Directives where there the word 'discrimination' appears, it means any form of discrimination, direct or indirect, and (by reference to Article 7) victimisation. Thus sex discrimination in all its forms is unlawful.

The EAT commented that if the respondent cannot produce an adequate explanation for facts which the applicant has proved could amount to discrimination, and therefore is not able to offset the burden of showing it did not commit the act of discrimination, it is taken to have *'committed an act of discrimination'*.

It is the definition of this phrase *'committed an act of discrimination'* where the EAT has started to depart from the *Barton* guideline. Following *Nagarajan*, the EAT noted, one commits unlawful discrimination (on grounds of sex) if gender has a significant influence on the decision. If gender is a very small factor amongst a large number of predominant factors, it will not be a reason for the treatment.

Controversially the EAT stated:

The principle of equal treatment in the Equal Treatment Directive applied in the Burden of Proof Directive does not require the eradication altogether of gender in a decision making process, merely its downgrading. In such a case, there will be 'no discrimination whatsoever' because gender had no significant influence on the decision. (Para 37)

But the EAT held in *Chamberlin* that *Barton* was not intending to change the law to require the respondent to show gender had no effect whatsoever in the decision.

The Court decided that guideline (10) in *Barton* should be adjusted to read as follows:

To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was not significantly influenced, as defined in Nagarajan v London Regional Transport [1999] IRLR 572, by grounds of sex.

On this they were partly right and partly wrong. It

335 had not been submitted that the law should be changed on this point in *Barton*. However the word '**whatsoever**' is crucial. It comes from the way in which the Directive is written in French and indeed this burden of proof point is written similarly in other Directives. It is plain that all discrimination is outlawed.

The second key area of debate, as to the way in which Tribunal reasoning should progress, was discussed in *Sinclair Roche & Tenperley v Hurd* [2004] IRLR 763 where the EAT held in paragraph 10:

> *The general structure required for a discrimination finding by an employment tribunal is now clear from the decisions of Barton v Investec Henderson Crossthwaite Securities Ltd [2003] ICR 1205, as supplemented by the decisions in University of Huddersfield v Wolff [2004] IRLR 534, and Chamberlin Solicitors v Emokpae [2004] IRLR 592 (at paragraphs 32 to 40). The tribunal must set out the relevant facts, draw its inferences if appropriate and then conclude that there is a prima facie case of unfavourable treatment by reference to those facts (identifying it), and then look to the respondent for an explanation to rebut the prima facie case. The employment tribunal must plainly make quite clear what the unfavourable treatment is which is prima facie discriminatory, so that the respondent can understand what it is that it has to explain. It then explains, if it can. Such explanations, if any, must be fully considered and:*
>
> *i) It may be, either obviously or after analysis, that there is no explanation.*
>
> *ii) There may be an explanation which only confirms the existence of discrimination.*
>
> *iii) There may be a non-discriminatory explanation which redounds to its discredit – e.g. it always behaves this badly to everyone.*
>
> *iv) There may be a non-discriminatory explanation which is wholly admirable.*
>
> *But the employment tribunal must address the respondent's response.*

This passage seems set to become as important for discrimination lawyers as *Barton*.

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Human Rights prevent sexual orientation discrimination

Ghaidan v Godin Mendoza [2004] 3 WLR 113 HL

Implication for practitioners

In this case the HL analysed the effect of the HRA section 3 interpretive obligation to read domestic legislation, in so far as is possible to do so, compatibly with Articles 8, 14 and Article 1, Protocol 1 of the ECHR where the discrimination alleged was founded upon sexual orientation. The relevant legislation was the provision in the Rent Act 1977 which concerned succession of tenure.

Facts

Mr Mendoza (M) had lived in a stable and permanent homosexual relationship with the protected tenant of a flat of which Mr Ghaidan (G) was the freehold owner. M sought to defend possession proceedings brought by G against him after his partner's death by contending that he should be treated, as a matter of law, as his partner's 'surviving spouse'. The County Court judge made a declaration that M could not succeed to the tenancy of the flat as the 'surviving spouse' within the meaning of paragraph 2 of Schedule 1 to the Rent Act 1977.

Court of Appeal

M appealed to the CA. They concluded that the provision in the Rent Act 1977 which extended the meaning of the word 'spouse' to include persons living together with the original tenant 'as his or her wife or

husband' placed a surviving homosexual partner in a less secure position than the survivor of a heterosexual partnership. The CA therefore concluded that M's rights under Articles 8 and 14 of the ECHR were infringed. The CA further found that, in light of the s.3 HRA interpretive obligation, it was possible to give effect to the offending definition of 'spouse' in a way which was compatible with M's Convention rights by reading it as extending to persons living with the original tenant 'as if they were his or her wife or husband.' M was thus allowed to succeed to the tenancy. G appealed to the HL.

House of Lords

The HL held, Lord Millett dissenting, that a literal interpretation of the definition of spouse contained in the relevant provisions of the Rent Act gave rise to the less favourable treatment of the survivors of homosexual partnerships as compared with their heterosexual counterparts. The HL found that the absence of a rational and fair basis for the differential treatment led to an infringement of the defendant's rights pursuant to Articles 8 and 14 of the Convention and that a compatible construction, in accordance with the Court's s.3 HRA obligation, was indeed possible without the destruction of the fundamental features of the law.

The decision of the HL was both ground-breaking and creative. In re-affirming the decision of the CA, the HL went on to define (and extend) the scope of the s.3 HRA obligation and to make clear their intolerance of unjustifiable discrimination on the basis of sexual orientation.

HRA Section 3

The HL stated that section 3 provides the primary remedy for addressing legislative incompatibility and that Courts *must* give effect to the Parliamentary intention that all legislation must be *read* and *given effect to*, where possible, in a way which is compatible with the Convention. The HL stated that the interpretive obligation:

- Does not depend upon any existing ambiguity in the legislation under scrutiny; even unambiguous legislative provisions could and should be given meanings which rendered them compatible (per Lord Nichols, para. 29);
- May require a court to read in words which change the meaning of enacted legislation so as to achieve compatibility; courts were bound only by what was 'possible' and possibility could require courts to depart from the intention of the enacting Parliament (per Lord Nicholls, para. 32);
- Is unusual, far reaching in character, very compelling and mandatory. It may require reading words in or reading them out but there is no necessity for deference to linguistic niceties and a literalistic approach is entirely inappropriate. Section 3 enables language to be interpreted restrictively or expansively. (Per Lord Nicholls, para. 30-32; per Lord Steyn, para. 41)
- Requires the court to perform the core remedial function provided for by the HRA. As such, recourse to s.4 (declaration of incompatibility) must be an exceptional course of last resort. (per Lord Steyn, para. 50)
- Cannot, however, require courts to adopt a meaning inconsistent with a fundamental feature or underlying thrust of the legislation. That would be to cross the constitutional boundary that s.3 seeks to demarcate and preserve. (per Lord Nicholls, para. 33; per Lord Rodger, para. 111; para. 122)

Applying these principles, the HL concluded that the less favourable treatment of the survivors of long-term homosexual partnerships resulting from the literal reading of the Rent Act provisions could be remedied by altering the definition of 'spouse' to include persons of the same-sex so as to 'read and give effect to' the Defendant's rights under Articles 8 and 14 of the Convention.

ECHR Articles 8 and 14

The HL re-affirmed the principle, now well established in the ECtHR, that sexual orientation – like sex, race or religion – is an unacceptable basis for unjustified differential treatment. It was common ground between the parties that the relevant provisions of the Rent Act which gave rise to the discriminatory treatment fell 'within the ambit of' the Article 8 right to respect for a person's home. In order to decide whether there was a violation of Article 14, therefore, the Court only needed to determine:

a) Whether the persons with whom the Defendant compared himself were in an *analogous situation*; and
b) whether the difference in treatment was objectively justifiable. (Questions 3 and 4 of the test for

infringement of Article 14 set out in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617)

The majority of the HL concluded that there is no rational or fair ground for distinguishing long-term cohabiting homosexual couples from their heterosexual counterparts. The two groups were in an analogous situation as couples who 'want[ed] the stability and permanence which go with sharing a home and a life together, with or without the children who for many go to make a family.' (per Baroness Hale, para 142). The majority found that no legitimate aim could be ascribed to the measure in question. They dismissed the Government's justification of the discriminatory impact of the legislative rule by reference to the 'protection of the traditional family'. Whilst the HL acknowledged that the protection of the traditional family might well be a legitimate aim in certain contexts, they concluded that provisions which afforded unmarried heterosexual survivors the same rights as married heterosexual survivors could hardly be said to be protective of the traditional family or the institution of marriage. Baroness Hale derided the putative aim of the 'protection of the traditional family' as, in actuality, a thinly veiled attempt, not to *encourage* marriage and its traditional role and to *discourage* society from 'sinful' unwedded cohabitation, but to encourage a particular kind of unmarried cohabitation: the heterosexual variant. It was illegitimate, she concluded, to discourage homosexual relationships, particularly where they were stable, responsible and secure.

The majority also rejected the government's argument on justification, namely that the legislation in question should not be held incompatible where legislative reform was immanent (i.e the Civil Partnership Bill). The majority stated that compatibility fell to be assessed when the issue arose for determination and that determination could not be avoided by reference to forthcoming legislation or to the state's discretionary area of judgment.

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Briefing 337

Guidance on 'reasonable adjustments'

Archibald v Fife Council [2004] IRLR 651 HL

Implications for practitioners

This case clarifies the extent of the duty to make reasonable adjustments (s.6 DDA) and the nature of the comparative exercise in a reasonable adjustments claim. It gives essential guidance as to what 'arrangements' can be the subject of adjustments and stresses the importance of the Code of Practice in construing the DDA.

Facts

Mrs Archibald ('A') was employed by the Council ('FC') as a road sweeper. Complications during minor surgery meant that she became almost unable to walk. She could no longer perform her original job but was capable of doing sedentary work. FC arranged training and assessment. The conclusion was that she was 'more than capable of working in an office environment'. FC's redeployment policy required her to submit to competitive interview. She applied for over 100 jobs with no success. It was in the nature of FC's organisation that these jobs were on a slightly higher grade and pay scale than her original job. A considered that she was disadvantaged in competing for these jobs because she was from an industrial, rather than a staff, background. She was eventually dismissed for incapability.

Employment Tribunal

A claimed that she should not be required to compete for the job in question if she could show that she was qualified and suitable for it, but should simply be transferred to it. The ET held that this would amount to 'more favourable treatment' and that this was expressly excluded by s.6 (7) DDA. It dismissed her application and she appealed to the EAT.

Employment Appeal Tribunal

The EAT held that there was nothing in the

arrangements for the sedentary job interviews which put A at a substantial disadvantage because the policy which required competitive interviews applied to everyone. Therefore the duty to make reasonable adjustments was not triggered. A appealed to the Court of Session.

Court of Session

The CS dismissed the appeal for different reasons. It held that 'arrangements' could not include the 'fundamental essence of the job'. The statutory duty is to make reasonable adjustments to the particular job. Since there was nothing FC could do to make it possible for A to continue as a road sweeper, no duty to make reasonable adjustments arose. The CS reached this conclusion despite the fact that s.6 (3) DDA, in giving examples of reasonable adjustments, includes the option of 'transferring him to fill an existing vacancy' (6(3) (c)) and the Code of Practice gives examples of how this ought to work in practice.

House of Lords

The HL allowed A's appeal and remitted the case to the ET.

The HL held that an employer may have to make a reasonable adjustment under s.6 DDA when an employee's disability makes it impossible for her to perform the essential functions of her job. This is consistent with the Code of Practice which must be taken into account in construing the DDA (para 40). The substantial disadvantage she suffered was that she was liable to be dismissed and the contractual term (express or implied) which provided for the dismissal in those circumstances was the relevant 'arrangement'. An employer's arrangements for dividing up the work he needs to have done into different jobs are just as capable of being 'arrangements' within the meaning of the Act as are an employer's arrangements for deciding who gets what job or how much each is paid (Hale at para 62).

Baroness Hale held that, in deciding whether the disabled employee is at a 'substantial disadvantage in comparisons with persons who are not disabled' (s.6 (1) DDA), the comparison is not a 'like for like' comparison as would be required in a (direct discrimination) claim under the SDA or DDA. It is with 'non-disabled people generally'. Lord Rodger's agrees that that comparison need not be with 'fit people who are in exactly the same situation as the disabled person' (para 38). It need not even be with people doing the same job (para 39). However, he considers that the comparison 'must be with some limited class of persons who are not disabled'. The choice of the appropriate comparator depends on 'the situation in which the discrimination is said to have occurred' (para 36). Lord Hope identifies the comparator in this case as 'others in the same employment who were not at risk of being dismissed on the ground that, because of disability, they were unable to do the job they were employed to do' (para 12).

Depending on the circumstances of the case, the employer may be obliged to put the disabled employee in the new post, not merely to give her the opportunity to apply for it. In some cases the duty may require the employer to move her to a post at a (slightly) higher grade: 'a transfer can be upwards as well as sideways or downwards' (Hale at para 66). These are matters of fact for the Tribunal and will depend on the circumstances of the case (para 70). In circumstances such as A's, Baroness Hale comments that:

> *there is no law against discriminating against people with a background in manual work, but it might be reasonable for an employer to have to take that difficulty into account when considering the transfer of a disabled worker who could no longer do that type of work. I only say 'might' because it depends on all the circumstances of the case.*

The HL approved the CA's decision on the correct approach to justification in a reasonable adjustments case in *Collins v National Theatre,* see *Briefing* 324. That justification must be something other than the circumstances which are taken into account for the purposes of deciding whether an adjustment is reasonable within the meaning of s.6 (1) DDA.

In an important passage (para 32) regarding the order in which s.5(1) and s.5(2) issues should be taken by a Tribunal, Lord Rodger comments:

> *so, in the present case, before a tribunal can decide whether the council's less favourable treatment of Mrs Archibald was 'justified' in terms of s.5 (1) and (3), they must first determine whether the council owed her a duty to make adjustments, what the content of any such duty was in the circumstances and what the position would have been if the council had fulfilled any such duty that was incumbent on them.*

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Agency arrangements must not discriminate

Jones v Friends Provident Life Office [2004] IRLR 783 NICA

Implications for practitioners

The scope of the protection of the SDA continues to raise questions for the courts, not least in the area of agency and contract workers. In this case, the Northern Ireland CA takes a robust purposive approach to the equivalent NI provisions, expressing the view that the provisions should be read widely, even if this does mean that a larger number of persons will benefit from them.

The central question in this case was whether Article 12 of the NI provisions protect a worker who is employed, not by the principle, but by another? The answer, say the NICA, depends firstly upon a broad reading of the legislation, and secondly, upon the factual circumstances of the case.

The law

Article 12 of the Sex Discrimination (Northern Ireland) Order states that:

1) *This article applies to any work for a person (the principle) which is available for doing by individuals (Contract Workers) who are employed not by the principle himself but by another person, who supplies them under a contract made with the principle.*
2) *It is unlawful for the principle, in relation to work to which this section applies to discriminate unlawfully against a woman who is a contract worker*
   a) *in the terms in which he allows her to do that work, or*
   b) *By not allowing her to do it or continue to do it or*
   c) *in the way he afford her access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them, or*
   d) *By subjecting her to any other detriment.*

This is identical to section 9(2) of the Sex Discrimination Act 1975.

The question for the Court, on appeal by Friends Provident (FP) was whether this section meant that a woman employed by a company, specifically to do work for the benefit of FP, was able to claim sex discrimination against FP when steps taken by them resulted inevitably in a detriment to her.

Facts

Mr Jones ran his own estate agency business. For part of his work, he traded as Wynchester Investments and in this capacity he applied to FP to become an appointed representative, in order to be approved to sell their products. This was agreed, and he entered into an agreement of tied agency, which restricted him to selling only their products. Mr Jones was appointed an introducer representative, which gave him the right to introduce clients to a company representative. Mrs Jones, his wife, then applied to FP to become a company representative. She was duly appointed by FP from 20 April 1995 as a company representative, and subsequently employed by Mr Jones' estate agency business to sell the various FP products to his clients.

Mrs Jones had her appointment confirmed in writing by FP and she attended a training course with FP.

In March 2000, following poor sales performance, which meant that the estate agency business failed to meet the required business targets, Mrs Jones had her company representative status taken away by FP, and became an introducer representative instead. This meant that she could only introduce business to others, and not sell the products herself. As a result of this, the amount of commission which she was able to make reduced significantly. Mrs Jones claimed that she had been discriminated against on the grounds of her sex when her status was changed, in that her performance was a good as some men working in the region. She sought to rely upon article 12 of SD (NI) O, claiming that she was a contract worker.

Industrial Tribunal

The Industrial Tribunal found that there was a contract between FP and Wynchester Investments, and that Mrs Jones was employed pursuant to that contract to sell FP products. They also found that this was 'work done' for FP. FP appealed on the grounds that the work Mrs Jones did whilst employed by Walter Jones, was not 'work done' for FP within the meaning of Article 12.

Northern Ireland Court of Appeal

The NICA disagreed and upheld the IT's decision.

Firstly, the NICA considered the decision of the CA in *Harrods Ltd v Remmick* [1997] IRLR 583, in which the CA had considered, and rejected, a construction of the article 12 words, that those doing the work, must be under the managerial power or control of the principal. The NICA recognised that such a construction was too narrow, and could deprive people who would otherwise be protected, of a remedy.

What the NICA had to decide, said Carswell LCJ, was the meaning of the words *'supplies them under a contract made with the principal'*. Considering the purpose of the legislation, which is to prevent an employer from escaping his responsibilities under anti discrimination legislation by bringing in workers on sub-contracts, he determined that the words should be given a broad construction. The effect of this was to provide the statutory protection of anti discrimination legislation to a wider range of workers.

The next question for the court was how broad that definition should be. Carswell LCJ stated:

> *the purpose of article 12 is to ensure that persons who are employed to perform work for someone other than their nominal employers receive the protection of the legislation forbidding discrimination by employers. It is implicit in the philosophy underlying the provisions that the principal be in a position to discriminate against the contract worker. The principal must therefore be in a position to influence or control the conditions under which the employee works. It is also inherent in the concept of supplying workers under a contract that it is contemplated by the employer and the principal that the former will provide the services of employees in the course of performance of the contract. It is in my view necessary for both these conditions to be fulfilled to bring a case within article 12.*

Since the contract that FP entered into with Mr Jones was one to sell products, and since Mr Jones himself could not sell them, the contract could only be fulfilled by Mr Jones employing someone else to do the actual selling. It was contemplated that Mrs Jones would be employed to do the work, and Mrs Jones was trained and authorised by FP. Carswell LCJ considered that the both conditions were thus satisfied in this case.

Nicholson LJ agreed with the need for a broad construction of article 12, but expressed his reluctance to define the limits to which it should be allowed to extend. It was preferable, he said, that cases covered by the article should be developed incrementally and be determined by the facts of each case.

Comment

This is an extremely helpful and realistic judgement. If the legislative purpose of this section is to prevent employers from escaping their liabilities by using contracting out and agency staff, it must be right that the provisions are given a broad construction.

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Briefing 339

Constructive dismissal under the ERA and the DDA – the correct approach to the implied term of trust and confidence – time limits in constructive dismissal cases under the discrimination legislation – sick pay under the DDA

Nottinghamshire County Council v Gaynor Meikle [2004] IRLR 703 EWCA

Facts

Mrs. Meikle (M) is an experienced teacher who became partially-sighted in around 1993. She worked at a school in Nottinghamshire. In 1999 she applied to the ET alleging that Nottinghamshire County Council (NCC) had failed to make adjustments to her workplace and conditions so as to accommodate her disability and that it had treated her less favourably for reasons relating to her disability. In the second originating application, presented in 2000, she made

further allegations of discrimination and claimed that she had been constructively dismissed.

The original adjustments M required were relatively simple and inexpensive. The Disability Service had agreed to meet the cost of the physical adjustments. M worked on without the adjustments, after they had been agreed in principle by NCC, for a further eight months. She then went off sick for nearly a year, because of the strain on her eyes, during which time these issues were still not resolved. She then resigned in 2000 from her full-time teaching post.

Employment Tribunal

The ET found that M had been subjected to unlawful discrimination (less favourable treatment and failure to make reasonable adjustments), contrary to the DDA, under eleven separate heads of complaint. These included:

- failing to arrange for documents to be enlarged. She had been asking for enlarged documents since 1993;
- failing to make any adjustments to the timetable to accommodate her needs;
- failing to allow her a small amount of additional 'non-contact' time, i.e non-teaching time for marking and administrative duties;
- failing to provide adequate lighting in the classroom in which Mrs Meikle taught. The ET found that M worked in lighting conditions which were substantially less than those required by law for a sighted person. Moreover, when new lights were eventually installed after some eighteen months they were designed by someone who did not even know that M was sight-disabled and thought M was a wheelchair user;
- failing to install an electrical socket which would have enabled M to use her CCTV in her classroom;
- suspending her as 'unfit to teach' without any rational basis.

Despite these findings in her favour, the ET went on to find:

- that M was not constructively dismissed under the Employment Rights Act 1996 (ERA);
- that, consequently, she was not wrongfully dismissed;
- the her claim under the DDA for the failure to pay her full pay during her sickness absence failed; and that 'dismissal' under the DDA did not include the concept of constructive dismissal.

Employment Appeal Tribunal

M appealed to the EAT against these findings. The EAT reversed the ET on all these points and substituted findings that she had been constructively and wrongfully dismissed and that, by reducing her pay when she was on long-term sickness absence, there had been less favourable treatment and a failure to make reasonable adjustments; further, that 'dismissal' in the DDA included constructive dismissal.

Court of Appeal

NCC appealed to the CA to re-instate the original decision of the ET on these points. The CA dismissed NCC's appeal on all grounds.

Six advances or clarifications in the law have emerged in the judgment which, because NCC has not sought to appeal further, is now settled for the foreseeable future.

Constructive dismissal under the ERA: the repudiatory conduct need only be part of the reason for the employee's resignation

NCC had argued that M resigned because it would not agree to pay her compensation and would not require the Deputy Head to undergo disability training. There was no contractual obligation on NCC to do either. It argued that her resignation was in response to their failure to agree to those conditions, rather than in response to NCC's discrimination and thus the resignation was not in response to the breach. The necessary causal connection was not established for it to amount to a constructive dismissal.

The CA agreed with the EAT that she resigned in response *both* to the failure to agree those conditions, which did not amount to a repudiatory breach, *and* in response to the ongoing discrimination, in particular the failure to guarantee enlargement of documents and non-contact time, which did.

The CA held that the fact that there were factors other than the repudiatory breach which caused her to resign did not matter. It was enough that she resigned in response 'at least in part' to fundamental breaches of contract.

Previous case law (e.g. *Jones v Sirl (Furnishers) Limited* [1977] IRLR 493) suggested than an employee had to show that the repudiatory breach was the 'effective cause' of her resignation. This is expressly overruled:

the proper approach … once a repudiation of the contract has been established, is to ask whether the employee has accepted that repudiation by treating the contact of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by NCC (para 33).

Affirming the objective test for whether there has been a breach of the implied term of trust and confidence

There is a tendency in Tribunals hearing constructive dismissal claims, where the employee resigns in response to a breach of the implied term of trust and confidence, to ask whether an employee 'has lost trust' in the employer and to assume that if the employee has not 'lost trust' there can be no breach of the term.

This is emphatically rejected by the CA. The CA re-states the principle in the HL case of *Malik and Mahmud v BCCI* [1998] AC 20 that the test is an objective test. Proof of a subjective loss of confidence in the employer on the part of the employee is not an essential element of the breach. The correct question is: did the employer conduct himself in a manner which was likely to destroy or seriously damage the relationship of trust and confidence. The focus is on the conduct of the employer and what it might (not what it did) give rise to.

The Tribunal went wrong in saying that the term cannot be broken unless the employee's trust and confidence has in fact been undermined. (para 29).

'Dismissal' in s.4 (2) (d) DDA must be read to include 'constructive dismissal'

A dismissal arises when an employer tells an employee to leave his employment. 'Constructive dismissal' arises when the employer is responsible for a state of affairs in response to which the employee is entitled to resign (this must include a breach of contract by the employer so serious as to indicate that he no longer intends to be bound by the contract).

Under s.4 (2) (d) DDA an employer discriminates against an employee by 'dismissing him' for a disability-related reason in circumstances which are not justified. Does 'dismissing' include 'constructively dismissing'? There is a contrast between the DDA and the SDA, which specifically includes constructive dismissal, which has caused some to think that it does not. The CA has now resolved this long-running debate in favour of 'dismissal' including constructive dismissal. The DDA has now, of course, been amended to clarify this.

Where there is a discriminatory constructive dismissal time runs from the termination of employment, not from the breach of contract or the acts of discrimination in response to which the employee resign

Where there is an act or acts of discrimination in response to which an employee resigns, claiming that the constructive dismissal is, therefore, also an act of discrimination, does time run for the purposes of the discrimination claim from the original acts or from the termination?

There was conflicting authority on this point, including dicta in the CA in *Cast v Croydon College* [1998] ICR 500 at p515, which suggested that time must run from the original acts, otherwise an employee would have a 'second bite of the cherry' in terms of time limits. The CA in *Meikle* reject that approach. Time runs from the termination of the contract not the original acts of discrimination.

The effect of this – and this applies to all the discrimination Acts, not just the DDA – is that, where an employee is relying on a series of discriminatory acts in response to which she resigned, provided the discrimination claim is in time by reference to the dismissal, the original acts will all have to be considered by the ET, even if some or all of them are, in themselves, out of time. The employee will still have to ensure that she does not delay too long between the earlier acts and resigning, although she may be able to rely on the 'last straw' principle.

This is likely to have a substantial impact on the way that Tribunals consider limitation questions in discrimination cases where there is a constructive dismissal.

An employer is obliged to consider making adjustments to sick pay – it is not excluded because of s.6 (11) DDA

The CA confirmed that s.6(11) DDA, which disapplies

339 the duty to make reasonable adjustments in relation to benefits under an occupational pension scheme and other benefits including those relating to 'accident, injury, sickness or invalidity' relates to benefits under insurance schemes, not ordinary sick pay paid by an employer. The CA agreed with the EAT that this section is linked to ss.17 and 18 DDA which re-imposes liability for insurance schemes, such as permanent health insurance, on the insurer, rather than the employer. S.17 DDA, however, has now been repealed.

The effect of this is that, where a disabled employee is on long-term sick leave and at risk of a cut in pay, employers will have to consider whether it would be a reasonable adjustment to maintain full pay and will have to provide cogent reasons for not doing so.

The effect of s.5 (5) DDA: in deciding whether less favourable treatment for a disability-related reason is justified Tribunals must consider whether, if all the reasonable adjustments had been made, the problem would have been avoided in the first place

In this case, M argued that the less favourable treatment of reducing her pay because of her long-term absence could not be justified because, if NCC had made the reasonable adjustments she needed, she would not have been absent in the first place.

The CA agreed and confirmed that the proper approach under s.5(5) DDA was to ask whether, if all the reasonable adjustments had been made, M would have been absent and thereby liable to the reduction in pay (para 66). The CA agreed with the EAT that NCC had failed to establish that and, therefore, the reduction of pay was less favourable treatment and unjustified.

This principle applies not only to sick pay but to any less favourable treatment where it can be argued that, if the employer had made the necessary reasonable adjustments, the employee would not have been vulnerable to the less favourable treatment, whether it is dismissal, suspension or non-promotion.

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Tribunals can consider the wider picture in discrimination cases

Rihal v London Borough of Ealing [2004] IRLR 642 EWCA

Implication for practitioners

The reality of race discrimination at work for many victims is that their career progression is affected and they are prevented from advancing in their chosen profession. Whilst white colleagues with similar experience and no better qualifications are promoted, black and Asian employees can often find themselves left stagnating in the same position. The difficulty in proving discrimination is often that, looked at separately, each failure to promote may seem to have reasonable and non discriminatory explanations. Additionally, a discriminatory act by one manager may simply be perpetuated by another, who inherits a situation, but takes no steps to correct the injustice. Often it is only when looked at cumulatively that the pattern of discrimination becomes clear.

In *Rihal v London Borough of Ealing*, the CA have considered the career progression of one such man, and found that the ET made no error of law in considering, as they did, the entire span of decisions taken across several years by different managers, and determining that racism had prevented him, an Asian man with a pronounced accent, from being promoted.

Facts

Mr Rihal (R) is an Asian Sikh. He worked for the London Borough of Ealing (LBE) as a surveyor in the housing department for many years.

R claimed that he was discriminated against on the grounds of his race between 1996 and 1999. During

this period the head of one of the planned maintenance teams had retired, and not been replaced. R, who was well qualified, was not appointed to act up as would have been logical. Instead he was given additional responsibilities jointly with a more junior member of staff.

Subsequently the manager who made this decision retired and was replaced by a Mr Foxhall (F), who continued the arrangements. In 1998 there was reorganisation of the department, and various new posts were created. To decide who got which posts, a process of 'assimilation' was followed, in which employees suitability for various positions was assessed on a point system. R applied for two particular posts, but got neither of them. One was not filled and he then applied for it by competitive interview. He was unsuccessful and a white man was appointed. R submitted a grievance about the way that he had been treated over several years, as well as during the reorganisation, but this was not dealt with for over 14 months. R filed a claim for race discrimination.

Employment Tribunal

R relied upon six incidents, starting with the failure to appoint him to act up in 1996, and ending with the failure to deal with his grievance.

The ET found in R's favour on all heads. They considered carefully what had happened at each stage of R's career, every time an opportunity for advancement or promotion arose. They considered his qualifications, his experience, and the reasons given by LBE for the choices made. They also considered the assimilation process in detail, and looked at statistics of staff levels and staff progression. They concluded that on every occasion the decisions were made to the disadvantage of R, this happened because no one at LBE could see a turban wearing Sikh in the more senior position, despite his experience and qualifications. They concluded that there was in effect a 'glass ceiling'.

Employment Appeal Tribunal

The EAT upheld the ET decision and dismissed LBE's appeal. LBE appealed to the CA. They argued that the ET had placed too great an emphasis on the general picture and had made insufficient findings of fact about the individual instances complained of. Further, the ET had drawn upon matters which were not the subject of complaint in drawing their conclusions.

Court of Appeal

The CA rejected the suggestions that a proper approach to the law had not been followed. They approved the approach set out in *Qureshi v Victoria University of Manchester* [2001] ICR 863, which requires a tribunal to take account of all the primary facts when determining whether the reason for treatment is discriminatory. Further, ETs should avoid a fragmented approach to the evidence, as this can diminish the eloquence of the cumulative effect of the primary facts. The CA pointed out that the statutory test cannot be divided rigidly into two parts, and that the questions of less favourable treatment and the question of why treatment has taken place may often become entwined (See Keene LJ at paras 26-29).

The ET were entitled to consider the wider picture in determining whether racial factors were involved in the treatment of R and to use its conclusions on that to inform its assessment of whether in respect of each of the complaints he had been less favourably treated than a white employee in the department in similar circumstances would have been.

The CA then considered LBE's points. They specifically rejected an argument that a local authority could not be held to have discriminated on the grounds of race when a new manager simply perpetuated a system put in place by a person who has retired. Here, R complained that he had not been appointed to act up when a colleague had retired. Instead, the senior manager, Ms Herman, had divided the role between R and a more junior colleague. LBE did not challenge that this decision was discriminatory, but argued that F, who took over when Ms Herman retired, could not be found to be discriminatory, simply because he allowed the situation to continue. The CA disagreed:

> *if an employer institutes an arrangement which is racially discriminatory, that arrangement does not cease to be so merely because the manager in charge changes….The attempt by Ealing to divide this period up …is artificial and ignores the fact that it was Ealing against whom this complaint was made, not Mr Foxhall.* see Keene LJ at para 34

The CA then considered the 'assimilation' exercise. Had R been treated less favourably by being given lower marks, even if there was no finding that he would have assimilated to the post had the marking been fair? The CA concluded that less favourable treatment can arise from unfair marking alone. The question is

340 whether R was given a lower score in the assimilation exercise than a white person would have been given, and whether that is on racial grounds. This is enough for Section 4(2) b RRA 1976 to be satisfied. It uses the words:

> ***in the way*** *he affords him access to opportunities for promotion, transfer or training.*

The CA also rejected an argument that a finding by an ET that a person was honest and honourable meant that they could not have committed an act of discrimination. Here the ET had made findings of fact that F could not see R, a turban wearing Sikh with a pronounced accent in an 'ambassadorial' role for LBE. The CA considered this was a reasonable and appropriate finding noting that few employers admit discrimination even to themselves, discrimination is often not ill intentioned but on the basis that person would 'not fit in'.

Was the ET entitled to find that R had been discriminated against in interview, even where the same questions were asked of each candidate, and the other candidate scored higher? The ET found that the questions asked played to the strengths of the successful candidate and that R was not given a chance to shine. The ET were entitled to take into account the circumstances in which R was not allowed to act up, and was further entitled to take into account their own findings that there was 'glass ceiling' in operation in respect of non white employees, when considering this question.

Finally, it is important to note that this was a case against the Local Authority employer, and not individuals. The LBE did not seek to raise a defence under section 32 RRA 1976, and thus:

> *faced an enhanced risk that their acts of discrimination would be found to have contained an element of discrimination.* Sedley LJ para 50.

Comment

The underlying discrimination in this case was of central importance, and the ET were able to make findings of fact about the culture, because of the existence of impressive staff progression charts, produced by R and the damning statistics which showed a clear lack of progression of Asian and black staff within the housing department. These figures put the ET on notice that there may be a culture of white elitism within the department.

> *Such a culture as the tribunal will have been aware, can exercise a potent influence on individual decision makers, of which they themselves may be aware faintly or not at all.* Sedley LJ at para 53.

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341 # Briefing 341

Less favourable treatment of part time workers

Matthews and ors v Kent and Medway Towns Fire Authority and ors
[2004] IRLR 697 EWCA

Facts

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

Law

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

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

Reg 2(4) sets out that:

> *a full time worker is a comparable full time worker in relation to a part time worker if, at the time when the*

treatment that is alleged to be less favourable to the part time worker takes place –

a) both workers are-

(i) employed by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience…

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

a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship…

f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.

Employment Tribunal

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

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

Employment Appeal Tribunal

The EAT found that the ET had been right to conclude that the part time firemen were not employed under the 'same type of contract' as the full time firemen within the terms of reg 2. They considered what other types of contract could fall within s2 (3) (f) if this type of contract did not and concluded that there were none and thus the clause would be redundant. The EAT concluded that in this case there was ample material from which the ET could conclude that the two different sorts of firemen were employed under different types of contract and that it was reasonable for the employers to treat them differently. That evidence related to the full time firemen doing more community safety work, and in some cases having better qualifications.

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

However, the ET were correct to conclude that the part time firemen were treated less favourably in respect of pension benefits and in some cases sick pay and pay for additional duties. They were also correct to conclude that each term in the respective contracts should be compared rather than assessing the overall favourableness of the employment packages. They were also entitled to use the 'but for' test for causation and correct in concluding that this less favourable treatment was 'on the ground that the worker is a part time worker'. The ET was correct to conclude, in the alternative, that the employers had not shown that this less favourable treatment was objectively justified.

Court of Appeal

The CA held that the ET and the EAT had been wrong to conclude that the part time workers were not employed under the *'same type of contract'* as the full time firemen within the terms of reg 2. Both categories of firemen fell within the terms of reg 2(3)(a), one that is *'neither for a fixed term nor a contract of apprenticeship'*. The purpose of the category in reg 2(3)(f) is to provide a residuary category of 'other' descriptions of worker who, for whatever reason, fall outside categories (a) – (e). They held that:

to enable an employer to remove an employee from one of (a) to (e) because it is reasonable to treat him differently on the ground that alleged comparators have a different type of contract would severely limit the scope of the protection provided by the Regulations.

However, the ET and the EAT were correct to conclude that the part time firemen and the full time firemen did not do the *'same or broadly similar work'*. The ET had been entitled to find that in addition to fire-fighting and responding to other emergencies there are *'measurable additional job functions'* carried out by full time firemen which are not carried out by

341 part time firemen. These include educational, preventative and administrative tasks. This entitled the ET to consider that they did not do the *'same or broadly similar work'* even before account was taken of the differences in their qualifications and skills, entry standards, training and promotion prospects.

Comment

It is depressing that the Courts are continuing to give a very narrow interpretation to the Part Time Workers Regulations one which appears to undermine the underlying purpose of the regulations. So long as employers give their full time workers *'measurable additional job functions'* compared to their part time workers they will not need to grant equal treatment to their part time workers.

Gay Moon
Editor

342 Briefing 342

Duty to alleged perpetrator in sexual harassment cases

Scott v Commissioners of Inland Revenue [2004] IRLR 713 EWCA

Implications for practitioners

Sexual harassment in the workplace is a serious matter and always requires addressing where there is a complaint about it, however, this does not mean that it has to become the subject of 'state trial' every time it occurs. In a case involving allegations of sexual harassment which the ET held were unfounded and established on the basis of wholly inadequate evidence, the CA found the ET were right to make separate awards for injury to feelings for unlawful discrimination and aggravated damages. Aggravated damages should not be aggregated and treated as part of the damages for injury to feelings.

Where the respondent had changed its policy on retirement age from 60 to 65 during the course of proceedings but had failed to disclose this, the Claimant's application to amend his schedule of loss to include earnings from the employers to the age of 65 should be considered by the ET.

Facts

Miss Fitch (F), a colleague, had complained that Mr Scott's (S) conduct towards her amounted to sexual harassment. The ET found that the Commissioners of Inland Revenue (CIR) without investigation took it more seriously than any reasonable person would have done. S's denials were ignored. The CIR settled the claim brought against it by F for £5,000 and publicised this amongst its staff at a time that S was going through the internal appeal process. From mid 1999 onwards S suffered increasing stress and clinical depression. The CIR failed to address his concerns and finally decided to retire him on medical grounds despite a letter from his GP pointing out that it was his perceived unfair treatment that was rendering him unfit. The ET found that S had been unfairly and wrongfully dismissed and discriminated against on grounds of both sex and disability. Additionally S's dismissal amounted to victimisation for protesting about the unfairness of his treatment.

Court of Appeal

The CA agreed with the EAT that £15,000 injury to feelings was not untenably low and upheld the award of £5,000 for aggravated damages. The award of £15,000 for psychiatric damage was remitted back to the ET for consideration on the grounds that the award was based on the ET's reliance on an overly optimistic prognosis which they had mistakenly attributed to the psychiatric expert and was therefore too low.

The CA held that the CIR had made an error of judgment when it failed to disclose details of a change in its retirement policy that enabled employees to work beyond the normal retirement age of 60 up to 65. This change was relevant to the calculation of S's future loss that flowed from his dismissal and the matter would be referred back to the ET for consideration along with issue of psychiatric injury and costs.

The CA also took the opportunity to reiterate that the ET is ordinarily a cost free jurisdiction and they did

not wish to see that principle eroded. However, costs may be awarded in discrimination cases against a respondent who spitefully or unfairly used the ET proceedings to pursue an unjust accusation that led to an act of discrimination in the first place. In deciding the question of whether to award costs on a 'misconceived' basis the ET should consider whether the respondent's case was doomed to failure and, if so, from what point of time.

Comment

This decision emphasises the separate nature of claims for injury to feelings, aggravated damages and psychiatric illness and in which cases the award of all three may be appropriate. It also gives guidance for the sensitive handling of internal sexual harassment complaints from the perspective of both complainant and alleged perpetrator.

The case warns against the failure to comply with the ongoing duty of disclosure and also reiterates the wide discretion afforded to ET's regarding the conduct of proceedings before them and in particular the power to allow amendments before at and even after the hearing of claim.

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Briefing 343

Court of Appeal rejects Tribunal rights for the over 65s

Rutherford and Bentley v Secretary of State for Trade and Industry (no 2) [2004] IRLR 892 EWCA

The CA has handed down latest judgment in the long-running saga of Rutherford (previously *Rutherford v Harvest Town Circle*), a decision which will come as bad news for workers over the age of 65. Pending any successful appeal to the HL, the effect of this decision will be to leave older workers with no legal protection for unfair dismissal until long-awaited age discrimination legislation finally comes into force in 2006.

Background

The entitlement to claim unfair dismissal and a redundancy payment has always been subject to age restrictions. The provisions in the Employment Rights Act 1996 (ERA) exclude employees aged over 65 from making such claims.

Messrs Rutherford and Bentley brought claims challenging this jurisdictional restriction. Mr. Rutherford had been dismissed at 67, because of his being over 65. Mr. Bentley had lost his job when his employers went into receivership but he received no redundancy payment, as he was 73. Their challenge was not on the basis that the default bar discriminated against them on grounds of their **age**, but on grounds of their **sex**, albeit indirectly. The argument was that provisions in the ERA sections 109(1)(b) and 156(1)(b) were contrary to article 141 EC, as more men than women were adversely affected by the age bar in the legislation, and that such indirect sex discrimination was not justified.

Their employers had gone into liquidation so the Secretary of State for Trade and Industry became the Respondent in both cases, and also sought to justify the lack of statutory protection.

Employment Tribunal

Following nine days of evidence and legal argument, the ET decided in August 2002 that the legislative bar on those aged 65 years plus from claiming unfair dismissal, or a redundancy payment, was unlawful and should be set aside. Hence the Applicants won on both stages of their argument.

Court of Appeal

The Secretary of State appealed to the EAT, and was successful; the Applicants then appealed to the CA. The appeals turned on two questions:

a) What was the correct statistical information to be

analysed and did that analysis show a significant difference in the effect of the provisions on men compared to women?

b) If disparate impact was demonstrated, could it be shown by the Secretary of State that the measures were objectively justified, irrespective of factors related to sex?

The arguments about the appropriate statistics comprising the first question were complicated but raised these issues:

a) Should the legislative provisions be considered by reference to all of the potential labour market: 16 -79 year olds, who may at some time be affected by the exclusion from the right to claim, or by reference to those for whom the provisions will soon or have already had an impact (in the Tribunals words, those for whom the provisions had real meaning)?

b) Once the pool was chosen, was it appropriate to determine the proportions within it who **could** comply, or who **could not** comply?

When analysing the smaller pool to look at the proportions of those who could not comply the ET had found there was a clear discriminatory impact on men. In the wider pool (16-79s) there was no real difference between the number of men and women who could comply.

The EAT and, now, the CA, held that the broader pool was the correct one and overturned the ETs decision on disparate impact on various grounds, including that it had chosen the wrong pool. Mummery LJ, giving the judgment of the CA, held that the correct approach was as follows:

a) taking as the pool 'the workforce' (i.e. the entire workforce) to whom the age limit is applicable, not taking just a small section of the workforce, confined to those who are adversely affected by being over 65 or within 10 years of the age of 65;

b) ascertaining the proportion of men in the workforce who are under the age of 65 and are advantaged by being able to meet the requirement, and the proportion of men who are excluded from the right and are therefore disadvantaged by being unable to meet the requirement;

c) ascertaining the proportion of women in the workforce who are under the age of 65 and are therefore advantaged by being able to meet the requirement, and the proportion of women who are excluded from the right and are therefore disadvantaged by being unable to meet the requirement;

d) comparing the results for men with the results for women in order to see whether the percentage (not the numbers) of men in the workforce who are advantaged is considerably smaller than the percentage of women who are advantaged. The primary focus is on the proportions of men and women who can comply with the requirement of the disputed rule. Only if the statistical comparison establishes a considerable disparity of impact, must the court then consider whether the disparity is objectively justifiable.

In reaching this conclusion the CA rejected the Appellants argument that the Burden of Proof Directive (BPD) required that the primary focus should be on the comparison of the disadvantaged groups. The BPD, which by Article 3 expressly applies to situations covered by Art 141 (ex 119), provides as follows in Article 2:

1) For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly.

2) For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

The CA rejected this argument on the ground that Article 2 BPD defines when a certain state of affairs exists, but does not prescribe the means by which statistical evidence is to be assessed.

Having determined the case against the Appellants on the issue of disparate impact, the CA did not need to determine the issue of justification and expressly refrained from doing so (although Mummery LJ did go on to criticise certain aspects of the ETs approach to the expert evidence which it had heard).

Comment

Sex discrimination law has long been used to challenge legislation which is objectionable on grounds other than sex. Part-time workers won new rights arguing indirect sex discrimination: *Equal Opportunities Commission v Secretary of State for Employment* [1994] IRLR 176. Age bars have been successfully challenged using indirect sex discrimination: see *Perera v The Civil*

Service Commission [1982] IRLR 147 and *Price v The Civil Service Commission* [1978] 1 All ER 1228. Detriment stemming from family responsibilities has also been challenged this way: see *Hurley v Mustoe* [1981] ICR 490, EAT.

In its approach to the issue of disparate impact, the CA's decision in *Rutherford* is open to criticism. The ET's decision to concentrate on those workers for whom the age bar had 'real meaning' was rooted in common sense, bringing the focus sharply onto the area where disparity had real effect and was of real significance. The guidance given by Lindsay J in this litigations first visit to the EAT (*Harvest Town Circle v Rutherford* [2002] ICR 123) was that it was desirable to focus on the problem of disparate impact from as many angles as possible, which would include considering the relative proportions of men and women who were disadvantaged. It is submitted that to narrow the approach, as the CA has done, by not considering those who are adversely affected is to take away an important tool for assessing the disparity where it matters most; and widening the pool to include huge numbers of workers for whom the age bar is a complete irrelevance has caused the true picture to be distorted.

The reasons given by the CA for rejecting the Appellants argument based on the BPD may also be criticised. Article 2 of the BPD seems, on its face, clearly to require a comparison of those who are disadvantaged, and not those who are advantaged. Since, as the CA held, the BPD sets out the definition of indirect discrimination, the BPD must surely be highly significant (at the very least) in determining where the focus of the assessment of disparate impact should be.

On a different level, the Secretary of States decision to pursue the case through the EAT and CA, and the justifications for the age bar which it has put forward along the way, cast a long shadow over the genuineness of the Governments oft-stated commitment tackle age discrimination, for unless the HL decides otherwise, the net effect of this litigation will be to leave those over 65 without any unfair dismissal or statutory redundancy rights until 2006. Further, the Secretary of States means to achieving that end – the objective justifications which were put forward – were quite striking:

a) Enabling employers to meet the expectations of younger employees for advancement;

b) Assisting employers to identify their future recruitment needs; and

c) Enabling an employer to dismiss an older and less capable employee without the need to justify the dismissal, and so damage the dignity of the employee, in a Tribunal.

Such reasons for an arbitrary age bar may or may not be sufficient to provide justification for indirect sex discrimination under the current law, but they smack strongly of ageist assumptions and do little credit to a Labour Government which has supposedly committed itself to improving opportunities for older workers. The Government has recently announced that publication of the draft Regulations in age discrimination is delayed yet again, this time to the New Year.

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Briefing 344

More on definitions of disability

Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540 EAT

Implications for practitioners

The definition of disability under the DDA is clearly the most heavily contested area of the Act. The basic provisions in s.1, which outline the definition, are supplemented by the schedules to the Act, by regulations and guidance. The schedules provide that recurring disabilities are also covered by the Act, but there have been particular problems with people who experience depression having the benefit of these provisions. The DRC, in its review of the DDA (*Disability Equality: Making it Happen*), made a number of recommendations for changes to the definition of disability particularly in relation to depression. It was said in particular that 'In a number

of cases a person who has experienced a series of severe depressions, each individually lasting less than a year, have been ruled not to be disabled. The applicant may argue that because they have a recurring depressive illness this should be covered. However, unless he or she can show a persistent low grade depression (known as dysthymia) technically they will have an impairment which recurs rather than a continuing impairment with recurring effects. This means they will not be protected by the DDA.' This issue has now been very helpfully addressed by the EAT in this case.

Facts

Mrs. Swift (S) worked as a civilian communications officer for the Wiltshire Constabulary (W). S claimed that 2 members of staff harassed and bullied her. She was off work from February to April 2001 and again from 3 February 2002 to 3 July 2002. On returning to work, she was put on recuperative duties. She specifically asked that she should not be required to work alongside the two employees who she said had harassed her, however, she was left to adapt the roster herself by negotiating with other workers. Occasionally she did overlap with them, on one occasion for 4 hours.

S initiated a claim of disability discrimination, on the basis that W failed to make reasonable adjustments for her by means of adjustments to her shift pattern. A preliminary issue arose as to whether she met the definition of disability in s.1 of the DDA. S relied upon para 2(2) of Schedule 1 of the Act, which provides that:

> *where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

A joint expert report was commissioned from a consultant psychiatrist. The report concluded that S was suffering from a recognised psychiatric condition from January 2001 to mid-2002 and that between those dates it appeared that there were substantial and long-term adverse effects on her ability to carry out normal day to day activities, with her memory and concentration being affected. After mid-2002, the psychiatrist said that a formal psychiatric diagnosis was not appropriate.

Employment Tribunal

The ET dismissed the claim on the basis that S had not proved that she was disabled after the beginning of July 2002 when she returned to work and that she had not shown that her disability was likely to recur. S appealed to the EAT.

Employment Appeal Tribunal

The EAT dismissed the appeal, holding that the ET was entitled to find that S had not shown that the substantial adverse effect of her impairment on her ability to carry out normal day to day activities was likely to recur so as to fall within the definition of a recurring condition in para 2(2) of Schedule 1. The EAT laid down the steps which a tribunal should take in considering the application of these particular provisions: it should ask itself

1) was there at some stage an impairment which had a substantial adverse effect on the applicant's ability to carry out normal day to day activities?
2) did the impairment cease to have a substantial adverse effect on the applicant's ability to carry out normal day to day activities and if so when? Asking and answering this question will ensure that paragraph 2(2) does not enter too early in to the process of the tribunal's reasoning.
3) what was the substantial adverse effect? This question needs to be answered with a degree of precision, as paragraph 2(2) requires the tribunal to consider whether *that* effect is likely to recur.
4) is *that* effect likely to recur? The tribunal must be satisfied that the same effect is likely to recur and that it will again amount to a substantial adverse effect on the applicant's ability to carry out normal day to day activities. It is more likely to recur if it is more probable than not that the effect will recur. Whether it is likely to recur is not necessarily determined by medical evidence, although this is of high importance.

The EAT went on to consider the question of whether in the case of an impairment resulting from or consisting of a clinically well recognised mental illness, the ET must be satisfied that it is the mental illness itself which is likely to recur, an interpretation which had been put forward by W. The EAT held that it is not a requirement of para 2(2) that the clinically well recognised mental illness should be likely to recur. The Act contemplates that an illness, physical or mental, may run its course to a conclusion but leave behind an impairment. Once an illness ceases, and impairment from the illness ceases to have a substantial adverse

effect, it will no doubt generally be the case that the substantial adverse effect will recur only if the illness recurs. So it will always be relevant for the tribunal to consider whether the illness is likely to recur. But it is possible to envisage circumstances where an impairment resulting from an illness may again have a substantial adverse effect without the illness itself recurring. There may, for example, be a change in surrounding circumstances which increases the effect of the impairment. The question for the tribunal is whether the substantial adverse effect is likely to recur, not whether the illness is likely to recur.

Comment

This case helpfully clarifies the provisions in paragraph 2(2), ensuring that the focus remains on the recurrence of the impairment rather than the illness. The comments made by Judge Richardson should mean that it is easier for claimants who have experienced a series of depressions to fall within the meaning of disability and thus have the protection of the Act. The poor experiences which people with mental health issues have had under the DDA (specifically in proving that they have a disability) should also be assisted by the proposals in the forthcoming Disability Bill to remove the requirement that a mental impairment be 'clinically well recognised'.

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Briefing 345

Difficulty in understanding normal social interaction can amount to a disability under the DDA

Hewett v Motorola Limited [2004] IRLR 545 EAT

Implications for practitioners

The EAT decided that the ET was wrong in finding that an autistic person's difficulty in concentrating when faced with social interaction could not amount to a disability.

Law

Under Section 1(1) of the DDA a disability is defined as:

> *A physical or mental impairment which has a substantial and long term adverse effect on [the] ability to carry out normal day to day activities.*

The above definition is expanded upon in Schedules 1 and 2 of the Act as well as the Disability Discrimination (Meaning of Disability) Regulations 1996.

Any tribunal must also have regard to the *'Guidance on matters to be taken into account in determining questions relating to the definition of disability'* and the Code of Practice for the elimination of discrimination against disabled persons. Hence, tribunals and courts must have regard to these when considering alleged disability discrimination.

Employment Tribunal

Mr Hewett (H) was an engineer for Motorola Limited (M) from August 2000 to October 2002. He was diagnosed as having Autistic Spectrum Disorder or Aspergers Syndrome. His employer conducted a review of his performance which was negative. As a result, H alleged that his employer had failed to make reasonable adjustments including changes to procedures relating to performance reviews. So he brought a disability discrimination claim. M denied that H had a disability within the meaning of the DDA and a preliminary hearing was held to enable the ET to reach a decision.

H argued that his impairment had a substantial effect on his 'memory or ability to concentrate, learn or understand'. Paragraph 4(1) of Schedule 1 to the Act states that an impairment effects the ability of a person to carry out normal day to day activities if it effects one of a number of different functions including 'memory or ability to concentrate, learn or understand'.

Due to his autism, H was consistently unable to remember names of familiar people or to adapt to small changes in his work routine. This made it difficult for him to build friendships and he was excluded from

normal social interaction. The constant need to remind himself of the needs of others and the need to control his urge to avoid involvement led to an inability to pay attention to what others were saying to him. This led to him suffering from stress causing his concentration to suffer and to reduce his ability to perform his duties.

The medical evidence from H's Consultant Psychiatrist was that his condition made him difficult to manage or to integrate within the organisation although he was suited to working in the industry. The evidence from his GP was that his disorder created difficulty with social relationships. The inability to understand non-verbal communication led to him suffering from fatigue and stress. The opinion of the employer's Consultant Developmental Neuro Psychiatrist was that H's autism was mild and had no substantial effect on his day-to-day activities in relation to his memory, ability to concentrate, learn or understand despite the fact that he was unable to deal with social interaction.

The ET found that H did not have a disability under the DDA. Although his ability to concentrate was impaired when faced with social interaction, such impairment was not substantial. The ET found that difficulties relating to communication and social interaction were not set out at Paragraph 4(1) of Schedule 1 to the DDA. Hence despite the fact that he suffered from a clinically well recognised condition which was accepted as being long term, the ET found it did not constitute a disability under the Act.

Employment Appeal Tribunal

H appealed on the basis that the ET had not addressed the issue of whether a person's ability to understand can include non-verbal communication during normal social interaction. The employer argued that 'social skills' are not covered by the phrase 'memory or ability to concentrate, learn or understand'.

However in reaching its decision, the EAT referred to Paragraph C20 of the Guidance which states that:

> *Account should be taken of the person's ability to remember, organise his or her thoughts, plan a course of action and carry it out, taking new knowledge, or understand spoken or written instructions.*

H fell squarely within the above definition. Furthermore Paragraph 4.58 of the Code of Practice specifically refers to autism and states that:

> *it is a reasonable adjustment for an employer to communicate in a particular way to an employee with autism (a disability which can make it difficult for someone to understand normal social interaction among people).*

No reference had been made to the Code of Practice in the original tribunal decision. In particular Paragraph 4.58 of the Code of Practice specifically refers to autism as a disability as defined by the DDA. H clearly had difficulty taking in new knowledge and the EAT concluded that the tribunal had erred by not accepting that:

> *Someone who has difficulty in understanding normal social interaction among people, and/or the subtleties of human non factual communication can be regarded as having their understanding effected and that the concept of understanding is not limited simply to an ability to understand information, knowledge or instructions.*

Hence H's appeal was allowed and it was held that his impairment had an adverse effect on his ability to understand within the meaning of the DDA. The matter was remitted back to the ET in relation to whether or not this effect was substantial.

Comment

The EAT pointed out the need for tribunals to adopt a purposive approach to discrimination legislation such as the DDA. It pointed out the comments of Mr Justice Morrison in *Goodwin v The Patent Office*, EAT [1999] IRLR 4. It is essential that tribunals have regard to the Guidance but they should be aware that it is not exhaustive and there may be conditions which although not specifically mentioned, which nevertheless amount to a disability under the Act.

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Indirect discrimination in pay structures

Ministry of Defence v Armstrong & others [2004] IRLR 672 EAT

Law

The Equal Pay Act 1970 (EqPA) provides that if an employee shows that she is employed on like work, work rated as equivalent under a job evaluation scheme or work of equal value to that of a man in the same employment as her, an equality clause is deemed included in her employment contract so that she is entitled to no less favourable terms than her male comparator. S1 (3) EqPA provides a defence if the employer can show that any difference in pay is 'genuinely due to a material factor which is not the difference of sex'.

Facts

Mrs Armstrong (A) and eight other Army Careers Officers (ACOs) issued proceedings for equal pay with male Senior Army Recruiters (SARs) because they were doing like work or work of equal value with their named comparators. ACOs are retired army officers who have at least 16 years' service. However, this only applied to male officers and female officers qualified after 3 years of service.

SARs are serving soldiers who have completed 22 years' service and have extended their career by entering the long-service list. They were also paid in accordance with their service and rank, using army pay scales. There were also three grades of ACOs and under the pay structures; officers with more than 16 years service were entitled to receive 'retired pay'. This was reduced until the age of 55, to reflect the wages they would have received in the equivalent rank of the army.

Due to the service requirements, all male ACOs received retired pay. The women had not served long enough to benefit from this as the majority of ACOs were women employed in grades lower than the equivalent SARs. Consequently the female ACOs earned considerably less in comparison to their male counterparts.

The Ministry of Defence (MOD), at a preliminary hearing put forward two main arguments in their defence. Firstly, it argued that the difference existed because SARs were liable to be redeployed on active service, whereas ACOs were retired officers who could not be called up for active service. Secondly, it was argued that pay for the two roles was historically determined by separate means and was subject to different market forces. Alternatively, the MOD contested that the different pay levels were necessary and justified in order to recruit suitable people as soldiers.

A contended that the fact that all male ACOs received retired pay, showed the MOD's historical attitude towards the determination of the level of ACO salaries. They further argued that the attitude had a disproportionate impact on women since they formed the higher proportion of the lower paid group (ACOs).

Employment Tribunal

The ET held that the employers had not established a 'material factor' defence, according to S1 (3) EqPA. The ET also found that no SAR had been deployed on operations since 1993 and that the 'actual risk of deployment of an SAR is so remote as to be non-existent', and was not a material factor. The ET accepted the claimant's case that their salary did not reflect the true value of the work as it was calculated on the assumption that ACOs were in receipt of retirement pay. This was not the case for the majority of female ACOs.

The MOD appealed against the ET's decision. It submitted that there were only three circumstances in which indirect pay discrimination could arise:

a) gender based characteristics
b) factors which significantly disadvantage women, or
c) the application of a requirement or condition (or since October 2001, provision, criterion or practice)

The MOD argued that the case did not fall within the categories and that the ET had asked the wrong question, and in not applying the indirect discrimination test, as in the SDA, it had failed to adopt the correct approach to the S1 (3) issue.

Employment Appeal Tribunal

The EAT decided that this test was not correct. The concept of indirect discrimination, when read in

346 conjunction with European equal pay legislation, is broader than that which applies under the SDA. The EAT emphasised that it was important not to lose sight of the purpose of the legislation. In considering S1 (3), the fundamental question was whether the material cause of the difference in pay is tainted by sex related factors. If it is, then the defence will fail.

When considering the question, the EAT looked at *Strathclyde Regional Council v Wallace and ors* [1998] IRLR 146, where the HL held that the purpose of S1 (3) was not to achieve fair wages but to eliminate sex discrimination in pay and it was not intended to operate where no sex discrimination was involved. The EAT emphasised that pay discrimination usually arises from gender job segregation or pay structures, rather than individual contractual terms.

In the *Strathclyde* case, Lord Browne-Wilkinson said that it was inappropriate to use the distinction between direct and indirect sex discrimination as set out in the SDA 1975, as S 1 (3) EqPA enables an employer to establish a valid defence. The EqPA also contains no equivalent to the SDA definition of indirect discrimination. The EAT also considered the ECJ decision in *Enderby v Frenchay Health Authority and anor* [1993] IRLR 591, which stated that the concept of indirect discrimination was not the same in relation to inequality of treatment. The ECJ noted that it was important to understand how women are disadvantaged in their working lives and additional obstacles should not be created in the courts, to claim pay discrimination. It was therefore not necessary to always adopt a formulaic approach of S 1(1) b of the SDA when considering whether there was sex-related pay discrimination and disparate impact for the purposes of S1 (3) EqPA.

In conclusion, it is essential that the ET decides whether or not the pay difference is caused by sex-related factors. The ET should focus on substance rather than form, as well as the fundamental question of whether there is a causative link between the claimant's sex and the fact that she is being paid less than the true value of her job.

The EAT dismissed the MOD's appeal and held that the ET had applied the correct legal principles and the appropriate test.

Comment

This case represents a move forward where the EAT has recognised that there are obstacles in the way where women and pay are concerned. This case will hopefully encourage employers not to pay male employees more than female employees for the same or similar work.

Kavita Bachada

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Extension of time limit in discrimination cases

Chohan v Derby Law Centre [2004] IRLR 685 EAT

The case concerns the exercise of discretion by an ET in the context of incorrect legal advice causing the Applicant to be late in presenting a claim.

Facts

Ms Chouhan (C) was employed as a trainee solicitor at the Derby Law Centre (DLC). She was dismissed and brought a claim for unfair dismissal and for sex discrimination. These were settled under a COT3 on 18 April 2002.

On 23 April the Law Society wrote to C informing her that it had been told of the termination of her training contract by way of a letter from DLC of 22 March 2002. The Law Society sent a copy of DLC's letter to C on 30 April 2002.

C claimed that the Law Centre's letter of 22 March constituted unlawful victimisation under the SDA. She presented an Originating Application on 9 July 2002 following the advice of her solicitor that time ran from 23 April 2002. It was accepted that the Originating Application was presented 18 days out of time, the time limit running from 22 March 2004.

Employment Tribunal

The ET refused to exercise its discretion to extend time. It held that the delay was due to the incorrect

advice of a solicitor. It noted that C herself was legally trained. C appealed to the EAT.

Employment Appeal Tribunal

The EAT held that wrong advice or the existence of an implied case against negligent solicitors ought not to prevent C's case being heard. Further, although she was a trainee solicitor experienced in employment law, C was entitled to rely on the advice of an experienced solicitor; the view that the cause of action arose on 22 March (the date DLC wrote to the Law Society) was not a straightforward matter.

Comment

Although this case provides nothing new, it is a timely reminder of the very different tests in discrimination cases and unfair dismissal under the pre-1 October 2004 law.

In unfair dismissal, applicants who miss the three months deadline are rarely granted an extension. Case law makes clear that if an applicant misses a deadline because of incorrect advice from an advisor, time will not be extended except in the most exceptional circumstances. It was reasonably practicable to bring the claim in time and the Applicant's remedy is to sue the advisor.

This case was decided under the pre-1 October 2004 law. After 1 October time limits are much more complicated and still the subject of debate. Some ET chairs fear that this discretion to extend time will not be available in certain situations under the new law.

Nevertheless, if the ET does have the discretion to extend time in a discrimination case (for instance, a dismissal – only complaint), this case shows that a mistake by an advisor over time limits will not always be fatal to the Applicant's chances.

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Disabled access to train stations

The Court of Appeal, in a significant decision for wheelchair users, have just ruled that it was reasonable to expect the train operators Central Trains to pay the cost of an accessible taxi to enable Keith Roads to travel to Norwich. Keith Roads' case – which highlights the experience that many disabled people have using transport services – revolved around the difficulty he had getting onto the Norwich bound platform at Thetford Station in Norfolk.

In Mr Roads' case, only one platform, travelling from Norwich to Thetford, allows for disabled access to the main station and town centre. When travelling to Norwich though access to the platform is via a half-mile journey from the front of the station. The route is fraught with danger for wheelchair-users as Mr Roads explained:

The half-mile journey wheelchair-users are forced to make is extremely perilous, consisting of potholes, steep hills, a narrow bridge, unpaved roads with two-way traffic and a muddy dirt-track. I would be taking my life into my own hands undertaking a journey like that.

Rather than risk life and limb on the perilous half-mile journey, Mr Roads has instead paid £45 for an accessible cab from Norwich to drive him to the other side of the station. This was because there are no accessible taxis available in Thetford.

According to the Strategic Rail Authority (SRA) over 1,850 stations out of a total of 2,500 on the rail network are classed as 'small, or unstaffed, inaccessible stations'. This would indicate such problems will affect many more stations.

Disabled access to planes

As we go to print the Court of Appeal will be hearing the appeal in *Ryanair v BAA and Ross* case on the extent to which wheelchair using air passengers may be charged a premium for access to aircraft. This case was won by Mr. Ross with support from the Disability Rights Commission and Ryanair have appealed.

Cadman v Health and Safety Executive [2004] EWCA Civ 1317

On the 15th October 2004 the Court of Appeal referred this case to the European Court of Justice. The issue raised by the case was whether it was necessary to justify service related pay increments when they were the source of pay inequality between men and women. The Court's rulings in *Danfoss* (Case 109/88) [1989] ECR 3199 seemed to suggest that this was not necessary; however academic writers and other commentators consider that the line of cases from *Nimz v Freie und Hansestadt Hamburg* (Case C-184/89) [1991] ECR I-297 onwards show that the ECJ has had a change of mind and this is necessary. Since spinal columns and other service related pay schemes are exceedingly common and are thought to be a frequent source of pay inequality this is a very important step. The Equal Opportunities Commission has intervened in this important case.

Joint Committee on Human Rights Inquiry into UK Government's implementation of UN race equality recommendations

Joint Parliamentary Committee on Human Rights, as part of its mandate to consider matters relating to human rights in the UK, regularly inquires into the UK's implementation of its obligations under each of the principle UN human rights treaties, and in particular into the action taken in response to the concluding observations of the UN treaty bodies. The Committee has just announced that it will be reviewing the UK government's response to the recommendations of the UN Committee for the Elimination of all forms of Racial Discrimination (See Notes and News – *Briefings* Vol. 20).

This short inquiry will review the steps taken by the government in response to the Concluding Observations on the UK's 17th Report. A copy of these concluding observations can be found at http://www.unhchr.ch/tbs/doc.nsf/Symbol)/cd515b6fbf9c7a12c1256e010056fdf4?Opendocument

For further information on this Inquiry see http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchr_press_notice_03_04_no__34.cfm

Evidence must be in by **30th November 2004**.

European Roma Rights Centre case

In 2000 the controversial section 19 D was inserted into the RRA, this allowed the home secretary to issue Ministerial Authorisations to discriminate on grounds of nationality and ethnic origin in relation to the operation of immigration and nationality functions. An authorisation in May 2001 allowed discrimination against various ethnic groups, including Roma.

In 2001 the government stationed UK immigration officers in Prague airport, they were authorised to refuse entry clearance to passengers to the UK before they boarded their planes, instead of waiting until a would-be entrant arrived in the UK. The government has always maintained that the section 19D authorisation did not apply to the operation at Prague airport. Its case has been that the operation was not carried out in a discriminatory manner, although statistics show that Roma were 400 times as likely to be turned away as non-Roma Czechs.

The case of *R v Immigration Officer at Prague Airport and ors* (see *Briefing* no 301 for a report on the CA hearing) is the culmination of a three-year legal battle over this operation at Prague airport. It is currently being heard in the House of Lords. UK immigration officers stationed there were authorised to refuse entry clearance before planes were boarded, instead of waiting until a would-be entrant arrived in the UK. In an astonishing turn of events the Government lawyers disclosed dramatic new evidence on the eve of the last day of a seven-day House of Lords hearing. The evidence, served on lawyers for the European Roma Rights Centre at their homes, appears to contradict that given by Home Office officials in the High Court.

The lawyers concerned said that they had never seen new evidence being produced at such a late stage in the Lords. Lord Lester QC, for the rights centre, said the witness statements served at the weekend made it clear that evidence put before the original High Court hearing by the Home Office '*was not merely incomplete, as they now acknowledge, but was in fact seriously misleading*'. We will have to wait to see what the HL makes of it.

Mrs Justice Laura Cox calls for urgent reform to Equality laws

During the course of the Legal Action Group 2004 Annual lecture on '*Challenging Inequality at Work: the Global Perspective*' Laura Cox J reviewed the international labour equality requirements and the work of the International Labour Organisation in particular. She concluded that against this international background our equality laws appear seriously wanting and that *'there is no developed concept of equality in our law'*. She commented on the 'confusing array' of piecemeal legislation on various areas of discrimination, she believes that there is *'a real need for urgent reform to provide effective equality legislation appropriate to the modern age'*.

The full text of the speech will be available on the LAG website (www.lag.org.uk) at the end of November.

Report of the Independent Race Monitor

Section 19 E of the RRA set up the post of an Immigration Race Monitor to monitor and report on the effect of the Ministerial Authorisations. The second annual report, for 2003/4, by the Home Office's Independent Race Monitor, Mary Coussey, calls on ministers to track refusal rates to see if they are fair. Ministers have powers to permit frontline staff to discriminate on grounds of nationality and ethnic origin to help them better target illegal immigration, but where operations become problematic, says Mary Coussey, is in the exercise of discretion. 'It seemed to me that passengers from certain nationalities with a record of refusals or of immigration breaches were less likely to be given the benefit of the doubt when compared with passengers from nationalities with a good record,' she said. 'What in some nationalities is viewed with scepticism will be accepted in others'. Whilst recognising the professionalism of many immigration officials she also called for action against 'case-hardened' staff who make derogatory comments about certain nationalities.

She also commented on the role of the media noting that much of their focus on asylum and immigration reporting has been 'ill informed, hostile and inflammatory', concluding that 'the Government should take the lead and encourage a more balanced public debate on immigration, and also explain more about the circumstances from which people claiming asylum are fleeing'.

The full text of the Report is available at:
http://www.ind.homeoffice.gov.uk/ind/en/home/0/reports/second_annual_report.html

MPs call for more land for Gypsies and Travellers

The House of Commons Select Committee on the Office of the Deputy Prime Minister has recommended that councils should be forced to set aside land for Gypsy and Traveller sites (see Editorial in Briefings vol 22, June 2004). They recognised that there is a pressing need for more sites. They estimated that there are currently 324 legal sites in England providing pitches for 5,005 caravans, although there are up to 3,500 caravans on unauthorised sites. See Gypsy and Traveller Sites (HC 633-I): 13th Report, 2003-04.

The DLA AGM and annual social event has been arranged for Monday 13th December 2004 beginning at 6pm. The venue for the AGM is:

Irwin Mitchell Solicitors
150 Holborn
London
WC1N 2NS

The speaker for this event will be Professor Conor Gearty. Professor Gearty is Rausing Director of the Centre for the Study of Human Rights, professor of human rights law at LSE and barrister at Matrix Chambers. He will speak on *Understanding equality: the need for discrimination*. This promises to be an extremely interesting evening!

It will help us very much if you will let us know by **Wednesday 1st December** that you plan to attend.

The DLA would also encourage members to nominate themselves or be nominated by others to stand as a member of the DLA Executive Committee (EC). If you are nominating someone please ensure that the person being nominated consents. Please e-mail or telephone Melanie West at the DLA office for a nomination form.

Please note that an executive decision was made to extend the deadline for receiving nominations for the DLA Executive Committee in order to allow members sufficient time to submit nominations. The revised deadline for receiving nominations is now 5.30pm Monday 15th November. This deadline cannot be extended as a reasonable amount of time is required for administrative arrangements before the AGM.

The EC consists of the Chair, Treasurer and up to 12 elected members.

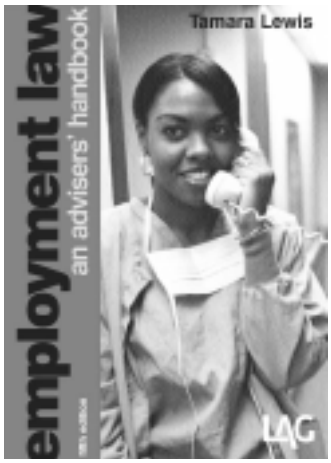
Anyone who is a member is entitled to stand for the EC and membership of the EC is not restricted to practising lawyers. Teachers of law, law students, trade union officers, advice centre and REC workers are particularly encouraged to stand. We would hope that the EC will include people with knowledge or experience in all of the different strands that are or will soon be covered by anti-discrimination legislation.

Wine, soft drinks and nibbles will be provided

BOOK REVIEW

Employment Law: an advisors' handbook

by Tamara Lewis, Legal Action Group, 5th edition, 2003. £26.00



This is the fifth edition of LAG's well-known adviser's handbook on employment law. It is aimed at advisers and lawyers and is famous for explaining ever-more complex employment law in jargon-free terms. The new edition does just as good a job as its predecessors. The book is much expanded from its original format, mirroring the expansion of employment law in the past thirteen years.

The book's range is very broad – it covers terms and conditions, wages, unfair dismissal, TUPE, redundancy, discrimination (including equal pay) and employment tribunal procedure.

What sets this book apart from the large number of general books for practitioners is that is it written specifically for Applicants and their advisers. Tamara Lewis is a highly experienced practitioner herself and the book is full of invaluable practical advice on what works and what does not when advising an employee or worker.

Whilst the book is written in a very readable style, every assertion of the law is referenced to the relevant section or regulation saving a great deal of research.

Inevitably, in a wide-ranging book, discrimination law only takes up about 275 pages. The book is very useful as almost every discrimination case includes other claims but discrimination practitioners would probably also need LAG's Discrimination Law Handbook.

One of the most useful parts of the book is the, much extended, checklists and precedents. These range from the redundancy payment calculator to extensive precedents on drafting discrimination questionnaires.

Readers need to be aware that the book makes no mention of new disciplinary and grievance procedures which have over-turned previous employment law. Practitioners need to work out carefully how the new law will dovetail with the advice in this book.

The procedure section also does not cover how the October 2004 Rules of Procedure will affect tribunal cases. Again, practitioners need to consider carefully the new procedural rules.

However, this does mean that what is written in the book is based on established law and precedent and can be relied upon.

Last but not least, the book's other unique selling point is its price. It is hard to think of a comparable publication costing only £26.00. It offers excellent value for money, in terms of expert advice obtained for pounds spent. At this price, it is strongly recommended to all advice agencies (whether specialist or not) and to anyone wanting a broad user-friendly guide to the realities of employment law.

JULIETTE NASH, NORTH KENSINGTON LAW CENTRE

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Abbreviations

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