Discrimination Law Association

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Editorial *Bombs and 'Britishness' – real equality issues*

Where were you on the 7/7? If you were in London, you probably had to walk home. Wherever you were you may have tried to phone or text friends or family and worried if you failed to get through. On 21/7 we re-lived those fears. Now three months later, for many grief remains, but our immediate fear has subsided and we can ask 'What did 7/7 mean for equality?' without being overwhelmed with emotion.

Actually the bombs had a quite shocking equality of random effect. Of the 56 people who died, almost exactly half were men and half were women. The victims included white British, Polish, West African, Jewish, Afghani, Japanese, Chinese, Turkish, Italian, Nigerian, and Indian. Their religions and beliefs covered the entire spectrum.

Nor did we respond in a discriminatory way. Nationally and internationally there was an outpouring of sympathy for the families of the dead and the injured that crossed all boundaries. The London Bombings Relief Charitable Fund received nearly £9 Million in just a few weeks with contributions from every imaginable source. The two minutes silence on the 15th July 2005 included almost everyone.

So do the bombs not raise equality issues? Consider the other ripples from the bombings. For a chilling start think of Jean Charles de Menezes. Then take a moment to look at the Metropolitan Police statistics recording 269 religious hate crimes in the three weeks after 7 July, compared with 40 in the same period in 2004. Or look at their stop and search statistics for this period. And ask yourself: what will be the colour of the first person locked up for 90 days under the proposed Terrorism Bill?

The Government first saw 'the religion thing' as key. They asked: how could disenfranchised Muslim youth feel more happily British? To get an answer they set up a 100 – strong Muslim Taskforce to 'confront the evil ideology' of Al Quaeda, and to 'take it on and defeat it by the force of reason'.

But they have surely regretted this decision. The Muslim Taskforce report, produced at the end of September, called for a public judicial inquiry into the bombings of 7/7 and 21/7, criticised media stereotyping of Muslims as terrorists and asserted that extremism among British Muslims is rooted in the government's conduct of foreign policy, including the war in Iraq. What's more, a recent poll has confirmed that two-thirds of voters agree with the Taskforce and see a connection between the war in Iraq and the London attacks.

What of this judicial inquiry? Lord Ahmed, a member of the taskforce, sketched out the obvious conditions for success of any attempt by the government to reduce this kind of radicalism amongst young Muslims in Britain. He said bluntly that action would fail unless the Government

agreed to a wide ranging public inquiry ... headed by an independent judge...The inquiry would need to include an examination of the extent to which the government's foreign policy has radicalised Muslim youth. Without such an inquiry the government is not going to win the confidence of the Muslim Community.

Remembering Hutton, the DLA does not always put its faith in judges, but this is surely better than the Government's response. There would be no inquiry only an 'interfaith advisory commission on integration and cohesion' chaired by a minister addressing the question of how to engender an increased sense of Britishness inclusive of all communities.

Is this really the best route to turn suicidal radicalism into social cohesion around a shared idea of Britishness? It makes one cringe to even hear it suggested.

Lord Ahmed was reputedly furious that Trevor Phillips' much-trailed speech on the dangers of 'ethnic segregation' and 'ghettoisation' in Britain was made on the same day that the Muslim taskforce reported. Was it a coincidence that this buried the Muslim Taskforce's report?

And what effect will this response have on the members of the Muslim Taskforce their friends colleagues and families? Of course, it could be argued that the Government's response demonstrated two very British characteristics to any potential radical protester: a refusal to accept criticism and a willingness to ignore and deny the obvious.

The DLA gently suggests that the Government might be better promoting other British characteristics if it really wants to secure this elusive inclusiveness. How about plain speaking, a willingness to own up to complicity, and a love of freedom? Accepting that images of Iraq in British Muslim homes just might have an effect on disengaged Muslim youth would be a start. And while we are at it, acknowledging that holding anyone for 90 days without trial is not very British might not be a bad idea too!

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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Consultation on the draft Employment Equality (Age) Regulations 2006

The government has now published its draft regulations on age discrimination in employment and training. This article looks at the main proposals. At the time of writing, the Discrimination Law Association has not yet finalised its response to the regulations, but we will be producing one which will be available from our website.

Background

The European Employment Framework Directive requires member states to make provisions outlawing discrimination in a number of areas, including age. The Directive makes specific provision, in Article 6, for justification of differences of treatment on grounds of age

> *…member states may provide that differences of treatment on grounds of age shall not constitute discrimination if they are objectively and reasonably justified under national law by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.*

In addition, there are a number of other exemptions which member states can use in relation to age alone.

THE DRAFT REGULATIONS

Definition of discrimination

The draft regulations define both direct and indirect discrimination. Direct discrimination occurs where, on grounds of B's age, A treats B less favourably than he treats or would treat other persons. Indirect discrimination occurs where A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B but

i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
ii) which puts B at that disadvantage.

Unusually, taking full advantage of the provisions in Article 6 of the directive, the regulations provide that direct discrimination can be justified on the same basis as indirect discrimination. The treatment will amount to discrimination if the discriminator cannot show that the treatment is a proportionate means of achieving a legitimate aim. The government, in their consultation paper, Equality and Diversity: Coming of Age, states that an exhaustive list of legitimate aims for direct discrimination would be too restrictive and prescriptive, and that this might prevent employers or providers of vocational training from demonstrating that age-related practices could be justified by reference to aims other than those in such a list. Also, unusually, the regulations contain a list of examples of treatment which, depending on the circumstances of the case, an employment tribunal or county/sheriff court, may find to be a proportionate means of achieving a legitimate aim. These are:

- The setting of requirements as to age in order to ensure the protection or promote the vocational integration of people in a particular age group
- The fixing of a minimum age to quality for certain advantages linked to employment or occupation in order to recruit or retain older people
- The fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period in post before retirement.

However, the paper does not make it sufficiently clear that even if such an aim is legitimate it is not necessarily justifiable.

In relation to indirect discrimination, the term 'age group' is defined as meaning a group of persons defined by reference to age, whether by reference to a particular age or range or ages. The reference to B's age also includes B's apparent age – effectively covering discrimination on the basis of a perceived age.

Harassment

Harassment is explicitly prohibited in regulation 5 where, on grounds of age, A engages in unwanted conduct which has the purposes or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Whilst the directive refers to the unwanted conduct 'relating' to any of the prohibited grounds, the government has

followed the same approach as in the other non-discrimination provisions and required that the conduct be 'on grounds' of age.

Scope

The regulations cover applicants and employees, contract workers, office holders, barristers and advocates, partnerships, trade organisations, qualifications bodies, vocational training, employment agencies and career guidance, and further and higher educational institutions. The regulations do not cover volunteers.

There is, however, an important exemption contained in regulation 7, which deals with applicants and employees. At paragraph 4, the regulation states that the prohibition of discrimination on grounds of age in relation to the arrangements made for determining to whom employment should be offered and the refusal of an offer of employment do not apply to anyone who has attained the age of 65 and who would, if recruited, be an employee or in Crown employment. The rationale for this is tied to the government's proposed default retirement age (see below for details on this).

Genuine occupation requirement

Draft regulation 8 provides that certain of the employment prohibitions do not apply where, having regard to the nature of the employment or the context in which it is carried out,

a) possessing a characteristic related to age is a genuine and determining occupational requirement;
b) it is proportionate to apply that requirement in the particular case; and
c) either –
    (i) the person to whom that requirement is applied does not meet it, or
    (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

The government indicates in the consultation document that it expects that age will only be a genuine occupational requirement in very few cases – though the provisions of the proposed directive would appear to be relatively broad. The guidance will therefore be very important.

Service related pay and benefits

The draft regulations contain a general provision and some specific exemptions related to the use of length of service as a criterion for awarding or increasing benefits in specified circumstances. The general provision is contained in regulation 33, whereby an employer may award a benefit to a worker 'A' but not to another worker 'B', if and to the extent that –

a) length of service is the criterion by reference to which the benefit is awarded;
b) it reasonably appears to the employer that there will be an advantage to him from rewarding loyalty, encouraging the motivation or recognising the experience of workers by awarding benefits on the basis of length of service;
c) the benefit is awarded to all of the employer's workforce who meet the length of service criterion and whose circumstances are not otherwise materially different; and
d) B does not satisfy the length of service criterion.

The specific provisions are contained in Regulations 32 to 36 and relate to the provision of benefits based on length of service. There is a specific exemption based on no more than 5 years service and statutory benefits. Regulation 31 makes certain exceptions for pay linked to age bands where the national minimum age applies.

Retirement

Perhaps the most controversial aspect of the draft regulations is the government's proposal to set a default retirement age of 65. Regulation 29 provides that dismissal of an employee at or over the age of 65 will not be unlawful if the reason for the dismissal is retirement. Whether or not the reason for a dismissal is retirement is to be determined in accordance with sections 98ZA to 98ZC of the Employment Rights Act 1996 (ERA). These sections state that retirement of an employee shall be taken to be the only reason for a dismissal which takes effect on a planned retirement date (although this will not apply where the dismissal amounts to unlawful discrimination under the 2006 regulations; or where the employee can show that the employer would not have dismissed the employee on the planned retirement date but for some reason other than retirement). A planned retirement date is the date when the employee reaches the age of 65, or any earlier or later normal retirement age applied by the employer. In addition, where an employee has been given at least 6 months written notice that he will be retired on a particular date, that date will be a planned retirement date.

The upper age limit for claim unfair dismissal is removed, but a dismissal on grounds of retirement will be fair if:

- It is genuinely a dismissal on grounds of retirement;
- It takes place on a planned retirement date, i.e. at or after the national default retirement age of 65, or a lower retirement age which has been set and is objectively justified by the employer; and
- It takes place in accordance with the procedural requirements for compulsory retirement.

A dismissal on grounds of retirement will be **automatically unfair** in the following situations:

- Prior to retiring the employee, the employer has not informed the employee of the right to request to continue working and of the intended retirement date, or the employer has informed the employee less than two weeks before the retirement date;
- The dismissal takes effect while a duty-to-consider procedure is still underway and the employer has not yet held the meeting with the employee or informed the employee of the decision; or
- Once a duty-to-consider procedure has started the employer fails to comply with it properly.

Duty to consider working beyond retirement

The 'duty to consider' procedure is contained in Schedule 7 of the regulations. An employer who intends to dismiss an employee for retirement has a duty to notify the employee of the date on which he intends the employee to retire and the employee's right to request working beyond that date. This notification must be given in writing not more than one year and not less than 6 months before dismissal. An employee may make a request to his employer not to retire on the intended retirement date. Such a request must be in writing and state that it is such a request. The employer has a duty to consider the request in good faith; to hold a meeting to discuss the request with the employee; and to give the employee notice of the decision within 14 days after the date of the meeting. An employee may appeal against the decision to refuse a request. If an employer does not comply with these requirements, then compensation may be awarded by an employment tribunal. The dismissal may also be automatically unfair (see above).

The final regulations

The consultation on the draft regulations runs until 17th October 2005. The government intends to submit the draft Age Regulations to Parliament in early 2006. In 2011, the government has stated that it will review whether to maintain a national default retirement age of 65. The review will look at, amongst other things, the evidence on longevity and employment patterns of older workers.

Catherine Casserley
Disability Rights Commission and
Tamara Lewis
Central London Law Centre

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Report of the Immigration Race Monitor

The publication in July of the third full Annual Report of the Independent Race Monitor is an opportunity to consider the provision in the Race Relations Act 1976 (RRA) which made the establishment of this post politically necessary. The Race Relations (Amendment) Act 2000 (RRAA) widely hailed for extending the scope of the RRA to the functions of public authorities and imposing a duty on some 40,000 public authorities at the same time amended the RRA to include a statutory exception sanctioning discriminatory treatment in the context of immigration and nationality functions. Section 19D of the amended RRA exempts immigration officers from the requirement not to discriminate if they are acting under an authorisation by a Minister either in relation to a specific case, or generally or by way of primary or secondary legislation.

In response to the strong public opposition to section 19D, the government created a new post of independent Race Monitor (section 19E) to monitor both the likely effect of ministerial authorisations on immigration functions and the operation of the

exceptions made under ministerial authorisations. The Race Monitor is required to report annually to the Home Secretary, who must then lay a copy of the annual report before both houses of Parliament.

In her third report, the Race Monitor, Mary Coussey, makes many of the same findings and draws many of the same conclusions as in her 2003-4 report. The fact that in 2005 the same issues are highlighted and many of the same recommendations made as in 2004 is itself a cause for concern.

During 2004-5 a number of authorisations were in force; the Race Monitor's report focuses on two: one that allows immigration officials to prioritise arriving passengers of specified nationalities for examination, and one that allows asylum claims to be prioritised by nationality.

New authorisations allowing discrimination by nationality in the examination of arriving passengers are issued each month; they refer to a list of nationalities where adverse decisions and immigration breaches exceed more than 50 in total and 5 of every 1,000 admitted persons of a particular nationality. Despite repeated requests by the Immigration Law Practitioners Association, these monthly lists are not published. Rates of non-asylum port refusals are published, and the report suggests from preliminary data that the highest proportions of port refusals in 2004 were nationals from Brazil, Romania, Nigeria, South Africa and Malaysia. The authorisations also include nationalities with high rates of other refusals and adverse decisions such as refusals of extensions and overstayers, which are stated to include Ghana, India, Bangladesh and Pakistan.

The authorisations permit immigration officers to examine passengers from priority nationalities more closely than passengers not from these nationalities, but not to apply higher standards when making decisions. The Race Monitor visited ports and airports and observed immigration officers examining arriving passengers and interviews of passengers held up for further questioning. She also reviewed 40 sample case files, 20 from nationalities with high refusal rates and 20 others randomly selected. She states that most of the questioning she observed was 'clearly justified', although there was some inconsistency in the depth of probing between different nationalities or based on factors such as appearance and dress, occupation or age. The Race Monitor found that despite careful instructions, some immigration officers accepted that knowing a person was from a priority nationality could affect their decisions. Senior officers acknowledged that information on risks 'created a mindset'. She found some indications that using profiles to assess the credibility of doubtful visitors from priority nationalities 'may become self-fulfilling because immigration officers are more sceptical about the replies given than is the case for arriving passengers from other nationalities'.

The Race Monitor also scrutinised the way in which these decisions on authorisations are reached. She reviewed three samples of asylum decisions: nationalities with high allowed appeal rates, nationalities with low allowed appeal rates and cases which had been granted asylum. As in 2003-4, she found high allowed appeal rates for applicants from certain nationalities, raising important questions on the quality of the initial decisions on applications from those nationalities. From her sample she found that many applicants' accounts are not believed because 'apparently western assumptions have been applied to judge a course of action'. Caseworkers formed their own assumptions of what should have been done. In other instances, caseworkers disbelieved claimants who told similar stories, assuming that they had learned the details from others. It appeared that negative perceptions of claimants from particular countries could influence tendencies to disbelieve, so that whatever the experience of an applicant from a suspect country, some grounds for refusal would be found.

In her conclusions the Race Monitor refers to persuasive argument that the issuing of authorisations based on statistical or other objective justification makes the differential treatment of arriving passengers of different nationalities more transparent than previous practices. Further, in the light of the 12 million non-EU/EEA passengers arriving in the UK annually she acknowledges that there is a 'compelling case for prioritisation in the examination of arriving passengers.'

Her main conclusions, repeating those from previous reports, are that the use of authorisations listing nationalities most likely to breach immigration laws or be refused, can be self-perpetuating, with passengers from the listed nationalities less likely to be given the benefit of the doubt than other passengers. She sees indications of similar case-hardening in

asylum casework for asylum seekers from certain nationalities.

The Race Monitor makes a number of recommendations to achieve greater fairness, including that there should be far more detailed and regular monitoring and improved training. In this context, and in other parts of her report, she refers to the Prague Airport case (*R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55 – see *Briefing* no 353),

In reading her report, it is important bear in mind the limits of the Race Monitor's role, namely to monitor the impact of the authorisations. Usefully, other bodies with a wider brief have looked at section 19D itself, most notably, the UN Committee on the Elimination of Racial Discrimination. In its Concluding Observations[1] on the UK report, which set out measures taken to give effect to the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) in the UK, the UN Committee stated (paragraph 16):

> *The Committee is concerned about the application of section 19 D of the Race Relations Amendment Act of 2000, which makes it lawful for immigration officers to 'discriminate' on the basis of nationality or ethnic origin provided that it is authorized by a minister. This would be incompatible with the very principle of non-discrimination.*
>
> *The Committee recommends that the State party consider re-formulating or repealing section 19 D of the Race Relations Amendment Act in order to ensure full compliance with the Convention.*

The Joint Committee on Human Rights considered the UK's implementation of ICERD, in light of the Concluding Observations of the UN Committee. They received evidence from the CRE, the DLA, JUSTICE, 1990 Trust and the Home Office. In their 14th Report (March 2005), they referred to the Race Monitor's 2003-4 report and to the Prague Airport case. Their recommendations reinforced those of the UN Committee (paragraph 83):

> *In our view there is a real concern that the use of section 19D will erode the equal treatment of certain national and ethnic groups both in the immigration service and more widely. We consider that authorisations under section 19D are likely to breach the UK's obligations under CERD. We therefore recommend that the Government should consider the repeal of the section, in accordance with the UN Committee's recommendation.*

It must be presumed that all of the provisions of the RRA are within the scope of the DTI's current review of discrimination law. It is to be hoped that the above unambiguous recommendations of a UN Committee and the Joint Committee on Human Rights will not be overlooked in this review.

Barbara Cohen

1. Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland 0/12/2003 CERD/C/63/CO/11

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Justifying indirect discrimination

Hockenjos v Secretary of State for Social Security [2005] IRLR 471

Implications for practitioners

In this case the CA ruled that a child-related supplement to jobseeker's allowance indirectly discriminated against men contrary to European law. At issue was the Social Security Directive 79/7/EEC (SSD), but the approach of the Court is of more general relevance to discrimination law.

Facts

The case concerned a supplement paid to parents responsible for children. Responsibility was assessed on the basis of whether the parent was in receipt of child benefit. Child benefit is payable to the mother except where the parents live apart. In such cases it is payable to the parent with whom the child lives or, where the child lives with both parents, to the parent to whom the parents jointly elect that benefit should be payable or, failing a joint election, to the parent to whom the Secretary of State determines in his or her discretion that payment should be made.

The tendency of the child benefit rules to favour women could not be challenged under the SSD, child benefit being outside the scope of the benefits to which that provision applies. The JSA supplement did, however, fall within the SSD. The rule at issue, which prohibited splitting of the childcare element of JSA between parents and conditioned entitlement to it on receipt of child benefit, operated so as to enable 92% of women but only 8% of men with significant shared care to access the childcare element.

Mr Hockenjos (H), who received JSA, was separated from his wife and had shared care, with her, of their two children. This was organised so that he had his daughters living with him for about 50% of the time. His wife, however, received child benefit and, accordingly, was eligible for the supplement at the relevant time. H challenged the rule before a Social Security Commissioner and, subsequently, the CA.

Social Security Commissioner

The Secretary of State did not dispute the indirectly discriminatory impact of the link between JSA supplement and child benefit. It was argued, however, that the link and the rule that only one parent could receive the child related element of JSA (i.e., that it could not be apportioned) was justified by the need to ensure consistency in the decision making process. Further, because child benefit was paid to the parent with primary parental responsibility, conditioning entitlement to the child related element of the JSA removed the need for JSA and income support decision makers to rely purely on a claimant's uncorroborated evidence when seeking to establish parental responsibility.

The Social Security Commissioner ruled that the indirect sex discrimination was not justified in so far as it linked entitlement to the child premium to receipt of child benefit. However, it was justified in so far as it provided that only one person could be eligible for the premium in respect of any child in any week.

Court of Appeal

The CA ruled that the Secretary of State had failed to objectively justify both the link and the prohibition on apportionment. Scott Baker LJ, who delivered the leading judgment, ruled that the doctrine of proportionality required the Secretary of State to take into account 'the discriminative extent of the measure he is seeking to justify' and to consider the question of 'fairness to recipients of the benefit, such as the appellant' as well as 'the interests of the State in running an efficient benefit system'. In this case, the problem was 'not one that operates at the margin in a few unfortunate but untypical cases; it goes to the very heart of the legislation'.

The Secretary of State argued that Member States had a broad margin of appreciation on social policy issues, and consequently he was entitled to succeed unless there was an alternative means of achieving the policy aim that was so obviously better that no reasonable Secretary of State could have avoided choosing it. Lord Justice Scott Baker disagreed, ruling that the approach was incorrect inasmuch as it:

> *focuses solely on the means of achieving the policy aim and does not allow for any balancing consideration to be given to the need not to frustrate a fundamental principle of Community law, namely the equal treatment of men and women under Article 4 [of the Directive].*

According to Scott Baker LJ:

> *there is a point at which it becomes no longer possible or appropriate to defer to the Member State's broad margin of appreciation on social policy.* ***That point is reached when the effect of doing so would be to frustrate the implementation of a fundamental principle of community law. It is therefore necessary to feed into the question of proportionality the importance of the principle of equality.*** *In doing so the Secretary of State, and subsequently the court, is doing no more than taking account of a fundamental concept of community law. The starting point is that the problem highlighted is sufficiently great that it strikes at a principle of Community law. That that is so in this case there is no doubt* [my emphasis].

The Secretary of State argued that a more flexible approach than that adopted 'would give rise to administrative problems and expense'. But there was 'no evidence that the government has tried to tackle the problem and in particular balance cost and administrative convenience against mitigating the rigidity of the scheme'. And 'social security legislation is full of examples of the government addressing complex issues in regulations. Whilst some element of what he calls 'bright line' treatment is no doubt inevitable, leaving a 40% minority carer with no assistance for child costs during a period of involuntary

unemployment is simply not acceptable'.

Ward LJ also found that unlawful indirect discrimination had occurred, ruling that the unfairness inherent in the 'all or nothing' approach meant that it was not suited to the aim put forward by the Secretary of State:

> *to establish a fair and efficient distribution of public funds available to maintain a child within the confines of a subsistence benefit such as jobseeker's allowance.*

Arden LJ also found that the operation of the JSA in this case breached the SSD, in her case, on the narrow ground that the fact that the rule had the effect that a person who had shared care of a child for substantial periods of time would be 'forced to live substantially below subsistence level' and that, in these circumstances,

> *The Secretary of State could not … reasonably consider that [the] scheme … was necessary or appropriate to achieve his legitimate aim [of producing a fair distribution of limited resources], unless possibly he could reasonably consider that very few individuals were involved or that the scheme was shortly to be replaced by another scheme under which this problem could be taken care of.*

Comment

Scott Baker LJ went on, perhaps less helpfully, to remark that the use of the term 'necessary' in the test for objective justification:

> *does not imply any more than that the means chosen is conducive to the aim in question. It does not have to be the only possible means.*

Ward LJ commented that the use by the ECJ of 'compound terms' such 'broad/reasonable' margins of discretion, 'necessary/legitimate' aims, and 'suitable/requisite/necessary' means 'are different ways of saying the same thing'. These comments chime with the Government's recent defence of its adoption of what looks like a watered-down test for justification in the proposed amendments to the SDA (which, like the amended RRA and the Sexual Orientation and Religion and Belief Regulations, require only that the discriminator establish that the impugned practice etc. is 'a proportionate means of achieving a legitimate aim', rather than (*Bilka*) being appropriate with a view to achieving a real need on the part of the undertaking and necessary to that end). More generally, however, the decision is to be welcomed as a strong defence against a watering down of the test for justification.

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This was also attempted more recently (and equally defeated) in *Hardys & Hansons plc v Lax* [2005] IRLR 668 (see *Briefing* no 383) in which the employer attempted to argue that the test for justification in an indirect sex discrimination required that the employer be granted a margin of discretion similar to that applicable in the unfair dismissal standard of the 'range of reasonable responses'.

Aileen McColgan
Matrix Chambers

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Briefing 380

Employers cannot save money by breaking the chain of causation

H M Prison Service v Beart (No.2) [2005] IRLR 568

Implications for practitioners

This case concerns the question whether an employer can break the chain of causation for compensation in a discrimination case by unlawfully dismissing the claimant. The employer argued that it could: in this case by dismissing the claimant after discriminating against her by failing to make a reasonable adjustment required under the DDA. The significance of the point to the employer was that had it been accepted that the losses following on the dismissal were divorced from the unlawful discrimination, they would have been subject to the upper limit on unfair dismissal compensation (this would not have been the case had the dismissal itself been found to have been discriminatory).

Facts

Ms Beart (B) had been employed by the prison service for 18 years, working as an administrative officer before 1996 when she was promoted to temporary executive officer. In August 1997 she raised the possibility of working part-time in order to enable her to collect her children from school. Her line manager concluded from the conversation that she wished to resign from her job as temporary executive officer and in September 1997 the claimant was informed that she had been assigned to an administrative assistant position which involved part-time work in the afternoon. This involved a significant pay cut and did not ease B's childcare problems, but her line manager refused to allow her to continue in her previous position. B went on sick leave with depression shortly thereafter and never returned to work.

Employment Tribunal

It was found as a fact by the ET that her vulnerability to depressive illness was exacerbated by her line manager's treatment of her which materially contributed to her severe depression. The employers then failed to comply with their own policies and did not obtain a medical report on the claimant for eight months. That report suggested that the claimant would not recover fully until her job-related difficulties were addressed and that redeployment to a different prison might be required. The employers did not take any steps to put the recommendations into effect but dismissed B on the basis that she had, contrary to her employer's instructions, undertaken some work in a shop she owned while on sick leave.

An ET ruled that B had been discriminated against contrary to the DDA by being refused a reasonable adjustment (relocation) and that she had been unfairly dismissed because the employer's investigation into her had been 'woefully inadequate' and its belief in her guilt was unreasonable. The employer pursued unsuccessful appeals as far as the CA ([2003] IRLR 238) before turning its attention to challenging the eventual award against it of a sum (to be agreed) which represented the claimant's future loss of earnings on the basis that there was a good possibility that, had the reasonable adjustment been made, the claimant would have been employed by the Prison Service until she was 62. It did not challenge the other awards of £3,300 in respect of unfair dismissal, £22,000 for personal injuries, £10,000 for injury to feelings and £5,000 aggravated damages. The ET was so offended by the manner in which the employers had conducted themselves that it awarded

costs against them in respect of their defence of the discrimination claim.

Employment Appeal Tribunal

On appeal the employer argued that the fact of dismissal, even though it was unlawful, broke the chain of causation as far as future loss arising from the claimant's depression was concerned. The EAT (per HHJ Ansell) ruled ([2005] IRLR 171) that the principle that 'a tortfeasor should not benefit from his second wrong' blocked the employer's argument regarding compensation. HHJ Ansell considered the application of the principle 'particularly important … when dealing with losses in the discrimination field'.

Court of Appeal

The employer appealed unsuccessfully to the CA who confirmed that causation was not breached by the fact of the dismissal. The Court relied both on the principle that the defendant could not rely on its own further wrong to break the chain of causation, and upon the finding that the dismissal did not, as a matter of fact, break the causal link between discrimination and losses arising subsequent to the dismissal. Rix LJ, who delivered the leading judgment, remarked on the inappropriateness of the argument that there had been an intervening act between discrimination and loss where that act was the tortfeasor's own:

> *All that has happened is that the Prison Service has committed two discrete wrongs in respect of which statute has provided a cap in respect of one but not the other.*

Wall LJ, who with Hooper LJ, agreed with Rix LJ, added declared that he:

> *shared the puzzlement expressed by Rix LJ at the proposition that any employer, let alone a public body, could escape liability for acts of disability discrimination by relying on a further wrong committed against the employee, namely that of unfair dismissal.*

Wall LJ also went out of his way to agree with the tribunal that:

> *if [the Prison Service] were allowed … by unfairly dismissing Mrs Beart, to escape or partly escape the consequences of having discriminated against her, it would, in our view, severely damage the protection given to employees by the Disability Discrimination Act, or, for that matter, other provisions against, e.g. race or sex discrimination.*

Comment

This decision is a victory for common sense. It would, as both the ET and Wall LJ pointed out, have been 'unconscionable' if the employer had been allowed,

> *by unfairly dismissing Mrs Beart, to escape or partly escape the consequences of having discriminated against her.*

Having said this, the application of the decision is only to those cases in which the dismissal is accepted as being divorced from the ongoing discrimination: any finding that an employer had deliberately tried to 'cut its losses' by dismissing an employee against whom it was already discriminating would have prevented an argument about causation having been run at all.

Aileen McColgan
Matrix Chambers

Briefing 381

Parental leave can only be taken in one week blocks

South Central Trains Limited v Rodway [2005] IRLR 583 EWCA

Implications

The CA hold that parental leave can only be taken in one-week long blocks unless the contract of employment makes other provision.

The Law

Part III of the Maternity and Parental Leave Regulations 1999 (MPLR) makes provision for parental leave. The 1999 Regulations seek to implement into domestic law the provisions of Council Directive 96/34/EC on the framework agreement on parental leave (as extended by Council Directive 97/75/EC) (the Directive).

Regulation 16 MPLR provides that where an employee's contract of employment does not

incorporate a provision giving entitlement to parental leave, the default entitlement set out in Schedule 2 MPLR applies to that employee.

Regulation 7 of Schedule 2 MPLR entitled 'Minimum periods of leave' provides that:

> *An employee may not take parental leave in a period other than the period which constitutes a week's leave for him under regulation 14 or a multiple of that period, except in a case where the child in respect of whom leave is taken is entitled to a disability living allowance.*

The issue arising was whether this provision permits an employee, under the default provisions of the MPLR, to take parental leave for a period of less than one week.

Facts

South Central Trains (SCT) had employed Mr Rodway (R) as a train guard conductor since 1984. R has a two-year old son. On 5 July 2003, R applied for one day of parental leave to care for his son on 26 July. SCT did not respond to this request until 24 July, when R was told that he could not take parental leave, as his job could not be covered. R sought to speak to a manager, but without success. On 26 July 2003, R did not come into work, but spent the day caring for his son. SCT initiated subsequent disciplinary proceedings against R, and these resulted in R being given a formal warning.

R then brought a complaint under section 47C of the Employment Rights Act 1996 (ERA). Section 47C provides an employee with a right not to be subjected to any detriment by his employer for a prescribed reason. By virtue of regulation 19(2) (e) MPLR, a 'prescribed reason' includes that the employee 'took or sought to take… parental leave'.

Employment Tribunal

The ET held that R had been entitled to take one day of parental leave. In so finding, the ET concluded that paragraph 7 of Schedule 2 MPLR should be interpreted as if the word 'take' meant 'use their entitlement' to parental leave. Thus, insofar as an employee took one day of parental leave, this would count as one week towards their overall maximum entitlement of four weeks per annum and 13 weeks in total. In reaching this conclusion, the ET stated that a purposive interpretation of the MPLR should be undertaken. The ET relied on the Directive, and specifically on extracts of the recitals annexed to it, notably recital I.5 which refers to 'allowing for better organisation of working hours and greater flexibility' and to recital I.3 which refers to the 'reconciliation of work and family life'.

Employment Appeal Tribunal

The EAT allowed SCT's appeal. The EAT emphasised the heading to paragraph 7 of Schedule 2 MPLR, namely 'minimum periods of leave'. The EAT concluded that the words 'in a period' in the phrase 'parental leave in a period other than the period which constitutes a week's leave' did not mean 'during the period' of a week but 'for a period of' a week. In other words, the minimum period of leave that could be taken under the MPLR.

Court of Appeal

The CA rejected R's appeal. Keene LJ (with whom Latham and Tuckey LLJ agreed) noted that he did not find the Directive to be helpful on this issue of interpretation (para. 32). He concluded that, like the EAT, he saw significance in the heading to paragraph 7 of Schedule 2 MPLR, namely 'minimum periods of leave' which is a phrase with a clear meaning (para. 33). He stated further, that the words used in paragraph 7, 'an employee may not take parental leave in a period other than' a week should be construed in the same way that the phrase 'in periods' is used in regulation 14(4). In regulation 14(4), the phrase undoubtedly refers to the length of time actually taken as leave.

Keene LJ concluded that the construction of the EAT was correct, and noted the practical sense of this conclusion for the default situation (para. 34):

> *One can readily see that employers might well prefer to be able to make arrangements for temporary employees to cover for a week during an employee's absence, rather than to face the problems arising from an employee being absent for a single day or two odd days. That is not so unbalanced a situation in the relationship between employer and employee in this default case as to cast doubt on the natural meanings of the words used in the Schedule.*

Finally, Keene LJ noted that even had there been ambiguity, he would have accepted that the criteria in *Pepper v Hart* [1993] AC 593 were met, and would have had regard to the relevant ministerial statements (para. 36). These, in his view, would put the interpretation beyond doubt.

Comment

This decision means that an employee must take parental leave in blocks of weeks, as opposed to days. As Keene LJ acknowledges, this assists an employer to cover absences arising as a result of employees taking parental leave. What Keene LJ does not acknowledge, however, is that requiring an employee to take leave in blocks may reduce flexibility for the parent concerned. Additionally, given that parental leave is unpaid, requiring an employee to take a block of one week as opposed to ad hoc days may make parental leave unaffordable to many parents.

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Territorial jurisdiction for discrimination claims

Saggar v Ministry of Defence [2005] IRLR 618 EWCA

Implications for practitioners

The CA has clarified the law relating to territorial jurisdiction in discrimination claims, where employees have worked outside Great Britain during their period of employment.

Background

The CA had to assess the jurisdiction of an ET to hear a race discrimination claim from an employee who had worked outside Great Britain during part of his contract of employment. The employee sought to assert that his employment was in Great Britain for the purposes of statutory protection from race discrimination.

The present-day test for territorial jurisdiction in cases of alleged discrimination, on the statute books in this form since 2003, is set out at section 8(1) RRA. It requires that the employee works 'wholly or partly' in Great Britain in order for statutory protection to apply. (Sections 8(1)(b) and (1A) of the Act provide protection for those employees working wholly outside Great Britain, under certain circumstances.)

Prior to 1999, and relevant to the facts of this case, the statutory test was different, and was that employment would be deemed to be inside Great Britain unless the employee works 'wholly or mainly outside' Great Britain. For completeness, between 1999 and 2003 the statutory test was that employees would be deemed to work in Great Britain, unless the employee works 'wholly outside' Great Britain. Lord Justice Mummery describes this evolution of the legislative approach in his judgement as the 'progressive enlargement of the jurisdiction', and the 'changing features of the jurisdictional map'.

Facts

Lt Col Surinder Saggar (S) is of Indian ethnic origin. He served as an anaesthetist in the Army between May 1982 and January 2002, after which he retired. S worked in Great Britain, with some work undertaken abroad on tours of duty, in particular a posting to Akrotiri in Cyprus between September 1998 and the end of his Army career in 2002.

S alleged he was racially discriminated against by the Commanding Officer of the Akrotiri posting between September 1998 and December 1999. The Ministry of Defence (MoD) raised the issue of jurisdiction prior to the first hearing of S's claim.

Employment Tribunal

The ET considered as a preliminary issue whether or not S worked 'wholly or mainly' outside Great Britain. If he had, his claim for British jurisdiction would fail.

The main area of confusion for the lower courts in addressing this issue was the relevant time period for use in assessing jurisdiction. The ET agreed with the MoD, who submitted that the ET had no jurisdiction to hear S's claim as at 'all relevant times' S worked wholly outside Great Britain. S was in Akrotiri for the entirety of the alleged period of discrimination, and the ET held that it was the period of the alleged discrimination which was the relevant period of time to use in assessing jurisdiction.

The ET explicitly noted that S had, therefore, by

382 virtue of his posting, lost the protection of the RRA. The ET pointed out this uncomfortable anomaly, but expressed the view that its hands were tied, due to the earlier case of *Carver (nee Mascarenhas) v Saudi Arabian Airlines* [1999] ICR 991, a decision of the CA. The EAT upheld the ET's decision.

Carver concerned the question of territorial jurisdiction for claims of both unfair dismissal and sex discrimination. At the time of *Carver* the test in relation to unfair dismissal was to find where the employee 'ordinarily worked' (s192(2) ERA 96, now repealed). In brief, the *Carver* decision held that this was to be where the entirety of the contract of employment envisaged the employee working. *Carver* made it clear, however, that the test for jurisdiction was very different in unfair dismissal cases to that in cases of discrimination. What *Carver* did not do, as Mummery LJ clarifies in *Saggar*, was to address how the (then) test for jurisdiction in discrimination cases should be applied. The question of jurisdiction for the sex discrimination element of the *Carver* matter was remitted to a differently constituted tribunal for assessment, and no analysis of the test was undertaken by the CA in that case.

Court of Appeal

The CA concluded that the lower courts had misinterpreted *Carver*, and had erred in considering themselves bound by the decision in relation to the facts of the present case.

Mummery LJ ruled that it was implicit in the legislation that in considering questions of jurisdiction the relevant period is the whole period of employment. Consideration should be given to the employment over a longer period of time than the period to which the alleged discrimination relates. He pointed out that the question as to whether an employee has worked 'mainly' (or 'partly') outside Great Britain (in terms of both the test in force at the relevant time and today) presupposes a longer period of time operating as the frame of reference. Mummery LJ clarified that the assessment should be at the time of the alleged discrimination on the basis of the whole of the period up to that date.

Comment

The simple fact that alleged discrimination occurs outside Great Britain is not sufficient to deprive an employee of statutory protection. Geographic information is relevant in relation to the whole of the employment, not just during the period the alleged discrimination took place.

This decision clarifies both the approach to be taken to the question of jurisdiction in discrimination cases, and the separate nature of the tests of jurisdiction to be used in discrimination and unfair dismissal cases. Although some practitioners may feel that to have decided otherwise would have been simply absurd, this high-level clarity is welcome.

The assessment undertaken by the CA in this case has a bearing on all discrimination statutes, and allows practitioners to assess more confidently whether individuals have lost the protection of our discrimination laws by virtue of their working, or having worked, abroad.

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Justification in indirect discrimination cases

Hardy and Hansons plc v Lax [2005] IRLR 726 EWCA

Implications for practitioners

This case restates and clarifies the correct approach to be adopted by tribunals in assessing an employer's justification defence in indirect discrimination cases under the SDA s1 (2) (b) (ii). The CA rejected the argument that tribunals ought to give an employer a 'margin of discretion' with regard to the reasons for following an otherwise indirectly discriminatory course of action. Instead, the tribunal should form its own view. In doing so it should take account the reasonable needs of the business and the principle of proportionality.

This is likely to require a detailed investigation into the needs of the business by the tribunal. The appellate courts in turn will need to subject the tribunal's judgment to close scrutiny to ensure that the tribunal has gone through the correct process in assessing the justification defence.

Facts

Mrs Lax ('L') was employed in a full-time managerial role by Hardy & Hansons plc. She wished, on her return from maternity leave, to return to work on a part-time basis. This would have required the employer to split the role on a job-share basis. The employer refused this request on the basis that the job had to be performed full-time for reasons of business efficiency. There being no part-time work available for L, she was dismissed for redundancy.

Employment Tribunal

The employer conceded disparate impact and conceded that its refusal to consider the job-share had been to the detriment of L. Accordingly justification was the only live issue.

The employer sought to justify its refusal to allow a job share by reference to a number of factors. These included alleged communication issues (particularly difficulties with carrying out effective handovers), duplication of effort, and the variation of workload from week to week which, it was said, would make splitting the workload difficult.

The ET found that the employer's arguments on justification were inadequate and overstated, and that the job-share could and should have been put into effect. The ET accordingly upheld L claims of indirect sex discrimination and unfair dismissal.

Employment Appeal Tribunal

The employer appealed. It argued that, in assessing whether the discrimination was justified, it was not for the ET to substitute its own view for that of the employer. It argued that the ET had to give the employer a 'margin of discretion' to run its business as it thought fit and that the test for justification ought to be more like the 'band of reasonable responses' test in unfair dismissal.

In a fairly brief judgment following a preliminary hearing the EAT seemed to uphold the employer's submission as to the correct approach to be taken by the ET, but rejected the appeal on the basis that the ET had allowed the employer a margin of discretion.

Court of Appeal

The CA rejected the employer's appeal. Pill LJ, giving the leading judgment, conducted a clear and helpful review of the law of justification in indirect discrimination cases. He held that the concept of a 'margin of discretion' in such circumstances was incompatible with the established European and domestic case-law, notably *Bilka-Kaufhaus GmbH v Weber von Hartz* (case 170/84) [1986] IRLR 317, *Enderby v Frenchay Health Authority* (case C-127/92) [1993] IRLR 591, and *Allonby v Accrington and Rossendale College* [2001] IRLR 364.

The CA went on to give guidance as to the correct approach to be followed by tribunals in assessing employers' justification defences.

The Court emphasised that the employer must show that the scheme (the 'provision, criterion or practice' he imposes) is 'reasonably necessary'. The presence of the word 'reasonably' does not permit a 'margin of discretion' or 'range of reasonable responses' test. Rather it denotes that the principle of proportionality needs to be observed, which in turn requires the ET to take into account the reasonable needs of the business. The employer does not have to demonstrate that no other scheme is possible. He has to show that the scheme is objectively justified, notwithstanding its discriminatory effect. A balance needs to be struck between the justification put forward by the employers and its discriminatory effects.

The Court was at pains to emphasise that the tribunal must conduct a critical evaluation of the scheme. As Pill LJ put it:

> *The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action.... This is an appraisal requiring considerable skill and insight… [I]n this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions. (paras 33-34)*

Pill LJ also stressed (paras 33-34) that the appeal courts should, in their turn, take a correspondingly

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critical view of the ET's reasoning:

[A] critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind… the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinize carefully the manner in which its decision has been reached.

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Discrimination in compensation for WW2 internees

R (on the application of Diana Elias) v Secretary of State for Defence and Commission for Racial Equality (Intervenor) [2005] IRLR 788 – EWHC

Implications for practitioners

This case concerns an ex-gratia scheme for compensating British civilians interned by the Japanese during the war and whether the requirement to have a blood link to the United Kingdom in order to qualify rendered the scheme discriminatory on racial grounds. It also considered whether the Secretary of State was in breach of his 'positive' obligations under the RRA, s.71.

Facts

This was a claim for judicial review by Ms Elias (E), an 81 year old woman, who challenged her exclusion from the Secretary of State's ex gratia scheme to compensate British civilians interned by the Japanese during the War. Her parents were both Jewish; her mother was from Iraq and her father from Iraq or India. She was born in Hong Kong on 9 January 1924 and was registered as a British subject with the British High Commission in Hong Kong. She was still in Hong Kong when the Japanese forces invaded in 1941. The British authorities gave the Japanese a list of British subjects. Her name was included on that list together with her parents and siblings. Her home was raided and she and her family were all interned by the Japanese, by virtue of being British civilians, in Stanley camp. She was there between 1941 and the liberation of Hong Kong in 1945, during which time she suffered extremely traumatic experiences. She remains a British citizen and since 1976 has lived here full time.

The Secretary of State set up a non-statutory compensation scheme which paid an ex gratia sum of £10,000 'to repay the debt of honour' owed by the United Kingdom to British civilians interned by the Japanese during the war. As far as civilian internees were concerned, in order to qualify they either had to have been born in the United Kingdom or have a parent or grandparent born here. E did not meet these 'birth link criteria' and so was excluded from the scheme. She argued that by excluding her from the scheme the Secretary of State was acting unlawfully because he had failed to consider whether because of the extreme suffering she had undergone she should be considered an exceptional case, and because the scheme was unlawfully discriminatory in a 'direct' and an 'indirect' sense. It was also argued (with the assistance of the CRE) that the Secretary of State in formulating the scheme had breached his obligations under s.71 of the RRA. The scheme had been challenged on other grounds in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 and *Phalam Gurung v Ministry of Defence* [2002] EWHC 2463 Admin.

High Court

E failed in her first argument that the Secretary of State had unlawfully fettered his discretion. The scheme was not statutory but had been set up pursuant to the common law powers of the Crown. The court did not accept her argument, based on *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349, that in those circumstances the Secretary of State must be willing to exercise those powers in such a way as to make exceptions in an appropriate case. There was no basis for saying that because the government agrees to make payments in a certain class of situations, it was obliged to consider applications from those who do not fall within the rules in a different way than it would otherwise have done.

As to her claim of direct racial discrimination, the HC approved *Ealing London Borough Council v Race Relations Board* [1972] AC 342, where the House of Lords had concluded that the concept of 'national origins' meant national in the sense of race and not citizenship. However, the Court did not accept the Claimant's argument that taken together the criteria adopted by the compensation scheme amounted to discrimination on grounds of national origin. Instead, the ground of discrimination was simply place of birth. The case was therefore distinguishable from *James v Eastleigh Borough Council* [1990] 2 AC 751 where the state pension age was so inextricably linked with discrimination on grounds of sex that the same result was achieved whatever criterion was adopted.

However, E did succeed in her claim of indirect discrimination. The Secretary of State had conceded, albeit late in the day, that the criteria involved in the case inevitably involved a disparate impact on grounds of national origin, even without the relevant statistics to prove this. The classic test for justification was set out in *Bilka-Kaufhaus GmbH v Weber von Hartz* (Case 170/84) [1987] ICR, namely whether the measures 'correspond to a real need' and 'are appropriate with a view to achieving the objectives pursued and are necessary to that end'. The measures here did have a legitimate aim in that the minister was in principle entitled to seek to limit the category of persons who would be eligible to claim and to choose not to extend the benefit to all British subjects. Here, the criteria which caused the disparate impact were themselves closely linked to national origins, as had been the criteria in *Orphanos v Queen Mary College* [1985] AC 761 (where students who had been ordinarily resident in the EEC were charged higher fees than those who had not). Using these criteria was by no means the only way in which the Minister could achieve his legitimate objective. He could have chosen criteria which narrowed the category of British subjects without linking them so closely with descent and national origins. A simple link, say, to a period of residence in the United Kingdom within a period leading up to internment, or the adoption of criteria based on domicile would have achieved this. Although there would have been a disparate impact on those who were not British nationals, the same would have been proportionate to the objective sought.

E and the CRE also succeeded in showing that the Secretary of State had breached his duty under the RRA, s.71(1)(a) which provides that he (like many other specified bodies) had, in carrying out his functions, '…to have due regard to the need (a) to eliminate unlawful racial discrimination'. There was no evidence that the Secretary of State had made any careful attempt to assess whether the scheme raised issues relating to racial equality, although the possibility was raised; nor was there any attempt to assess the extent of any adverse impact, nor other possible ways of eliminating or minimising such impact.

Comment

This case is interesting not only for the rigorous analysis Elias J subjected the justification defence to, but for the fact that (it is understood, for the first time), a public body was held by the Court to be in breach of its 'positive' duty under s.71 of the RRA. This section, which was inserted into the RRA by the RRAA, is intended to 'mainstream' racial equality by compelling government bodies to consider the potentially discriminatory consequences of their policy making decisions before they take them. This decision gives s.71 real 'teeth' in a way that had not necessarily been anticipated before. Notably, the Secretary of State conceded that E had standing to bring a complaint under s.71, when there is no such specific enforcement mechanism provided for in the Act (unlike the specific duty to publish a Racial Equality Scheme which is enforceable by the CRE).

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Bonus payments while on maternity leave

Hoyland v ASDA Stores Ltd [2005] IRLR 438 EAT

Implications for practitioners

This case concerned the application of the Maternity and Parental Leave Regulations 1999 (MPLR) to the payment of an annual bonus, which was based upon the sales achieved by the whole workforce over the course of the year. The case considered whether it was lawful for the employer to make a pro rata reduction in the amount awarded to an employee, in respect of her absence on ordinary maternity leave. The EAT concluded that it was, and that the reduction was neither sex discrimination nor a pregnancy-related detriment.

Facts

Ms Hoyland (H) was employed from 1988 by ASDA stores. She was absent from work for a period of 18 weeks ordinary maternity leave (OML) and a further period of 8 weeks additional maternity leave.

ASDA stores operated a bonus scheme which was paid annually to all employees. The bonus was intended to reward employees for good attendance and not individual productivity. Pro rata reductions were made in respect of part time employees and in respect of staff absences of more that 8 weeks. The bonus paid to H was reduced pro rata in respect of the period she was absent from work on maternity leave. H complained that she had been discriminated against both on the grounds of her sex and because she had taken maternity leave. She argued that during the 18 week period of the OML at least, she was entitled to equal treatment with male colleagues, and the receipt of a full bonus. The ET and the EAT disagreed.

In deciding the central questions, both the ET and the EAT considered the nature of the bonus payment. Was this a discretionary bonus or was it a payment which was a benefit regulated by the woman's contract within the meaning of section 6(6) SDA? If it was a contractual benefit, then the claimant could not rely upon section 6(2) SDA, because of the exclusion. The EAT agreed with the ET. The bonus was a benefit regulated by the contract. Whilst it was described as discretionary, in fact it was paid to everyone who satisfied the qualifying requirements, and any such person was entitled to receive the bonus. Further, the EAT rejected the argument that the payment of the bonus pro rata was contrary to the ETD and article 141 EC. H had relied upon the judgment of the ECJ in *Lewen v Dender* [2000] ICR 648. In that case Ms Lewen was excluded entirely from a Christmas bonus because she was on parenting leave at the time of payment. The ECJ had commented that

> *.....The refusal to pay a woman on parenting leave a bonus as an exceptional allowance given voluntarily by an employer at Christmas does not therefore constitute discrimination within the meaning of Article 119 of the Treaty where the award of that allowance is subject only to the condition that the worker is in active employment when it is awarded.*
>
> *The position would be different if the national court were to classify the bonus at issue under national law as retroactive pay for work performed in the course of the year in which the bonus is awarded.*
>
> *In those circumstances, an employer's refusal to award a bonus, **even one reduced proportionally**, to workers on parenting leave who worked during the year in which the bonus was granted, on the sole ground that their contract of employment is in suspense when the bonus is granted, places them at a disadvantage as compared with those whose contract is not in suspense at the time of the award and who in fact receive the bonus by way of pay for work performed in the course of that year. Such a refusal therefore constitutes discrimination within the meaning of Article 119 of the Treaty since female workers are likely, as noted in paragraph 35 of this judgment, to be on parenting leave when the bonus is awarded far more often than male workers.*

The effect of this judgment, and that of *Gillespie v Northern Health and Social Services Board* [1996] IRLR 214 ECJ, is that a woman who is absent on maternity leave during a period when a bonus becomes payable to workers, is entitled to be paid a bonus, but a pro rata reduction can be made in respect of any period during which she is absent due to maternity leave.

The second question was whether the claimant had

been subjected to a detriment, contrary to the MPLR, by receiving only a reduced bonus. Again the EAT agreed with the ET that she had not been. Again, the central question was the nature of the bonus, this time in the context of the MPLR. Regulation 9 provides:-

1) *An employee who takes ordinary maternity leave-*
   (a) is entitled, during the period of leave, to the benefit of all of the terms and conditions of employment which would have applied if she had not been absent….
2) *In paragraph (1) (a) 'terms and conditions' has the meaning given by Section 71(5) of the 1996 Act and accordingly does not include terms and conditions about remuneration.*
3) *For the purposes of section 71 of the 1996 Act, only sums payable to an employee by way of wages or salary are to be treated as remuneration.*

The question, therefore, is whether the bonus was a sum payable to H 'by way of wages or salary' in which case it was not required by the Regulations to be paid in respect of the period of ordinary maternity leave (other than the compulsory fortnight).The ET concluded that the bonus was part of the applicant's 'wages or salary' within the meaning of regulation 9(3) MPLR. As well as the comments made about the nature of the discretion to pay, the ET placed particular emphasis on the circumstances in which the bonus was paid to employees. In particular, it was paid via the pay roll with the basic wages and was subject to deduction of national insurance and tax. Further the court rejected the submission that the failure to pay the bonus was a detriment within the meaning of section 47c ERA, on the basis that if it were, the exclusion of terms and conditions about remuneration by way of wages or salary in section 71(5) and regulation 9(2) (see above) would be meaningless.

However, it was accepted by the ET that the failure to pay the full bonus in respect of the fortnight compulsory maternity leave was a detriment, and thus Ms Hoyland was entitled to the payment of £5.20.

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Discriminatory retirement ages

Cross and Ors v British Airways PLC [2005] IRLR 423 EAT

Implications for practitioners

In Cross, the EAT have considered indirect discrimination and justification of a discriminatory provision, criterion or practice (PCP) in the context of a normal retirement age of 55. Part of the case concerned the meaning of a normal retirement age, but the case also raised the question of whether the application of the retirement age to all workers employed after 1971 was sex discrimination.

Facts

Mr Cross (C) and his colleagues were pilots and cabin crew employed by British Caledonian Airways. The company merged with BA in 1988. Until the merger, C and others had had a contractual retirement age of 60. BA operated a normal retirement age of 55, and therefore terminated his employment, and that of others, when C reached the age of 55. He claimed unfair dismissal and sex discrimination.

The initial question regarding the normal retirement age was resolved in the employers favour, and thus the unfair dismissal claim failed. The ET and the EAT also found that there had been no discrimination. However, the EAT did find that there had been a PCP applied to employees who were employed after 1971, of retiring them at 55.

The EAT also found that the PCP had an adverse effect, and that the ET had not erred in its consideration of the impact on both the advantaged group, those who did not have to retire at 55, and the disadvantaged groups, those who did. The ET considered the proportion of men and women in each group, and determined that the proportion of women in the disadvantaged group was significant, and thus the PCP required justification.

The ET, and the EAT, found that the employer

386 could justify the PCP. On appeal, the EAT rejected the argument put forward by the claimants that an employer could not rely upon considerations of cost when seeking to justify discrimination. Whilst it was right that a national state could not rely upon budgetary considerations to justify a discriminatory social policy, an employer seeking to justify a discriminatory PCP could put cost into the balance, although he must not rely upon this as the sole factor in their justification. Here, the cost of changing the terms and conditions of employment was one of the factors that BA had relied upon as justification, and the ET had not erred in law in allowing it to be taken into account, along with other factors.

Comment

The test for indirect discrimination changes on October 1st 2005, with the introduction of the Employment Equality (Sex Discrimination) Regulations 2005. The new test is whether or not a discriminatory PCP is a *"proportionate means of achieving a legitimate aim"* (see section 3b(3) SDA 1975 as amended). However, the question of the role that cost can play in any assessment will remain important. Following the EAT decision in *BA PLC v Starmer* EAT/0306/05; it is likely that any analysis will also require significant evidence of actual costs, balanced against the discriminatory effect. It is arguable that an ET will err in law, if it accepts arguments about cost benefit analysis at face value without making any further enquiries.

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Guidelines on the interpretation of 'mental impairment'

Dunham v Ashford Windows [2005] IRLR 608 EAT

This case appears to be the first case considered at appellate level on the issue of how to establish a mental impairment before the ET.

Facts

Mr. Dunham (D) began employment in September 2002 as a fork lift-truck driver and yardman in September 2002. He was dismissed on 6th December 2002. He brought a claim of disability discrimination against the Ashford Windows (AW), claiming that he had been unlawfully dismissed and that there had been a failure to make reasonable adjustments. Initially D said that he had dyslexia but he was subsequently permitted to amend his originating application to assert that he was disabled 'due to severe reading and writing difficulties'. AW denied that he was disabled; said that although he might have learning difficulties, he did not have a clinically recognised mental illness or a specific mental impairment amounting to an impairment.

Employment Tribunal

The ET considered evidence in the form of an expert report from a chartered psychologist, Mr. Cawkwell (C), a senior educational psychologist for 20 years. AW did not wish to take issue with the report; he was not required to attend the tribunal for cross examination; and his report was put before the ET unchallenged. The ET considered the 2 main authorities on mental illness, the cases of *Morgan v Staffordshire University* [2002] IRLR 190, and *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] IRLR 711. They concluded that D had not established a specific mental impairment or clinical condition, and therefore that it was not open to them to conclude that D had a mental impairment and the claim was dismissed. In particular, they held that C's report identified the consequences of any condition and did not define a specific mental

impairment. They also rejected C's evidence because he is a psychologist and not a medical practitioner.

Employment Appeal Tribunal

The EAT allowed the appeal. They considered the above authorities, as well as the unreported case of *John Grooms Housing Association v Burdett* [2004] UKEAT/0937/03. The court held that:

- the distinction between mental impairment consisting of learning difficulties or disability is of some weight. It is consistent with the natural construction of the words of para.1(1) of Schedule 1 DDA which clearly include within the definition of mental impairment an impairment which does not arise from a mental illness,
- three of the four routes to establishing the existence of mental impairment within the DDA (as laid down in *Morgan*) relate to proof of mental illness,
- there must be a fourth route by which an applicant who bases his case on learning difficulties or mental handicap (sic) can seek to establish that he suffers from mental impairment. Otherwise claimants with what may be very serious disabilities which have serious effects on their functioning generally, or in a specific area of function, would be excluded from the scope of the DDA, contrary to good sense and contrary to the guidance (on definition),
- The words of Mummery LJ in para 17 of his judgment in *McNichol* cannot be taken as requiring the establishment of a clinically well-recognised illness in a case which is not based on mental illness at all,
- Although in the case of mental impairment which does not consist of mental illness, the words 'only if the illness is clinically well recognised illness' do not apply, it is unlikely to be sufficient for a claimant to put his case only on the basis that he had difficulties at school or is 'not very bright'. ET are likely to look for expert evidence as to the nature and degree of the impairment from which a claimant claims to suffer and for evidence of a particular condition from which the claimant suffers – which may have a specific or generalised effect on function,
- The ET was wrong to rely on the fact that C is a psychologist and not a medical practitioner. *McNicol* and *Morgan* do not impose a requirement of medical evidence in every case, even where appropriate expert evidence as to the type and nature of the condition which formed the basis of the claim is available. In a case of learning difficulties, there is no reason why the essential evidence which establishes the nature of the condition from which the claimant claims to suffer should not be provided by a suitably qualified psychologist. What is important is that there should be evidence from a suitably qualified expert who can speak on the basis of his experience and expertise as to the relevant condition, and
- The ET was also wrong to find that C did not identify a specific condition. C did identify a specific condition, namely that of borderline moderate learning difficulties which were generalised. They were described as generalised not because there was no specific condition, but because the specific condition which he described had a generalised effect, as he had demonstrated in his report.

The case was remitted to a tribunal for consideration of the remaining issues including, if still in dispute, the issue as to whether his impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Comment

The requirement that a mental illness be 'clinically well-recognised' is to be removed from December 2005 (as a result of the DDA 2005) but it has proved extremely problematic in the context of mental health claims. It is particularly important that the EAT has stated very clearly that mental impairment is a different type of claim, and not subject to the somewhat rigorous requirements (which would clearly be inapplicable in cases of mental impairment) of Morgan in relation to medical evidence.

Catherine Casserley
Disability Rights Commission

Definition of impairment for the DDA

Carden v Pickerings Europe Ltd [2005] IRLR 720 EAT

Implications for practitioners

The CA, in the case of *Woodrup v London Borough of Southwark*, expressed a certain degree of scepticism of the provisions of the DDA which, when considering whether or not an impairment has a substantial adverse effect on the ability to carry out normal day to day activities, provide for the disregarding of corrective measures. *Carden* has revisited this and looks at the definition of 'measures' for the purposes of the definition.

Facts

Mr. Carden (C) fractured his ankle in 1984. He had treatment on the ankle which involved the surgical placement on the fracture of a plate and pins. Subsequently, although he had some minor problems for which he was referred to an orthopaedic surgeon on a few occasions, he experienced no problems with the fracture or with the pins which solved the fracture. C brought a claim of disability discrimination. He relied upon Schedule 1 paragraphs 6(1) and 6(2) DDA. These make provision for:

> 6 *(1) an impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.*
>
> *(2) In sub-paragraph (1) 'measures' includes in particular medical treatment and the use of a prosthesis or other aid.*

Employment Tribunal

The tribunal, having considered evidence in the form of a report from a Dr Roy (R) in which he described the plate and pins as prosthetics or, in the alternative, as correction measures, held that C was not disabled within the meaning of s.1 DDA. In particular, they held that since there had been no further treatment to C's ankle since 1984, the treatment had ceased and therefore the effects of the treatment namely the insertion of the pins and plates should be taken into account in order to assess the question of disability. Taking that treatment into account, they found that C's impairment did not have a substantial effect upon his ability to carry out normal day to day activities. C appealed.

Employment Appeal Tribunal

The EAT upheld the appeal. It held that:

- 'measures' is defined in schedule 1 paragraph 6(2) as including, in particular, 'medical treatment and the use of a prosthesis or other aid'. Even leaving aside the non-inclusive definition of the word measures, there is reference to the words 'or other aids'. Depending on the facts, plates or pins would count as an aid, even if they do not count as a prosthesis, much as, for example, the use of a stick by an otherwise handicapped person would amount to an aid.
- On the evidence, there was no continuing treatment but whether there were any continuing measures to correct the problem would depend upon whether there was any continuing support or assistance being given by the pins and plates to the functioning of the applicant's ankle.
- The relevant question is whether on the balance of probabilities, the plates, still in the ankle after 20 years, are or amount to a measure to treat or correct what would otherwise be a disability.

The case was remitted back to the same tribunal, with permission for both parties to call supplementary evidence on the key question to be answered.

Comment

In the case of *Woodrup v London Borough of Southwark* ([2003] IRLR 111) the CA expressed a certain degree of scepticism about the deduced effect provisions. Whilst the EAT did not express any reservations, they did comment on the matter of causation in a case reliant upon the deduced effect provisions. In particular:

> *The effect as we have indicated here would be that if this applicant is disabled he is disabled by virtue of the deeming provision in Schedule 1 paras. 6 which, as we*

have indicated, must make it the more difficult to prove that any alleged unfavourable treatment is by virtue of that deemed disability.

This seems at odds with the fact that the vast majority of people who fall within the definition of disability as a result of these provisions are people who have, for example, epilepsy or diabetes (so called 'invisible disabilities') and who experience discrimination purely because of their medical condition – regardless of whether it is controlled by medication or not. It should be no more difficult to prove causation based on a deduced effects case than any other.

Catherine Casserley
Disability Rights Commission

Briefing 389

Joint and several liability in discrimination cases

Peter Way and Intro-Cate Chemicals Ltd v Angela Crouch
[2005] IRLR 603 EAT

Implications for practitioners

When an ET make a finding of sex discrimination, section 65 SDA states that they may award a remedy 'as it considers just and equitable' from a list of three remedies – an order declaring discrimination has occurred; an order for compensation and recommendations for the respondent to undertake specified actions. It may award any or all of the remedies.

The level of compensation and the heads of compensation include any type of compensation which a county court could have awarded under section 66 SDA 1975, and include injury to feelings awards.

Awards of compensation may be made against either the person responsible for the discrimination directly, or the employer of the individual. In many cases the courts have held both the perpetrator and the employer liable, with a division of the liability between them.

What was novel in this case was that the ET decided that both the first respondent, who had himself committed the act of discrimination, and the second respondent, the company, were jointly and severally liable for the whole of the compensatory amount awarded. The question on appeal to the EAT was whether or not this was a legitimate exercise of the section 65 power.

Facts

Ms Crouch (C) was employed by Intro-Cate Ltd. Peter Way (W) was the Managing Director and major shareholder of Intro-Cate Ltd. W dismissed C when she ended her relationship with him.

Employment Tribunal

The ET found that this was an act of sex discrimination, since but for her gender they would not have had a relationship and she would not have been dismissed for ending it. They went on to consider the award of compensation at a second hearing and found that:

> *In such cases we would normally order the employer to pay this compensation, perhaps with an order for a small lump sum to be paid by an individual Respondent. However, in this case, the First Respondent is the Managing Director of the Second Respondent and is answerable to nobody at the Second Respondent. There is no board of directors and he is the major shareholder. We think it appropriate therefore in this case to make the compensation order payable jointly and severally by the First and Second Respondents.*

Employment Appeal Tribunal

W appealed. He argued that the ET was prevented from making such an award on the basis of joint and several liability because of section 6(1) of the Civil Liability (Contribution) Act 1978 (CLA). The EAT rejected this argument, on the basis that the CLA had been in force at the time the SDA 1975 was introduced, and thus parliament must have been presumed to have taken account of it. Had they wanted to exclude the power to make awards jointly and severally, they would have made this clear. The

statutory language made it quite clear that the ET in cases of sex discrimination is entitled as a matter of law to make an award on a joint and several basis. They also noted that the same would be true of Section 56 (1) (b) RRA; Section 8 (6) (b); Section 8 (3) DDA; Regulation 30 (1) (b) of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003 No. 1660) and Regulation 30 (1) b) of the Employment Equality (Sexual Orientation) Regulations 2003 SI 2003 No. 1661.

They upheld the ET decision on compensation but recognising that the point was a novel one, gave the following guidance to ETs:

1) The practice of ETs since 1975 confirms that in almost every case it will be unnecessary to make a joint and several award of compensation in a discrimination case. The present practice of apportioning liability (where appropriate) between individual employees and employers works well in practice and does justice to the individual case.

2) If an ET considers it necessary to make a joint and several award of compensation then it should make clear its reasons for doing so.

3) If an ET considers it necessary to make a joint and several award of compensation it must have regard to the language of Section 2 (1) of the Civil Liability (Contribution) Act 1978 which provides that:

> *(1) Subject to Sub-section (3) below in any proceedings for contribution under Section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.*

In other words, it is not appropriate in almost any case for an ET to make a joint and several award which is 100% against each respondent. That is to do violence to the language of Section 2 (1) of the 1978 Act which specifically directs the attention of the ET 'to the extent of that person's responsibility for the damage in question'.

4) What Section 2 (1) of the 1978 Act makes clear is that it is not a permissible option for an ET to make a joint and several award of compensation because of the relative financial resources of the respondent. For example, an ET cannot make such an award because it believes that a company is more likely to be able to satisfy such an award or because a corporate respondent may be insolvent or in receivership or liquidation. That is to ignore the clear language of Section 2 (1) of the 1978 Act.

5) In providing guidance to an Employment Tribunal about the meaning of Section 2 (1) of the 1978 Act, we can do no better than refer to the discussion in Clerk and Lindsell on Tort (17th edition 1995) at paragraph 4-63 (pages 154-155). The editors of that standard practitioners' work take the view that the word 'responsibility' in Section 2 (1) of the 1978 Act refers both to the extent to which each tortfeasor caused the damage and to their relative culpability. There is extensive reference to the relevant case law in the footnotes to that paragraph of Clerk and Lindsell.

Comment

The EAT also emphasised that this case did not involve a claim for unfair dismissal. They made it clear that the ET has no power to make a joint and several award of compensation in an unfair dismissal case. This is because Section 111 read with Sections 112 and 117 of the Employment Rights Act 1996 make no provision for compensation to be assessed on the same basis that it is assessed in the County Court or a Sheriff Court. The award for unfair dismissal is created by statute and statute alone. There is simply no reference to the principles of compensation applicable in a County Court. This is in marked contrast to the compensation provisions for discrimination.

Catherine Rayner
Tooks Court Chambers

Extending the meaning of 'on racial grounds'

Redfearn v Serco t/a West Yorkshire Transport Service
[2005] IRLR 744 EAT

Implications for practitioners

This case builds on the authority of *Showboat Entertainment Centre v Owens* [1984] IRLR 7 that discrimination 'on racial grounds' under section 1 RRA is not limited to the race of the complainant. In *Showboat*, the EAT held that a white employee dismissed for refusing their white employer's instructions not to admit black customers, was discriminated against 'on racial grounds'. This neatly avoided having to rely on the little-used 'instructions to discriminate' provisions in the Act which may only be actioned by the relevant Commission, thus permitting the wronged white employee to bring their own case.

However, in *Redfearn*, the EAT under its President go far further than this and interprets discrimination 'on racial grounds' in a manner which must have come as a surprise to those responsible for drafting the Act.

Facts

Mr Redfearn (R) was employed as a driver by Serco Ltd (S), who provided transport for disabled people in Bradford. 70-80% of Serco's clients in Bradford and 35% of the workforce were of Asian origin.

R was elected as a local councillor for the British National Party (BNP). After representations from unions and other employees, R was dismissed on health and safety grounds, with little or no procedure. It appeared that S's reason for dismissal was the reaction or expected reaction from Asian colleagues and patients and that this might lead to violence. Interestingly, S did not appear to argue that R had brought his employer into disrepute and thus merited dismissal.

R lacked the necessary one year's continuous service and brought claims for direct and indirect race discrimination. He lost on both counts at first instance; the ET finding that he was dismissed on health and safety grounds, not 'on racial grounds'. He appealed.

Employment Appeal Tribunal

Taking the less controversial decision first, the EAT took little time in deciding that, as only whites were permitted to belong to the BNP, much less stand as a candidate, the ET was correct in finding that an effective ban on membership of the BNP, had a disproportionate impact on white employees. The ET's finding on justification had been succinct in the extreme. The EAT had little trouble in finding authority that an ET must carry out a critical evaluation of any justification defence; the ET had failed to do so. The question of justification would be sent back to another tribunal.

However, it is the EAT's reasoning in the direct discrimination case which has caused consternation. The case turned on how 'on racial grounds' should be interpreted. S argued that a complainant could not take advantage of the Act when he was dismissed for discriminatory behaviour. However, the EAT found that motive for treatment of a complainant is irrelevant. Using, among other cases, the arguments of the then President of the EAT, in *O'Neill v St Thomas More School* [1996] IRLR 372, the EAT found that 'on racial grounds' could be interpreted sufficiently widely to encompass less favourable treatment of a worker because he held racist views.

The EAT further accepted that the logical consequence of its decision was that an employer who dismisses an employee who racially harasses another employee (but who would not have dismissed had the harassment not been of a racial nature) would be liable under the Act. This scenario is common; many employers will dismiss (often for gross misconduct) an employee who uses a racially offensive term to another employee, even where they would not have dismissed the employee for a highly offensive term which is not racial. Such an employee, it appears, now has a claim under the Race Relations Act. Although, it must be pointed out, the EAT doubted if such an employee would recover compensation.

Comment

Quite where this leaves the Act is open to question. How public respect for the RRA (and, by extension,

discrimination law in general) may be maintained if it is seen to protect members of fascist organizations from the consequence of their own racism is unclear.

S was given leave on the papers to appeal to the CA. It is hoped that the appeal may be heard in October. Notwithstanding the appeal, it is abundantly clear from the BNP website that this, for them, is not the end of the matter. They claim that they fully intend to use the results of this case against government and other bodies (trade unions being an obvious first target, particularly those, such as the GMB, with high-profile anti-BNP strategies).

It is perhaps ironic that when the Religion/Belief regulations were enacted, some commentators feared that adherents of repellent ideologies might obtain protection; the BNP was a quoted example. Following *Redfearn* it now appears that it is the 30 year old RRA which has provided such protection.

Finally, after over thirty years of European influence on English courts, it is clear that expecting the EAT to give anything resembling a purposive interpretation to legislation is most unwise.

Juliette Nash
North Kensington Law Centre

Notes and news

New definition of indirect discrimination and sexual harassment after 1 October 2005

The Employment Equality (Sex Discrimination) Regulations 2005 came into force on October 1st 2005. A new definition of indirect discrimination in the area of employment and vocational training and sexual harassment will apply to all incidents taking place on or after 1 October 2005.

Indirect discrimination will be defined as a provision, criterion or practice which applies, or would apply equally to a man, but

- **which puts, or would put, women at a particular disadvantage when compared to men,**
- **which puts her at that disadvantage, and**
- **which cannot be shown to be a proportionate means of achieving a legitimate aim.**

Sexual harassment will be defined as either:

- **unwanted conduct on the ground of the recipient's sex; or**
- **unwanted physical, verbal or non-verbal conduct of a sexual nature.**

In either case, the conduct must be done with the purpose of, or have the effect of, violating the person's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

These changes are to implement the updated Equal Treatment Directive 2002/73.

It is disappointing that once again the Government has chosen to do the minimum possible to implement the directive, thus leaving us with different definitions of indirect discrimination according to whether the alleged discrimination is in relation to employment or to goods, facilities and services.

Civil Partnership Act 2004

This comes into effect on **December 5th 2005**. Stonewall have just produced a guide to the new civil partnership law called **'Get Hitched'**. It is available from their website at
http://www.stonewall.org.uk/information_bank/partnership/civil_partnership_act/default.asp

New Duties for landlords, private clubs and public authorities outlined in the Draft Revised Part 3 Code of Practice

Part 3 of the Disability Discrimination Act 1995 has been amended by the Disability Discrimination Act 2005. A draft Code of Practice revises the existing Code to reflect the changes, most of which will come into effect in December 2006. These changes affect:

- public authorities, some of whose functions had previously not been covered by the Act;
- private clubs whose activities regarding their members had previously not been covered by the Act;
- the housing sector, with important new duties being placed on those letting, controlling and managing property.

There are no changes to the duties of those already covered by Part 3 of the DDA (for example service providers such as shops and restaurants).

The Disability Rights Commission is keen to receive comments on this draft Code of Practice. It is very important for the DRC to receive views in particular from those with an involvement in public authorities, the housing sector, private clubs and disabled people themselves.

To view the draft Code and for further details, please visit: http://www.drc-gb.org/thelaw/consultation.asp The consultation period ends on **14th November 2005**. All comments will receive careful consideration and help shape the redrafting of the Code for publication next Summer.

DTI launches its consultation on the new Gender Equality Duty

On October 4th, the DTI published its draft consultation on the Equality Bill 2005, setting out government proposals for the 'specific duties' that will deliver the gender equality duty in the public sector. The Gender Equality Duty will require public bodies to identify the big issues for sex equality in their services, employment and policy making. They will have to ask:

- **What are the priority issues for women and men in the services we provide?**
- **Do they have significantly different needs within some services?**
- **Are we paying men and women on our staff equally?**

The EOC is calling for specific duties to require public services providers to:

- **Set and publish goals on gender equality.**
- **Demonstrate that they have taken targeted and systematic action to achieve those goals.**
- **Conduct and publish gender impact assessments for all legislation and major employment, policy and service development.**
- **Take action to address the causes of the gender pay gap for their own staff.**

The duty could and should result in policies and services which better address the needs of both men and women. The consultation period ends on January 12th 2006. For further details see
http://www.dti.gov.uk/consultations/consultation-1540.html

DRC lawyers win Employment Team of the Year award

Lawyers from the Disability Rights Commission's (DRC's) legal team saw off strong competition from corporate lawyers to win The Lawyer magazine's Employment Team of the Year Award. The DRC won the award after winning the landmark legal case of *Archibald v Fife Council* in support of Scottish council worker Susan Archibald.

The Lawyer's judges described the DRC's success in Susan Archibald's case as 'a remarkable victory'.

DRC lawyers supported Susan Archibald in her three year legal case against her employers Fife Council. The Law Lords unanimously ruled that there is a duty on employers to make reasonable adjustments for disabled people if they become unable to carry out the job they are in due to their disability. This duty includes considering whether it is reasonable to transfer the disabled person to another vacant post, even if that post is at a higher grade.

Mrs Archibald now works as supervisor at Kelty Community Centre and as a youth worker, as well as studying part-time for an education degree at Dundee University.

Equality Bill

The Equality Bill 2005 will complete its report stage in the House of Lords on October 19th. The Government have conceded some important changes in response to the critical Briefings put out by organisations such as the DLA.

In part 1, the Commission for Equality and Human Rights section, our criticisms about the lack of independence of the new CEHR have been partially met by the deletion of all the clauses that provided that the Secretary of State could require the new Commission to take action. However, our recommendation that the CEHR should be directly answerable to Parliament and should be a non-departmental public body has not been taken up. In part 2, the religion or belief section, although the definition of indirect discrimination has been amended to bring it into line with definition for indirect discrimination in employment the Government are proposing a much more cumbersome definition for 'on grounds of religion or belief' which is likely to give rise to plenty of litigation. There is also a wide exemption in relation to the Government's immigration functions. In part 3, dealing with the new gender equality duty, this duty will be extended to include the prohibition of harassment in the exercise of public functions as well as a duty to eliminate harassment. However, these duties have not been expressly extended to cover transsexual and transgendered people as we had recommended.

When the report stage is completed the bill will go to the House of Commons. The full text of the bill is available at http://www.publications.parliament.uk/pa/ld200506/ldbills/002/2006002.htm

The full DLA Briefings on the Equality Bill 2005 are available on our website www.discrimination-law.org.uk

Northern Ireland Equality Commissions constitutional role to review the introduction of ASBO Legislation without an Impact Assessment

On 7th October 2005 the High Court in Belfast ruled on Peter Neill's Application for a Judicial Review (ref GIRC5372). This concerned the effect and application of section 75 and Schedule 9 of the Northern Ireland Act 1998, (which implemented The Good Friday Agreement) has constitutional importance. These provisions have the most comprehensive equality effect of any in the United Kingdom. They require all public authorities to pay due regard in carrying out their functions in relation to the promotion of equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status, sexual orientation, men and women, persons with and without disability, persons with and without dependants. They give the Equality Commission for Northern Ireland a key role in supervising public authorities' implementation of the duty.

The Commission criticised the Northern Ireland Office for introducing the ASBO legislation without ensuring a proper equality impact assessment. However the NIO challenged this conclusion even though the NIO expected the legislation to have a differential impact on young males.

The High Court rejected this attempt to curtail the Commission's powers, declaring that it had a didactic, collaborative, advisory, investigative, and reporting role in respect of the duty, which was not to be lightly curtailed by the court.

The Commission can now confidently exercise its clearly defined and critical constitutional role.

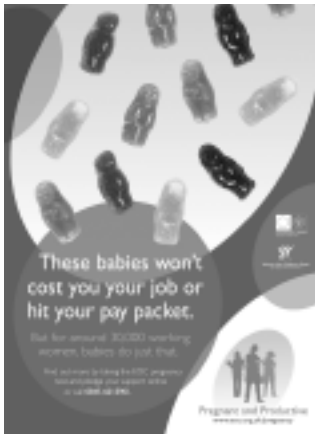
Department for Constitutional Affairs announces wider pool of applicants to be considered for judiciary

The Department of Constitutional Affairs has announced that judges will in future be drawn from a wider pool of applicants than ever before. The Government are setting up a Judicial Appointment Committee to oversee the appointment of Judges. The new Chair will be Baroness Prashar.

In future legal executives, two-thirds of whom are women, will be able to apply to become judges. This will open up a new route into the judiciary for thousands who have combined their legal training with their family responsibilities.

A judiciary which more accurately reflects British society will inspire far greater confidence in our legal system. Currently just 8.3% of the senior judiciary are female, and there is just one ethnic minority High Court Judge and none in the Court of Appeal or House of Lords. It is time for the barriers to access which prevent able people from rising to the top are tackled.

EOC Investigation into pregnancy discrimination



The EOC Pregnant and Productive campaign is calling for an end to discrimination against pregnant women. The EOC report ***Great Expectations*** sets out the findings of their two year investigation. They concluded that women sacked for being pregnant are losing out on £12m in statutory maternity pay every year and replacing these women costs employers £126m a year. Those who have been unfairly treated are far less likely to return to their old jobs, causing long-term damage to Britain's economic productivity.

The EOC noted that their investigation has exposed an unprecedented desire to find a solution from all quarters – human resources professionals, employers large and small, trade unions, as well as women and their families. The EOC is calling for the government to act to support employers and ensure fair treatment for pregnant women with three key recommendations:

- The provision of a written statement of maternity rights and responsibilities to be given to every pregnant woman at her first antenatal visit, with a tear-off copy to hand to her employer,
- Employers to be given a 'green light' to ask women to give a clear indication of their planned date of return from maternity leave, where this is possible,
- Greater support for business, specifically financial support for employees of small businesses and access to HR support for small employers.

The report is available at www.eoc.org.uk

Discrimination Law Association

The DLA AGM and annual social event has been arranged for
MONDAY 14TH, NOVEMBER 2005
beginning at 6pm.

The venue for the AGM is:
Irwin Mitchell Solicitors
150 Holborn
London EC1N 2NS

Wine, soft drinks and nibbles will be provided.

BOOK REVIEW

Partnership Rights, Free Movement and EU Law

Helen Toner, 2004, Hart Publishing, £40.00

In the last decade or so, there has been a clearly discernable social, political and legislative movement within Western Europe to recognise, and indeed regulate, an increasing variety of conjugal relationships. We tell ourselves that we are far from the time when marriage was the only form of cohabitation regarded as legal or of legal consequence. In this sense, Toner's book testifies to the progress that Western European society has made, but issues a timely reminder of how much further we ought to go.

The book focuses specifically on immigration and on the framework within which judicial decisions are made about the immigration rights which accrue as a consequence of particular kinds of familial relationship. Toner's analysis starts from the premise, and indeed ends up concluding, that Community Law has tended to reinforce rather than to jettison the pride of place given to heterosexual marriage over and above other forms of partnership. She points out that EC law only guarantees immigration rights to the married (heterosexual) partners of migrant EU citizens, leaving the immigration rights of same-sex couples, registered partners of both opposite sex and same sex, and other forms of partnership to the discretion of Member States. In the first chapter, she describes the diversity of national laws relating to partnerships and immigration rights. In Chapter 2 she provides an overview of currently applicable community law and sketches out recent developments such as the Amended Proposal to consolidate measures relating to residence rights of Member State nationals (COM(2003) 199). Classically, like so many other of the legislative and judicial initiatives she considers, this Proposal creates no obligation on the part of Member States to permit the entry of a registered partner unless the host state recognises such a partnership as equivalent to marriage. Moreover, the suggested obligation on Member States will merely be to 'facilitate' entry rather than to admit such partners. Therefore, the Proposal will only have 'teeth' in States which have already been sufficiently progressive as to recognise such partnerships and will do little to require other more conservative jurisdictions to treat them as a worthy basis for immigration rights.

Chapters 3 and 4 examine the impact of human rights principles on immigration policy. Chapters 5 and 6 consider other Community Law principles such as free movement and discrimination on grounds of nationality. In the first six chapters, Toner argues, in essence, that partners of all new and various kinds are entitled to protection by reason of EC and ECHR law. She suggests that the protected rights which ought to be afforded (but which have not always been given effect to by the Community and its organs) require justification in order to be interfered with. Chapter 7 analyses the extent to which there is a proper justification for the kinds of interference referred to in the immigration sphere. Chapter 8 details Toner's conclusion that there is a need for the ECJ and policy-makers to rise to the challenge of properly protecting basic EU law principles in the enactment of legislation and in the proper implementation of such legislation in accordance with those principles.

Quite apart from giving clear guidance to immigration practitioners who have to grapple with the labyrinthine framework created by domestic, ECJ and ECHR jurisprudence in respect of 'family' reunification and partnership rights, this book contains a careful examination of at least two issues of general importance to equality law. Firstly, it urges a reconsideration of the meaning of the word 'family' in today's world; a reconsideration which, she implores, must necessarily involve a departure from the traditional notion tied to

heterosexual marriage. It stresses the importance of recognising the 'family' as a concept which embraces non-traditional coupledom and highlights the fallacy of the ECtHR approach of treating same-sex relationships as giving rise to mere 'private-life' rights rather than 'family-life' rights. It further focuses on the absolute necessity of regarding the reunification of the 'family', in its expanded rather than traditional sense, as a social entitlement which, if denied, is detrimental to social stability in general. However, Toner is careful not to argue for an all encompassing EU wide family law, not least because that may be beyond the scope of the Treaty.

Secondly, the book locates the 'protected status' which ought to be given to familial relationships, properly defined, securely within the confines of existing principles of EU law. It is unfortunate that the book, because of the timing of its publication and the limit in its scope, does not deal with the extent to which the new Civil Partnership Act 2004 reinforces the hierarchy of relationship recognition in the United Kingdom. Nonetheless, it is a thoughtful and clear statement of the law as currently understood as well as a careful analysis of how the law ought to be drafted and applied. It is essential reading for immigration practitioners and those with a broader interest in equality law.

Ulele Burnham
Doughty Street Chambers

Briefings

Notes and news

Abbreviations

CA	*Court of Appeal*	*ECJ*	*European Court of Justice*		*Discrimination*
CEHR	*Commission for Equality & Human Rights*	*ED*	*Employment Directive*	*PWD*	*Part-time Workers Directive*
CLA	*Civil Liability (Contribution) Act 1978*	*EOC*	*Equal Opportunities Commission*	*MPLR*	*Maternity and Parental Leave Regulations 1999*
CRE	*Commission for Racial Equality*	*EPD*	*Equal Pay Directive*		
DDA	*Disability Discrimination Act 1995*	*EqPA*	*Equal Pay Act 1970*	*OML*	*Ordinary Maternity Leave*
DRC	*Disability Rights Commission*	*ERA*	*Employment Rights Act 1996*	*PCP*	*Provision, Criterion or Practice*
EAT	*Employment Appeal Tribunal*	*ET*	*Employment Tribunal*	*RD*	*Race Directive*
EC	*Treaty establishing the European Community*	*ETD*	*Equal Treatment Directive*	*RRA*	*Race Relations Act 1976*
		HL	*House of Lords*	*RRAA*	*Race Relations (Amendment) Act 2000*
ECtHR	*European Court of Human Rights*	*HRA*	*Human Rights Act 1998*	*SDA*	*Sex Discrimination Act 1975*
ECHR	*European Convention on Human Rights*	*ICERD*	*International Convention on the Elimination of all forms of Racial*	*SSD*	*Social Security Directive*
				UN	*United Nations*