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Editorial *The world is suddenly a better place...or is it?*

Obviously the world is now a better place! If not globally then at least within the world of work. Anecdotal reports indicate a 40% drop in the number of applications to the Employment Tribunal. So *obviously* employers and employees in England and Wales are now far less often in dispute. What can have made so much peace suddenly break out across the industrial landscape of Britain?

The most probable answer is the new Dispute Resolution Regulations which require employees to take matters to a grievance hearing before they are admissible as a complaint to an ET. But there is a deeper question to be asked – is the 40% drop the result of 40% more happy people whose cases have been resolved in the workplace or is it that 40% or so of potential complainants can't face the additional stress of taking grievance proceedings and can't work out how these Regulations work?

The general view within the DLA has been that it is the latter. You only have to start to read about the complications of these procedures to see why. Tess Gill's article on page 3 of this edition of Briefings shows just how complicated the procedures are. Whatever else you do with this edition we recommend that you read that Article!

You will discover that employees and their advisors must learn to 'grieve' and count their weeks. If you, as their advisor, don't, you will not be able to help your clients start another ET claim. It is that simple, only it's not... since the regulations are so complex that it is almost impossible to work out what they are intended to do. And then consider what it might be like in an internal procedure to be confronted by an employer you allege has harassed or discriminated against you on any of the protected grounds. Surveys again and again reveal that victims of discrimination and harassment do not complain; the DLA shares the concern of many that the new procedures will serve as yet another deterrent. Dispute resolution has become a game of snakes and ladders – with rather more snakes than ladders.

These difficulties overlay the already existing difficulty of obtaining any legal assistance for discrimination cases. In the current financial year the CRE is devoting only 2% of its budget to representation, for the EOC it is 3.1% and the DRC it is 5.5% (down from 3.4%, 4.7% and 6% in 2002-3 for each Commission respectively). There is currently no Commission to provide any advice or assistance to victims of discrimination on the ground of their sexual orientation or religion or belief. There is no legal aid for employment tribunals, and Legal Services Commission public funding for all civil cases is increasingly restricted. So, while legislation has expanded the protection against discrimination, access to justice for victims of discrimination via public assistance is shrinking.

On the other hand the Employment Tribunal Regulations 2004 have made it easier for the ETs to award costs and they can now award costs of up to £10,000. It is inevitable that the fear of such costs orders will deter some victims from seeking redress in the ETs.

Concerns have been expressed by the General Secretary of the TUC that the new dispute resolution measures will severely disadvantage non-union employees who cannot afford legal representation. Members of the House of Commons have also expressed concern by signing an Early Day Motion (no 239) as well as a second Motion (no 240) regarding access to justice for victims of discrimination. There are also comforting signs that many ET Chairs are also appalled by these new barriers to justice. Many have been willing to say privately how concerned they are.

In December 2004, the AGM of the Discrimination Law Association passed two resolutions making the issues around the new dispute resolution provisions and the lack of legal assistance for victims of discrimination priorities in planning our activities for the coming year. The DLA needs your help with the first. We need to be kept informed of your experience when you and your clients have tried to make these regulations work. The DLA is planning a meeting in the Autumn to see how the procedures are working in practice. We are particularly concerned that the requirement to follow a grievance procedure is deterring employees from bringing discrimination claims. We need to gather evidence which is not merely anecdotal. We will therefore be sending by e mail a short questionnaire form, which we are asking members to complete for any relevant case and return to us so that we can collect and collate the information.

We shall have to work hard, and together, to confront this new challenge to access to justice and equal treatment.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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The impact of the new employment tribunal procedures on discrimination claims

The new procedures brought in by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 will now be familiar to practitioners, although the new standard prescribed claim form does not become compulsory until 6 April 2005. This article assumes a general familiarity with the new regime and seeks to highlight the specific impact on discrimination claims.

It considers the combined impact on discrimination claims of the new rules and statutory provisions. It is, of course, early days and the issues raised are likely to be clarified in due course by decisions of Employment Tribunals (ET) and appeal Courts.

The requirements are set out in no less than three separate statutory documents: the Employment Act 2002 ('EA'); the Employment Act 2002 (Dispute Resolution) Regulations 2004 ('DR'); and the 2004 Employment Tribunals (Constitution and Rules of Procedure Regulations 2004 ('the rules').

The starting point is that if a claim falls within the new procedures and is not covered by one of the exceptions, no claim will be accepted unless the subject matter of the claim has been taken to a grievance procedure ('grieved') by the claimant (or in some circumstances the trade union or employee representative) by putting the complaint in writing to the employer within one month of the original time limit for making the complaint and allowing 28 days before the claim is presented to the ET.

Although the time limit for lodging the grievance is one month after the original time limit for presenting the claim, the time limit for presenting the claim remains as before (i.e. normally three months), so that to avoid having to ask for a just and equitable extension, the grievance should be lodged within the normal time limit.

If this is done, then if necessary the time limit for presenting the claim will be extended under DR reg 15 as a matter of right (see below) and it will not be necessary to seek a just and equitable extension.

The requirement to grieve applies to constructive dismissal and to a complaint that the application of the disciplinary procedure is discriminatory unless the employer has dismissed the employee or is contemplating dismissal. It is very important to remember that the ET has no discretion to extend the time limit for grieving, see below. Thus the advice must be if in doubt grieve and do not delay.

There are certain exceptions to the requirement to grieve. For example, there is an exemption from the requirement to grieve if it is not *practicable* for the party to commence the procedure or comply with the subsequent requirement within a reasonable period, (DR reg 11(3) (c)). This is a strict test but would apply, for instance, if the employer had shut up shop and could not be traced or if the claimant was so ill that she could not grieve. In addition, if employment has ended, neither the disciplinary or grievance procedure has been commenced and since employment has ended it has ceased to be *reasonably practicable* to comply, (DR reg 8).

Not all claims fall within the procedures. Breaches of flexible working procedures, refusal of time off for ante natal care and for dependants, refusal of time off for parental leave, suspension of pregnant employees as well as less favourable treatment of part-time and fixed term workers are excluded. It may be that a claim that the claimant has suffered a detriment done on the ground that she has raised a complaint or brought proceedings against the employer in respect of the flexible working procedures is meant to be covered. It is not listed as being covered but the relevant section (s47E ERA 1996) was originally s47D which is listed.

If the new procedures do not apply, then the extension of time which they provide, see below, will also not apply, so that if there is any uncertainty the complainant should comply with the original 3 month time limit and if necessary re-submit if it is necessary to grieve and wait 28 days. If part only of the claim is covered there will be different time limits for each part and they may have to be submitted separately and consolidated later. To avoid this complication the best advice is to grieve early, within a month, wait 28 days and lodge within the 3 months so you are safe whether or not the procedures apply.

If either employer or employee do not follow the procedures compensation may be increased or decreased by between 10-20%.

Access to justice

The new regime raises many general difficulties of access to ETs. These however, may have particular impact on those whose first language is not English, and those with certain disabilities.

Recognising no doubt that access to the relevant law was going to be limited to the specialist adviser; the DTI has produced guides on its website including one for employees. That guide gives a link to the claim form and states it may be obtained from Job Centres, Law Centres and CABs. So far so good, but the number of workers without easy access to websites, or knowledge as to where to look, is likely to be higher among those with certain disabilities or those whose first language is not English.

The new procedures require the complainant, if an employee, to make complaints in writing firstly to the employer (the grievance) and then, after 28 days have elapsed, to the ET. Sample letters are provided, but knowledge of English and literacy is necessary to grieve adequately. As is clear from this article, the time limits are not straightforward and have very limited extensions.

The requirement to grieve

One unresolved question is whether it is necessary for the claimant when grieving to do more than raise the nature of the complaint, such as a failure to promote? Must the claimant specify in such a case, that her complaint is that the failure was discrimination on a particular ground, whether race, sex etc. Neither EA nor the DR assist on this issue.

Rule 1(4) (h) states that the claim must specify *'whether or not the claimant has raised the subject matter of the claim with the respondent in writing'.* That may be an indication that it is the factual basis of the complaint rather than the legal basis of any claim which is required. The DTI guidance does not suggest that it is necessary to identify any legal claim which might later be pursued. If a ground of discrimination is identified all to the good, but it should not bar a claim if it is not. To avoid any doubt the grievance should be expressly referred to as such.

Time limits for presenting claims

The position on time limits for presenting claims appears to be as follows:

1) S.32(4) EA and Schedule 2, paras 6 and 9, require an employee making a complaint of discrimination on any ground to have made a complaint under the grievance procedure within one month of the original time limit for making the complaint. But, as explained above, it should be made within the original time limit for submitting claims to avoid the need to apply for a just and equitable extension.
2) Rule 3 (2) (c) requires the ET not to accept the claim if it is clear that the claim has been presented in breach of s32 (4) (b). So that if the complainant has not grieved in time the complaint will be returned to the claimant with the reason why it was not accepted. The claimant will be invited to explain why she has not grieved, but unless one of the exceptions applies this will not result in the claim being accepted. Once the one month extension to the original time limit provided for by s32 (4) EA has elapsed without the claimant having grieved, there is no apparent mechanism for extending time further.
3) If the claimant has either:
   i. presented her claim within the normal time limit for presenting the complaint but not grieved or not waited 28 days before presenting the complaint;
   ii. or having grieved within the normal time limit for presenting the complaint has failed to present the claim within that time limit;

   then DR reg 15 provides for a three month extension to the time limit for presenting the complaint. DR, reg 15, makes things more complicated by referring to the 'normal' time limit and not the 'original' time limit as in s.32 EA. It would appear that both refer to the statutory time limits before any extension under the DR regs.
4) The extension of time provided for by DR, reg.15 is only to presenting the claim, not to grieving. Those extensions are to the normal time limit, defined as the time limit without any just and equitable extension.
5) S33 EA enables the Secretary of State to *'make provision about the exercise of a discretion to extend the time for beginning proceedings'*. What is not contemplated is an extension of time for grieving.
6) If the claimant has grieved within one month after

the original time limit for presenting claims, but presented the complaint outside the time limit (as extended by regulation 15 if it applies), then the statutory provisions for a just and equitable extension could apply as there is no prohibition on the ET accepting the complaint and this may be why the DTI guidance (paragraphs 125 and 128) state that the just and equitable extension has not been affected.

7) If there is a failure to grieve in time which is apparent to the ET or raised by the employer, the complaint will be returned to the complainant and the ET has no apparent jurisdiction to extend time on a just and equitable basis. There is provision for the claimant to apply to the ET for a review of the Chairman's decision not to accept the claim. This is the only mechanism to obtain a hearing and perhaps could be used to argue for a just and equitable extension. It would require the ET to give precedence to the provisions on just and equitable extension over s.32 EA. It would also require the just and equitable extension to apply not to the presenting of the claim but to the grieving. This is more difficult and may be fatal unless some HRA, Article 6 or EU breach of effective remedy could be argued successfully.
8) As to that, time limits for bringing actions are normally left to Member States, and this is now enacted in the new Article 6 of the new Equal Treatment Directive to come into effect on 5 October 2005. However, the requirement to comply with the statutory grievance procedure within a certain time limit as a pre-condition to presenting a claim is a potential barrier to judicial process and not a time limit for making a claim. It is also not mirrored in other comparative claims governed by domestic law and could therefore be arguably in breach of the principle of equivalence considered in cases such as the Preston litigation. In respect of equal pay claims the comparison would be other contractual claims, for other discrimination claims the comparison would be claims in tort, such as personal injury.

Continuing discrimination

In cases of complaints of continuing discrimination which may consist of a number of incidents over a period of time, the time limit for grieving in respect of the last incident will be satisfied provided the grievance is made within the time limit provided for in EA s.32 (4) (b) of one month after the expiry of the original time limit for making the complaint. However, if the subject matter of the claim includes earlier incidents it would seem that they have to be grieved as well as the trigger incident leading to the grievance and claim. If such earlier incidents have not been grieved it would appear likely that in respect of them s32 EA has not been satisfied and the claimant could be prevented making them part of her complaint. If the claimant seeks legal advice within the time limit the matter can be put right by re-submitting the grievance detailing the earlier incidents, provided of course that she succeeds in establishing continuing discrimination. Thus, unfortunately the advice may be to grieve, grieve and grieve again.

If as may often be the case the full extent of the complaint only becomes clear after that time limit has expired then there could be difficulties in pursuing the claim relying on the earlier incidents. In these circumstances the discretion to extend time would not assist as there is no discretion to extend the time to grieve, see above.

The prescribed claim form

Whereas previously no particular format for the claim to the ET was required, from the 6 April 2005 the prescribed form must be completed. Rule 3 provides that the claim will not be accepted by the tribunal if the form does not contain all the relevant required information.

The facility on the ET website to complete the claim form on line is to be welcomed but is quite demanding. It will only move to the next page if essential items are completed including, for example, dates in the correct format. It does not appear to be possible to print out a blank form, nor could this user go back to check the form although the notes advised the user to do this. While there are certain help notes they do not include any assistance on the employee/worker point.

Employee or worker?

The information which the claimant is required to complete includes whether the claimant is an employee or a worker. This is relevant information as only an employee has to grieve. However, it is a difficult question for many workers to answer, in particular those on atypical contracts who may be over represented among women and certain ethnic minority groupings.

If a claimant wrongly considers herself an employee

she may seek to grieve and then wait 28 days to lodge her claim. She may also assume that the time for lodging her claim will be extended. In so assuming she may miss the time limit for a worker which remains the original three months. The good news is that if she is a worker the tribunal could extend the time limit on a just and equitable basis and if she reasonably considered herself an employee and that was the reason for missing the time limit one would hope that time would be extended.

If an employee wrongly considers she is a worker and does not grieve the claim would not be accepted if the employer raises the issue and is found to be correct. Therefore if there is any doubt the claimant should grieve but submit the claim within the original time limit even if that is before 28 days has elapsed so that it may have to be submitted again. Alternatively, the claim could be presented within 3 months on basis that there is no requirement to grieve (to avoid having to say you have grieved but not waited 28 days). Then grieve immediately afterwards wait 28 days and lodge again.

Amendments

Further problems may arise where a claimant seeks to amend the claim to add further allegations or add another ground of alleged discrimination, perhaps arising from discovery or answers to a discrimination questionnaire and has not grieved in these respects. The very purpose of the questionnaire procedure is to obtain information to assist the claimant bearing in mind that it is the employer and not the employee who normally has access to why and in what circumstances the action of which complaint is made was done. It may well be only when the complainant has such information and any information revealed by discovery that she is in a position to properly formulate a claim, whether it is direct or indirect discrimination, on what ground or grounds and sometimes whether earlier acts are now revealed as part of a policy or series of acts constituting discrimination. This process is likely to be completed outside the time for grieving. It will be important that ET's do not apply the requirement to grieve in such a restrictive way as to prevent such claims being properly pursued.

The harassment exemption

There are certain exemptions from the requirement to grieve, including DR, reg 11 which applies to a party who has been subjected to harassment and has reasonable grounds to believe that commencing the procedure or complying with the subsequent requirement would result in her being subjected to further harassment. This is likely to be difficult to prove. If the claimant relies upon the exemption and does not grieve, and then fails to establish that the exemption applies, no extension of time to grieve beyond the one month extension specified in s32(4) is available, see above. This is despite the fact that bringing complaints of harassment in some workplaces regularly results in further hostile acts against the complainant by other employees if not the employer concerned.

So, it is never safe to rely on exceptions – unless, which is unlikely, the ET rule on it early enough.

Complaints against third parties

Is there a requirement to grieve at all where the complaint is against third parties?

There are two likely situations.

1. A complaint may arise because of the action of a fellow employee, typically harassment or racial abuse. The employer is vicariously liable for the alleged act if proved. If the claim is made against the employer alone the grievance procedure applies and the complainant must grieve against the employer in respect of that act.
2. The complainant may wish to bring her complaint against both the employer and against the fellow employee or manager who committed a discriminatory act. The DR regulations and the rules are silent on whether in these circumstances the complainant has to grieve against the third party. The DTI guidance (paragraph 56) is that the complainant must grieve. This would appear to be right. A claim against a third party can only be made if the employer is responsible for their action under the statutory provisions, see for example, s42 and 63 SDA. In practice it would be the same grievance as in (1) above, as the subject matter of the complaint would be the same.

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Gypsies and Travellers: the need for law and policy reform

Gypsies and Irish Travellers are amongst the most excluded groups in British society. Life expectancy is a decade less for Gypsy and Traveller men than for other racial groups and still less for women; the percentage of Gypsy pupils achieving five or more passes at GCSE is less than half the national average;[1] thousands of families have no lawful residence. Trevor Phillips, Chair of the Commission for Racial Equality recently equated Gypsies and Travellers living in Britain to black people living in the deep South in the 1950s. Yet Romany Gypsies have been resident in Britain since the 16th century, Irish Travellers since the 19th Century, and race relations legislation has been force in the UK since 1965.

This briefing considers the position of Gypsies and Irish Travellers in Great Britain from the point of view of discrimination law, and then looks at wider legal developments affecting Gypsies and Travellers and the need for further legal and policy reform. It only considers the position of Gypsies and Irish Travellers currently resident in the UK, and not the situation of Roma arriving in the UK.[2]

Racial Groups – protection for Gypsies and Travellers

Romany Gypsies and Irish Travellers are 'ethnic' groups for the purposes of the Race Relations Act 1976 (RRA). The criteria for determining whether a group constitutes an ethnic group is set out in *Mandla v Dowell Lee* [1983] 2 AC 548. The two essential factors that need to be met in order to qualify as such are:

- a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive;
- a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance

Other relevant considerations which are likely to indicate, but not essential to define, a distinct ethnic group include:

- a common geographical origin or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to that group;
- a common literature peculiar to the group;
- a common religion different from that of neighbouring groups or from the general community surrounding it;
- being a minority or being an oppressed or a dominant group within a larger community.

In *CRE v Dutton* [1989] 2 WLR 17, a case involving a 'No Travellers' sign in a pub, the CA found that Romany Gypsies were a minority with a long shared history, a common geographical origin and a cultural tradition of their own. In *O'Leary and others v Allied Domecq and others*, 29 August 2000 (Case no CL 950275-79), Central London County Court (unreported), HHJ Goldstein reached a similar decision in respect of Irish Travellers. Although this was a county court judgement, Irish Travellers are explicitly protected from discrimination under the Race Relations (Northern Ireland) Order 1997, Article 5. This makes it highly unlikely that their status could be open to challenge in the UK, since this would, as HHJ Goldstein made clear in his judgment , give rise to '*a very strange anomaly that Irish Travellers are protected in Ireland but not protected in England as a result of legislation by a British Government*'.

The distinct racial identity of Scottish Travellers, Welsh Travellers or other Travellers has yet to be considered by the courts. It is unlikely that New Travellers or other occupational Travellers would come within the definition of a racial group, and in delivering his judgement in *O'Leary*, HHJ Goldstein made it clear that the court's decision should not be seen as inviting other groups to make applications. In

1. DFES, Statistical release, Feb 2004 – 23% of Roma/Gypsy pupils achieved 5 or more passes at GCSE in 2002/3 compared to an average of 51%.

2. See recent landmark ruling on this subject: *Regina v. Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others* [2004] UKHL 55 – see Briefing no 353.

CRE v Dutton, Stocker LJ stated that *'the fact alone that a group may comply with all or most of the relevant criteria does not establish that such a group is of ethnic origin'*.

Ethnicity and the statutory definition of 'Gypsy'

Romany Gypsies and Irish Travellers are protected from racial discrimination whether or not they travel. This point was discussed in both *Dutton* and *O'Leary*, and was a particularly relevant consideration in the latter case where it was a feature which distinguished Irish Travellers from other Irish people who were already protected. It is their separate group identity that makes them eligible for protection.

However there is a separate 'statutory' definition of Gypsy in planning law, requiring a person to be of a 'nomadic habit of life' to qualify. This means that a person can qualify as a 'statutory' Gypsy, but not be a Gypsy or Irish Traveller for the purpose of the RRA, or, vice versa, as the recent judgement in *Berry v The National Assembly of Wales and Wrexham CBC* [2003] EWCA Civ 835 makes clear.

Many Gypsies and Travellers only travel for certain months of the year, or do not travel at all, but they may still have a 'cultural aversion' to bricks and mortar housing. In this way travelling becomes more a 'state of mind' than a 'day to day reality'.[3] The statutory definition for planning purposes can therefore have a negative impact on 'ethnic' Gypsies and Travellers. Gypsy and Traveller support groups and the CRE have lobbied to change the statutory definition for planning purposes to one which includes an additional 'ethnic dimension'. The Office of the Deputy Prime Minister (ODPM) has now put forward a revised definition, which is being consulted upon,[4] this focuses on those with a 'traditional cultural preference for living in caravans'. Concern has been expressed that this may exclude New Travellers and so have wider negative consequences.

The Race Relations Act 1976

The RRA makes it unlawful to discriminate on racial grounds in employment, education, housing, planning, the exercise of public functions and in the provision of goods, facilities and services. Additionally, the RRA now places a positive legal obligation on over 40,000 public bodies,[5] including local authorities, police bodies, schools, higher and further education institutions, health bodies and central government to *'have due regard to the need to eliminate unlawful discrimination, to promote equality of opportunity and good race relations between persons of different racial groups'* in carrying out all their functions' ('the race equality duty').[6]

If a Gypsy or Irish Traveller suspects that they have been subjected to unlawful discrimination or harassment, they can send a questionnaire to the person or body suspected of discriminating against them. The questionnaire and any reply are admissible in any subsequent proceedings. If a respondent fails to reply, without reasonable excuse, or is evasive or equivocal in their reply the court or tribunal can draw any inference that it considers just and equitable, including an inference that the respondent committed an unlawful act. Since 19 July 2003 the burden or proof has shifted[7] so that once the complainant has established the facts from which discrimination or harassment could be inferred, the burden of proof is on the respondent to show that they did not discriminate against the complainant. Discrimination complaints must be made within six months of the act of discrimination complained of for county court proceedings, and made to the ET within three months. There is an exception however when the discrimination act complained of a continuous nature.

The RRA 1976 contains no express provision for enforcement of the race equality duty. Compliance may be secured by way of judicial review in the High Court by a person who is directly affected or has sufficient interest, such as the CRE itself. Additionally the CRE may use its formal investigation powers to secure compliance. In relation to the specific duties, if the CRE is satisfied that a public authority is not complying with the specific duties, it may serve a 'compliance notice' on the authority and if this is not complied with to apply to the county court for an order to comply with the specific duty and/or to furnish information requested. There is as yet no case law relating to the race equality duty and concepts such as 'due regard' and the detailed requirements of the specific duties have not yet received judicial scrutiny.

3. Niner, P. 2002. *The Provision and Condition of Local Authority Gypsy/ Traveller Sites in England*. London: ODPM.

4. *Planning for Gypsy and Traveller sites: consultation Paper* ODPM, December 2004.

5. Listed in RRA 1976 Sch 1A.

6. RRA 1976 s71.

7. Race Relations Act 1976 (Amendment) Regulations 2003.

Racial discrimination cases for Gypsies and Travellers

Despite the fact that Gypsies and Irish Travellers are protected by the RRA 1976, there have been very few successful discrimination cases. And although race relations legislation has developed since 1965 to protect against increasingly subtle forms of discrimination, it is only the most overt forms of discrimination which are routinely challenged. 'No Travellers' signs, used intentionally to exclude Gypsies and Travellers, are still widespread and the CRE responds to approximately 30 such signs every year.[8] The practise is to ask the respondent to remove the sign and seek formal agreement that the act will not be repeated. Where necessary, proceedings may be brought under RRA 1976, as in the case of *CRE v Dutton.*

The case of *Smith and Smith v Cheltenham BC* [9] provides an example of successful challenge under s20 and s21 of the RRA (provision of goods and services). Here a Gypsy woman hired a venue from the council for her daughter's wedding reception, but after hearing rumours the council attached onerous conditions to the hire of the venue. HHJ Rutherford found in their favour and awarded damages. Yet there is a marked absence of other similar service delivery discrimination cases. A number of cases have been successfully won on human rights grounds, but although several have pursued claims under Article 14 of the ECHR in addition to the substantive claim, they are usually won on Article 8 grounds alone.[10]

Many reasons have been put forward as to why there are so few successful race discrimination cases in this area. In certain cases involving Gypsies and Irish Travellers, particularly where they live on sites and feel they have been discriminated against in the way accommodation or ancillary facilities are offered or managed, it may be difficult to find an appropriate comparator. A council tenant is unlikely to be accepted as a comparator because the nature of a caravan on a council site would be considered 'materially different' from a council house. Gypsy and Traveller support groups point to the reluctance of many Gypsies and Irish Travellers to report cases of discrimination, and the lack of support and funding available when they do so. It has been suggested that housed Gypsies and Irish Travellers may be particularly keen to remain 'ethnically anonymous' so are less likely to report harassment or discrimination. This in turn leads to their further invisibility, and a tendency of service providers to overlook the ethnic status of housed Gypsies and Irish Travellers.

Challenging racial discrimination: the way forward

It is clear that several areas are ripe for challenge. Areas where discrimination may be occurring that were highlighted in recent consultation carried out by the CRE include: access to health care, exclusion from school, site provision and planning, homelessness applications, stop and search, access to bail and harassment at work.

There may be ample scope to challenge public bodies under s71 of the RRA 1976 on whether they are promoting equality of opportunity for, and/or eliminating unlawful discrimination against ,Gypsies and Irish Travellers and whether they are actively seeking to promote equality of opportunity between these and other communities. Those public bodies with specific duties to produce a race equality scheme (police, health, local authorities) or a race equality policy (schools, higher and further education), should be identifying all of their functions and policies relevant to race equality within their schemes/policies. This should include functions relevant to Gypsies and Irish Travellers.

In order to implement their policies and practices effectively, such listed bodies should actively monitor their existing policies for adverse impact on all racial groups, and assess the impact of new and proposed policies, including those policies generally affecting Gypsies and Irish Travellers. If they found that Gypsies and Irish Travellers were, or were likely to be, adversely affected, and this could not be justified within the wider goals of their policies, then the policy should be changed. Public authorities should also consult with Gypsies and Irish Travellers on policy changes and ensure that information is available to them. Public authority staff should be trained on the race equality duty.

Since no cases have yet been taken under s71 of the RRA, there has been no consideration of breaches particularly in relation to Gypsies and Irish Travellers. However, one cause for concern is the lack of data available on Gypsies and Irish Travellers. The effective implementation of the race equality duty relies on

8. RRA 1976, s29.

9. *Smith and Smith v Cheltenham BC, Avery, Lambert and Hogg*, 7 June 1999, (CN755478), (unreported), Bristol County Court, HHJ Rutherford.

10. See for example *Connors v The United Kingdom*, and *Somerset CC v Isaacs and Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1014 Admin.

ethnic monitoring – collecting ethnic data, analysing results, identifying disproportionalities and making changes where they cannot be justified. However, with the exception of schools (for whom this is now mandatory), the majority of authorities are not ethnically monitoring Gypsies and Irish Travellers and this means that they may fail to benefit from the race equality duty.

In terms of the wider impact of the duty on Gypsies and Irish Travellers, concerns have been raised by the Gypsies and Irish Travellers as well as their Support Groups that public authorities are unaware of their responsibilities in relation to these groups, and are not making positive efforts to meet their needs. In particular they have highlighted local authorities' approach to planning, site provision and eviction. This may be a fertile ground for legal challenges.

Gypsies and Travellers Scrutiny Project

The CRE is currently conducting research which will highlight the extent to which the duty is being met by local authorities. On 18 October 2004, the CRE launched the 'Gypsies and Travellers scrutiny project', the aim of which is to provide, through detailed research, an authoritative evidence base from which an accurate assessment can be made of how local authorities are meeting their s71 race equality obligations in relation to Gypsies and Irish Travellers. There are three elements to the project. A questionnaire has been sent to every local authority in England and Wales, asking detailed questions on their race equality policy and practice, planning, site provision and eviction. Nine authorities have been selected for more detailed on-site analysis, with a document analysis and interviews with key staff. Authorities have been selected where there are particular issues which are relevant to the scrutiny project and which the CRE wishes to explore in more detail. Finally the CRE has sent out a call for evidence inviting detailed information from a wide range of stakeholders – Gypsies and Travellers, support groups, public authorities, lawyers, and politicians. The call for evidence deadline has now been extended to the end of March 2005. **The CRE is particularly keen to receive information from lawyers practicing in this area.** Details of the information that the CRE needs can be accessed from the CRE's website.

The research will be completed in Summer 2005, and launched in September 2005. This will be followed by robust guidance for local authorities, setting out what they should be doing to comply with their s71 obligations in relation to Gypsies and Irish Travellers.

Wider developments in Gypsy and Traveller Law

Despite the lack of discrimination case law in relation to Gypsies and Travellers, there have been many other recent cases involving Gypsies and Travellers, and some significant legislative and policy developments. Recent high profile evictions and unauthorised developments have ensured that public attention has remained focused on unlawful land use, leading to calls for increased powers of enforcement against unauthorised encampments and developments. Government has responded by introducing increased powers of eviction via amendments to the Criminal Justice and Public Order Act 1994[11] and then a power to issue temporary stop notices against unauthorised development, via the Planning and Compulsory Purchase Act 2004. Yet these legislative changes in themselves recognise that increased enforcement must be linked to increased site provision, and there are a number of recent significant cases which lend weight to this argument. They show an increasing judicial tendency to rule that enforcement action will be limited by a local authority failure to provide sites, where there is clear evidence of need.[12]

There have been two recent landmark judgments in this area. In *South Buckinghamshire CC v Porter*,[13] the HL ruled (unanimously) that the unlawfulness of a Gypsy's occupation of their land is largely immaterial in determining their planning application/appeal and that a combination of Gypsy status, ill health and lack of an alternative site can as a matter of law amount to 'very special circumstances' which allow for planning permission in the Greenbelt. This is the highest authority to date on this area of law. In the case of *Connors v United Kingdom*, the European Court of Human Rights ruled on 27 May that the lack of protection from eviction and security of tenure for

11. New s62A was introduced into the CJPOA 1994 via the Planning and Compulsory Purchase Act 2004, giving the police powers to evict where only one caravan is present, provided alternative pitches are available on a site elsewhere in the local authority area.

12. Eg, recent cases involving South Cambridgeshire, Wychavon and Chichester district councils.

13. *South Bucks District Council and another v Porter* (FC) [2004] UKHL 33.

Gypsies living on local authority sites breached Article 8 of the ECHR. Government failed to convince the court that the flexibility needed to facilitate the nomadic way of life justified the lack of security, since there was insufficient site provision to enable such nomadism in practice. Government is now considering how to resolve the security of tenure issue.

There have also been important policy developments at government level. Since early 2003, the Office of the Deputy Prime Minister has been conducting an extensive review of Gypsy and Traveller legislation and policy, focussing primarily on site provision. Whilst the review is not yet completed, many significant changes have already been announced and work on these developments has begun. Perhaps most significantly, planning circular 1/94, which advises local authorities on planning applications for Gypsy sites, has been revised. The new circular, which is currently out for public consultation, aims to close the 'criteria loophole', making clear that authorities should identify locations for Gypsy sites on the face of their local development documents, and only use criteria in exceptional circumstances, or in addition to a location based approach enable unexpected applications to be evaluated.

The circular also sets out how site needs will be met within the reformed planning system, introduced via the Planning and Compulsory Purchase Act 2004: that local housing needs assessments should include Gypsy and Traveller accommodation needs, that Regional Spatial strategies should include site needs, and that that local authorities should include site requirements in their local development documents.

The CRE, Gypsy and Traveller law reform coalition, supported by ACPO, Shelter, the Children's Society, the National Farmers Union and others, have been recently lobbying for amendments to the Housing Bill (now Act 2004) to introduce a duty to facilitate site provision and where necessary to provide sites. This would underpin these policy developments providing a powerful legal lever. The duty, which was supported by the ODPM select committee holding a recent inquiry into Gypsy and Travellers sites was not accepted by government. However, if robustly enforced, the new planning system could lead to major improvements in the level of site provision. Furthermore amendments were made to the Housing Bill so that the Act now contains provisions to: oblige local housing authorities to conduct an assessment of Gypsy site needs; extend protection from eviction to those living on all local authority sites, and to extend suspension of eviction orders to these sites, and broaden availability of the disabled facilities grant to those living in caravans. Concern remains however about what happens to Gypsies and Irish Travellers with nowhere lawful to live in the time before the changes take effect on the ground.

The need to address the discrimination dimension

The last year in particular has seen some important policy and legislative developments for Gypsies and Travellers. It has also seen some landmark cases, particularly in relation to planning and site provision, recognising that in the absence of adequate site provision, local authorities must do more to facilitate the Gypsy and Traveller way of life. So far race equality legislation has had relatively little impact on the discrimination that Gypsies and Travellers experience. Changes to the RRA offer new opportunities to challenge public authorities who fail to recognise the needs of Gypsies and Irish Travellers, but this must be seen against a background of inaction. So it is essential that discrimination case law in this area is developed further. Whilst the importance of the recent 'non-discrimination' cases cannot be underestimated, the fact that these cases have been won on 'lifestyle' grounds and not 'ethnic' grounds means that the full extent of the racial discrimination faced by Britain's Gypsy and Irish Traveller communities is not recognised, and as long as it continues to do so will remain unaddressed.

Sasha Barton
Commission for Racial Equality

- Details on the CRE Gypsy and Traveller Scrutiny Project and the call for evidence can be accessed at **www.cre.gov.uk/scrutiny**. Alternatively e-mail scrutinyproject@cre.gov.uk.
- Legal Action Group recently published '*Gypsy and Traveller Law*' edited by Chris Johnson and Marc Willers, with foreword by Trevor Phillips – see Book Review on page 39.
- Office of the Deputy Prime Minister is currently consulting on the revised planning circular 1/94 and regulations accompanying the new Temporary Stop notice provision (which can be accessed at **www.odpm.gov.uk**).

After Bernard Manning – the employer's liability for harassment by third parties

Employment law has, historically, had some problems in fixing the employer with liability for the actions of others.

Acts by fellow employees

Under all the discrimination acts, an employer is liable for the acts of its employees done 'in the course of employment' (e.g. RRA s.32 (1)). In *Jones v Tower Boot Co Ltd* [1997] IRLR 168 the CA clarified the employer's liability for its employees' discriminatory acts.

It made clear that the restrictive personal injury test for vicarious liability does not apply in discrimination law. The employer is always liable for the acts of its employees committed in the course of their employment (as understood by a layperson, not a personal injury lawyer) unless the employer can take advantage of the 'reasonable steps' defence. Any other interpretation would defeat the purpose of the statutory scheme.

Whether an act is done in the course of employment is a question of fact. An employer's liability for its employees' misdeeds has been held on occasions to extend outside working hours and outside the workplace in appropriate circumstances.

Acts of third parties

The employer's liability for the acts of third parties, such as clients, customers or passing members of the public is more problematic.

The years of Bernard Manning

The statutes are silent on the specific issue of third party harassment. However, until last year, *Burton v De Vere Hotels* 1997 ICR 1 (the 'Bernard Manning case') and *Go Kidz Go Ltd v Bourdouane* EAT 1110/95 – unreported – provided a very useful framework. This has now changed but the facts of these cases are useful for understanding the problems.

In *Burton* a club hired a room in a hotel for an evening and the club booked Bernard Manning as entertainer. Manning racially abused the two waitresses as they were working, as did some members of the club. The EAT stated that an employer's liability for third party discrimination is decided by the amount of *control* the employer has in the circumstances, i.e., what could the employer have done to stop it? The ET had made a finding of fact that the employer could have prevented the harassment and the EAT therefore found the employer liable under the RRA.

In *Go Kidz Go*, an employee at a children's party company was sexually harassed by the father of one of the children; she complained to the employer who insisted she returned to the party whereupon the harassment worsened. The EAT held the employer liable for the harassment as, in the circumstances, this was within their control.

It was unclear how much warning the employer needed that the employee might be subjected to harassment before it incurred liability. However, the fact that the harassment was foreseeable was not in itself enough to fix the employer with liability. Workers subjected to harassment outside of their employer's control were still vulnerable, for instance, parking wardens subjected to discriminatory harassment by irate motorists.

These cases have been criticised as being inconsistent with the strict wording of the statutes. It was said that the EAT had ignored the question of identifying a comparator and how that comparator would have been treated.

Bernard Manning overturned

In 2003 the HL gave judgement in *Macdonald v Advocate General for Scotland* and *Pearce v Governing Body of Mayfield Secondary School* [2003] IRLR 512 – cases concerning sexual orientation discrimination. In this decision, the HL held *Burton* was wrongly decided and was not based on statute.

The HL said that if an employer was not vicariously liable for the harasser, the employee's claim will only succeed if the employer's failure to protect is connected with the victim's race (or sex etc), so that in *Burton* the hotel would have treated a white waitress who suffered racial abuse in a more favourable way. Thus, the

employees would lose unless they could prove that the employer would not have permitted hypothetical white employees to be subjected to racially discriminatory harassment.

This made it a hard case to win. An ET might presume that the employer is, if anything, more, not less, likely to protect, a member of a perceived more vulnerable group, rather than a group which is not perceived as being so vulnerable to discrimination.

The HL went on to hold that being the victim of explicitly gender-specific abuse is not enough in *itself* to establish conclusively that the reason for the harassment is gender-based. Thus abuse which is (sex) specific in form is not in itself less favourable treatment on (gender) grounds; although in practice it will often be good evidence of this. This reversed the landmark decision in *Strathclyde v Porcelli* [1986] ICR 564 that gender-specific discrimination does not require a comparator.

Third party harassment under the current SDA

Currently, and until October 2005 at the earliest, when the Directive must be transposed into UK law, the SDA does not contain a free-standing definition of harassment, unlike the RRA.

Therefore an employee claiming under the current SDA has to argue that they have been subjected to a detriment under section 6(2)(b), in that the employer has failed to take steps to protect them from the harassment. Following *MacDonald* the comparator is a male employee subjected to harassment by a third party.

If the employer can prove that it would have treated a hypothetical male employee in the same way, there is no unlawful discrimination. Again, it will usually be hard to persuade an ET that an employer will be more proactive in protecting a male employee from sexual harassment than a woman. There is a growing body of cases where tribunals have criticised employers who, receiving a complaint of sexual harassment from a woman, have subjected the alleged male perpetrator to unfair (and sometimes discriminatory) treatment through misplaced zeal.

The free-standing definition of harassment

The Race Directive led to amendments to the RRA. Now there is a free-standing definition at section 3A RRA:-

the employer discriminates against the employer where:- on the grounds of race… he engages in unwanted conduct which has the purpose or effect of –

a) violating that other person's dignity, or

b) creating an intimidating, hostile, degrading, humiliating or offensive environment for (the victim).

Once the SDA comes into line with the RRA, the employer's vicarious liability for its employees' actions will remove the need for a comparator in employee-on-employee harassment cases and broadly restore the *Porcelli* status quo.

However, will the new free-standing definition provide employees with protection from third party harassment? When this matter was discussed at the Practitioners' Group Meeting in January 2005 opinion was divided, but the majority feared that the free-standing definition would not solve the problem.

If the employer is not subjecting the employee to harassment and neither is a fellow employee for whom the employer is vicariously liable, will the new definition of harassment apply at all in third party cases?

One answer lies in arguing that the harassment has created an 'intimidating …environment' for the victim, and that the employer who fails to protect an employee from third party harassment has engaged in 'unwanted conduct'? However, usually the employee is complaining about the employer's failure to take action, rather than their actions.

Further, it will be asked, has the employer acted 'on the grounds of' the victim's race? Or will the courts and tribunals only find the employer has acted on the grounds of the victim's race if the employer would have ignored harassment of an appropriate comparator?

The recent Practitioner's Group meeting concluded that there is, at least, a significant risk that the free-standing definition will not protect employees subjected to harassment by customers or other third parties.

How to run a third party discrimination case

What can such an employee do?

● *Direct discrimination*

Make a claim of direct discrimination and argue that *Burton* can be distinguished. This *may* be easier using the new free-standing definition. In particular, consider if the employer has acted in a gender (or race etc) specific way; perhaps a woman is accused

of being 'hysterical'. Further, in particularly reprehensible cases, for instance, where the employer had every opportunity of protecting the employee over a long period, the tribunal may be unwilling to find that the employer is not liable. Many third party harassment cases have much stronger facts than *Burton* where the employer had to make up its mind to act or not to act on the spot; notwithstanding the employment tribunal's finding that the employer should have foreseen the harassment.

● *Unfair dismissal*

If the employment has come to an end (either through resignation or dismissal for refusing to carry on working in the circumstances) and the Claimant has more than one year's continuous employment, they can bring a straight–forward (constructive) unfair dismissal claim. With a constructive dismissal, even if there is no discrimination claim, it may be argued that the employer has breached the fundamental duty of trust and confidence by failing to protect the employee from harassment. However, following the House of Lords decision in *Dunnachie*, compensation for injury to feelings is not available.

● *Health and safety unfair dismissal*

In serious cases a claim might be brought for automatic unfair dismissal under section 100 of the Employment Rights Act 1996 (ERA) in that the employee has been dismissed for a health and safety reason. There is no one year qualifying period. However, there may be difficulties in bringing the employee's specific circumstances within the wording of s.100; in particular danger to the employee may not be 'imminent'. Although compensation for injury to feelings is not available, there is an increased minimum basic award and an unlimited compensatory award.

● *Health and safety detriment*

If the employee is not dismissed for a health and safety reason but is subjected to a detriment, they may be able to bring a claim under section 44 of Part V ERA 1996 – protection from suffering detriment in employment.

It is important to understand that the third party harassment itself is not the detriment for these purposes; the *employer* must have subjected the employee to a detriment for one of the prohibited reasons. Therefore if the employee has refused to go back to the working environment where they are being harassed and the employer puts them on a disciplinary or suspends their pay, the employee can argue that they have been subjected to a detriment for a prohibited reason. The burden is on the employer to show that there was a lawful reason for the detriment.

The tribunal awards such compensation as it considers just and equitable having regard to the infringement and the loss attributable. Thus the employee can recover economic loss as in a claim for automatic unfair dismissal under section 100 ERA with no statutory cap.

What is less clear is whether compensation for injury to feelings is available. The tribunals have made awards for injury to feelings in detriment cases and the EAT in *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 held (obiter) that there was no reason why such compensation should not be available for health and safety detriment cases.

However, it is unclear whether the last year's House of Lords decision in *Dunnachie* will prevent tribunals awarding injury to feelings damages in detriment cases. It is arguable that *Dunnachie* should have no effect as the wording for compensation in Part V is different from that governing unfair dismissal compensation which was the subject of the *Dunnachie* decision.

This would mean that, as injury to feelings compensation (including personal injury) can be extremely high in such cases, an employee who is subjected to a detriment rather than dismissed (constructively or not) could recover far higher compensation.

Any injury to feelings compensation will be for the losses arising out of the detriment (for example, the disciplinary process) rather than the harassment itself. Such claims for quantum must be carefully pleaded and argued.

● *Equal Opportunities Policy contractual claim*

Some employers may be in breach of a contractual Equal Opportunities Policy; many policies were updated post-*Burton*. A claim for breach of contract may be brought in the employment tribunal if the employment has terminated or in the county court otherwise. The county court has power to issue an injunction to enforce a contract.

Non-employment law options

These include:

- If the employee has been made ill, a claim for personal injury.
- The harassers themselves may have committed a criminal offence under the Prevention of Harassment Act 1997 and/or the Criminal Justice and Public Order Act 1994 and the victim may be able to obtain a civil injunction against the harassers.

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Briefing 351

Substantive equality is required by European law

Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation Nationale and Ministre de la Justice C-319/2003 ECJ 3rd July 2004. Unreported.

Implications for practitioners

The European Court of Justice (ECJ) has recently considered what both Article 2(4) ETD and 141(4) EC mean. These are both concerned with positive action. Article 141(4) is a new provision which is particularly interesting. It speaks of 'full equality in practice'. This case provides a good review of the case law on positive action and the present thinking of the ECJ. It is particularly useful in reinforcing the fact that EC equality law is concerned with *substantive* and not just formal equality.

Facts

In this case the ECJ considered whether a French law, which prohibited recruitment to employment in the Civil Service for anyone aged over 45 unless the applicant was a widow or an unmarried man with child care responsibilities, was discriminatory against a man whose wife had died.

European Court of Justice

Firstly, the ECJ reviewed the weaker provisions of Article 2(4) of the ETD.

> **22** *As the Court has already held, Article 2(4) is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life (Case C 409/95 Marschall [1997] ECR I-6363, paragraph 26).*
>
> **23** *A measure which is intended to give priority in promotion to women in sectors of the public service must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates (see, to that effect, Case C-158/97 Badeck and Others [2000] ECR I-1875, paragraph 23).*
>
> **24** *Those conditions are guided by the fact that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (Lommers, cited above, paragraph 39).*
>
> **25** *Article 2(4) of the Directive thus authorises national measures relating to access to employment which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. The aim of that provision is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons*

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concerned (see, to that effect, Case C-450/93 Kalanke [1995] ECR I-3051, paragraph 19, and Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 48).

The ECJ held that the French provision in question was not consistent with the limits to permissible positive action. The reasons of the ECJ are also helpful in explaining more about the concept of *'full equality in practice'*.

26 *In its observations, the French Government maintains that the national provision in question in the main proceedings was adopted with a view to reducing actual instances of inequality between men and women, ...*

However, in *Briheche* the ECJ held that this argument was insufficient on the facts to justify the step taken.

27 *As the Commission has correctly pointed out, such a provision automatically and unconditionally gives priority to the candidatures of certain categories of women, including widows who have not remarried who are obliged to work, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding widowers who have not remarried who are in the same situation.*

28 *It follows that such a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women, while it is to men in the same situation as those women, cannot be allowed under Article 2(4) of the Directive.*

The ECJ noted that the provisions of Article 2(4) ETD and 141(4) EC were not identical and added:

29 *In those circumstances, it is necessary to establish whether a provision such as that in question in the main proceedings is nevertheless allowed under Article 141(4) EC.*

30 *Article 141(4) EC authorises the Member States to maintain or adopt measures providing for specific advantages in order, inter alia, to prevent or compensate for disadvantages in professional careers, with a view to ensuring full equality in practice between men and women in working life.*

31 *Irrespective of whether positive action which is not allowed under Article 2(4) of the Directive could perhaps be allowed under Article 141(4) EC, it is sufficient to state that the latter provision cannot permit the Member States to adopt conditions for obtaining access to public-sector employment of the kind in question in the main proceedings which prove in any event to be disproportionate to the aim pursued (see, to that effect, Abrahamsson and Anderson, cited above, paragraph 55).*

The French sought to achieve their aim of enabling a woman to pursue a career on an equal footing to a man, by giving a special advantage to the woman. But the means chosen were not acceptable.

Overall, the ECJ held that Article 2(4) ETD and Article 141(4) EC clearly looked beyond formal equality to substantive equality, but reserved its position on how far this goal could be achieved where positive action for a woman may create a claim of unlawful discrimination by a man.

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Briefing 352

Financial considerations cannot justify discrimination

Schonheit v Stadt Frankfurt am Main and *Becker v Land Hessen,* C-4/02 & C-5/02 [2004] IRLR 983 – ECJ

Facts

Hilde Schönheit, a social worker, was employed by the city of Frankfurt am Main. Initially she worked full time but from July 1st 1992 she worked part time, apart from a six month period of unpaid leave, until her early retirement on July 1st 1999. She was given a pension at the rate of 65.8% of her final pensionable salary. This was a lesser proportion than she would have been entitled to had the City only taken into account her periods of unpaid leave and part time employment as a proportion of a full time workers pension.

Silvia Becker, a teacher, was employed from 1971 by

the Land of Hesse, also in Germany. She worked part time between August 1981 and July 1989, she was then on unpaid leave until July 1995 when she returned to work part time until her early retirement in February 2000. Her pension was calculated at a rate of 52.18% of her final pensionable salary. She, too, brought proceedings claiming that her pension should have been calculated at a higher rate.

Issues referred to the ECJ

The German court referred questions to the ECJ in relation to these facts asking in summary whether the cost of full equality was a basis for justifying differential treatment and whether the justification on which reliance was placed had to have been considered at the time that relevant legislation was passed. A further question about the extent of the so called *Barber* Protocol was also asked.

European Court of Justice

The ECJ ruled that:

- A retirement pension paid under such a scheme falls within the scope of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Article 141(1) and (2) EC. Those provisions preclude legislation, which may entail a reduction in the pension of civil servants who have worked part-time for at least a part of their working life, where that category of civil servants includes a considerably higher number of women than men, unless the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.
- It is for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether, and to what extent, a legislative provision which, though applying independently of the sex of the worker, actually affects a considerably higher percentage of women than men is justified by objective factors unrelated to any discrimination on grounds of sex.
- Restricting public expenditure is not an objective which may be relied on to justify different treatment on grounds of sex.
- The different treatment of men and women may be justified, depending on the circumstances, by reasons other than those put forward at the time when the measure introducing the difference in treatment was introduced.
- National legislation, which has the effect of reducing a worker's retirement pension by a proportion greater than that resulting when his periods of part-time work are taken into account cannot be regarded as objectively justified by the fact that the pension is, in that case, consideration for less work or on the ground that its aim is to prevent civil servants employed on a part-time basis from being placed at an advantage in comparison with those employed on a full-time basis .
- Protocol No 2 concerning Article 119 of the Treaty establishing the European Community and the Protocol concerning Article 141 EC annexed to the EC Treaty (the Barber protocols) are to be interpreted as precluding the application of Article 119 of the Treaty and Article 141(1) and (2) EC respectively to benefits provided under an occupational social security scheme payable in respect of periods of employment prior to 17 May 1990, subject to the exception for workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

Implications

The comment in relation to the Barber protocols is unsurprising, however the other two points deserve to be emphasised. It is often the case that a justification for unequal pay is advanced on the basis that it would cost too much to implement full equality. This case re-iterates the case law of the ECJ that this is not permissible since otherwise the extent to which there was equality would differ according to time and circumstance.

It is also important to note that the ECJ said that it might be permissible to provide a justification for legislation after the event. This answer is more worrying, yet it seems likely that such after the event explanations will be liable to intense scrutiny from the court or tribunal which has to review them. If the aim of the legislation at the time that it was passed is different from that which is advanced at the point of litigation, the court or tribunal will question whether, the new aim is legitimate and proportionate.

Gay Moon
Editor

Race discrimination in UK government immigration practice

R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others

[2004] UKHL 55, [2005] IRLR 115

Background

In February 2001 the government of the Czech Republic agreed that UK immigration officers could be stationed at Prague Airport to screen all passengers intending to travel to the UK, the alternative being the imposition by the UK of a visa regime for Czech nationals. The UK was concerned about the growing number of asylum seekers from the Czech Republic, up from 515 in 1998 to 1800 in 2000, with consistently low rates of success (6% at the beginning of 2001). The objective was to prevent or deter would-be asylum seekers from reaching the UK. The vast majority of Czech asylum seekers were Roma seeking refuge from the oppression and violence they experienced in the Czech Republic.

The scheme began in July 2001 and continued intermittently for unannounced periods during 2001 and 2002. Anyone intending to travel to the UK from Prague airport, regardless of nationality, was required to pass through UK immigration control before checking in for their flight. From the outset there were concerns that this operation was targeted at Roma; the different experiences of two journalists, one Roma and one non-Roma whose circumstances were otherwise almost identical, received wide publicity in the Czech Republic and elsewhere.

An employee of the European Roma Rights Centre (ERRC) observed flights from Prague to the UK on 51 different dates in January – April 2002; his observations showed that Roma were 400 times more likely to be turned away than non-Roma. He also observed that Roma were questioned for longer and that 80% of Roma were taken to a second interview area while this happened to less than 1% of non-Roma.

The ERRC together with six Roma brought an application for judicial review to challenge the lawfulness of these procedures. All six Roma were refused leave in 2001 to enter the UK by immigration officials at Prague airport. Three had stated that they wanted to apply for asylum, two gave other reasons but were intending to apply for asylum, and one person stated that she wished to visit relatives already in the UK.

They challenged the screening procedures on two grounds: whether they were incompatible with the UK obligations under the 1951 Geneva Convention and 1967 Protocol relating to the Status of Refugees and whether they involved discrimination on racial grounds.

Their application on both grounds was unsuccessful in the High Court and in the Court of Appeal. However, in the Court of Appeal Law, LJ dissented from the majority on the question of unlawful racial discrimination (see *Briefings* Vol. 20 pp 25-6). The applicants were given leave to appeal to the HL on both grounds.

Legal chronology

On 30 November 2000 the Race Relations (Amendment) Act (RRAA) received Royal Assent. This Act extended the scope of the 1976 RRA to all functions of public authorities (s. 19B), including immigration control. It created an exception (s.19D) for certain immigration functions when discrimination on grounds of nationality or ethnic or national origin would not be unlawful when authorised by a Minister. The RRAA into force on 1 April 2001. A Ministerial Authorisation came into force on 24 April 2001 which allowed discrimination against persons of particular ethnic or national origins, including Roma, in the course of specified immigration control operations.

House of Lords

The HL rejected the appellants appeal in relation to the Geneva Convention but upheld their appeal under the RRA.

Throughout this litigation the position of the UK government was that the Prague Airport operation did not rely on the Ministerial Authorisation, and that it did not involve unlawful racial discrimination.

Evidence relating to the instructions and training given to immigration officers on the implementation of this Authorisation was disclosed only at the end of the appeal in the Lords. Baroness Hale advised, that, if it was not the intention of the officers in Prague to act on the Authorisation and no instructions had been given to implement it, then, the combination of the objective of the whole Prague operation and a very recent ministerial authorisation of discrimination against Roma created such a high risk that the Prague officers would consciously or unconsciously treat Roma less favourably than others that very specific instructions were needed to counteract this. No evidence was offered that such instructions had been given.

The evidence was that Roma were, simply because they were Roma, treated with greater suspicion and subjected to more intensive and intrusive questioning. The fact that Roma were more likely than non-Roma to claim asylum, and therefore immigration officers more likely to be suspicious of their reasons for wanting to travel to the UK did not provide a defence to direct racial discrimination. While there may have been a good reason for immigration officers to treat Roma more sceptically than non-Roma, this involves acting on racial grounds and, for purposes of direct racial discrimination the reason is irrelevant. Stereotyping on racial grounds is wrong, not only if it is untrue, otherwise this would imply that direct discrimination can be justified, which is not permitted under the RRA.

In overturning the decision of the CA, Baroness Hale commented,

> *It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong. In 2001… the race relations legislation had only just been extended to cover the activities of the immigration service. It would scarcely be surprising if officers acting under considerable pressure of time found it difficult to conform in all respects to procedures and expectations which employers have been struggling to get right for more than a quarter of a century.*
>
> *All of the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma...setting up an operation like this...requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systematically discriminatory and unlawful.*

Both Lord Steyn and Baroness Hale also examined the discriminatory Prague Airport scheme in relation to wider international law obligations of the UK. They found that it was contrary both to customary international law and the international treaties to which the UK is a party, referring to the Universal Declaration of Human Rights, (art.2), the International Covenant on Civil and Political Rights (art. 2 and art. 26) and the International Convention on the Elimination of All Forms of Racial Discrimination (art.2). Baroness Hale also referred to the recent conclusions of the UN Committee on the Elimination of Racial Discrimination that s. 19D of the RRA is *'incompatible with the very principle of non-discrimination'* and commented that:

> *A scheme which is inherently discriminatory in practice is just as incompatible as is a law authorising discrimination.'*

The unanimous declaration of the House of Lords was that:

> *UK Immigration Officers operating under the authority of the Home Secretary at Prague Airport discriminated against Roma who were seeking to travel from that airport to the UK by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the UK, contrary to section 1(1) (a) of the Race Relations Act 1976.*

Comment

There are important legal and policy implications of this decision.

Looking first at discrimination law, the decision illustrates very clearly, against what might seem difficult facts, that UK anti-discrimination legislation offers no defence of justification for direct discrimination. The fact that a stereotype of a racial group is true does not make it lawful to subject any individual member of that racial group to less favourable treatment.

The RRA duty to promote race equality applies to the Home Office, like all other public authorities; in respect of immigration functions the Home Office must have due regard to the need to eliminate unlawful discrimination and to promote good race relations. Where, as in the Prague Airport operation, it was 'inevitable' that Roma would be subjected to greater degree of suspicion; it was incumbent on the Home Office to ensure that officers involved did not discriminate on racial grounds. Applying this principle more generally, where an employer or service provider is aware that particular circumstances in an activity within their control make it likely that discrimination may occur, it is appropriate to expect them to take specific preventative measures. Where the employer or service provider is a public authority with a statutory equality duty, the obligation to avoid unlawful discrimination is all the greater.

A significant feature of the opinions of Baroness Hale and Lord Steyn is the reference to international law standards. In addition to declaring the UK to be in breach of the RRA, they looked beyond our borders and found the action of the UK government to be contrary to its obligation under international instruments as well as customary international law. It is to be hoped that once the door has been opened to scrutinising acts of the state against instruments such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination, it will remain open. This should serve as a strong encouragement to discrimination lawyers, especially in proceedings against public bodies, to consider the UK's international equality obligations. Further, the proposed CEHR, with its joint equality and human rights mandate, should be expected to develop and strengthen the application in the UK of international equality and human rights standards.

This case also raises doubts regarding the validity of s.19D RRA, which exempts immigration functions from the prohibition of discrimination when this is done pursuant to a Ministerial Authorisation. This statutory licensing of discrimination by the executive in what is, perhaps, the most racially sensitive area of government activity, remains highly controversial. Although it was not meant to be the basis of the operation at Prague Airport, arguably it could have been. Migration Watch UK, suggest that immigration officers should not need to be 'instructed' to rely on a Ministerial Authorisation, but if the officers in this case had kept records of interviews by ethnicity, the government could have relied on the Ministerial Authorisation to establish that the treatment of Roma was lawful, and the case would never have reached the HL (see www.migrationwatchuk.org). Referring to the recommendation of the UN Committee on the Elimination of Racial Discrimination that s.19D should be re-formulated or repealed (which was made before the Lords' decision); the Home Office stated (in a memorandum to the JCHR, January 2005) that it had no plans to do so. *'It is not a blank cheque to discriminate but it does allow immigration control to be carried out in an intelligence led way.'* In the context of this case this would have meant relying on racial stereotypes. It is no longer acceptable to retain in UK anti-discrimination legislation a provision that is wholly contrary to UK and international equality standards, and therefore s.19D should be repealed at the earliest possible date.

Barbara Cohen

Belmarsh cases rule on discriminatory detention

A (FC) & Others v Secretary of State for the Home Department [2004] UKHL 56
16 December 2004

Implications for practitioners

The HL judgments in *A & Others* ('the Belmarsh cases') have been widely reported for their impact on civil liberties and the rule of law. However, the judgments are extremely important for equality lawyers and activists. The response of government when it is finally formulated will not only signify the extent of its commitment to democracy and human rights but, in particular, its respect for equality as a fundamental principle deserving of substantive and not merely formal respect.

Facts

The case concerned section 23 of the Anti-terrorism, Crime and Security Act 2001 ('the Act'). The Appellants were foreign (non-UK) nationals against whom no criminal charges had been brought and in none of their cases was a criminal trial in prospect. They were detained under section 23 of the 2001 Act. They challenged the lawfulness of their detention arguing that their detention was inconsistent with the UK's obligations under the European Convention on Human Rights (ECHR) and that the UK was not entitled to derogate from those obligations.

Article 5 ECHR provides for liberty of the person and prohibits detention except in certain limited cases (eg following a conviction), including where action is being taken with a view to deporting a foreign national (Article 5(1)(f)). As Lord Nicholls observed in the Belmarsh cases: *'Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law.'* (para 74) and as Lord Hoffman observed: *'Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.'* (para 86). However, section 23 of the Act allowed for the indefinite detention of a 'suspected international terrorist' where such person was a non-UK national. Such detention was authorised only in respect of a person against whom a deportation order had been made. But the Act allowed for a deportation order to be made against such a person where as a matter of law he could not in fact be removed from the UK (and thus the deportation could not be effected). This covered cases in which the person would be likely to face torture in the country to which they were to be deported – such a deportation would be contrary to Article 3 of the ECHR. The ECtHR has held that where a person cannot in fact be removed, Article 5(1)(f) will not justify his detention. Accordingly, the detentions were incompatible with Article 5 and unlawful under the ECHR.

As a result, the UK 'derogated' from Article 5 of the Convention. The Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) ('the Derogation Order') contained this derogation and was an attempt to legitimise the otherwise unlawful detention provisions of the Act. This derogation could only be lawful if it could be said that there was some public emergency threatening the life of the nation and the derogation was only to the extent strictly required by the exigencies of the situation and were not inconsistent with its other obligations under international law (ECHR, Article 15).

House of Lords

The majority of the HL accepted that after 9/11 it could properly be said that there was *'a public emergency threatening the life of the nation'* (though not without expressing some hesitation). However, they concluded that the measures taken were not justified in that they could not be said to be 'strictly necessary' or, put any other way, they did not satisfy the requirements of 'proportionality' (see, Lord Bingham, paragraph 30). This was because they did not rationally address any perceived threat. They did not, importantly, address the position of UK nationals suspected of international terrorist links and they permitted non-UK nationals suspected of international terrorism to be released so long as they found a country willing to accept them and left the UK (i.e. essentially consented to

deportation) and so, implicitly, permitted them to continue any 'terrorist' activities abroad. In addition, other less intrusive measures (e.g. tagging) may have been adequate to met any threat posed and, at least on the face of the statute, section 23 allowed for the detention of others completely unconnected with Al-Qaeda (e.g. ETA). The HL concluded that SIAC (the first instance tribunal) and the CA erred in concluding otherwise.

Importantly, the HL also concluded that section 23 and the derogation order failed the requirements of proportionality and breached Article 14 (the ECHR's non-discrimination guarantee) because they were discriminatory, applying as they did to non-UK nationals but not UK nationals. In so concluding, the HL made some important observations on the proper comparator for determining whether there was any discrimination as between the Appellants and others in an 'analogous situation' as required by Article 14.

The CA had held that UK nationals suspected of international terrorism were not proper comparators because *'the nationals have a right of abode in this jurisdiction but the aliens only have a right not to be removed'*. The HL did not agree. They said that the effect of this approach was to '*accept the correctness of the Secretary of State's choice of immigration control as a means to address the Al-Qaeda security problem, when the correctness of that choice is the issue to be resolved'* (Lord Bingham, para 53). Suspected international terrorists who were UK nationals were, according to the House of Lords, *'in a situation analogous with the appellants because, in the present context, they share the most relevant characteristics of the appellants.'* (Lord Bingham para 53). Accordingly, an alleged discriminator may not rely on a discriminatory explanation for any treatment as a basis for contending that the complainant and any comparator are not in comparable situations where that explanation is itself the subject of the complaint.

This approach is consistent with the decision of the HL in *James v Eastleigh* [1990] IRLR 288 (not referred to in the Belmarsh cases) in which the Lords accepted that a male and a female between the ages of 60 and 65 were in a comparable situation, notwithstanding that the retirement age for men was 65 and for women 60, for the purposes of holding that a policy which allowed free swimming to those over pensionable age was discriminatory. The fact that one was not a pensioner and another was did not make their situations non comparable where the use of a pension age condition for determining free entry was precisely the issue in the case. (This might be compared to the approach of the CA in *Dhatt v MacDonalds* [1991] IRLR 130 which should now be considered unsafe).

Accordingly, whilst a State may lawfully discriminate in the context of its immigration control (subject to compliance with International law) it may not unjustifiably treat non-UK nationals differentially where the treatment does not concern immigration control (see too, Lord Hope, para 138; Scott, para 157; Rodger para 170-172). This is an important point for equality lawyers and the proper approach in a race discrimination case where immigration status is said to provide the explanation for the treatment.

The conclusion that the discriminatory nature of the provision rendered it unlawful is important. The test for government is what it does with that ruling. As Lord Hoffman (who concluded that there was no emergency threatening the life of nation) stated:

> *...the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory. (para 97).*

The Lords had no legal power to release the detainees who were held pursuant to the provisions of an Act of Parliament. Their only power lay in ruling that the provisions of the Act and the detentions were incompatible with the ECHR and in quashing the Derogation Order. Any power to act to release the detainees lay exclusively with government.

Comment

In spite of the forceful remarks of the Lords, the government has indicated that it proposes to introduce a new and self evidently oppressive set of 'control orders' so that anyone, UK or non-UK national, suspected of being involved in terrorism might be subject to house arrest, curfews or tagging indefinitely and without charge or trial. This response shows a

contemptuous disregard for human rights and a disrespect for the important values of equality and non-discrimination. Rather than securing equality for non-UK citizens by according them their fundamental rights consistent with international law, government has decided that if it cannot select to deprive non-UK nationals only of their rights, it will deprive us all of them. As Lady Hale observed (para 237):

> *Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities. As Thomas Jefferson said in his inaugural address:*
>
> *'Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable . . . The minority possess their equal rights, which equal law must protect, and to violate would be oppression.'*

Government proposes to resolve the discrimination issue by providing itself with power to oppress us all equally. Of that we should be concerned.

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Briefing 355

Time limits for equal pay claims

Powerhouse Retail Limited v Burroughs and ors [2005] IRLR 979 EWCA

Background

The equal pay litigation brought by some 60,000 part-time workers complaining of unlawful discriminatory exclusion from pension schemes, previously known as *Preston v Wolverhampton Healthcare NHS Trust* (no 3), has found its way to Europe and back via the HL and been returned to the ET to deal with various test case issues. The litigation over the various test issues is currently working its way back up through the courts.

In this case the CA was required to consider how a transfer of undertaking, and the Transfer of Undertakings (Protection of Employment) Regulations 1981(TUPE) would affect equal pay in respect of an occupational pension, and in particular, what effect, if any, a TUPE transfer would have on the time limit for bringing an equal pay claim.

Section 2(4) of the Equal Pay Act 1970 provides that claims must be brought within six months of the termination of the contract of employment. Regulation 7 of TUPE specifically excludes the terms of the occupational pensions from the general effect of TUPE, which is that the contract transfers intact, and continues with the transferor employer as before. So the key question was: if an occupational pension does not transfer, what happens to any rights to bring a claim in respect of those rights? And importantly for this case, when does the 6 month time limit run from?

Here the difficulty for the employees arose because whilst their employment had been transferred, their pension rights had not, and they had not sought a remedy in respect of equal pay arising from their pension rights until the termination of their contract much later. The employees argued that, because of the intended effect of TUPE on contracts of employment, time should not start to run until the end of the contract. The fact that the pension rights did not transfer should not affect this. The EAT agreed.

Court of Appeal

The CA disagreed. They held that the EAT were incorrect in saying that time would not run until the end of an employee's employment with the transferee. They found that where a transfer of an undertaking excludes the occupational pension from a transfer, the pension terms fall out of the contract of employment at the point of transfer. Thus no further pension rights can accrue against the transferor and therefore any equal pay claim in respect of pension rights will be based wholly on a previous contract, the terms of which have not transferred in this respect only. Time therefore

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will start to run from the point of the transfer itself.

Lord Justice Pill giving judgement for the Court stated that:

> *The continuing contract of employment is deemed always to have been with the transferee, but it must be acknowledged that the pension rights have been removed from it and it cannot be treated as if they have not. It cannot be regarded as the specific contract of employment, giving rise to the claim for pension rights, which existed between the transferor and the employee before the transfer took place. The employment under a contract of employment about which a complaint is made is the contract between transferor and employee with its equality clause providing pension rights and the post-transfer contract of employment, shorn as it is by statute of existing pension rights, is not the specific contract of employment for the purposes of Section 2(4). The claim is based on the previous contract and insofar as its terms have not been transferred, it terminated upon the transfer and time began to run. The existence in each of the contracts of an equality clause does not mean that they can be treated as the same contract.*

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Briefing 356

When bankrupt employees have a right to appeal

Khan v Trident Safeguards Ltd and others [2004] IRLR 961 EWCA

Implications for practitioners

Claims of race discrimination and victimisation are 'hybrid' claims containing a personal element and a claim to the bankrupt's property which vested in his trustee. Consequently the bankrupt individual would have standing to pursue such claims if his claims for relief were limited solely to a declaration under s56(1)(a) and compensation for injury to feelings under s57(4) of the RRA.

Facts

Mr Arfan Khan (K) was employed as a security officer by Trident Safeguards (TS) from June 1999. Between February and August 2000 he issued six originating applications claiming direct discrimination and victimisation under the RRA. The essence of his complaints was that he was being made to work longer hours for less pay than his comparators. In October 2001 an ET dismissed all the complaints. In March 2001 K brought further complaints of race discrimination and victimisation against TS and three other Respondents. All these claims were dismissed on 13 March 2002 and K was ordered to pay costs of £10,000 to TS and costs to another party.

On 23 March 2002 TS terminated K's employment on grounds that there had been a complete breakdown of trust and confidence. K issued further proceedings claiming unfair dismissal and victimisation under the RRA. On 3 December 2002 the ET dismissed his complaints and ordered him to pay TS's costs of £7,800.

On 12 August 2002 TS having obtained a county court judgement for its costs in the discrimination proceedings served a statutory demand on K. On 16 December 2002 K filed a bankruptcy petition. The question arose whether K had status after that date to pursue appeals to the EAT against the three ET decisions.

The EAT decided that because he had been adjudged bankrupt, K did not have the status to prosecute any of his appeals.

Court of Appeal

After the EAT decision, the CA in *Grady v HM Prison Service* [2003] IRLR 474, held that a bankrupt can pursue an unfair dismissal claim as this is personal to the Claimant and not a 'thing in action' which vests in the trustee in bankruptcy. The effect of the *Grady* decision was that the EAT had jurisdiction to entertain K's appeal against the decision that he had not been

unfairly dismissed. The CA allowed that appeal and remitted it to the EAT.

Additionally, the CA found that the EAT had been wrong to hold that as a bankrupt the Claimant had no standing to pursue an appeal against a finding that he had not been subjected to discrimination or victimisation on the grounds of race.

The CA clarified that a claim for race discrimination is a 'hybrid' claim including both a claim for pecuniary loss, which is property that forms part of the bankrupts estate, and a claim for injury to feelings, which is 'personal' and does not form part of the bankrupts estate. Accordingly the whole of the hybrid claim vests in the trustee in bankruptcy (as in the decision of the CA in *Ord v Upton* [2000] Ch 352 EWCA). If a bankrupt limits their claim for relief sought to a declaration and compensation for injury to feelings only their claim would cease to be a hybrid one. Thus K would be permitted to pursue his appeal further if he amended his claim by withdrawing any claim that would make his claim a hybrid one.

Comment

The decision gives guidance as to how a bankrupt Claimant may still pursue a claim for race discrimination or victimisation after becoming bankrupt. The CA referred to the observations of Lord Steyn in *Anyanwu v South Bank Student Union* [2001] IRLR 305 in so doing the decision reminds practitioners that it is in the public interest that claims of race discrimination are fully examined and not subjected to summary processes.

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Briefing 357

Disability discrimination in access to transport, part 1

Roads v Central Trains Ltd [2004] EWCA Civ 1541

The Court of Appeal has recently given judgment in two cases under Part 3 of the Disability Discrimination Act, both of which have significant implications for those providing services, those taking cases under these provisions, and those instructed in such cases.

Background

Mr. Roads (R) is disabled and dependent upon an electric wheelchair for mobility. He has difficulty in gaining access at Thetford railway station to platform 1, the eastbound Norwich line. Whether he has arrived from Norwich and wishes to cross the track for the return journey, or whether he has gone into Thetford and now wishes to return to Norwich, the only access is from the forecourt on the south side of the station, where the ticket office is located. He cannot use the footbridge, and the alternative half mile route east along Station Lane, which returns west to platform 1, is negotiable only with excessive difficulty and risk in his wheelchair. R brought a claim against Central Trains Ltd (CT) contending that they had breached the DDA in failing to provide him with a reasonable adjustment, namely the provision of a taxi to transfer him via the Station Lane route in his wheelchair. CT contended that by going west to Ely, R could cross in safety to the Norwich Line for his return journey, and that by making this provision they have discharged their duty to him.

County Court

R's claim was dismissed, on the basis that it was not reasonable in the circumstances of the case for CT to make such provisions. R, supported by the DRC, appealed against the decision, on the basis of the finding itself and the way in which it had been reached. CT cross appealed, contending that the judge overlooked whether it was unreasonably difficult for disabled persons generally, not just R, to use the alternative route unaided, and thus whether the duty under s.21 had been breached at all.

Court of Appeal

They allowed the appeal holding that:

- S.21 sets out a duty on service providers, who, whilst not being expected to anticipate the needs of every individual who may use their service, must think about and provide for features which may impede persons with particular kinds of disability – impaired vision and so on. The practical way of applying section 21 in discrimination proceedings will usually be to focus on people with the same kind of disability as R.
- When considering the right created by s.19 DDA, there is a double test: does the particular feature impede people with one or more kinds of disability, and, if it does, has it impeded the claimant?
- When considering what is a *'reasonable alternative method of service'* (as in s.21 (2) (d)), what is reasonable is not always straightforward. Where there is only one practicable solution, it may have to be treated as reasonable even if it is demeaning or onerous for disabled people to use it. If, on the other hand, there is a range of solutions, the fact that one of them, if it is stood alone, would satisfy section 21(2) (d) may not be enough to afford a defence. This is because the policy of the Act is *'to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large'*. Whilst the DDA does not require the court to make fine choices between comparably reasonable solutions, such comparison is inescapable when one solution that is offered is said to be unreasonable precisely because a better one in terms of practicality or of the legislative policy is available.
- The judge should have addressed the question of impeded access in relation to wheelchair users as a class before asking it and answering it in relation to R. The questions to be asked then were:
  - Is it impossible or unreasonably difficult for wheelchair users to use the Station Lane route to get to platform 1?
  - If it is, had CT taken such steps as it was reasonable for them to have to take in order to provide an alternative means of access for wheelchair users?
- In light of the observations made by the judge on the evidence of those accessing the Station Lane route, he would have answered the question of whether or the service was impossible or unreasonably difficult for wheelchair users, as well as for R himself, in the affirmative had he addressed it correctly.
- In light of the fact that CT had agreed in pre-trial correspondence that the cost of bringing an adapted taxi from Norwich would not be relied on in relation to the reasonableness of making the provision sought; the policy of the Act; the relative infrequency of the problem; the advance notice which CT would have of R's travelling, the decision could only have gone in R's favour.
- The policy of the DDA is not a minimalist policy of simply ensuring that some access is available to the disabled: it is, so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public. Thus access via Ely, while plainly relevant, is not by itself an answer.
- To require him to spend over an hour – perhaps well over an hour – travelling in the wrong direction and then back again when at no cost to CT a taxi could be waiting to transfer him in minutes to the other side of the track at Thetford could not on any fair view, given the policy of the Act, be called a reasonable alternative method of reaching platform 1.
- Judgment was entered in the sum fixed by the judge of £1000 general damages together with £97 special damages.

Comment

This judgment affirms the policy behind the Act. It is not a 'minimalist Act', access should be afforded that is as close as possible to that offered to the public at large. It also emphasises the 'anticipatory' nature of the duty, owed to disabled persons at large (as express in the DRC Part 3 Code of Practice on Access to Goods, Facilities Services and Premises) and the importance of this.

There are also implications in this judgment for the options set out in s.21 (4) of the DDA, in relation to addressing physical features. When considering whether a reasonable adjustment has been made, courts will be able to consider whether a different approach could have been taken – for example, whether a feature should have been removed, instead of providing an alternative means of service – rather than being confined to assessing whether the one step taken has resulted in the barrier to service being addressed.

Catherine Casserley
Disability Rights Commission

Comparators for proof of discrimination

Madden v Preferred Technical Group Cha Ltd & Another [2005] IRLR 46 EWCA

Background

Under Section 1(1)(a) RRA a person is subjected to direct race discrimination where s/he is treated less favourably than others of a different 'race' are or would be. The RRA requires that a comparator or a hypothetical comparator is identified with whom to compare the Complainant. The comparator's circumstances must be 'the same, or not materially different, to those of the Complainant'. Where there is no actual comparator available, such as an employee in similar circumstances, the Complainant's treatment will need to be compared with a hypothetical comparator.

In *King v Great Britain China Centre* [1992] ICR 516, it was clearly established that as it is rare to find clear evidence of race discrimination, if the facts point to the possibility of discrimination, an employer is required to provide an innocent explanation for the treatment accorded. Without such an explanation it is open to an ET to draw an inference that race discrimination has taken place. However there is no obligation to make such a finding.

In this case the CA considered a situation where an employee was found to have been treated less favourably than the hypothetical comparator and yet the ET found that he had not been discriminated against on the grounds of his race. The CA considered the circumstances in which it is appropriate to make such findings.

Facts

Mr Madden (M) was summarily dismissed in February 1998, for misconduct. He brought claims of unfair dismissal, wrongful dismissal and race discrimination against his employer, Preferred Technical Group Cha Ltd (PTG Ltd). He complained that his supervisor had treated him less favourably because he was Irish and therefore discriminated against him on the grounds of his nationality and ethnic origin.

The ET found in favour of M with regard to his unfair dismissal and wrongful dismissal claims. However his race discrimination claim was rejected. M appealed to the EAT and his case was remitted back to the ET to reconsider its decision.

Employment Tribunal

The ET found that M was able to prove that he had been treated less favourably in relation to a number of incidents – either when compared to a colleague or by using a hypothetical comparator. However, the ET was not convinced that such treatment was on the grounds of race. They considered that that M's poor treatment was due to his fraught relationship with his supervisor, rather than the fact that he was Irish. The ET rejected his race discrimination claims.

Court of Appeal

The EAT upheld the ET's decision and M appealed to the CA.

The ET had considered PTG Ltd's investigation into M's alleged misconduct and its decision to dismiss him. It identified hypothetical comparators similar to M. The ET considered the manner in which each of these comparators would have been treated in relation to an investigation and a disciplinary hearing carried out by PTG Ltd. It found that M was treated less favourably than the comparators would have been and that PTG Ltd could not offer an adequate explanation of this. However, the ET still concluded that there had been no facts from which it could draw an inference of race discrimination.

M's Counsel argued that the findings of less favourable treatment and the absence of a satisfactory explanation to justify such treatment were sufficient for the Tribunal to draw an inference in line with the guidance given in *King v Great Britain China Centre*. He also argued that under Section 3(4) RRA, when selecting a hypothetical comparator, an ET must 'compare like with like, save for the difference in race/nationality'. Hence, if the only material distinction between Mr M and the hypothetical comparator had

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been race, and it was found that he had been treated less favourably and no other adequate explanation was given, then the ET's conclusion that such treatment had not been on racial grounds was an error in law.

These arguments were rejected by the CA. It stated that the ET had been entitled to dismiss M's claims under the RRA and had given adequate reasons for its decision.

The CA concluded that it was not necessary that the hypothetical comparator be *'a clone of the [Appellant] in every respect (including personality and personal characteristics) except that he or she is a different race'*. Wall LJ stated that otherwise a finding of race discrimination would be required in every case where a Claimant had been treated less favourably than a hypothetical comparator.

The CA pointed out that the ET had identified the reason for M's less favourable treatment as being his poor working relationship with his supervisor and that this was not connected with his race. The CA upheld the original ET decision and dismissed M's appeal.

Comment

The CA accepted that where there is a finding of less favourable treatment and no adequate explanation for it is given, an ET is obliged to explain the reasons for it not drawing inference of discrimination. The original ET had found less favourable treatment. The ET then concluded that the reason for this was not on racial grounds but because of Mr M's poor working relationship with his supervisor. As this reason was unconnected with race the ET had not erred. This decision sits uncomfortably with S54(A) of the RRA in that the fact that the Claimant had established facts from which the ET could have concluded, without an adequate explanation, that unlawful discrimination had occurred. Had it taken a purposive approach a positive finding of unlawful discrimination ought to have been reached.

The Court's suggestion that a hypothetical comparator need not be a 'clone' of the Claimant in every respect except for race is unfortunate. The purpose of a hypothetical comparator is to allow a Tribunal to consider whether or not a person's race was the reason for any differential treatment. Hence any hypothetical comparator should have the same characteristics and circumstances, apart from race, as the Claimant. This approach was confirmed by the HL in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

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Briefing 359

Disability discrimination in access to transport, part 2

Ross v Ryanair and Stansted Airport Ltd [2004] EWCA Civ 1751

Background

This case concerned charges made by Ryanair for the use of a wheelchair at Stansted Airport. Mr. Ross (R) has cerebral palsy and arthritis, and has difficulty in walking for long distances. He is a regular customer of Ryanair, and makes return flights between Stansted and Perpignan about four times a year. He does not often use a wheelchair, but has to at Stansted to get from the check-in point to the plane. When he travelled on 27th March 2002 he was told that he would have to hire a wheelchair from Ryanair's agents at the airport and that he would have to pay £18 for this service on each occasion. At Perpignan, a wheelchair was freely available.

With the support of the DRC, R initially brought proceedings against Ryanair for breach of the DDA. Stansted were joined to the claim when Ryanair accepted in their defence that R had been subjected to unlawful discrimination but that Stansted should have been the ones to meet the cost of the wheelchair.

County Court

The CC held that Ryanair was a provider of services within the meaning of s.19 in that they provided him with a number of ancillary service to a journey by air, such as check in, taking on baggage, issuing a boarding card, the provision of a customer service desk at the

entrance to Satellite 3 at Stansted; assistance at the departure gate; and delivery of baggage to the carousel on the return flight.

The CC held that:

- the service provided by Ryanair did not fall within the exemption contained in s.19(5) (anything so far as it consists of the use of a means of transport);
- they were providing a service to R on less favourable terms when compared with passengers with restricted mobility who came in a wheelchair (as they did not have to pay £18) contrary to section 19(2)(d) of the Act;
- the physical features of Stansted airport made it unreasonably difficult for R to have access to their service. They should have provided a wheelchair as a reasonable alternative method of making the service available and an auxiliary aid, and thus that there was a breach of the duty to make adjustments contained in s.21(2) and s.21(4) in conjunction with section 19(1)(b).
- if a duty arose under s. 19(1) (b), it was not open to the service provider to tell the disabled person that he could afford to have a wheelchair himself and thereby avoid a finding that it was a breach of duty.

Damages of £1336 were awarded, £1000 for injury to feelings, £300 for the cost of wheelchair which he felt obliged to purchase for use at Stansted Airport and £36 for the wheelchair assistance he had to pay for at Stansted on the two days in question.

Ryanair appealed against the decision, on the basis that Stansted Airport should have been liable for the discrimination.

Court of Appeal

The CA allowed the appeal. They held that:

- Both Ryanair and Stansted were providing Ryanair's passengers the service of access to and use of the relevant airside parts of Stansted airport. Stansted were the owners of the airport, and they allowed members of the public who held a boarding card access to and use of the relevant airside parts of the airport on their outward and return journeys. Ryanair provided this service because in giving them a boarding card it provided them with the key which unlocked this access for the purposes of their flight. They were both 100% liable to R.
- The long distance between the check-in desk and the departure gate at Stansted Airport makes it unreasonably difficult for disabled persons to make use of the service involved in access to and use of Stansted 'airside'. In these circumstances the combination of section 19(2) (a) and s.21 (2) (d) imposed an obligation on **both** Stansted and Ryanair to provide a reasonable alternative method of making this service available to a disabled person. Both Stansted and Ryanair had a duty to take such steps as was reasonable for them to have to take in order to provide a wheelchair for them (s.21(4)(b)).
- R should be entitled to enjoy the airside service at Stansted at no cost, as did those who did not have his particular disability. Because the obligations contained in section 21 of the Act are owed to disabled persons as a class and not to any particular claimant (as held by Sedley LJ in *Roads v Central Trains*), it is irrelevant whether a particular claimant might have the financial means to pay for the necessary auxiliary aid. There was no suggestion that it was not reasonably practicable for Ryanair or Stansted to provide a wheelchair without cost, given their financial resources.

Comment

There are a number of key points which emerge from this judgment:

- The Court cited the words of the CA in Roads, that *'the policy of the Act... is... to provide access to a service as closed as it is reasonably possible to get to the standard normally offered to the public at large'. And that 'the policy of the [1995 Act] is not a minimalist policy of simply ensuring that some access is available to the disabled: it is so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public'*. This casts the threshold for reasonable adjustments 'impossible or unreasonably difficult', in a new light, and emphasises the importance of ensuring that disabled people do not experience a 'second class' service.
- The duty applies regardless of ability to pay.
- More than one service provider can have a duty in the same situation but the duty must be met in any event. Whether this is the case and, if so, whether each service provider has discharged its liability will depend on the precise circumstances of the case. For example, with regard to shopping centres, whilst the owner of the shopping centre will be providing a service to the shopper, the shops within the shopping

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centre will generally not have a liability until the shopper enters their individual store. The situation with Ryanair differed because:

Ryanair, for their part, provided this service to their passengers because in giving them a boarding card it provided them with the key which unlocked this access for the purposes of their flight and permitted them this use both on their outward and on their return journeys

The same would not apply to stores in a shopping centre. In addition, Stansted Airport had known that Ryanair were not going to provide a free wheelchair for passengers in Rs' position but they did nothing to ensure that their obligations under the 1995 Act were being complied with.

- Long distances within service provider's premises may require provision of free wheelchair assistance/loan of a wheelchair, as they will amount to a physical feature of the premises
- A service provider cannot escape liability merely because it provides adjustments to one group of disabled people. The CA found that R experienced less favourable treatment as compared to disabled people who were wheelchair users, as they were not required to pay for any assistance.

Catherine Casserley
Disability Rights Commission

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Briefing 360

When unequal pay requires justification

Home Office v Bailey and Ors [2005] IRLR 921 EAT

Implications for practitioners

The ECJ has considered how to approach the question of how to assess whether there is a prima facie case of discrimination in an equal pay case in two key decisions, firstly, *Enderby v Frenchay Health Authority* [1993] IRLR 591. The second is the case of *R v Secretary of State for Employment ex parte Seymour-Smith* [1999] IRLR 253. The question of whether there is a prima facie case is of key importance, since, where there is a prima facie case, the Respondent employer will then have an obligation to objectively justify the difference in pay existing between the men and the women. The approach taken in each case was different, but each found favour with the ECJ for different reasons.

Facts

In this case, 2000 administrative staff in the Prison Service brought equal pay claims. They compared themselves with prison officers. The work was rated as equivalent to that of their comparators under the Prison Service job evaluation scheme. The employers argued that, whilst there was a difference in pay between the two groups, this was due not to discrimination, but to a historic difference in pay bargaining arrangements, and that this was a material factor for the purposes of Section 1(3) EqPA. The Applicants were part of a group which was about 50% female and 50% male. In contrast, the comparator group was predominantly male.

Employment Appeal Tribunal

The question for the EAT was whether the approach of *Enderby*, or the approach of *Seymour Smith,* was to be preferred, when assessing whether there was, or was not, a prima facie case of discrimination. The ET considered that there was a prima facie case of disparate treatment and thus the obligation to objectively justify the disparity arose. The EAT disagreed and allowed the employer respondents appeal.

The employers argued that, on the basis of *Enderby*, there are three distinct situations in which a prima facie case of discrimination is made out in an equal pay case. The first is where there is a barrier, requirement or condition which is demonstrated to

have a disparate impact on women. The second is where the bargaining arrangements are not transparent. The third is where it can be demonstrated that the disadvantaged group is predominantly female whereas the advantaged group is predominantly male. In this case, it was the third situation which was most relevant but, said the employers, it did not apply. Whilst the advantaged group was predominantly male, the disadvantaged group was neither predominantly male nor predominantly female. The EAT agreed with the employer that this was the correct approach and applying it to the case found there was no prima facie case of discrimination and thus no need for the employer to objectively justify the difference in pay.

The EAT specifically rejected the contention put forward for the employees that the approach of *Seymour-Smith* was more appropriate. The ET had been wrong, they said, to consider that when searching for a requirement or condition, it was sufficient that in order to obtain the advantage of better pay enjoyed by the advantaged comparator group to demonstrate membership of that same comparator group. The EAT considered it was wholly artificial to erect membership of the advantaged group as the relevant requirement or condition.

In upholding the employers' appeal, Judge Wilkie QC said,

> *In our view there is a clear and sensible difference between: on the one hand assessing the disparate impact of a requirement, or a condition, or a provision, criterion or practice, which presents a barrier to or militates against women becoming a member of a particular workgroup; and on the other considering whether a disparity of pay which has arisen as between two workgroups by reason of a history of different arrangements for collective bargaining evidences sex discrimination. In the former case it is sensible to compare the extent to which men and women across a pool can satisfy the provision, criterion or practice in order to become a member of the working group. By doing so the disparate impact of the provision, criterion or practice can be measured. On the other hand where it is simply a question of whether membership of a particular working group and a history of collective bargaining operates disparately as between sexes, it makes sense as it did in Enderby to consider that if the advantaged group is predominantly male and the disadvantaged group is predominantly female, then there is a prima facie case of discrimination. Where, however, the advantaged group is predominantly male and the composition of the disadvantaged group is neutral in gender terms, then the situation may not be fair but is not prima facie discriminatory on the grounds of the sex.*

Comment

It is arguable that the approach taken by the employees is the purposive and realistic approach. By comparing the actual effect of the pay disparity, and the whole population affected, the employees showed that the disadvantage complained of by the women impacted disparately on eight women, for every one man. This is clearly a circumstance that requires greater consideration, and it is desirable that both approaches should be examined further. Leave has been given to appeal to the CA.

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Pornographic images as harassment

E.A. Moonsar v Fiveways Express Transport Ltd [2005] IRLR 9 EAT

Implications for practitioners

The viewing of pornographic material by male employees in the presence of a female employee can amount to an act of sex discrimination unless it could be shown that the female employee had taken part or actually enjoyed what was going on. In this case, the fact that the female employee did not complain at the time did not afford a defence where the behaviour was so obvious.

Facts

Ms Moonsar (M) appealed against a decision dismissing her claim for sex discrimination and limiting her award in respect of race discrimination to £1000. M had been employed by Fiveways Express Transport (F). She worked close to certain male members of staff who, on three occasions, downloaded pornographic images onto their computers. Although the images were not circulated to M, she was aware of what was going on. At the time, she made no complaint even though she considered the behaviour as unacceptable. She was subsequently dismissed on grounds of redundancy. The ET found that that the conduct of the male employees did not amount to sex discrimination by way of sexual harassment because M had not complained of the behaviour at the time and the images had not been shown to her. However, it found race discrimination in respect of her selection for redundancy and awarded a sum for injury to feelings.

M appealed on the grounds that;

- the facts clearly gave rise to an inference of sex discrimination and therefore the burden shifted to F to disprove discrimination under the SDA s.63A; and
- the award of £1,000 for race discrimination was too low.

Employment Appeal Tribunal

The EAT held that:

> *viewed objectively, this behaviour, namely that on three occasions male colleagues in the same room were downloading onto a computer pornographic material, clearly had the potential effect of causing an affront to a female employee working in the close environment and as such would be regarded as degrading or offensive to an employee as a woman. It was, in our view, clearly potentially less favourable treatment and a detriment clearly followed from the nature of the behaviour, and there was evidence before the tribunal that this lady indeed found that behaviour unacceptable. The fact that she did not complain at the time does not, in our view, afford a defence where the behaviour was so obvious, as in this case.*

Having established that there was a case to answer the burden shifted to F to show that M had been a party to or enjoyed what was going on and therefore the conduct was not discriminatory. In this case, that had not happened as F had played no part in the proceedings. Accordingly, the EAT substituted a finding that there was sex discrimination and the matter was remitted to the ET for an award in respect of that discrimination.

It could not be said that the award was outside the reasonable band of awards that a tribunal should make. Although the award was on the low side, the ET had given reasons and justified the award by reference to the limited injury to feelings to M. Accordingly, there was no basis for interfering with the ET's award.

Gay Moon
Editor

Atos Origin IT Services UK Ltd v Haddock [2005] IRLR 20

Implications for Practitioners

This DDA case concerned both a procedural point on appealing to the EAT when a notice of appearance has not been entered, and the matter of compensation to be awarded in the event of an employee benefiting from a company insurance policy. In addition, the EAT considered a novel way of applying s.8(2)(c) to ensure continued payment of salary for the applicant. The case has a somewhat long and tortuous history.

Facts

Mr. Haddock (H) began employment with the respondent, known as Sema (S) in 1983 and was employed in a succession of increasingly responsible jobs. Following a period of absence due to a depressive illness, he successfully returned to work. However, he was then effectively demoted by a new manager. H was extremely distressed and developed a severe depressive illness which did not respond to treatment. He did not return to work.

As H was a senior employee, he benefited from a permanent health insurance scheme. In the event of permanent incapacity, the cover provided for up to 75% of the salary less statutory deductions and National Insurance sickness benefit to be reimbursed to S, so long as the individual remained employed and had not reached normal retirement age. The insurers accepted the S's claim in relation to H and thus he continued to receive his full salary while his employers recovered 75% of it from the insurers.

Employment Tribunal

H submitted a claim to the ET under the DDA, particularly in relation to his being moved to a different post. His claim was heard on 4th September 2000. S had neither entered an appearance nor did they appear at the hearing.

The ET upheld the claim of disability discrimination in relation to both less favourable treatment and a failure to make adjustments (what was then both s.5(1) and s.5(2)). They awarded him compensation of £35,000 for psychiatric injury, £20,000 for injury to feelings and £10,000 aggravated damages. Assessment of future financial loss was adjourned to a future date.

On 25 September 2000, S applied under rule 13 of the 1993 rules for an extension of time to enter an appearance. On 27 October the same ET refused to extend the time and gave detailed reasons for doing so. S appealed to the EAT against the refusal of a time extension and the assessment of compensation. The EAT dismissed the appeal against a refusal to extend time and ruled that as a result S could not challenge the tribunal's assessment of compensation on appeal.

Court of Appeal

The CA then refused permission for S to appeal against the EAT's decision on the refusal to extend time to enter a notice of appearance, but gave permission to appeal two elements of the compensation award. In doing so, it held that the EAT were wrong to hold that the dismissal of the appeal against the ET's refusal to extend time for entering the notice of appearance precluded S from appealing against the assessment of compensation. The claim was then compromised.

Employment Tribunal

H then applied to the ET for a determination in relation to issues relevant to the assessment of his pecuniary loss, including the effect that the permanent health insurance scheme had on the calculation of his lump sum compensation for future loss. The ET held that there were two alternative ways of addressing the issue of the insurance payments: the first was to calculate H's loss on the basis of 25% of salary, on the basis that S would continue to receive 75% of his salary from the insurers and to pay him an equivalent sum. The second was to base the calculation on the entirety of his loss of salary. S would recoup the 75%

over the coming years, but would have to pay a higher capital sum. The ET decided on the second approach.

S appealed against the ET's decision to the EAT, whilst H contended that because S did not enter a notice of appearance to his claim, they were not entitled to appeal at all.

Employment Appeal Tribunal

The EAT allowed the appeal. They considered that the word 'proceedings' in the 1993 regulations sub-rule 3 (now enacted as rule 3(3) of the Employment Tribunals (Constitution and Rules of Procedure) 2001) refers to proceedings before the ET. Thus the rule has no bearing on entitlement to appeal to the EAT. There was nothing in the authorities which the EAT reviewed which prevents the EAT from entertaining an appeal by an employer who has not entered a notice of appearance. As in all appeals the grounds of any such appeal must be error of law, but there are no other restrictions on the rights of appeal.

In relation to the matter of compensation, the EAT held that the ET were wrong to hold that the calculation for the applicant's future loss should be determined by reference to the entirety of his loss of salary, and in failing to take into account payments which might be made under the permanent health insurance scheme. The effect of s.8 (3) DDA is that the same deductions must be made from an award of compensation to victims of disability discrimination as would be made in the case of claimants to whom an award of damages for personal injury was made. It is settled law that both payments made by a tortfeasor, of whatever category, and payments made by the underwriters of an accident or health insurance policy for which the premiums were paid by the tortfeasor, without contribution from the claimant, fall to be deducted in calculating an award for pecuniary loss. In principle, it makes no difference that the payments will be made in the future rather than in the past. As in the case of any assessment of future loss, contingencies and chances must be allowed for. A contractual entitlement to a payment may make it more certain that a loss will be mitigated than a mere expectation that a discretion will be favourably exercised or that the employer would continue to employ the employee. The obligations of underwriters may need to be considered and if they have a discretion to exercise, so may the chances of their doing so in a way favourable to a beneficiary. The exercise may be difficult and it is unlikely to produce a figure which is precisely right but it must be undertaken if the primary remedy to be provided to H is to be an award of lump sum compensation.

The EAT went on to consider s.8 (2) (c) of the DDA, which provides for the making of a recommendation by the tribunal. It stated that this section would permit the tribunal to recommend that S continues to employ H until his normal retirement age and to pay him 100% of the salary, so long as he complies with all reasonable requirements to, for example, submit to medical examinations. If such a recommendation were to be made, and S failed to comply with it, H would be entitled to seek additional compensation under s.8(5)(a). However, H would need to amend his originating application to seek such relief.

Catherine Casserley
Disability Rights Commission

The DLA gives evidence on race discrimination to the Joint Committee on Human Rights

In November 2004 the Joint Committee on Human Rights announced a short inquiry into the UK government's response to the concluding observations of the UN Committee on the Elimination of All Forms of Racial Discrimination, which would also consider how the UK could more effectively meet its obligations under the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). The DLA submitted a short paper to the JCHR that focused on two of the UN Committee's recommendations: legislation to remove the anomalies and inconsistencies in the RRA and legislation to extend protection against religion or belief discrimination to goods and services and functions of public authorities, which should be consistent with provisions in the RRA and in the existing religion or belief discrimination regulations, that apply only in the field of employment.

The DLA was invited to give oral evidence to the JCHR on Wednesday 26 January with the 1990 Trust. In addition to expanding on their written submission, the DLA commented on the way the UK government meets its obligations under CERD; the DLA and the 1990 Trust both urged that there should be a right of individual petition. The DLA agreed with the UN Committee's recommendation that s.19D of the RRA (allowing a Minister to authorise discrimination in certain immigration functions) should be reformulated or repealed, although the government has made clear its intention not to do so. The final set of questions related to Article 4 of CERD, under which States are expected to adopt measures to tackle racism, discrimination, racist violence and to ban racist organisations. The DLA commented on current proposals for an offence of inciting religious hatred and expressed a concern that a statutory power to ban organisations could, like the incitement to racial hatred legislation, result in the banning of black and ethnic or religious minority organisations.

The full evidence by the DLA will be included in Minutes of Proceedings of the JCHR on the JCHR website: www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights

New Equal Treatment Directive on gender access to goods and services

A new EC Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services was agreed on December 13th 2004. Directive no 2004/113/EC must be implemented by member States by 21st December 2007 at the latest. It covers direct discrimination, indirect discrimination, harassment and victimisation in the supply of goods and services in the public and the private sectors. Advertising, media and education are specifically excluded from its provisions. As a result of extensive lobbying by the insurance industries there is also a provision to permit *'proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assesment of risk based on accurate actuarial and statistical data.'* The UK government has claimed that this will mean that women can continue to enjoy lower car insurance costs, however, they do not refer to the impact on womens life insurance cover.

CEHR and the Equality Bill

As we go to press the new Equality Bill to set up the new Commission for Equality and Human Rights has still not been published which makes it very unlikely that it will be passed in the current session of Parliament. In addition to the provisions for a new Commission it also contains provisions for the new sex equality duty for public authorities and the extension of protection for protection from discrimination in the fields of access to goods, facilities and services on the grounds of religion or belief.

Legal aid for discrimination cases

On January 12th 2005 Marsha Singh MP presented a private members Bill in the House of Commons to make provision about representation of and assistance to complainants in discrimination proceedings before ETs and the EAT and to establish and confer functions upon a Tribunal Representation and Assistance Board. It is due to for its second reading on 18 March. The DLA believes that it is of critical importance in the interests of justice that adequate resources are made available to ensure that complainants in discrimination cases have access to skilled representation.

Age discrimination and retirement age

On December 6th 2004 the Government announced that it will legislate to set a default retirement age of 65, but give employees the right to request an extension, which employers will be entitled to reject for business reasons. The new legislation, which has to be in place by October 2006, in order to implement the Employment Directive, will only permit retirement ages under 65 if they can be shown to be absolutely necessary. The decision to retain a default retirement age has been widely criticised. Age Concern said:

> *This makes a mockery of the Government's so-called commitment to outlawing ageism, leaving the incoming age discrimination law to unravel.*

The Chartered Institute of Personnel and Development said:

> *It simply delays the inevitable end of mandatory retirement ages.*

Patricia Hewitt said that the Government had listened to 'strong representations' from business that the lack of a default retirement age could have adverse consequences for occupational pension schemes. Although the CBI and the Institute of Directors have broadly welcomed her announcement the Employers Forum on Age have called it a 'fudge'. This led Michael Rubenstein to write in January's issue of Equal Opportunities Review:

> *Mandatory reirement age is age discrimination personified. What could be more arbitary than forcing an employee out of their job because they have reached an arbitary birthday, regardless of their circumstances, regardless of whether the employer has any justification?*

He concludes his strident Opinion Piece by suggesting that Patricia Hewitt, for whom so much was hoped, is now widely regarded as the CBI's poodle.

European Commission takes enforcement action against Member States who have not implemented the anti-discrimination Directives

The European Commission has announced that it will refer five Member States to the European Court of Justice for failing to transpose the Employment Equality Directive. Member States had until 2 December 2003 to implement the Directive prohibiting discrimination on grounds of religion or belief, disability, age or sexual orientation in employment and vocational training (Directive 2000/78/EC). Only France, Spain, Italy and Sweden had fully transposed the Directive into their national legislation by the dead-line.

Over a year after this dead-line, five Member States have failed, either partially or completely, to transpose the Directive into their national law. The Commission has therefore taken the final step of the infringement procedure and has referred Germany, Luxembourg, Greece, Austria and Finland to the ECJ.

The DRC is currently consulting on major new changes in relation to disability equality for the public sector

The DDA is to be amended by the Disability Discrimination Bill 2005 to place a duty on all public sector authorities to promote disability equality. This duty will have a significant impact on the way in which all public services are run and on improving the lives of disabled people. It will ensure that all public bodies build disability equality into the way in which they carry out their business.

This new legislation will mean that public sector bodies will have a duty to promote disability equality in all aspects of their work – similar to the RRAA. From the police to health services, schools, local authorities, NHS trusts, central government, the entire public sector will have a duty to promote the equalisation of opportunities for disabled people.

The DRC have drawn up draft Codes of Practice to support the amended legislation and are now consulting on these drafts.

Major formal investigation to test inequalities in health care for disabled people

Disabled people's access to GPs, essential health screening services and healthier lifestyle initiatives in England and Wales is to be formally investigated by the DRC. Their investigation, which will run for 18 months, will gather evidence on whether primary health services are addressing the significant health inequalities experienced by people with learning disabilities and people with mental health problems; it will also make recommendations to Government on the most effective means of closing the gap in health outcomes. Particular areas of interest are GP services, essential screening and health improvement.

This investigation has been prompted by a body of evidence that people with learning disabilities and people with mental health problems are amongst the poorest groups in society, die younger of preventable diseases than the rest of the population and miss out on life-saving screening programmes.

Research finds that:

- preventable deaths for people with learning disabilities are 4 times higher than for the rest of the population;
- people with a diagnosis of schizophrenia live on average 9 years less than other people;
- fewer than 20% of women with a learning disability attend cervical screening compared with 81% of women overall;
- people with a learning disability are 58 time more likely to die before the age of 50 than the general population, according to one study in England;
- Diabetes, which can lead to serious health problems and early death, has been estimated to be four to five times more common among people with a severe mental health problem.

Evidence detailing the root causes of unequal health outcomes is complex but when research shows that many deaths of disabled people are preventable, the DRC has said that it believes it is correct to inquire whether at a systems level we are failing to take the positive action needed to close this stark health gap.

The investigation will seek out good practice as well as uncovering existing barriers that prevent disabled people's access to primary healthcare. The DRC will consult widely to gather evidence from individuals and organisations on the ability of disabled people with learning difficulties and people with mental health problems to access primary care health services in England and Wales. It will also analyse primary care health data; and four primary healthcare bodies in England and Wales will be independently monitored to identify barriers facing people with learning disabilities or with mental health problems and the most effective solutions.

Consultation will be conducted using a dedicated website where people can register their views, as well as targeted questionnaires, face to face interviews, road-show focus groups and independently chaired formal hearing sessions. The DRC has launched a website for individuals, organisations and primary health service providers to submit their experiences, this can be found at www.drc-gb.org/health

The Formal Investigation will run from December 2004 – May 2006 when the findings and recommendations will be announced.

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EOC proposes pensions solution to end double jeopardy faced by parents and carers

With the gap between men and women's pensions increasing since the 1980s, the EOC urged the Pensions Commission to recommend a universal state pension for everyone. The EOC also called for additional state contributions to a compulsory pension savings system for low paid workers and all parents and carers. This would give everyone an equal opportunity to save for a retirement income above poverty level.

The EOC argues that women suffer a 'double jeopardy' in both the Basic State Pension and in contributing to private pensions because of pay differences when in work and the unpaid caring role they play at home. In total, almost 1.3 million older women live below the poverty line and suffer serious financial disadvantage in their old age compared with men of the same age – their average income in retirement is 57% of mens.

The EOC considers that the current system discriminates against women, relies too heavily on complex means tested benefits and does not adequately recognise the contribution that parents and carers make to society as unnecessary paid work.

Protocol 12 of the European Convention on Human Rights now in force

The new Equality protocol of the ECHR will come into force on April 1st 2005 for those Member States that have signed and ratified it. The UK government has so far neither signed nor ratified it.

Research reveals true extent of pregnancy prejudice in Britain's workplaces

Each year around 30,000 working women are sacked, made redundant or leave their jobs due to pregnancy discrimination, according to new research findings released by the EOC.

The research quantifies, for the first time, how many pregnant women and new mothers say they are experiencing discrimination in workplaces across the country. Of the 441,000 women who are pregnant at work each year, the EOC's research report reveals that:

- Overall almost half (45%) of women who had worked while pregnant said they experienced some form of discrimination because of their pregnancy.
- A fifth (21%) said they lost out financially due to discrimination.
- One in 20 (5%) were put under pressure to hand in their notice when they announced their pregnancy.

For more information see www.eoc.org.uk/pregnancy

EOC Report: Sex and power: who rules Britain?

Women's career chances are still being blighted by employers' failure to adopt more flexible working practices and recognise women's responsibilities away from the workplace. *Sex and power: who runs Britain?* 2005 published by the EOC argues that a need for a total overhaul of family policies is essential if Britain is to stop losing out on women's talent. The report calls on the government and political parties to develop a national family strategy to replace the current piecemeal approach to childcare and family support.

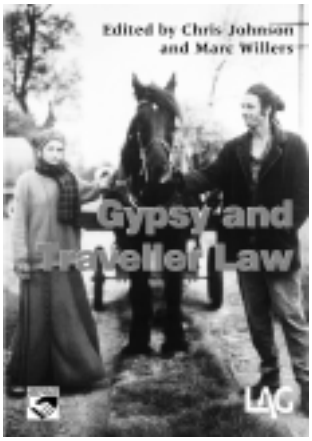
The report shows that even allowing for marginal improvements (1%) in women's position in business, the police and senior legal posts during the last 12 months, British public life remains firmly locked in the past and unrepresentative of society. The report also provides evidence that women pay a big penalty for being seen as the principal home maker and child carer.

This report reveals that we are still lagging behind other European countries in terms of the numbers of women getting to the top in politics. The UK comes 14th out of the EU member states for female representation in its national parliament. While 45% of Sweden's parliament is made up of women in the UK the figure is just 18% and 52% of Sweden's Cabinet members are female but here, just 27%.

BOOK REVIEW

Gypsy and Traveller Law, edited by Chris Johnson and Marc Williams, 2004
Legal Action Group, £29.00

Available on line from www.lag.org.uk



The story of how nations and governments have responded to the needs of Gypsies and Travellers is not an uplifting one. It is a story of hatred and fear, which resonates throughout history and across Europe. In the UK, it is also a story which affects a significant number of individuals, from different cultures and communities. As the authors of the new LAG guide, Gypsy and Traveller Law, point out in their introduction, there are between 200,000 and 300,000 travellers in the UK. The largest group are Romani Gypsies, a recognised racial group since 1988. The second largest group are Irish Travellers, who have travelled in England as a distinct social group since the 1800s and are also, since 2000, recognised as a racial group. The book deals with these groups, as well as the group it calls New Travellers.

This book tells a very particular part of the story of the travelling people. It tells us of the way that government, both local and national, and the courts have responded to them, through the development and application of laws, dealing with matters from housing and homelessness, to education and health.

The book is a key guide to those laws, written and edited by some of those who have worked most closely with Gypsies and Travellers over the years to develop specific expertise in the law which affects them.

Whilst there are chapters dealing with human rights legislation and anti discrimination legislation, which include measures which can serve to protect Gypsies as a class of people, there are significant chapters, sandwiched between these two chapters on rights, about the legislative restrictions and limitations placed on the choices of where to live, where to travel and when and where to camp.

As would be expected of any LAG publication, this is not simply a recitation of the various legal provisions which affect these groups. Rather, it is a collection of thoughtful statements of the law, set in their historical and social context, in which policy and legal provisions are explained and their application to Gypsies and Travellers demonstrated with reference to examples of both recent case law and central and local government practice and procedure. In addition, numerous references are made to reports by groups such as the Minority Rights Group and the CRE, adding an often disturbing texture to the clear legal provisions described.

Any one providing legal services to Gypsy or Traveller communities will find this clear, concise and user friendly volume a valuable addition to their library. For the discrimination lawyer and the human rights lawyer, it is a vital study of the treatment received by one particular group. Similarly, any one interested in the social history or culture of the people, whether academic or otherwise will also find this a fascinating study of the day to day difficulties problems faced by Travellers in 2005.

Whether the reader is an adviser who needs to know the meaning of the term 'caravan' (see Caravan Sites and Control of Development Act 1960 sec 29(1)) or an academic who wants to find about the life expectancy or dental health of the Gypsy population compared to the sedentary population (the Gypsy life expectancy is significantly less and Gypsies have little, if any access to dental care because of NHS opt outs by dental practices), the information is here, with clear references to source materials for the more in-depth research. The book has an extensive index, relevant appendices of statutes and statutory material as well as lists of useful organisations and a comprehensive bibliography.

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Briefings

Notes and news

Abbreviations

CA	*Court of Appeal*	*ECHR*	*European Convention on Human Rights*	*NICA*	*Northern Ireland Court of Appeal*
CEHR	*Commission for Equality & Human Rights*	*ECJ*	*European Court of Justice*	*RD*	*Race Directive*
CRE	*Commission for Racial Equality*	*ED*	*Employment Directive*	*RRA*	*Race Relations Act 1976*
DDA	*Disability Discrimination Act 1995*	*EOC*	*Equal Opportunities Commission*	*RRAA*	*Race Relations (Amendment) Act 2000*
DR	*Employment Act 2002 (Dispute Resolution) Regulations 2004*	*EqPA*	*Equal Pay Act 1970*	*SDA*	*Sex Discrimination Act 1975*
DRC	*Disability Rights Commission*	*ERA*	*Employment Rights Act 1996*	*SIAC*	*Special Immigration Appeals Commission*
EA	*Employment Act 2002*	*ET*	*Employment Tribunal*	*TUPE*	*Transfer of Undertakings (Protection of Employment) Regulations 1981*
EAT	*Employment Appeal Tribunal*	*ETD*	*Equal Treatment Directive*		
EC	*Treaty establishing the European Community*	*HC*	*High Court*	*UN*	*United Nations*
ECtHR	*European Court of Human Rights*	*HL*	*House of Lords*		
		HRA	*Human Rights Act 1998*		

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