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Editorial *The Commission for Equality and Human Rights: meeting the needs of everyone?*

Immediately after the election in May, the new Equality Bill was published with the proposal for the establishment of the new Commission for Equality and Human Rights (CEHR). The successful launch of the CEHR in 2007 will be one of the major challenges for equality in this decade. The DLA believes there must be no inequality of the equalities and so no hierarchy of rights nor of effort to protect those rights. Instead the CEHR must be alert to the ways that different areas of law and social policy impact in different ways on different groups and so use its powers in ways that are appropriate for each of the grounds of discrimination. It will not be an easy task to get this right.

The aim is clear. The CEHR is challenged to meet the diverse *and* combined needs of all the different kinds of discrimination and human rights. Each protected ground will need to be considered strategically, starting with an analysis of the current situation and the threats and possibilities. But it will also be necessary for the strategic thinking to address multiple discrimination.

This reflects the common experience around the world. Canada is a good example. The various Canadian Human Rights Commissions (which deal predominantly with equality issues) have become increasingly aware of discrimination on multiple grounds and the need for an intersectional approach to address this.

The Ontario Human Rights Commission have estimated that just under half of all their cases concern multiple discrimination. They argue that in such cases the discrimination experienced is different from that experienced on any of the individual grounds alone. So that, for example, the experience of discrimination suffered by a black woman is intrinsically different from that suffered by a black man, or a white woman. This has been described as:

> *intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone…*

Such an approach permits the particular experience to be both acknowledged and remedied. They argue that taking an intersectional approach leads to a greater focus on society's response to the individual and a lesser focus on what category the person may fit into. Surely this approach would be very attractive in Great Britain.

All too often a pragmatic decision is made to proceed on one or the other ground, sometimes based on the availability of evidence, sometimes on the strength of the law in that particular area. Madame Justice L'Heureux Dubé has explained why this is important in a Supreme Court case in Canada:

> *…categories of discrimination may overlap, and …individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.*

It may be that each of the categories for discrimination are individually insufficient to establish a case of discrimination, however, taken together the discrimination is easier to establish.

So, how is this to be approached strategically? We support the establishment of a disability committee, *and*, based on equally cogent arguments in relation to the other grounds, we recommend the establishment of similar standing committees for **all** of the equality grounds and for human rights. The views of committees should feed into the Commission, which would retain final authority to set strategy.

Such support committees would be similar to the advisory system in the Northern Ireland legislation and which was supposed to support the work of the Equality Commission for Northern Ireland. However, unlike in Northern Ireland they need to be part of the initial structure and to make a contribution to setting the work programme from the very outset.

The CEHR itself, and not the committees, should set the strategy for dealing with multiple discrimination. This is the whole point of having one multi-tasked Commission. When it comes to tactics it is important that the different committees (if there is to be more than one equivalent to the Disability Committee) are given oversight. In cases of multiple discrimination they should work closely with the other relevant Committee/s.

This is not going to be an easy process to manage and there can be no doubt that there will be mistakes or at least criticism of the way that the CEHR proceeds. Only really careful thought now at the point of legislation will ensure that it gets off to a good start and that we do not spend the next decade repenting errors made in this legislation or the setting up of the CEHR.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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'Big, black and dangerous?' – race discrimination in mental health care and treatment

The recent announcement by the Government of its response to the report into the death of David 'Rocky' Bennett[1] has brought to the fore, yet again, the issue of whether there is institutional racism in the perception and treatment of mental health issues. The Bennett case raises two broad but overlapping issues which this article hopes to explore – concerns about the reaction to mental health issues among black and minority ethnic individuals detained by the police, in prisons or in mental health institutions (particularly when that reaction leads to dangerous restraint and death), and fears that race discrimination is endemic in the provision of mental health care in the wider community generally.

Rocky Bennett

Rocky Bennett died in the early hours of 31 October 1998, aged 38. He had had mental health problems throughout much of his life, and died at the Norvic Clinic, an NHS medium secure unit in Norwich, where he had been a detained patient for three years. After an incident involving racist abuse, Mr Bennett had been restrained by five nurses at the clinic for at least 20-30 minutes, using what were described by the nurses' own trainer as 'unacceptable and unapproved' techniques of restraint. He was also found to have had unduly high levels of anti-psychotic medication in his body – one doctor said that the medication he had been prescribed was 'higher than almost any other patients she had known'.

The jury at the inquest into Mr Bennett's death accepted expert evidence that the restraint had caused his death and that, had the restraint been applied in the approved manner, he would not have died. On 17 May 2001 the jury returned a verdict of accidental death aggravated by neglect. HM Coroner for Norfolk also made six recommendations following the verdict including an emphasis on the need for national standards on restraint in psychiatric hospitals and for staff to be pro-active in dealing with incidents of racist behaviour by and against patients. Similar concerns about the use of control and restraint procedures would later be raised under Rule 43 of the Coroner's Rules after the inquest into the death of Roger Sylvester, who had died in police custody following the use of restraint.

An independent inquiry was set up to enquire into the facts surrounding Mr Bennett's death and explore the wider treatment issues it raised. On 12 February 2004 the Bennett inquiry team – a distinguished Panel of mental health specialists, chaired by Sir John Blofeld, a retired High Court judge – published their report[2].

The Bennett Report

The Panel confronted the fact that Mr Bennett had died as a result of the manner in which he had been restrained by nurses. The Panel concluded that the fact that there was no limit on the time that a patient could be restrained in the prone position was 'a failure defect in training'[3]. It recommended that this should be remedied by the imposition of a 3 minute limit for such restraint, and the establishment of a national system of training in restraint and control within twelve months of the report[4]. The Parliamentary Joint Committee on Human Rights, in its December 2004 report into deaths in custody, made a related recommendation on the need for staff to be fully trained in alternatives to the use of control and restraint[5].

Equally concerning, however, were the Panel's conclusions on the issue of racism. The Panel adopted the definition of institutional racism as set out by Sir William Macpherson in the Stephen Lawrence inquiry (1998), namely:

….the collective failure of an organisation to provide an

1. see Department of Health, *Delivering Race Equality in Mental Health Care: An Action Plan for Reform Inside and Outside Services*, Chapter 2 (HSMO, 11 January 2005) ('DOH Report')

2. Norfolk, Suffolk and Cambridgeshire Strategic Health Authority, *Independent Inquiry into the Death of David Bennett* (December 2003) ('the Report')

3. Report, p.29

4. Recommendations 8 and 9, Report, p.67.

5. Joint Committee on Human Rights Third Report, *Deaths in Custody* (14 December 2004) ('JCHR Report'), paras. 234-52.

appropriate and professional service to people because of their colour, culture or ethnic origin…[which]…can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people[6].

It concluded that there was indeed 'institutional racism in the mental health services' and called for a 'Ministerial acknowledgment' of this, and a 'commitment to eliminate it'[7]. This finding has led to the Bennett case being described as 'the Stephen Lawrence case for the mental health services'[8].

What was it that had led the Panel to reach such a damning conclusion?

Firstly, the Panel found that insufficient attention had been paid to Mr Bennett's cultural, social and religious needs prior to his death[9], and expressed concerns at the lack of diversity in the workforce caring for him, something of which he himself had complained[10]. The Panel noted that it had heard no evidence that there had been any attempt actively to recruit black or minority ethnic staff at the Clinic despite the number of patients in this category[11].

Secondly, the Panel was referred to research showing that psychiatrists tend to over-predict dangerousness in black people[12]. This phenomenon of stereotyping of black men in particular as 'big, black and dangerous' was something that had been observed as far back as the 1993 report into the deaths of three black men (Orville Blackwood, Michael Martin and Joseph Watts) at Broadmoor psychiatric hospital[13]. The campaigning group INQUEST has long been concerned with the 'negative' imagery which often informs the treatment of detainees from black and minority ethnic groups and leads to references being made at inquests into their 'superhuman' strength and 'animalistic behaviour'[14] and '..ascribing to black people stereotypical characteristics of extraordinary strength and dangerousness'[15]. Moreover, as the academic Melba Wilson has pointed out, such stereotyping can compound the discrimination a person with mental health problems experiences:

..When the dimension of race is added to the media portrayal of people suffering from mental distress, the notions of big, black and dangerous (male and bad and black) become fused in public perceptions…[16].

Thirdly, the Bennett Panel heard that there was a 'widespread suspicion' that in clinical care young people from the black community tend to be treated with higher doses of individual anti-psychotic drugs or with poly-medication (simultaneous prescription of several different drugs), because they are perceived by the staff to be more dangerous or more of a nuisance[17]. This suspicion is borne out by the experience of the mental health group MIND, who recently gave evidence to the Joint Committee on Human Rights that they were concerned about high levels of medication and poly-medication administered to African-Caribbean men, and warned that excessive medication was being used in such a way as to 'increase the risk of adverse effects which may be disabling or life-threatening'. MIND also raised a particular concern that there is 'a clear pattern of African-Caribbean male patients in secure settings who have died having been given emergency sedentary medication which exceed British National Formulary levels or due to polypharmacy'. It suggested that the discrepancies may result from 'racial stereotyping and unjustified perceptions of dangerousness and aggression in black male patients'[18].

Fourthly, the Panel heard evidence that African-Caribbean patients received 'a more coercive spectrum of care in the NHS' and were more were likely to find themselves in secure in-patient environments than white patients[19]. It heard evidence from the Royal College of Nurses that restraint (generally accepted to be the last resort in a mental health situation):

6. Report, p.43
7. Recommendation 4, Report, p.67
8. http://www.blink.org.uk/pdescription.asp?key=2324&grp=13
9. Report, p.24
10. Report, pp.24; 25
11. Report, p.9
12. Report, p.44
13. *Big, Black and Dangerous: Report of the Committee of Inquiry into the death of Orville Blackwood and a review of the deaths of two other Afro-Caribbean patients*
14. see INQUEST's submission to the Joint Committee on Human Rights, December 2003, at pp.10-11
15. INQUEST Briefing, *The restraint related death of David 'Rocky' Bennett* at p.3
16. Wilson, Melba (1997), 'Printing it in Black and White', OpenMind 85 May/June
17. Report, p.49
18. JCHR Report, para. 187.
19. Report, p.44

…might be initiated early in respect of black and ethnic minority people because of the perceptions of nurses who initiated restraint. There was a tendency to turn to control and restraint far too quickly instead of going down the 'let's go for a cup of tea and talk about it' approach…[20]

Statistical evidence appears to support this position. A 2000 mental health survey showed that 78% of African-Caribbean respondents had been forcibly restrained under the Mental Health Act 1983 compared to 38% of white respondents. It also showed that although African-Caribbean men constitute less than 3% of the national population, they make up 16% of high security and 30% of medium risk patients[21].

Fifthly, and perhaps most alarmingly, the Panel heard the opinion of a Dr Pereira that young black men were also more likely to suffer fatal injuries under control and restraint in proportion to their numbers in the population than young white men[22]. It is hard to establish statistically whether this opinion is accurate or not across all forms of detention (police, prisons and mental health institutions), particularly because (as the Bennett Inquiry revealed) there is no annual national collation of statistics involving deaths of psychiatric in-patients (something in relation to which it made recommendations to the Department of Health[23]). As INQUEST pointed out to the Joint Committee on Human Rights, '…the existing internal systems for examining and reporting these deaths are so poor that we believe some contentious deaths will escape any public scrutiny'[24].

However, there is evidence from the Police Complaints Authority that of all those deaths in police custody from 1998–2003, restraint issues were raised in a higher proportion of the deaths involving non-white individuals (21.7%) than among white individuals (12.3%)[25]; and that the Authority upheld 10% of its complaints of assaults in custody[26]. Deaths such as those of Shiji Lapite, Kenneth Severin and Ibrahima Sey have all raised issues as to whether there has been a stereotypical response to perceptions of aggression or risk in those from black or minority ethnic groups by the police. The Mental Health Act Commission notice that of the 28% restraint-related deaths it had recorded in the last 7 years (although the numbers were small) were of minority ethnic patients, in contrast to a minority ethnic population of about 5-6%[27]. Moreover INQUEST has long observed that its own monitoring (of deaths in custody, including in psychiatric detention) has shown that a disproportionate number of those from black and ethnic minority groups have died as a result of restraint or serious medical neglect[28]. The December 2004 Joint Committee on Human Rights report into deaths in custody concluded that despite the statistical difficulties:

….the unsafe use of restraint is an ongoing problem across all forms of detention…[and]…the possibility that racial stereotyping has been a contributory factor in at least some deaths in custody resulting from restraint should be taken seriously, by both police forces and NHS trusts…[29]

The death of 24 year old Azrar Ayub on 28 May 2004, a patient at the secure Edenfield Unit at Prestwich Hospital near Manchester, following an incident involving alleged sedation and restraint by staff at the hospital, illustrated once again the pattern of concerns raised by the Bennett case.

The future?

The Bennett Panel recommended that all those who work in mental health services, including 'managers and clinical staff, however senior and junior', should receive cultural awareness and diversity training, they should be trained in the assessment of people from black and minority ethnic communities, with special reference to the effects of racism on their mental well

20. Report, p.51

21. George Sandamas and Gary Hogman (2000), *No Change?*, cited in Matilda McAdam, *Control or Care: The draft Mental Health Bill and black and ethnic minority communities*, www.openuptoolkit.net

22. Report, p.44

23. Recommendation 14, Report, p.67

24. JCHR report, para. 225.

25. JCHR report, para. 78

26. JCHR report, para. 225

27. JCHR report, para. 254

28. www.inquest.gn.apc.org/policy.html; see also the JCHR report at para. 226. The results of the same Police Complaints Authority research showed that 17.65% of those who died in police custody from April 1998 to March 2003 were from black or minority ethnic groups, compared to 9% of the population. Interestingly, although there may be an over-representation of black or minority ethnic groups in restraint-related deaths in custody, it is clear that white prisoners are more likely to take their own lives – see the JCHR report, para. 51.

29. JCHR report, paras. 227; 256

being[30]. It noted that the workforce in mental health services should be ethnically diverse and recommended that where appropriate, active steps should be taken to recruit, retain and promote black and minority ethnic staff[31]. The Panel also recommended that there was a need for training to ensure that medical personnel were reminded of the importance of not over-medicating patients[32], a recommendation that was effectively repeated by the Joint Committee on Human Rights[33].

In the Government's response to the Bennett report, it accepted the need for cultural awareness and diversity training for all those involved in mental health services, for the need to ensure a more ethnically diverse workforce in the field, and for the issue of over-prescribing to be addressed, and set out its proposals in that regard[34]. Although the Government accepted 'in principle' the need for there to be a national system of training in control and restraint[35], the National Institute of Clinical Excellence has recently announced that it will not adopt the Bennett report's 'no restraint for more than 3 minutes' recommendation. It has been heavily criticized for this refusal[36].

One very real concern that has been raised in the light of the recommendations in the Bennett report is the fact that many of these recommendations (such as the need for improved training on control and restraint issues and for monitoring diagnosis of schizophrenia among Afro-Caribbean's) had been raised as far back as 1993, with the publication of the Blackwood report referred to above[37]. It is to be hoped that on this occasion the inquiry's recommendations are taken seriously because, as the recent Joint Committee on Human Rights report pointed out, practices such as over-medication and the excessive use of restrain raise serious concerns about violations of Article 8 (the right to respect for private and family life), Article 3 (the right to freedom from inhuman and degrading treatment) and Article 14 (the right not to be discriminated against in the enjoyment of the other Convention rights on any ground, including that of race)[38]. They also raise issues as to the compliance by state bodies such as the police and mental health institutions with their positive obligation to promote racial equality under the RRAA[39].

The Government also announced improvements in the recording of the use of control and restraint, and sudden, unexplained deaths in psychiatric units[40]. Article 2 (the right to life) is clearly engaged by cases were an individual dies while in detention by the State. Practitioners will recall that Article 2 incorporates both a substantive obligation (to take positive steps to protect life) and a procedural one (to ensure that there is a full, independent investigation into any deaths that raise Article 2 issues). Article 14 can also be relevant to Article 2 deaths. In *Kunchova v Bulgaria* (Application Nos 00043577/98 and 00043579/98, 26/2/2004), for example, the European Court of Human Rights (ECtHR) held that there had been a breach of both Article 2 and Article 14 when two Roma men had been shot and killed by the Bulgarian military police. The ECtHR has also concluded that the state is obliged to undertake an effective investigation in any situation where there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, whether or not state agents are said to be involved, but especially where racism appears to be a motive for acts which led to injury or death (*Menson v UK*, Application No. 47916/99, ECtHR, 6 May 2003[41]).

The Independent Police Complaints Commission (IPCC) replaced the Police Complaints Authority with effect from April 2004 and offers the promise of a greater independence to the investigation of deaths in police custody. On 13 August 2004, for example, it announced that it would independently investigate the death of Kebba Jobe, a 42 year old Gambian who died from breathing difficulties while undercover Metropolitan Police officers were trying to arrest him.

30. Recommendations 1-3 and 15, Report, pp.67-8
31. Recommendation 8, Report, p.67
32. Recommendation 21, Report, p.68
33. JCHR Report, para. 195.
34. DOH Report, pp. 21-2; 25-6; 30-31; 34-5
35. ibid., pp.27-8
36. See, for example, INQUEST press release, *'NICE Guidance – A Profoundly Inadequate Response to the Death of David 'Rocky' Bennett'*
37. See Institute of Race Relations, *Rocky Bennett – killed by institutional racism?* at http://www.irr.org.uk/2004/february/ak000013.html
38. JCHR report, paras. 193-5
39. JCHR report, para. 256
40. DOH Report, pp.28; 29-30
41. *'…where that attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence...'* (*Menson* at pp.13-14).

The ancient British system of coroner's inquests is also changing. How the coronial system can be an effective part of the state's discharge of the Article 2 investigative obligation was considered in the recent case of *R (on the application of Middleton) v HM Coroner for the Western District of Somerset & Anor* [2004] 2 AC 182. In *Middleton* the HL held that in order for the coronial system to comply with its discharge of the Article 2 obligation, 'how' in section 11(5) (b) (ii) of the Coroners Act 1988 and rule 36(1) (b) of the Coroners Rules 1984 should be interpreted as meaning not merely 'by what means' but 'by what means and in what circumstances'. The manner in which the coronial system needs to be reformed is itself under review[42].

Given the very real concerns that arise when the potentially discriminatory use of restraint leads to a death in custody, it is to be hoped that mental health bodies, the IPCC and coroners conducting investigations into such deaths have fully in mind the principles set out in *Kunchova* and *Menson*; and that the reform of the coronial system takes these issues fully on board. At the most serious end of the spectrum, it is to be hoped that the Government also give serious consideration whether deaths in custody should be capable of being prosecuted under the new offence set out in the draft Corporate Manslaughter bill.

What can practitioners do?

What the recent inquiry and response has demonstrated is that:

> *Despite the commitment by both professionals and managers to provide ethnically sensitive and culturally appropriate services, the overall experience of psychiatric services by Black and South Asian people in this country remains largely negative and aversive….In fact, there is no single aspect of contemporary psychiatric care within which Black or South Asian people are not disadvantaged.*[43]

Whereas the government has made a number of useful proposals to ensure ethnically and culturally sensitive service delivery, little has been done to examine psychiatry's inherent historical, racial and cultural bias. There is, many commentators say, a tendency to regard minority ethnic groups as deviating from the Western or euro-centred psychiatric norms and an ever-present risk of diagnostic misattribution. Much of the psychiatric debate of the last 50 years has been said to be focused upon a quasi-anthropological study of race differences and an unreasonable pre-occupation with the theory that 'ethnic' factors can be can be causative of mental illness. These issues should be our real targets as practitioners in light of the findings of the Bennett Inquiry.

So what can we do, as practitioners, in mental health and discrimination law? There is, in fact, the scope for much to be done but this is to a great extent uncharted territory. We now have the benefit of the provisions of s.19B of the RRA (inserted by the RRAA). Practitioners must use this to ensure that service delivery is ethnically appropriate and sensitive, but what are the realistic remedies and sanctions? Complaints about misdiagnosis, it seems to us, can be made in two ways, either by bringing a RRA claim in the ordinary civil courts or, where the issue is about compulsory anti-psychotic medication, making the race-based misdiagnosis part of the Administrative Court challenge (made possible after the case of *R (Wilkinson) v Responsible Medical Officer of Broadmoor Hospital and others* [2002] 1 WLR 419) to the administration of medical treatment in breach of Articles 3 and 8 of the Convention.

However, it seems to us that neither of these strategies will be easy to pursue and there will be no magic formulas. Firstly, expert independent psychiatric evidence will be necessary in both cases. Whereas there is a plethora of statistical evidence about the detrimentally differential care and treatment of ethnic minorities within psychiatric institutions, it may be difficult to find reliable independent experts who are prepared to challenge such individual potential mis-diagnoses as being racially discriminatory. Even if such brave professionals exist (and they are likely to be few in number particularly given the under-representation of ethnic minorities within the profession) they too are likely to face serious problems of proof in any individual case.

Stereo-typical assumptions made about ethnic

42. *Death Certification and Investigation in England, Wales and Northern Ireland – The Report of a Fundamental Review 2003* (the Luce Report) – www.official-documents.co.uk/document/cm58/5831/5831.htm)

43. Sashidharan, S.P. 'Institutional Racism in British Psychiatry

363 minorities by their treating psychiatrists can also have a detrimental effect on the discharge prospects. The mental health tribunal's jurisdiction does not extend to dealing directly with complaints of discrimination and therefore the most effective way of dealing with this kind of issue will be to make submissions about the dangers of culturally insensitive treatment. It is also possible to use the anti-discrimination provision of the Convention but that provision would have to be linked to the statutory discharge criteria.

What appears obvious, in light of the well-documented failure on the part of psychiatric services to meet the needs of ethnic minority groups, is that it is imperative to stimulate debate about how best to make use of the new avenues of redress where discriminatory treatment is a live issue in the mental health system. Whilst it might have been thought that the clinical judgment of a psychiatrist was protected from challenge, the RRAA and the HRA have altered the legal landscape immeasurably. Practitioners – including psychiatrists and other mental health workers – must now seize the opportunity to alter the practical reality for those whose very lives may depend upon the reform of psychiatric service provision.

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Introduction to the Disability Discrimination Act 2005

In December 2004, the government introduced the Disability Discrimination Bill into the House of Lords. The Bill was intended to complete the government's implementation of those recommendations of the Disability Rights Task Force which it accepted. It amends the Disability Discrimination Act 1995 (DDA) significantly and it is expected to have a major impact upon disabled people – filling existing gaps in the legislation and taking forward a positive, proactive approach to equality.

The bill had previously been published in draft form, and was the subject of a Joint Parliamentary Scrutiny Committee, which took evidence from a vast range of organisations. The Scrutiny Committee published its report on 27th May 2004. The government made a number of changes to its initial bill following the recommendations of the scrutiny committee, and there were further changes following government amendments in the Lords. This article looks at the main provisions of the Act.

Definition of disability

The Act amends the definition of disability in the DDA to cover people with HIV, Multiple Sclerosis and cancer from the point of diagnosis. There, is, however, a regulation making power in the bill in order that the government can exempt certain cancers from automatically amounting to a disability, the intention being that certain types of cancer which do not require 'substantial' treatment would not be covered. The DRC is urging the Government not to use these regulations for people with cancer as people with relatively minor cancers which require only limited treatment (e.g. some types of skin cancer) may still face discrimination.

The Act also removes the requirement for people with mental illness to show that their illness is 'clinically well recognised' in order to meet the definition of disability. This is particularly welcome, as mental health service users have faced the biggest hurdles in claiming their rights under the DDA because the definition of discrimination inadequately captures the challenges they face. The House of Lords had passed an amendment which would have made it easier for people with depression to prove disability but the government did not accept this.

Public authorities

Comparison with case law under the RRA shows that a

number of public functions are unlikely to be covered by the service provision parts of the DDA. These include some local authority functions such as planning, highways and fostering and adoption (in respect of carers) as well as immigration control, the law enforcement aspects of policing, and some aspects of the prison system. The Act will ensure that these areas are now covered by the DDA. The provisions will also cover the appointment of office-holders, such as school governors, who are not already covered by the DDA.

The new provisions work in a similar way to the existing access to services provisions, in other words, it will be unlawful for public authorities to treat a disabled person less favourably in the carrying out of a public function. Authorities will be under an anticipatory duty to make reasonable adjustments to the way they carry out their functions which will include changing practices, policies and procedures; providing auxiliary aids and services (such as interpreters or information in accessible formats) and considering removing or changing physical barriers. The functions provisions will only come into operation, however, where there is no other provision of the Act which would cover the situation (such as Part 2, the employment provisions, or Part 3, the goods and services provisions). In this sense, they are 'residual' provisions.

There are different justifications applicable to public functions, such as potentially discriminatory treatment being a proportionate means of achieving a legitimate aim.

The duty to promote disability equality

The centrepiece of the Act is a new statutory duty on public authorities, when carrying out their functions, to have due regard to:

- The need to eliminate discrimination and harassment against disabled people.
- The need to promote equality of opportunity between disabled and non-disabled people.
- The need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons

- The need to promote positive attitudes towards disabled persons
- The need to encourage participation by disabled persons in public life

When originally published, the bill did not contain any equivalent to the duty in the RRA to promote good relations; and the elimination of harassment was confined to harassment which is unlawful under the DDA. The government had indicated that it did not feel that a duty to promote good relations would be appropriate in the context of disability. Following intensive lobbying by disability organisations and the DRC, however, the government brought forward an amendment to address the particular concerns expressed by disabled people – the elimination of any harassment; the need to counter the negative images of disabled people by promoting positive images; and the need to address the lack of participation by disabled people in public life.

The positive duty placed upon public authorities requires them to examine the way in which they employ and provide services to identify any patterns of systematic discrimination. They must then take proportionate measures to address any problems identified. Rather than a reactive approach to a discrimination claim, authorities will need to consider disability equality issues in the way in which they operate generally.

As with the existing race equality provisions there are two aspects to the new duty. First, there is a general duty, applying to all public authorities and outlined above. There is no list of public authorities to whom the general duty applies. Instead, the Act uses the HRA approach in defining public authority to include any person certain of whose functions are functions of a public nature. Whilst this has the advantage of being potentially broader than the list approach contained in the RRA, and eliminating the need for a list to be constantly updated, it has the disadvantage of a lack of clarity for those bodies who are not 'pure' public authorities.

As well as the general duty, the Secretary of State (or Scottish Ministers as appropriate) may use regulations to impose specific duties on certain public bodies. The specific duties will be designed to assist key public bodies in meeting their general duty, and those bodies will be listed in the regulations. The specific duties are different from those applicable in relation to the race duty: broadly, they require public authorities to produce a Disability Equality Scheme which disabled people must have been involved in (and not merely consulted on); they require authorities to set out steps which they will take to comply with their general duty; and they require public authorities to take these steps. In this respect, they are very outcome focused.

In addition, there are specific duties placed upon the Secretary of State to publish a report on their policy areas one every three years. The report must:

a) give an overview of progress made by public authorities operating in the Secretary of State's policy sector towards equality of opportunity between disabled persons and other persons; and
b) set out the Secretary of State's proposals for the coordination of action by public authorities operating in that sector so as to bring about further progress towards equality of opportunity between disabled persons and other persons.

Although the government has published draft regulations these do not contain a list of the bodies to whom the specific duties will apply nor of the specific Secretaries of State to whom the additional duties will apply.

This duty will come into effect from December 2006.

Housing

The existing housing provisions in the DDA provide protection for disabled tenants against basic discrimination by landlords (such as being evicted or refused a tenancy because you are a disabled person). The Act extends the DDA's duties on landlords and management companies to include a duty to make reasonable adjustments to policies, practices and procedures and a duty to provide auxiliary aids and services. In addition, commonholds are brought into coverage for the first time. This will lead to practical benefits such as changing a 'no dogs' policy to allow assistance dogs, and providing accessible copies of contracts and rent statements.

Originally, the Act did not contain the task force recommendation relating to a prohibition on landlords unreasonably withholding consent from tenants to make improvements to their premises – for example, to install a handrail. The government introduced such provisions to the Bill in the Lords though, which build upon similar provisions contained in the Landlord and

Tenant Act 1927 and the Housing Acts 1980 and 1985. The DRC is empowered to issue a code of practice in particular relating to when consent might be reasonably or unreasonably withheld.

Transport

At present, any service so far as it consists of the use of any means of transport, is excluded from the goods, facilities and services provisions of the DDA (s.19(5)). This is a major flaw in the Act and one which the DDA 2005 and regulations made under it will address. The Act itself removes the existing exemption and replaces it with a more precise exemption (discrimination in the provision or the use of a vehicle). The Act also provides a regulation making power to enable such discrimination to be brought within the scope of the goods and services provisions of Part 3. The government has already published draft regulations on bringing taxis, private hire vehicles, private rental or car hire, breakdown vehicles, buses and trains into the scope of the goods and services provisions, and its intention is to do this by December 2006. The reasonable adjustment duties will apply, although there will be no obligations in relation to physical features of the vehicles other than in relation (in varying degrees) to car hire and breakdown vehicles. The DRC will be publishing a draft code of practice on the provision and use of transport vehicles, which is intended to supplement the Part 3 Code of Practice. The public consultation will be from 31st May to 19th August 2005.

There are also provisions within the Act relating to the application of the rail vehicle accessibility regulations and the recognition of blue badges issued to enable disabled people to park.

Councillors

At the moment, those carrying out their duties as councillors are not covered by either the recently-expanded employment and occupation provisions or the service provisions of the Act. The Act remedies this, by making it unlawful for a number of specified authorities (such as county and district councils) to discriminate against members of the authority in relation to, for example, opportunities for training or any other facility for the carrying out of official business. These provisions mean that authorities will also be subject to the duty to make reasonable adjustments – for example, providing committee papers in accessible formats such as on tape or in Braille.

Private Clubs

At present, private clubs, that is those private clubs where personal selection mechanisms for membership apply, do not fall within the service provision parts of the Act as they are not providing a service to a section of the public. The Bill will extend the DDA service provisions to such clubs, covering not only membership and application for such, but also guests and associates. This means that disabled people will have equal rights to membership and equal access to the club's facilities. In addition, clubs will have to make reasonable adjustments to the way in which they deal with membership issues and in relation to facilities provided. The detail of the reasonable adjustment provisions will be contained in regulations which have not yet been published. The government has stated, however, that it intends the provisions to mirror those in Part 3 (goods and services) and thus that there will be an anticipatory duty to make reasonable adjustments.

General qualifications bodies

Whilst vocational qualifications bodies have been covered by Part 2 of the Act since October 2004, those qualifications bodies which award more generalised qualifications, such as GCSEs and A levels, have had no obligations under the DDA. Following lobbying by the DRC and others and the recommendations of the Joint Committee on Human Rights the Government amended the original bill to ensure that general qualifications bodies are brought within Part 4 of the Act. The provisions applicable to the bodies will, however, mirror those in relation to vocational qualifications bodies in Part 2, with an individualised duty to make adjustments.

Part 3 questionnaires

The Act will extend the part 2 questionnaire procedure to cover Part 3 claims. The questionnaire is extremely important in assisting disabled people to establish the reason for their treatment and often in obtaining information from an employer to determine whether to proceed, or not, with a claim of discrimination. The lack of such a procedure in relation to Part 3 claims has added to the difficulty which disabled people have to face in bringing Part 3 claims in the county court. Hence this is a very welcome provision.

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Other provisions

The Act also contains provisions regarding:

- discriminatory advertisements (ensuring that third parties such as newspapers publishing a discriminatory advertisement on behalf of someone are covered), and
- group insurance (making it clear that a person who provides group insurance services to employees of particular employers would be regarded as a provider of services for the purposes of Part 3 of the Act).

Implementation of the new provisions

The provisions are to be implemented in stages, beginning with December 2005 (when, for example, the extensions to the definition of disability will take effect) with the final provisions to be implemented in December 2006 (such as the duty to promote disability equality). The DRC is currently preparing and revising Codes of Practice to reflect the new duties and this year will see the publication of 3 draft Codes of Practice for consultation (Disability Equality Duty code – the consultation on which has closed; Transport code, dealing specifically with the provisions and use of transport vehicles; and a revised Part 3 code). Details of any of the consultations can be found on the DRC website (www.drc-gb.org).

Whilst the new provisions are extremely important and very welcome, they have added to the complexity of the DDA. In addition, this Act and the October 2004 amendment regulations mean that the DDA 1995 is now unrecognisable. Without a consolidated Act, it will be extremely difficult for individuals to find out what the Act now says and where it says it: we can only hope that the government produce a consolidated Act sooner rather than later.

Catherine Casserley
Disability Rights Commission

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Briefing 365

Casual workers rights under EC law

Wippel v Peek und Cloppenburg und Co KG C313/02 [2005] IRLR 211 ECJ

Background

The EC Equal Treatment Directive 76/207/EEC (ETD) sets out the obligations of community members regarding equality of treatment between men and women in the workplace. The EC Part Time Workers Directive no. 97/81/EC (PWD) sets out requirements for member states to ensure equal treatment between full and part time workers in certain circumstances.

In this case, the European Court of Justice (ECJ) was asked to consider a range of questions, referred by the Austrian High Court about whether and if so how these provisions would apply in the context of a person who was retained on a 'work on demand' contract.

Facts

Ms Wippel (W) had an agreement by which she was offered work by the company as and when she was required by them. The company did not guarantee work, but offered the possibility of around three days a week with two Saturdays a month. W was allowed to refuse work, and did so on occasions. The result was that she had no fixed hours of work, and as a consequence her salary fluctuated month by month. In fact, the maximum hours worked by her in one month was 123.3.

W sought to compare herself with full time workers, and claimed the difference between the pay she had received and the maximum pay that she would have received had she worked the maximum amount that could have been allocated to her. She relied upon the fact that the majority of part time workers were women (90%) and claimed less favourable treatment than full time workers.

In Austria, the Labour law sets out the normal working week for a full time worker at 40 hours and eight hours a day, and guarantees certain rights to workers, related to pensions and benefits. There are no such comparable arrangements for part time workers.

Reference to the ECJ

The Austrian High Court asked the ECJ, among other

things,

- whether W could be considered a worker, so that the relevant directives on part time workers would apply, and
- whether it was correct for W to compare herself with a full time worker in these circumstances, so that she was discriminated against.

European Court of Justice

Dealing with the **first question**, the ECJ confirmed that since W was undertaking a contract which laid down rules concerning working conditions within the meaning of ETD article 5(1), she was a worker for the purposes of the directives, regardless of the work on demand nature of the arrangements. In addition, the rules came within Clause 4(1) of the Framework Agreement annexed to the PWD.

Having established that W could be a worker, the ECJ then considered whether the PWD would apply to her.

They decided that it could do so, but that this would depend upon considerations of national law. The national courts would have to consider:-

- whether an individual had a contract or employment relationship as defined by national law, collective agreements or other member states practices;
- whether the hours worked, calculated either weekly, or on an annual basis were in fact less that the full time equivalent.

The ECJ considered that the worker could come within the provisions provided that, if they were working on a casual basis, the member state had not specifically excluded them from the provisions.

The consequences of this in national law, is that the courts will have to go through the familiar and time consuming process of determining employment status, before an individual worker can gain entitlement to remedies for inequality. Where there is no mutual obligation to provide or accept work, a worker will not be considered an employee in the UK. (See, for example, *Carmichael v National Power PLC* [1999] ICR 126 HL). The implication of this is that the rights of part time workers to equal rights with full time workers are dependant on the quantity of work and the arrangements made between the parties. In the case of casual and agency work, a large proportion of which in certain industries is done by women, this will be a real barrier to equality.

The **second key question** concerned the correct comparison to be made in this case. The ECJ considered that W could not make a valid comparison between herself and a full time worker. They referred to the guidance within the framework agreement which defines a full time worker who can be a comparator as

> *a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.*

Where there is no such person the comparison is to be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

The ECJ drew the distinction between W and full time workers in the establishment on the basis of the contractual arrangements themselves. Not only were the full time workers hours of work fixed, but they could not refuse to work, as W could.

Thus, the ECJ considered that there were clear differences in the nature of the contractual arrangements which made the comparison between full time and part time work invalid. There was consequently no validity in the claim of indirect discrimination.

Comment

The clear difficulty with this judgement is that it effectively limits protection of part time workers on casual, 'as needed' contracts to those establishments where the contractual arrangements for full and part time workers are comparable. Since the point of the directive was to ensure that workers are not treated less favourably simply because they work fewer hours than the full time norm, there is a lack of logic in demanding that, as a threshold for those rights, a worker must be able to find a full time comparator, whose contractual provisions are the same. However, this is a case which deals with a very particular type of contract, the 'as needed' contract, and it is certainly arguable that the judgement of the ECJ in this respect is therefore restricted to those type of part time contracts only.

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Part time workers obligations must be in proportion to those of full time workers

Elsner-Lakenberg v Land Nordrhein-Westfalen [2005] IRLR 209 ECJ

Facts

Edeltraud Elsner-Lakeberg (EL) worked part time as a teacher for Land Nordrhein-Westfalen (LNW). She taught for 15 hours per week, full time teachers worked for 24.5 hours per week. The statutory civil service code which applied to her required civil servants to work additional hours where the job requires it. Extra leave or supplementary pay is only paid where the additional work exceeds 5 hours per month, but in the case of teachers 3 additional teaching hours is deemed to be the same as 5 hours.

In December 1999 EL taught an extra 2.5 hours. She was not paid for these as she had not exceeded 3 extra hours of teaching time. She brought a claim on the basis that part time teachers who work no more than 3 extra hours per month receive less extra pay than full time teachers who work the same number of extra hours.

LWN and the German Government contended that there was no discrimination because part time workers were treated in the same as full time workers. The Administrative Court of Minden referred the question of whether these terms were compatible with article 141 EC and the Equal Pay Directive 75/117/EEC (EPD) to the ECJ.

European Court of Justice

The ECJ ruled that article 141 EC and the EPD:

> *must be interpreted as precluding national legislation which provides that teachers, part time as well as full time, do not receive any remuneration for additional hours worked when the additional work does not exceed three hours per calendar month, if that different treatment affects considerably more women than men and if there is no objective unrelated to sex which justifies that different treatment or it is not necessary to achieve the objective pursued.*

They concluded that part time workers are entitled to have the same scheme applied to them as that applied to other workers, but this should be done on a basis proportional to their working time.

In this case a full time teacher needs to work an extra 3% of their time in order for a payment to be triggered, whereas a part time teacher in the position of EL must work an extra 5% of their time. This is a greater burden for part time teachers. Unless this can be justified by a reason unrelated to their gender this treatment will be contrary to article 141 and the EPD. The number of additional teaching hours needed to trigger an extra payment for part time workers should be an appropriate proportion of that required for full time teachers.

Comment

This is an important judgement for part time workers who are often required to work extra hours, or not to qualify for overtime, on the same basis as full time workers. Whilst this may appear to be equal treatment, in fact, this may have a disproportionate adverse impact on them. The ECJ has recognised this and requires that these benefits or disadvantages should be applied in proportion to the hours worked.

Gay Moon
Editor

Originating applications must fully particularise claims

Ali v Office of National Statistics [2005] IRLR 201 EWCA

Background

In December 1999, the appellant, Mr Ali (A) applied for a post with the Office of National Statistics (ONS) and was unsuccessful. He filed a claim alleging racial discrimination. In the originating application, A identified the complaint as one concerning whether he had been 'discriminated against…on racial grounds contrary to the RRA'. The applicant provided details for previous unsuccessful applications to the ONS and added 'I always knew and thought they did not hire blacks. This suspicion of mine was firmly established when I read their recruitment statistics, which effectively excluded blacks.' At the interview he had been asked why he continued to apply to the ONS when previous applications had been unsuccessful. He added that 'for such a question from the recruitment personnel, the telling statistics with their work and recruitment practice, which excluded black, I thought the authorities should be told the experience of a black candidate'.

In the course of disclosure of documents evidence emerged that ONS's interview procedures favoured internal candidates. As ONS's existing employees were mainly White this could amount to indirect racial discrimination against A. The ET found that:

> *There is no doubt, for instance, that the existing interview procedures favour internal applicants. The applicant in the present case has effectively shown that there is different supporting documentation in the case of internal applicants. His cross-examination was also responsible for disclosing that different forms are in use in their case. It is apparent that a number of criteria will favour those that have knowledge of the respondent's existing procedure*

The ET upheld the claim on the basis of direct race discrimination and awarded damages. The finding of direct discrimination was however overturned on appeal and the case remitted to the ET for rehearing.

The need to amend the originating application

In light of the evidence that emerged in the course of the first hearing, A now sought to pursue of claim for indirect discrimination. A wished to amend the originating application and add a paragraph 25A:

> *I believe the rejection from the post was both directly and indirectly discriminatory on grounds of race. I base my claim of indirect discrimination on the fact that the ONS had a policy of offering preference in recruitment to internal candidates. The statistics show that black people are grossly underrepresented in the ONS. Being an internal candidate was therefore a condition or requirement which had a disparate impact on black people and which was not justified.*

The question arose as to whether a claim of indirect discrimination was a 're-labelling' of already pleaded facts or a new claim that was being made out of time and would require an amendment to the originating application. If it was the latter, a further issue concerned the basis on which the tribunal should exercise its discretion in allowing an amendment to the claim. The ET sided stepped these issue altogether and found that the originating application raised the issue of ONS's recruitment practice and so covered a claim of indirect discrimination. Consequently amendment to the originating application was not needed. An appeal was made to the EAT on the basis that this was not a point argued by either party.

Employment Appeal Tribunal

They allowed the appeal, and found that a claim of indirect discrimination was not a clarification of a claim already made, it was a new claim, and therefore required an amendment to the originating application.

Court of Appeal

The CA also found that even if there was some suggestion of indirect discrimination in the originating application, nothing in the factual allegation of the originating application suggested the indirect discrimination which A was now alleging. This was not surprising as A did not know, at the time of the originating application was issue, the facts supporting

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the claim for indirect discrimination, these only emerged in the course of the disclosure by the respondents in the process leading up to the first hearing. The CA emphasised that claims of direct and indirect discrimination were distinct claims. If the facts alleging indirect discrimination are not particularised in the originating application then it is a new claim that requires an amendment to the originating application.

A accepted, in the CA, that even if this was a case of re-labelling already pleaded facts, the re-labelling required an amendment, out of time, to the originating application. At this point a further issue emerged. Counsel for A argued that the test to determine whether to allow an amendment out of time differed depending on whether the amendment is a re-labelling of existing facts or a new claim. If it is a re-labelling of existing facts then a decision on whether to allow the amendment is based on where the 'balance of hardship and injustice' falls between allowing and refusing an amendment. This was argued to provide a lower threshold than the test of whether allowing an amendment is, in all the circumstances, 'just and equitable' which applied to amendments that involved a new claim. Without resolving the question of whether two different tests are applied in these different situations and whether the different tests imply substantially different thresholds, the CA concluded that:

> *It is inconceivable that an application to amend to add that claim as soon as it is discovered would have been refused.*

Comment

This case highlights the importance for practitioners of fully particularising the claim being made, and, of speedily amending it as soon as further facts altering the nature of the claim come to light.

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Briefing 368

Burden of Proof re-assessed

Igen Ltd and others v Wong, Chamberlin Solicitors v Emokpae, and *Brunel University v Webster* [2005] IRLR 258 EWCA

Implications

This case finally resolves the long-running debate about how ETs should approach the reversal of the burden of proof in discrimination cases. Guidance was first given in *Barton v Investec* in the EAT. But later decisions of the EAT (*Emokpae, Sinclair Roche, Wolff*) had modified the *Barton* guidance in ways which, on balance, made it less onerous for respondents.

This was a joint appeal in a number of cases under the SDA and the RRA. The Commissions (DRC, CRE and EOC) intervened to make submissions as to how they considered the law should be applied.

Court of Appeal

The CA approved the *Barton* guidelines in every respect and indeed strengthened them with some small amendments. The amended guidelines are set out as an Annex to the judgment.

The fundamental approach remains that it is for the employee to make out a *prima facie* case of discrimination, i.e. to prove facts which *could* – in the absence of an adequate explanation – amount to less favourable treatment on the prohibited ground (sex, race, sexual orientation, disability, religion or belief etc). However, the CA now stresses that, at this first stage, the ET must assume that there is no adequate explanation for the treatment (guideline (6) and para 22 of the judgment), although it can have regard to *inadequate* explanations by the employer as the basis of drawing an inference (para 21 of the judgment). Clearly this makes the task easier for the Claimant to secure a reversal of the burden of proof.

Once the claimant has proved facts which could amount to discrimination, the burden shifts to the respondent who must prove that the treatment complained of was 'in no sense whatsoever' on grounds of sex, race etc. This last phrase has been confirmed by the CA, after its use was doubted in *Emokpae*. The non-

discriminatory explanation must be '*adequate to discharge the burden of proof on the balance of probabilities that [sex/race etc] was not a ground for the treatment in question*'.

The final guideline (13), which is retained unamended, states that the Tribunal *'would normally expect cogent evidence [from the respondent] to discharge that burden*'.

One additional point: it is not enough for the claimant at the first stage to prove facts which could amount to discrimination and for which the respondent *might* be liable (e.g. a racist remark which was definitely made but by an alleged discriminator who may or may not have something to do with the employer). Obviously the act complained of must be shown to be that of the respondent or someone for whom s/he is responsible. The claimant must show at the first stage that the respondent would be liable, if discrimination were to be made out.

The new version of the guidance is as follows:

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

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In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Comment

It is now clear that earlier suggestions that the new provisions do little more than codify the old approach under *King v Great Britain China Centre* were wide of the mark. Respondents must now satisfy the stringent requirements at the second stage to prove non-discriminatory explanations for apparently discriminatory conduct, if they are to avoid being liable.

Careful consideration needs to be given by practitioners as to how the guidance will apply in cases under the DDA, given that the comparative exercise for less favourable treatment is different from that under the other Acts. It should also not be forgotten that the reversal of the burden of proof also applies to 'reasonable adjustments' claims. In the view of the present writer it works as follows: the burden falls initially on the Claimant to prove 'substantial disadvantage' and that there were adjustments which *could* reasonably have been made; if that burden is discharged, the burden shifts to the respondent to show that there were no adjustments which could reasonably have been made to remove the substantial disadvantage. There is guidance on these questions in the new DRC Code at para 4.42.

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Briefing 369

New cause of action in cases of harassment and bullying at work

Majrowski v Guy's and St Thomas's NHS Trust [2005] IRLR 340 EWCA
Banks v Ablex Ltd [2005] IRLR 357 EWCA

Implications for Practitioners

The Court of Appeal decision in Majrowski establishes that employers can be vicariously liable under section 3 of the Protection from Harassment Act 1997 (PHA) for their employees' breach of the duty under section 1 of the Act not to subject another person to harassment. This novel use of the 1997 Act provides an important tool in the armoury of discrimination practitioners. Following the decision, employees who suffer harassment and bullying at work have a new cause of action against their employers – a development which is of particular relevance to claimants who do not fall under the equal opportunities regime. These may include those who are not claiming race, sex, disability, sexual orientation or religious harassment or cannot claim because of the limits to the relevant legislation but who nonetheless suffer harassment at work or in any other context. In the past if such claimants wanted to bring an action against their employers this would only have been possible if they could show that they had suffered physical or psychiatric illness as a result of the harassment, for which they could bring a personal injuries claim either on a vicarious basis, or directly, in negligence on standard occupational liability principles. Alternatively, if the claimant had been forced to leave their job as a result of the harassment, they could have brought a claim in the employment tribunal for constructive unfair dismissal.

The *Majrowski* decision changes this position. A majority of the CA held, on construction of the PHA, that an employer may be vicariously liable for the actions of its employee which contravene the Act if a sufficiently clear link between the employer's work and the harassment can be established. The 1997 Act states that "a person must not pursue a course of conduct – (a) which amounts to

> *harassment of another; and (b) which he knows or ought to have known amounts to harassment of the other.*

To bring a claim under the Act the victim must show that behaviour which constitutes harassment took place (harassment is not defined in the Act but will probably

be assessed from the victim's points of view) and that this was unreasonable behaviour. A "course of conduct" must involved "conduct on at least two occasions" and "conduct" includes "speech". The harm resulting from the harassment need not be foreseeable, nor does the victim need to show that s/he has suffered any form of physical or psychiatric injury as a result of the harassment. This was the case for Mr Majrowski who suffered bullying, intimidation and harassment by his departmental manager which fortunately did not result in him sustaining any form of psychiatric injury.

The CA decided this case after hearing argument on the wider question of whether an employer can be held vicariously liable for its employee's breaches of statutory duty when the duty is held by the individual person alone and not the company. The HL had on three separate occasions ducked this important question, when dealing with statutes in very different contexts. In Majrowski the CA accepted unanimously that as a general principle employers could be liable in these circumstances.

In the second case, *Banks*, vicarious liability under the 1997 Act was assumed by the CA. The CA rejected this claim, however, and in so doing provided limited guidance on the type of behaviour which will contravene the 1997 Act, namely that there must be a course of intentional conduct which amounts to harassment. The judgment is clear that the conduct in question must occur on more than one occasion and must be directed at the same victim (rather than anger/abusive behaviour directed at the world in general). Intentional conduct need not be calculated to produce the consequences it does (e.g. of misery to the victim).

Comment

The *Majrowski* judgment makes clear that the cause of action under the 1997 Act is not a free for all for disgruntled employees, however it will inevitably extend the possibilities for employees who have been subjected to acts of bullying and harassment at work and should add weight to employers' efforts to stamp out this type of behaviour in all its forms in the way that the anti-discrimination legislation has already had some positive effects.

The PHA is not only applicable to employment situations, it has a very wide application and could be used in the context of access to goods, facilities and services where they are not otherwise covered by the relevant legislation.

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Briefing 370

Equal pay comparisons across Government departments are not permitted

Robertson v Department for Environment, Food and Rural Affairs [2005] IRLR 363 *EWCA*

Implications for Practitioners

The EqPA Section 1(2) provides that a comparator for equal pay purposes must be in the same employment as the claimant, which, as defined by s. 1(6) (c), means employment with the same or an associated employer in the same establishment, or, alternatively, at a different establishment at which common terms and conditions are observed. The limitations inherent in this provision have caused many claimants to bring claims directly under Article 141 EC. Art. 141 has no inherent restrictions of this nature, although relevant limitations have been developed over the years by the ECJ. Most pertinently for present purposes, in *Lawrence and others v Regent Office Care Ltd and others* [2002] IRLR 822, the ECJ held that, for equal pay proceedings to come within the ambit of Article 141, the pay differences between workers of different sexes performing equal work must be attributable to 'a single source'.

This principle has now been considered by the CA in *Robertson*, an equal pay claim brought by civil servants working in DEFRA, who wished to rely on a comparison with the terms and conditions of civil servants working in a different government department. The novel point in *Robertson* was that,

despite working in different departments, both the 'claimants' and the 'comparators' were legally employed by the ***same employer***, the Crown. The judgment is clearly of great significance to the government and Civil Service, but the principles may also be of more general application.

Facts

The claim was brought by six male civil servants (three executive officers and three administrative officers) working in DEFRA, who sought to compare themselves with higher-paid female civil servants employed as senior personal secretaries in the Department for Environment, Transport and the Regions (DETR). Although the claimants and their comparators were all employed by the Crown, their terms and conditions of employment were, and had been since 1995, set by the individual government department for which they worked. The claimants were unable to bring their claim under the EqPA as they worked at different establishments, and there were no 'common terms and conditions of employment'. They therefore sought to rely directly on Article 141.

The ET held, on a preliminary point, that the claimants were entitled to compare themselves with those working in another government department. On appeal, the EAT, following *Lawrence*, found in favour of DEFRA, on the basis that the differences in pay conditions could not be attributed to a single source.

Court of Appeal

The claimants argued firstly that there was no need to rely on the *Lawrence* 'single source' approach in a case where the claimants and the comparators of a different sex were employed by the same employer. In such a situation the common employer (in this case, the Crown) would be responsible for any differences in pay, and it was therefore for the Crown to justify any differences. The Crown could not escape from this fact by departmentalising pay negotiations and settlements, as this would undermine the effectiveness of the fundamental principle of equal pay.

Mummery LJ, giving the judgment of the Court, disagreed and held that the 'single source' principle was of general application. Common employment was not a necessary or sufficient condition of comparability in equal pay cases [para. 28]. Mummery LJ considered the ECJ in *Lawrence* to have been setting out a *'principled basis upon which responsibility for difference and discrimination can be pinned'*. In this context, the relevant body within which the comparison had to be made was the one 'which is responsible for the inequality and which could restore equal treatment'. That body would not always be the legal employer. Mummery LJ noted that if the claimants' argument were correct, every civil servant would be entitled to compare him or herself with any other civil servant of the opposite sex, subject only to objective justification by the employer of differences in pay. He considered this not to be a 'sensible or practical approach' to the preliminary task of identifying appropriate comparators [para. 29].

The claimants' second argument, which had found favour with the ET, was that, in this case, the Crown was the 'single source' referred to in *Lawrence*. The main premise of the argument was that, although the individual departments had delegated responsibilities in day-to-day decision making, control was ultimately with the Crown as employer and paymaster. Simply relying on the existence of different departments could not be sufficient to justify unequal pay.

In reaching his conclusion on this point, Mummery LJ considered the regulatory framework permitting the delegation of certain powers to individual government departments. He found that each department had responsibility for negotiating and agreeing the pay of civil servants employed in its department, subject to compliance with the management code, and to overall budgetary control by the Treasury. Neither the Treasury nor the Cabinet Officer was involved in pay negotiations; their approval of settlements was not required; and there was no co-ordination between the different sets of negotiations. The different needs of departments had resulted in vastly divergent pay scales and terms of service [para. 35]. Mummery LJ concluded, referring to the EAT judgment, that the individual departments responsible for the terms and conditions were responsible for ensuring equality, and that in the present state of diversity of terms and conditions, there was no single source to which the differences in pay and conditions between departments could be attributed [para. 36].

Two further (related) arguments were put forward on behalf of the claimants, namely:

a) that delegation to Government departments had not divested the Crown of the power to regulate the pay

of civil servants; and

b) that the Crown had the power to revoke the delegation of power to the departments.

Mummery LJ rejected both arguments on the basis that the mere retention of a legal power, which might theoretically result in Crown intervention in the future, could not make the Crown 'the body responsible' for the actual pay negotiations and decisions made by individual departments, which had resulted in the pay differential complained of [para. 41 and 43].

Comment

It is apparent from Mummery LJ's judgment that policy considerations played an important part in the CA's decision. The Court clearly considered the civil service as a whole to be too broad a canvas for sensible comparison. However, such an approach may risk perpetuating potentially sex-related differences in the pay and conditions offered by different departments. The CA declined to refer a question to the ECJ on the basis that the law had already been settled in *Lawrence*. A petition for leave to appeal to the HL has been made, and the decision is awaited.

It remains to be seen whether a similarly stringent approach will be taken in comparable cases not involving the civil service, where the policy considerations may be different, or absent.

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Briefing 371

Better protection for equal pay

Bailey & Ors v Home Office [2005] IRLR 369 EWCA

Implications of decision

In its recent decision in *Bailey* the CA put right, at least in part, the latest of the many wrong turnings taken by the EAT in the long and sorry saga of equal pay litigation. The *Bailey* case was a test case in wider equal value litigation (involving 2000 claimants) in which predominantly female administrative workers in the prison service compared their work with that of prison officers, industrial and non-industrial support staff.

Facts

The *Bailey* claimants were higher executive officers in the Prison Service who named as their comparators men employed as governors and principal officers. The employers argued that the differences in pay were due to different collective bargaining arrangements.

Employment Tribunal

The ET ruled that the Home Office was not required under s.1(3) of the EqPA to justify reliance on this factor, if the reliance was genuine (i.e., the factor was the causal explanation of the pay difference), and the factor was unrelated to sex. In this the decision of the tribunal was consistent with that of the HL in *Glasgow City Council v Marshall* [2000] ICR 196, though arguably inconsistent with the decision of the ECJ in *Brunnhofer v Bank der Österreichischen Postsparkasse AG*, C-381/99 [2001] ECR I-04961.

The ET accepted that a *prima facie* case of indirect discrimination had been established where the group of higher executive officers was broadly equal in composition between men and women, but the comparator group was 90% male.

Employment Appeal Tribunal

The EAT allowed the employer's appeal, ruling that the burden of proof was on the equal pay claimant to establish that a factor relied upon by the employer was discriminatory in order to defeat a s.1(3) defence, and that in order to establish that a factor was indirectly discriminatory the claimant had to either:

a) point to a requirement or condition (other than membership of the comparator group) with which she was unable to comply in order to obtain the advantages enjoyed by the comparator group, or

b) establish that the advantaged group was predominantly male and the disadvantaged group predominantly female.

In reaching this conclusion the EAT purported to rely on the decision of the ECJ in *Enderby v Frenchay Health Authority*, C-172/92 [1993] ECR I-05535, which it preferred to the decision of that Court in *R v Secretary of State for Employment ex parte Seymour-Smith*,C-167/97 [1999] ECR I-00623.

The peculiarity about EAT's decision in *Bailey* is that s.1(3) appears in terms to place the burden on the employer to *disprove*, rather than the claimant to *prove*, discrimination. In effect, the EqPA requires the employee to establish a *prima facie* case of discrimination by showing that she is underpaid by reference to a suitable male comparator, at which point the employer is given the opportunity to show that the apparent discrimination is something else. Thus s.1(3) provides that:

> *an equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex.*

The EAT in *Bailey*, like the CA in *Nelson v Carillion Services Ltd* [2003] ICR 1256, nevertheless read s.1(3) as imposing the burden on the equal pay claimant to prove that the factor put forward by the employer was discriminatory. Further, the EAT went on to adopt an approach to indirect discrimination which was redolent of that of the EAT in *Enderby v Frenchay Health Authority* [1991] ICR 382 and *Brook v London Borough of Haringay* [1992] IRLR 478, and which had been discredited by the C A in *Allonby v Accrington & Rossendale College* [2001] ICR 1189. EAT's approach was also inconsistent with the approach of Lord Nicholls in *Glasgow v Marshall*, on which EAT purported to rely. In a passage cited by the appeal tribunal, Lord Nicholls declared (having stated that the burden of disproving discrimination was on the employer once a difference in payment had been established) that:

> *In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the preferred explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is ... a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case.*

When s.1 is thus analysed, it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a 'good' reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity.

Court of Appeal

The CA overruled the EAT and accepted that it was bound by the decision in *Nelson* to the effect that the claimant had to establish that the factor relied upon by the employer was indirectly discriminatory, though all three Lords Justice of Appeal expressed their doubts as to the correctness of this ruling. The Court further agreed with the EAT that the fact of membership of the advantaged group could not sensibly be regarded as a 'requirement or condition' for the purposes of proving indirect sex discrimination. But it went on to rule that the tribunal had been entitled to base a finding of indirect discrimination on the fact that a group of employees containing a significant number, though not a clear majority, of female workers was paid less than a predominantly male group of employees doing comparable work.

Comment

It is perhaps unfortunate that the claimants in the *Bailey* case were constrained to concede that they bore the burden of proving discrimination (twice). Waller LJ observed:

> *I have to say that I do not understand why the applicants in this case should have to accept that there was some onus on them to show 'disparate impact'. I understand that the concession was made in reliance on Nelson v Carillion Services [2002] ICR 1256. We did not explore that decision during the hearing of the appeal and it may be that the concession in the light of that authority was rightly made. But, by an applicant*

being compelled to take on that burden, cases, in my view, get into an unnecessary evidential tangle…

However, the decision of the CA is to be welcomed inasmuch as it unravels the tortured logic of the EAT, rather than waiting for the HL to do so (contrast, for example, the decisions in *Leverton v Clwyd County Council* [1989] ICR 33 and *Hayward v Cammell Laird* [1988] QB 12, not to mention that in *British Coal Corporation v Smith*, *North Yorkshire County Council v Ratcliffe* [1994] ICR 810, in which the CA itself threw the spanner in the works). This case is likely to go on appeal to the HL.

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Briefing 372

Reasonable adjustments to training for a blind person

Williams v J Walter Thompson Group Limited [2005] IRLR 376 EWCA

Implications

This case relates to the defence of justification (formerly provided by s.5(4) DDA), the duty to make reasonable adjustments (as formerly provided by s.6 DDA), and constructive dismissal as an act of disability discrimination.

Facts

Ms Williams (W) is blind. She was employed by J Walter Thompson Group Limited (JWT) on 1 September 1999 as a software operator, with the specific aim of undertaking development work on the software application Lotus Notes. At the time of her employment, W made it clear that she did not have much knowledge of Lotus Notes, and that she would need training.

The only training that she was given was one day's training, some 18 months after she commenced employment. JWT did not provide W with adequate software for her to do her job, nor did it provide her with suitable work as a software operator. With the exception of some research work, completing the holiday database (2 months of work for a sighted person) and video-conferencing (3 days), W was given nothing to do for 2 years. On 8 October 2001, W resigned.

Employment Tribunal

The ET held that JWT constructively unfairly dismissed W. The ET found

- that JWT had, for a reason related to the blindness of W, without justification, treated her less favourably than someone to whom the reason did not or would not apply (contrary to s.5 DDA), and
- failed to make reasonable adjustments to arrangements in compliance with the duty imposed by s.6 DDA because JWT failed to provide the necessary or adequate training, failed to acquire or adapt adequate software to enable W to carry out her duties, and failed to provide W with suitable work.

Employment Appeal Tribunal

The EAT held that the ET was wrong to substitute its views for those of JWT by failing to ask itself in each case whether JWT's investigation and its justification for more detrimental treatment fell within the band of reasonable responses (that being the test laid down by the CA in *Jones v The Post Office* [2001] IRLR 384). On the issue of failure to make reasonable adjustments, the EAT also concluded that the ET had impermissibly substituted its views for those of JWT on matters of training that were going to be difficult, time consuming and uncertain and had failed to explain why JWT's justifications were neither material nor substantial.

Court of Appeal

The CA held that the EAT had itself committed the 'sin of substitution' by overstepping the mark of reviewing a tribunal decision on questions of law and altering permissible conclusions of fact and degree found by the ET.

The CA held that the issue of justification in relation to training and the provision of software raised matters of materiality and substantiality in terms of the time and cost of training, on which the ET found as fact that JWT

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had failed to conduct adequate investigations or assessment. JWT employed W in circumstances in which it knew that adjustments would have to be made. Investigation into the technological possibilities and training options would be involved, as would expenditure. The ET was entitled to conclude that JWT was not justified in its treatment of W. It was not the response of a reasonable employer in the circumstances of the case.

The CA further held, that the ET was entitled to hold that JWT was liable for the constructive unfair dismissal of W. Further, following the decision of the CA in *Meikle v Nottinghamshire County Council* [2004] IRLR 703, the ET ought to have concluded that the detriment occasioned to W by the discriminatory conduct was the effective cause of her resignation and that her constructive dismissal was itself a discriminatory act relating to her disability.

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Briefing 373

Schools liability for discrimination

Murphy v Slough Borough Council & Anor [2005] IRLR 382 EWCA

Background

Teachers in schools whose governing bodies have delegated budgets are employed, in common with other teachers in the state system, by Local Education Authorities (LEAs) rather than by the schools themselves. But the Education (Modifications of Enactments Relating to Employment) Order 2003 provides that the governing bodies of such schools are to be treated as if they were employers in relation to claims brought under the employment-related provisions of the SDA, the RRA and the DDA where those claims relate to the exercise of the governing bodies' 'employment powers'. The Order (whose predecessor was the 1999 Order of the same name) also provides that 'employment powers' are '*the powers of appointment, suspension, discipline and dismissal of staff conferred by or under*' the School Standards and Framework Act 1998 (SSFA). The SSFA sets out a scheme whereby, although the LEA remains the legal employer of teachers, responsibility for decisions relating to the appointment (though not the terms of appointment), disciplining and dismissal of teachers is transferred to the Governing Body.

In *Green v Governing Body of Victoria Road Primary School* [2004] ICR 684 the CA adopted a wide approach to the 1999 Order, ruling that the governing body was the correct respondent to a claim of unfair constructive dismissal. In *Murphy* the lower courts ruled that the governing body of a school with a delegated budget was the correct respondent to a disability discrimination claim because the DDA was one of the provisions scheduled to the Order.

Facts

Shahina Murphy (M) was a teacher at a maintained community school with a delegated budget. She had a congenital heart defect so she had been advised that it would be dangerous for her to carry a baby to term. She therefore entered into a surrogacy agreement in the USA. After the birth of her child she asked for a period of paid leave to enable her to bond with the child. The governing body sought funding for this from the LEA's contingency fund and this was refused. The school therefore offered her only unpaid leave because of the financial difficulties of the school.

The claim here related, in part, to an alleged failure to make reasonable adjustments to accommodate the disabled worker's needs. The significance of this decision was its potential to operate, as in this case, to place the focus on the resources of the governing body, rather than the LEA, in determining whether an adjustment sought was reasonable, and its refusal accordingly unlawful, under the 1995 Act. The school had been in special measures for some time and its resources were very strained. The governing body was content to allow M leave of absence but they took the view that they could not fund M's leave.

Court of Appeal

The claimant contended that the 'all or nothing' approach adopted by the lower courts in *Murphy* had the effect of depriving about a million public sector workers of the full protection of the DDA, because the LEA was financially responsible for some of adjustments which could otherwise be required under the DDA (such as those relating to adjustments to premises) whereas it appeared that only the governing body could be sued under the Act. The CA ruled that the 1999 Order did not have the effect of excluding the LEA as the respondent to claims in respect of its exercise of its own employment powers. But the Court went on to accept the argument of the LEA that decisions as to paid leave were within the '*employment powers*' granted to the governing body of the school under the SSFA, thus reiterating the broad approach adopted by the Court in *Green* to the scope of those powers.

Comment

The approach taken by the CA in *Murphy*, while not in theory as 'all or nothing' as that of the lower courts, appears to overlook the contractual position which provided that it was for the LEA (rather than the governing body of the school) to make provision for leave other than maternity leave. The effect of the decision is to permit an LEA, as employer of a disabled teacher working in a school with a delegated budget, to refuse an adjustment required by the teacher by virtue of her disability, and to do so without fear of being called to account under the DDA. This is contrary to the stated purpose of the Modification Orders, which was to ensure that the power and the responsibility for the various aspects of teachers' employment rested with the same body. Instead, powers and responsibility are divorced by the decision in *Murphy*. The cost of this will fall disproportionately on disabled workers because of the very strict financial constraints under which schools with delegated budgets operate. This outcome appears to fly in the face of the approach taken by the HL in *Archibald v Fife Council* [2004] ICR 954, and it is to be hoped that permission will be granted to the claimant to appeal to the HL.

Gay Moon
Editor

Briefing 374

Equal pay for women on maternity leave

Alabaster v Barclays Bank (1) and Secretary of State for Social Security (2)
[2005] IRLR 576 EWCA

Implications

This case establishes for the first time that pregnant women and women on maternity leave are entitled to bring claims under the Equal Pay Act 1970 (EqPA). The CA has extended to the EqPA the principle in *Webb v EMO Air Cargo* (UK) Ltd [1994] ICR 770 ECJ, [1995] ICR 1021 HL, in which the HL held that in cases of pregnancy or maternity related sex discrimination, those provisions of the SDA which require a male comparator should be disapplied.

This principle is arguably much more radical when applied to the EqPA than the SDA, since the EqPA is structured entirely around the comparative principle and requires an actual comparator in every case. The CA was very general about which sections of the EqPA will be affected in pregnancy and maternity related cases, but it certainly appears that almost the entire Act will have to be disapplied. It is hard to see from the judgment how the 'no comparator' principle will be applied in practice.

The case is likely to end the current practice by which pregnant women or women on maternity leave are attempting to establish that aspects of their remuneration are non-contractual so as to be able to bring a claim in relation to those matters under the SDA.

The case also establishes that statutory and contractual maternity pay must be calculated so as to include any pay rise awarded before the end of maternity leave. Statutory maternity pay (SMP) will still be calculated by reference to the 'pay reference period', which is the period of two months prior to the

qualifying week, but must now be recalculated if a pay rise is awarded after the end of the pay reference period. It will not need to be recalculated in order to reflect any drops in pay after the pay reference period.

Facts

A began her maternity leave on 8 January 1996. Her SMP was calculated by reference to her salary during her pay reference period, which was the two month period prior to her qualifying week of 29 October 1995. Her employers did not recalculate her SMP to reflect a pay rise which she was awarded in December 1995, after the qualifying week.

In not recalculating A's maternity pay, the employer acted in accordance with Regulation 21(7) of the SMP (General Amendment) Regulations 1996, which only requires an employer to recalculate SMP to include a pay rise if the pay rise is backdated into the pay reference period. Reg 21(7) purportedly implemented the decision in *Gillespie v Northern Health and Social Services Board* [1996] ICR 499 at para 22, in which the ECJ had held that a pay rise must be reflected in maternity pay 'even if backdated'.

A brought a claim in the ET under the EqPA and Article 141 EC (previously Article 119), relying on *Gillespie*. She later amended her claim to include an out-of-time alternative complaint of unlawful deductions from wages under section 13 of the Employment Rights Act 1996 (ERA).

Employment Tribunal and Employment Appeal Tribunal

The Secretary of State was added as a party before the ET and the employer took little further part in the proceedings.

The ET and the EAT held that, following *Gillespie*, the failure to take into account the pay rise in the calculation of A's maternity pay was a breach of Article 141. However, additionally, they held that the ET did not have jurisdiction to determine the claim. The reasoning for this was, firstly, that ETs cannot hear free-standing Article 141 claims (*Biggs v Somerset County Council* [1996] ICR 364; *Barber v Staffordshire County Council* [1996] ICR 379). Secondly, the ET and the EAT believed that was impossible for A to rely on the EqPA because that Act always requires a complainant to compare her pay with that of man in similar circumstances, and the 'special position' of pregnant women and women on maternity leave meant that it was impermissible for them to compare their situation with that of a man. The ERA claim would have been the proper route, but Mrs Alabaster was out of time to pursue that claim.

European Court of Justice

A appealed to the CA in May 2000 and in 2002 the CA referred to the ECJ the question of whether the failure to take into account the pay rise was a breach of Article 141. The ECJ held that *Gillespie* meant that the maternity pay should have been recalculated to include the pay rise and that Article 141 had been breached.

Court of Appeal

The CA held that the EqPA was the proper vehicle for a complaint about a breach of Article 141 in these circumstances. The alternative route under the ERA was significantly less favourable in procedural terms: for example, the time limits were shorter, interest was not payable on awards, and EOC assistance was not available for an ERA claim.

The comparator problem was solved by simply disapplying the comparator provisions in the EPA, as the HL had already done in relation to the SDA in *Webb v EMO Air Cargo* (UK) Ltd [1994] ICR 770 ECJ; [1995] ICR 1021 HL.

The CA was not specific about which provisions of the EqPA would have to be disapplied in pregnancy and maternity cases. However, it is clear that this sort of claim is likely to be considerably less complicated than an ordinary EqPA claim. It will probably only be necessary to show that the complainant has been treated detrimentally in relation to her contractual pay for a reason relating to pregnancy or maternity. There will be no need for a male comparator, and the question of 'like work', 'work rated as equivalent' or 'work of equal value' will disappear. It also appears possible that it will not be open to an employer to make out a 'material factor' defence under s.1 (3) EqPA.

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How should a school's uniform policy comply with Article 9 rights?

R (on the application of SB) v Headteacher and Governors of Denbigh High School, [2005] EWCA Civ 199

Background

This case concerned an appeal by Shabina Begum (SB) against an order of the Administrative Court which dismissed her application for judicial review of a decision by the Headteacher and Governors of Denbigh High School in Luton. They refused to allow SB to attend the school if she did not comply with the school's uniform policy.

Eighty per cent of the pupils at the school were Muslim. The school believed that its existing uniform policy did meet the needs of Muslim pupils. The school's uniform policy allowed female pupils to wear a *shalwar kameez*. The *kameez* is a sleeveless smock-like dress with a square neckline, which ensured that their shirt collar and school tie is visible. The *shalwar* is a loose trouser tapered at the knees. Girls are also permitted to wear a headscarf.

By September 2002, SB who had previously attended the school wearing the *shalwar kameez*, reached the view that the *shalwar kameez* did not meet her religious requirements. To act in accordance with the requirements of her faith, she attended school wearing a *jilbab*, a cloak that provided covering from head to toe. The school refused to allow her to attend unless she wore the existing school uniform.

SB sought a declaration that, through their actions, the Headteacher and the school Governors:

- unlawfully excluded her from school,
- unlawfully denied her the right to manifest her religion, and
- unlawfully denied her access to suitable and appropriate education.

In their defence the respondents emphasised that in formulating its policy the school consulted widely with Muslim organisations in the local community and other experts. The CA found that the evidence from experts revealed a genuinely held disagreement on the question of whether the *shalwar kameez* or *jilbab* met the needs of Islamic dress code. They also accepted the sincerity of SB's belief in the appropriateness of the *jilbab*.

Court of Appeal

The CA considered in some detail the requirements of ECHR article 9 and the jurisprudence of the ECtHR in cases involving the Islamic dress. However, the Court's decision to allow the appeal and make a declaration that the respondents had acted unlawfully did not engage with the substantial issue of whether, in refusing to allow SB to wear a *jilbab*, there was in fact a violation of article 9 rights.

The Court's decision focused on the process by which the school reached its decision regarding SB. The CA identified six issues that needed to be considered in reaching the decision properly:

- Has the claimant established that she has a relevant Convention right which qualifies for protection under Article 9(1)?
- Subject to any justification that is established under Article 9(2), has that Convention rights been violated?
- Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
- Did the interference have a legitimate aim?
- What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?

The starting premise for any decision on the issue should therefore have been that SB had a right recognised in English law and the onus was on the School to justify its interference with that right. Instead, Waller J noted, the school *'started from the premise that its uniform policy was there to be obeyed, if the claimant did not like it, she could go to a different school'*. The school had approached the issue from the wrong direction. It had focused on whether its uniform policy met the needs of Islamic dress codes, rather than on whether there was an interference with SB's right to manifest her religious beliefs and if such interference could be justified. It was irrelevant to the engagement

375 of article 9 that SB could have changed to a school that accommodated her religious requirement. The statutory duty is on the school to act in compliance with rights in the Convention.

It still remained possible that the school, once it addressed the issues in the correct manner, could still find that their restriction on the wearing of the *jilbab* was justified. The Court also called on the government to provide more detailed guidance on the handling of human rights issues.

Comment

The CA in this case did not have to decide on whether, if the correct approach to the legal issues had been taken, the school's uniform policy would be a violation of the claimant's article 9 rights. The case illustrates how the Convention requires a particular process of decision making. Here the school failed to consider the article 9 rights of the schoolchild and, instead, focussed solely on the application of their policy. If it had approached the matter by reference to the five questions set out above its conclusions that it had a reasonable policy would have been seen as only part, but not all, of what was necessary to be taken into account.

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Dattani v Chief Constable of West Mercia Police
[2005] IRLR 327, EAT

Implications

Inferences may be drawn under RRA s65 from material given by a respondent other than in response to a statutory questionnaire form, including a response to Further Particulars or in the Notice of Appearance.

Employment Appeal Tribunal

Dattani (D) a police officer appealed against a decision that the Chief Constable (W) had not discriminated against him on racial grounds. He was the only ethnic minority officer in his division based at Hereford Police Station. He rose through the ranks to become a sergeant. As part of a re-structuring exercise, D was selected to be transferred, against his wishes, to Ross-On-Wye Police Station. W denied that there had been any discrimination in reaching this decision and said the reason for transferring D was because he was the only officer who had not worked outside Hereford.

The ET accepted W's explanation, holding that it was plain from the documents that D had been transferred for the stated reasons. D appealed and argued that:

- the ET had failed to define whether 'outside Hereford' meant 'as a sergeant' in which case another sergeant also qualified under the criteria;
- the ET's decision was perverse in the sense that it was contrary to the documentary evidence and internally inconsistent in its reasoning;
- the ET had failed to apply correctly the burden of proof;
- the ET had failed to correctly apply the opportunity given by the RRA s65 for it to draw adverse inferences from documents other than replies to the statutory questionnaire (in this case, the replies given to a request for further particulars).

The EAT held:

- That the ET's duty was to decide whether or not having worked 'outside Hereford' meant 'as a sergeant' or 'as a constable'. The ET had failed to define that expression and what that expression should mean was a question remitted to the ET.
- In holding that it was 'plain on the documents' that the reason for transferring D was the 'outside Hereford' condition, the ET had acted perversely. An examination of the relevant documents showed that the decision-makers had considered additional factors in making the selection for the transfer.
- The burden of proof transferred when D made a

prima facie case from which the ET could conclude that D had been discriminated against, in absence of any explanation from W. In deciding whether a prima facie case had been made out by a Claimant, the ET was required to put aside explanations which it had already heard from the respondent: *Sinclair Roche and Temperley v Heard* [2004] IRLR 763 applied. The ET had been wrong to conclude that he had not established a prima facie case. The fact that D was an ethnic minority officer and had been selected for transfer out of a pool of otherwise white officers without being given any clear access to the selection criteria established a prima facie case.

- Most interestingly, the ET had failed to apply RRA s65 correctly. Section 65(2) applies to questions posed by an aggrieved person *'whether in accordance with an order under sub-section 1* ***or not****'*. A statutory format is provided under the order and, no doubt, it is more convenient for an aggrieved person to adopt that format. But the Tribunal may draw an inference from a non-reply or evasive or equivocal reply to **any question in writing at all** if it considered it just and equitable to do so. This approach is made clear in the judgment of the EAT in *Barton* where Guideline 6 reads:

> *'6. These inferences can include, in appropriate cases, any inference that it is just and equitable to draw in accordance with Section 74(2)(b) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions which fall within Section 74(2) of the Sex Discrimination Act.'*

Comment

Since H.H.J. McMullen QC gave judgment on behalf of the EAT, the *Barton* guidance (subject to some amendment) has been approved in the CA in *Igen Ltd v Wong* (see *Briefing* no 348). It is quite clear that the existence of non-answers or evasive or equivocal answers to questions can help the Claimant in two ways:

- where it is the Claimant that has the burden, inferences can be taken into account when the ET decides if the Claimant has proved a prima facie case of discrimination;
- when it is the respondent who bears the burden of proof, in understanding what the respondent says, any justification advanced for why such non-answer or evasive answers have been given will be 'of particular interest' to the ET.

Advocates should look out for the question and answer format not only in the Respondent's Answer and Further Particulars or Notice of Appearance. It is clear that it also applies to written statutory discipline and grievance notices and, indeed, correspondence. The power given to the Claimant goes beyond cases in which the question is asked in the questionnaire format; what may be the inference to be drawn from an evasive or equivocal answer to any written question will be a fact for determination in each case.

As a point of fact, there is no requirement that the question be **in writing** within the express words of the RRA s65. Clearly, if that means that oral evidence as to questions is necessary, that makes it a less certain tool. However, in the new generation of statutory grievance and dismissal procedures, if the claimant says that he has been discriminated against at a meeting, it is likely that the employer has taken a note. It appears that, subject to proving that, in fact, that question was asked, the Claimant (and the ET) will be interested in non-answers or equivocal answers, which can, of themselves, indicate that discrimination has occurred.

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CORRECTION

In Tess Gill's article, Briefing no 348, on the Impact of the new Employment Tribunal procedures on Discrimination Claims the reduction or increase in compensation if either the employer or the employee do **not** follow the procedures is 10-50% not 10-20%.

European Human Rights Court to Hear Roma School Segregation Complaint

On May 17th the ECtHR decided to review the racial segregation practiced in the Czech School System in the case of *D.H. & others v Czech Republic*. This is the first significant challenge to systemic discriminatory education of Romani children to come before the Court. It will consider whether the assignment of disproportionate numbers of Romani children to substandard, separate schools constitutes racial discrimination in breach of the European Convention on Human Rights.

The case concerns eighteen children represented by the ERRC and local counsel. The applicants allege that their assignment to 'special schools' for the mentally disabled contravened human rights law and was tainted by racism. Tests used to assess the children's mental ability were culturally biased against Czech Roma, and placement procedures allowed for the influence of racial prejudice on the part of educational authorities.

Evidence before the Court based on ERRC research in the city of Ostrava demonstrates that school selection processes do frequently discriminate on the basis of race:

- Over half of the Romani child population is schooled in remedial special schools;
- Over half of the population of remedial special schools is Romani;
- Any randomly chosen Romani child is more than 27 times more likely to be placed in a school for the mentally disabled than a similarly situated non-Romani child.
- Even where Romani children manage to avoid the trap of placement in remedial special schooling, they are most often schooled in substandard and predominantly Romani urban ghetto schools.

Once children have been streamed into substandard education, they have little chance of accessing higher education or steady employment opportunities.

They argued that the assignment to special schools constituted 'degrading treatment' in violation of Article 3; that the absence of adequate judicial review denied them due process in breach of Article 6; that they were denied the right to education in breach of Article 2 of the Convention's First Protocol, and, finally, that they suffered racial discrimination in the enjoyment of their right to education, in violation of Article 14.

While reserving final judgment, the Court unanimously declared admissible the applicants' main complaint of racial discrimination in the enjoyment of the right to education (Article 14 of the Convention combined with Article 2 of Protocol No. 1). The other claims were declared inadmissible. Decision on the merits is pending.

For further information on the case, please see http://www.justiceinitiative.org/advocacy/litigation

Council of Europe Human Rights Commissioner reports on the UK

Mr Alvaro Gil-Robles, Commissioner for Human Rights for the Council of Europe, visited the UK between November 4th – 12th 2004. The report on his findings has just been published. It covers the prevention of terrorism, immigration and asylum, the criminal justice system, discrimination and race relations, the creation of a Commission for Equality and Human Rights, identity cards and respect for human rights in Northern Ireland. His wide reaching recommendations include that the Government should consider the introduction of single equality legislation standardising protection across all areas and include the prohibition of discrimination on the grounds of age and sexual orientation in the provision of goods and service in future legislation in this area. He also focussed on the position of Gypsies and Travellers and recommended the re-introduction of the statutory duty on local authorities to provide caravan sites for them.

The report is available through http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/By_year/2005/index.asp#TopOfPage

EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI)
Third Report on the United Kingdom

The European Commission against Racism and Intolerance (ECRI) is part of the Council of Europe, composed of independent members. Its aim is to combat racism, xenophobia, antisemitism and intolerance at a pan-European level and from the angle of the protection of human rights.

One of the ways that it does this is through its country-by-country reports, which analyse the situation as regards racism and intolerance in each of the member States of the Council of Europe and makes suggestions and proposals as to how to tackle the problems identified.

The Third Report on the UK has just been issued. Since the publication of ECRI's second report on the UK, progress has been made in a number of areas. The legal framework against racism and racial discrimination has been strengthened. An important element of this framework, the statutory duty on public authorities to promote equality has been in force and implemented for over three years. Emphasis has increasingly been put on the achievement of concrete outcomes for ethnic minorities and specific equality targets for these groups of persons have been set across the public sector. Monitoring of the situation of different ethnic groups across a wide range of areas has facilitated the identification of priority areas for action and the elaboration of targeted policies. A strategy has been launched to promote community cohesion and race equality throughout GB. Citizenship education has been introduced in secondary schools in order to better reflect the needs of a multicultural school population. Work is underway to establish a support mechanism to raise the awareness of the general public of their rights under the HRA and to advise and assist individuals.

However, a number of recommendations made in ECRI's second report have not been implemented or have only been partially implemented. In spite of initiatives taken, members of ethnic and religious minority groups continue to experience racism and discrimination. Asylum seekers and refugees are particularly vulnerable to these phenomena, partly as a result of changes in asylum policies and of the tone of the debate around the adoption of such changes. Members of the Muslim communities also experience prejudice and discrimination, especially in connection with the implementation of legislation and policies against terrorism. Continuing high levels of hostility, discrimination and disadvantage of Roma/Gypsies and Travellers are also a cause for concern to ECRI. The media has continued to play an important role in determining the current climate of hostility towards asylum seekers, refugees, Muslims, Roma/Gypsies and Travellers. Although it is in part the result of better reporting and recording techniques, the number of racist incidents is high. The disproportionate impact of criminal justice functions on ethnic minorities has continued to increase.

In this report, ECRI recommends that the authorities of the UK take further action in a number of areas. These areas include the need to ratify Protocol No. 12 to the European Convention on Human Rights, which lays down a general prohibition of discrimination, and the need to adopt a consolidated equality act that would eliminate current discrepancies in the levels of protection of individuals against discrimination. ECRI recommends that the authorities take the lead in promoting a debate on asylum issues that is balanced and that reflects the human rights dimension of these issues. It also recommends that the authorities of the UK review their legislation against terrorism in order to eliminate discrimination in its provisions and in its implementation and that they assess the impact of legislation and policies against terrorism on race relations. ECRI also recommends a series of measures to address the situation of disadvantage and discrimination faced by the Roma/Gypsy and Traveller communities.

The Report can be accessed at:
<http://www.coe.int/T/E/Human_Rights/Ecri/1-ECRI/2-Country-bycountry_approach/United_Kingdom/United%20Kingdom%20third%20report%20-%20cri05-27.pdf>

Incitement to Religious Hatred

The Racial and Religious Hatred Bill is to have its second reading in the House of Commons on 21st June and will reach its committee stage on July 12th. Its provisions are essentially those previously introduced in the Serious Organised Crime and Police Bill but dropped with the election. In the past the DLA has publicly supported the principle of legislation criminalizing the incitement of religious hatred, essentially on the grounds that there should be consistency with the existing offence of incitement to racial hatred which protects Jews and Sikhs but not Muslims or Hindus. However, concern has been raised that the Bill may be used in a way which is inconsistent with an appropriate level of free speech.

The Government's proposals are controversial. Some have welcomed them as a contribution to the security of marginalised groups defined by their common religion – among the most significant is the Commission for Racial Equality. Opponents fear that the new offence will increase religious intolerance. However, after 9/11 there is already an increase in religious intolerance suffered by many. This religious intolerance is real and very frightening for such marginalised groups. The DLA has argued that these provisions are to be welcomed because of the consistency that they will bring to the existing law and because it is a necessary and proportionate measure in respect of the threat to community relations and public safety posed by religious hate speech. However, others are concerned that the existing laws on religiously aggrevated offences already cover this area adequately.

The DLA executive committee will be reviewing their approach to this issue in the coming weeks.

DRC consults on draft Transport Codes of Practice

The DRC has launched a consultation on important changes to the Disability Discrimination Act in relation to the provision and use of transport vehicles. The consultation period lasts for 12 weeks and closes on 19 August 2005. This is a vital opportunity for individual transport users, transport providers, disability organisations and other stakeholders to give the DRC their views on this important document.

For further information, please visit: www.drc-gb.org/transport

The Disability Debate 'shaping the future of equality'

The DRC is launching a major new initiative – *The Disability Debate*.

The Disability Debate provides an opportunity to take part in shaping a new forward looking agenda for action which moves towards a society in which disabled people can genuinely expect to participate and contribute as equal citizens.

The discussion paper: 'Shaping the future of equality', sets out what the DRC believes are some of the major issues facing disabled people in 2005, and the potential challenges of the future. Over the summer the DRC plan to host a series of 'debating points' covering issues such as risk, welfare and work, the role of professionals in disabled people's lives, and whether it is still right that some disabled people live, learn and work in places which separate them from the wider community. They also plan to provide opportunities for discussion of the issues directly with those with the power to bring about change.

For further information see the DRC website: www.drc-gb.org

BOOK REVIEW

Employment Tribunal Procedure – a users guide to Tribunals and Appeals

by McMullan, Tuck and Criddle, Legal Action Group, 2005, £37 and

Employment Tribunal Claims – tactics and precedents

by Naomi Cunningham, Legal Action Group, 2005, £25

It is a truth almost universally recognised that whatever the intention when they were first introduced, Employment Tribunals do not now provide a straightforward jurisdiction for the simple resolution of employment disputes.

As ETs have seen their jurisdiction increase year on year, and the types of claim they are called on to determine grow both in volume and complexity, both legally and factually, so the job of representing claimants becomes more complex, and increasingly governed by strict procedural and legal rules. Race discrimination cases can and often do last weeks rather than days, and the legal rules that the tribunals are called upon to interpret often go to the CA, if not Europe, and back, before any clarity is obtained.

However, whilst the jurisdiction has expanded, and the rules of procedure developed, the claimants still find themselves in the position of fighting the loss of livelihood, with scant resources against the full might and power of employer respondents, often large organisations with legal budgets and corporate lawyers representing them.

Law Centres, Trade Unions and advice centres continue to provide excellent low cost or free services, but as any busy advice worker knows, keeping up to date with developments and staying on top of case management is an uphill struggle.

With this clearly in mind, the Legal Action Group has provided no nonsense guides to the law, which have been gracing the desks of advice centre workers and lawyers, for many years.

The publication of two books, one a new edition, one a wholly new publication, on employment tribunal practice and procedure is a cause for celebration, and for many practitioners, will be greeted with a huge sigh of relief – both books are right up to date, helpful, well written, comprehensive, relatively inexpensive, and, as paperback volumes, easy to carry to and from court!

The two books are, of course, very different, but they compliment each other, and together provide a practitioner of employment law with clear guidance about how to deal with a case from the consideration and issue of proceedings, through to the hearing at the Tribunal and beyond.

The third edition of *Employment Tribunal Procedure – a users guide to Tribunals and Appeals* by McMullan, Tuck and Criddle provides an eagerly awaited update on the rules and practice of the Tribunals. It gives the adviser or representative a clear and comprehensive overview of what the rules of procedure say, when they are used and what are their implications. The book covers the new rules and starts at the beginning with the ET history and jurisdiction, time limits and stages before the proceedings are issues. The book then deals, chapter by chapter, with the stages of legal proceedings, taking in case management discussions, applications, dealing with documents, witness orders, through to the hearing, the decision and ending with appeals and reviews of decisions.

This is the book that tells you what the rules say, and how they operate in practice. It is the book that every adviser should have in their bag on the way to any pre-hearing review, and is the first book this writer consults on any issue of Tribunal Procedure. It does not of course, cover every nuance, and for detailed argument on tricky points, or for up to date developments, further reading will be necessary, but in most cases, for most issues, this will cover the basics and provide the necessary pointers for a well founded application or order.

What this book does not do, is tell the adviser how to run the case or how to apply the rules to the case in hand.

This is where the second book, *Employment Tribunal Claims – tactics and precedents* by Naomi Cunningham comes in.

Having worked for several years with the Free Representation Unit, Ms Cunningham knows just what the busy adviser needs to know to get the most out of case preparation. She has clearly gained a vast knowledge of the sorts of problems that advisors really face day to day, perhaps particularly when new to an area, and has also developed a vast bank of advice and expertise on how to deal with those problems.

The approach is practical and helpful throughout, and the language plain and straightforward. By providing numerous examples of letters, lists and cross examination, with annotations explaining exactly what will be useful and, importantly, pointing out what will not be useful, the book guides the adviser step by step through the various stages of tribunal claims. Rules are explained using examples with realistic scenarios involving clients and tribunal proceedings.

A particular strength of this book, and a feature that distinguishes it from other LAG books, is the focus on

working precedents and annotated letters and lists included throughout the text. Whilst it is quite usual to have precedents at the end of books, the inclusion of them as part of the text makes the book very readable, and highly practical to use.

In addition, Ms Cunningham gives answers to questions not found in other text books, including answers to the questions which no one ever thinks to ask.

One of my favourite examples of this is the section headed 'things that can go wrong at tribunal'. Many advisers and representatives will recognise some if not all of the examples – the chairman who takes an instant dislike to you or the client; the respondent who arrives with a briefcase full of previously undisclosed but highly relevant papers – and will value the sensible advice on offer. For those who encounter these problems for the first time, it is comforting to know that this book can offer some help and advice.

Other sections deal with nuts and bolts issues, such as when and how to instruct an expert, what to ask a medical expert, what to include in a trial bundle, and how to plan effective cross examination. The advice is clear, practical and user friendly and in the opinion of this writer, very good value for money.

This is a unique guide to the tactics involved in running an ET case, with clear guidance on when to take certain steps, and importantly, how to deal with the opposition. It will be an invaluable tool to law centres, advisors, trade union representatives, as well as being a real help to the unrepresented litigant. This is also an excellent read for lawyers who represent claimants or practitioners who need to brush up their skills. There are few books which take such a practical approach to a legal area, and the precedents and letters alone must earn this book a place on any employment advisors bookshelf.

Whilst both books are different in approach, they provide a complementary package. There is some overlap between the materials described, but this is inevitable, and also provides a useful double check. Whilst either book will be a valuable addition to any library, the combination provides a tool of real use, that will assist advisors in dealing with the complex and difficult environment that the ETs have become.

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Blackstone's Guide to The Disability Discrimination Legislation

by Karon Monaghan, OUP, 2005, £34.95, and

Disability Rights in Europe from theory to practice

edited by Anna Lawson and Caroline Gooding, Hart Publishing, 2005, £35.00

Disability law becomes more complex year on year, but there are very few books to help advisors find their way through this web of provisions. It is therefore particularly useful to have two new complementary disability discrimination books to add to the legal bookshelf.

The first book is an extremely comprehensive book by Karon Monaghan which aims to provide a 'practical and easy-to-use Guide' to the disability discrimination legislation. It starts by looking at the history of UK disability discrimination legislation as well as looking at it in the context of European and human rights law. It then considers the meaning of 'disability' in some detail before dealing with disability in the context of Employment and Occupation, Goods, Facilities, Services and Premises, Education and finally Transport respectively. This is followed by more procedural chapters on liability and exceptions, and then enforcement and remedies. Finally there is a chapter on the Disability Rights Commission and the new (then) draft Discrimination Disability Bill now the Disability Discrimination Act 2005.

It is large, running to 570 pages and usefully contains a copy of the amended Disability Discrimination Act. It is perhaps unfortunate that it does not include the provisions of the latest Disability Discrimination Act 2005 which received Royal Assent in March 2005, however, the last section of the book sets out to anticipate this and explains the proposed changes.

This book is essential reading for the busy practitioner and the academic or policy worker alike.

The second book comprises a very interesting collection of essays considering disability discrimination provision in Europe from a number of different angles. It arose out of a conference held in September 2003 in Leeds as part of the European Year of Disabled People. The first section looks at disability discrimination through the prism of human rights, the next considers the anti discrimination laws and the final section looks at whether Equality can be achieved through law. This structure provides a very useful vehicle for an interesting series of essays exploring the key concepts of discrimination law and the way in which they can be developed. It is a stimulating and thought-provoking read for anyone seeking to develop their understanding of disability discrimination law.

Gay Moon
Editor

Progress on Equality Law

The Equality Bill, once passed by Parliament, will establish the Commission for Equality and Human Rights by 2007. It will also introduce a duty on the public sector to promote gender equality and introduce some protection from discrimination on grounds of religion or belief in the provision of goods, facilities and services. At the same time as this was first published the Government also announced an **Equalities Review** and a **Discrimination Law Review**.

The **Equalities Review** will examine the barriers to equality of opportunity and the underlying causes of discrimination. It will be chaired by Trevor Phillips. Its recommendations will help shape the development of the new Commission for Equality and Human Rights and the development of a Single Equality Bill. It will report to the Prime Minister in summer 2006.

The **Discrimination Law Review** will work in parallel to the Equalities Review on the development of a simpler, fairer legal framework. This will lead to a Single Equality Bill that will modernise and simplify equality legislation.

The work of both the Equalities Review and the Discrimination Law Review will need to be informed by the views and experience of stakeholders and experts in the relevant equality and human rights areas, business, trade unions and public services. The Discrimination Law Association hope to contribute to this.

The Reference Group will act in an advisory capacity to the Equalities Review and the Discrimination Law Review, reacting to and suggesting ways forward as they develop their inquiries. The Reference Group will be consulted at regular intervals to advise on particular issues or questions throughout the period of each Review. It will also be able to offer independent advice to each Review on a regular basis. The Reference Group will have access to the same evidence base used by the Review teams, and will be able to see factual papers and research presented to the Review teams.

The Reference Group will be co-chaired by the Chairs of the Disability Rights Commission and Equal Opportunities Commission. Membership of the Reference Group will include independent experts and representatives from equality bodies, business, unions, public sector, Scotland and Wales. The DLA asked to be a member of this reference group, however, we are not represented.

The Discrimination Law Review will consider the opportunities for creating a clearer and more streamlined equality legislation framework, which produces better outcomes for those who experience disadvantage.

This work will begin alongside the independent Equalities Review, which will carry out an investigation into the causes of persistent discrimination and inequality in British society. The Discrimination Law Review will consider the recommendations of the Equalities Review, which will report to the Prime Minister in Summer 2006.

Key areas of this work will include:

- A consideration of the fundamental principles of discrimination legislation and its underlying concepts and a comparative analysis of the different models for discrimination legislation
- An investigation of different approaches to enforcing discrimination law so that a spectrum of enforcement options can be considered;
- An understanding of the evidence of the practical impact of legislation – both within the UK and abroad – in tackling inequality and promoting equality of opportunity;
- An investigation of new models for encouraging and incentivising compliance;
- Consideration of the opportunities for creating a simpler, fairer and more streamlined legislative framework in a Single Equality Act. Any proposals will have due regard to better regulation principles and take into account the need to minimise bureaucratic burdens on business and public services. A key priority will be seeking to achieve greater consistency in the protection afforded to different groups while taking into account evidence that different legal approaches may be appropriate for different groups.

The Government say that the Discrimination Law Review will be grounded in a comprehensive analysis of the efficacy of Great Britain's current equality enactments and the requirements of European equality legislation. The Review will not consider changes to the substantive rights contained in the Human Rights Act (HRA) but will take account of views expressed on interactions between the HRA and the equality enactments.

The Government hope that together the Equality Bill and these reviews will establish a new Commission charged with promoting equality and human rights, informed by a deeper understanding of the root causes of inequality and will be well placed to advise upon and enforce a coherent modern legislative framework. Only time will tell whether this is a realistic expectation.

Briefings

Notes and news

Abbreviations

CA	*Court of Appeal*	*ED*	*Employment Directive*	*PWD*	*Part-time Workers Directive*
CEHR	*Commission for Equality & Human Rights*	*EOC*	*Equal Opportunities Commission*	*RD*	*Race Directive*
CRE	*Commission for Racial Equality*	*EPD*	*Equal Pay Directive*	*RRA*	*Race Relations Act 1976*
DDA	*Disability Discrimination Act 1995*	*EqPA*	*Equal Pay Act 1970*	*RRAA*	*Race Relations (Amendment) Act 2000*
DRC	*Disability Rights Commission*	*ERA*	*Employment Rights Act 1996*	*SDA*	*Sex Discrimination Act 1975*
EAT	*Employment Appeal Tribunal*	*ET*	*Employment Tribunal*	*SMP*	*Statutory Maternity Pay*
EC	*Treaty establishing the European Community*	*ETD*	*Equal Treatment Directive*	*SSFA*	*School Standards and Framework Act 1998*
		HL	*House of Lords*		
ECtHR	*European Court of Human Rights*	*HRA*	*Human Rights Act 1998*	*UN*	*United Nations*
ECHR	*European Convention on Human Rights*	*IPCC*	*Independent Police Complaints Commission*		
ECJ	*European Court of Justice*	*PHA*	*Protection from Harrassment Act 1997*		