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Editorial *Are you ready to be inspired?*

This was the question posed by Judge Albie Sachs, as he began his keynote speech to the DLA Conference in December 2005. Using examples where the South African Constitutional Court had resolved difficult equality cases, he certainly gave us every reason to say: 'Yes!'

The Conference, reviewed below (see *Briefing 391*), was timed to coincide with the deliberations of the Discrimination Law Review, for which the terms of reference include

> *A consideration of the fundamental principles of discrimination legislation and its underlying concepts and a comparative analysis of the different models for discrimination legislation.*

One tension surfacing in our equality laws again and again, is between formal and substantive equality. Equality laws were initially founded on the idea that all people should be treated equally, women the same as men, black people as white people, and so on. But this principle does not always produce real or substantive equality. It is therefore understandable that as the case-law has developed, practitioners and academics have both pointed to the need to recognise, and take account of, historic disadvantage, in order to achieve a truly just outcome.

Of course, existing laws offer some scope for positive action to rectify specific instances of under-representation, but positive action is almost always regarded as exceptional. Only in the DDA – with its many shortcomings – can we see an approach in which the balance is tipped in favour of the disadvantaged. So we must argue one point for the Review – that past disadvantage is always taken into account, at the time that the equal treatment principle is applied. This is essential, if the equal treatment principle is not to serve to re-inforce existing inequalities. This takes us to *Redfearn v Serco* (see Briefing no 390) where the EAT seems to have forgotten the purpose of equality law altogether!

Shortly after Mr Redfearn had begun his employment as a driver for disabled children and adults in Bradford, it came to light that he was standing for election as a Councillor for the BNP. The BNP constitution says that it :

> *is wholly opposed to any form of racial integration between British and non-European peoples...[and is]... committed to stemming and reversing the tide of non-white immigration and to restoring, ... the overwhelmingly white makeup of the British population that existed in Britain prior to 1948.*

As 70-80% of Serco's clients and 35% of their staff, were of Asian origin, it is hardly surprising that they were seriously concerned!

Serco, thinking this gave rise to unacceptable health and safety issues, dismissed Redfearn, but he claimed the dismissal was 'on racial grounds'. Thus remarkably he sought to invoke to his advantage, an Act, whose purpose he bitterly opposed. It seems bizarre that he should argue a dismissal for reasons relating to the promotion of racial segregation, is contrary to the RRA, but the EAT, referring to the *Showboat* line of cases, agreed.

Surely this is not what Parliament envisaged when the RRA was passed. The problem, however, is that the Act has no clause or preamble that explicitly says what is its purpose or how it should be interpreted. The text simply provides protection for those who are less favourably treated on racial grounds. Hence, a lawyer applying a literal interpretation of the words of the statute, blind to Parliament's purpose, might conclude it protects anyone adversely treated for a reason linked to race, whether the reason is advocating racial segregation or challenging the ill treatment of a black colleague. The EAT applied a literal interpretation ignoring existing HL case-law saying the RRA was passed to remedy a 'very great evil'. The Review must make such judical amnesia impossible; but how?

One way is an explicit purpose clause, setting out the objective of the legislation and requiring consistent judicial interpretation. There are other additional ways. Both Canada and South Africa have adopted a different definition of discrimination, requiring complainants to show membership of a class of historically disadvantaged persons. Adding this to our law would underscore its purpose. Both ideas seem worth further consideration.

The Court of Appeal will resolve some of these issues in March when it hears *Redfearn*. To get it right they must turn to the case law on the purpose of the RRA, and ensure that they follow the Preambles to the Race Directive.

This case shows that, if our law is really to secure substantive equality, it is not just DLA members who need to be inspired, but also our judges and tribunals!

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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A new vision for equality law?

'Re-imagining Equality: A vision for the future' was the title of the DLA's 6th National Conference held in London on December 11th 2005. The conference was timed to coincide with the UK government's review of equalities and discrimination law and was intended to be a springboard for debate, and possible consensus, on what a new framework for anti-discrimination legislation should look like. The breadth of knowledge and experience of speakers – lawyers and non-lawyers, practitioners and academics – and participants did provide a raft of ideas. We were particularly privileged to be the beneficiaries of the luminary insight and wisdom of our keynote speaker, Judge Albie Sachs of the South African Constitutional Court. Looking at the feedback from conference participants, it is clear to us that the conference did, as we had hoped, inspire and provoke. The next stage is to transform the ideas generated at the conference into concrete submissions to the Discrimination Law Review which is scheduled to produce an initial report in Spring 2006.

The over-arching concern of all of the speakers was the need for more comprehensive, inclusive, and enforceable guarantees of equality. This concern was founded upon incontrovertible evidence that, despite decades of anti-discrimination laws in the UK, many of those who experience societal disadvantage remain outside the existing incoherent legislative protection. Moreover, even those who might benefit from express statutory prohibitions[1] (i.e. those who can complain of discrimination based upon race, sex, disability, religion, sexual orientation and, in the near future, age) are beset by (often insurmountable) problems of proof and inadequate remedial measures.

The common theme running through many of the presentations was the notion of the need for a robust reconfiguration of UK anti-discrimination law. What appeared to emerge was a consensus that 'discrimination' ought not to be narrowly characterised as difference in treatment on specified prohibited grounds. Rather, it ought to include the social exclusion and disadvantage faced by individuals or groups based on aspect(s) of their identity. Similarly, the promotion of 'equality' by legislative means ought to include the removal of impediments to an individual's or a group's full participation in the life of the community by both positive and negative measures which are part of a broader societal aim of achieving integration, social cohesion or 'solidarity'.[2]

Conference speakers examined both the large (conceptual) and small scale changes to domestic equality law necessitated by a realistic analysis of the successes and failures of current law and practice. At the level of fundamental principles, the presentations of Judge Sachs, Professors Aileen McColgan and Sandra Fredman and Karon Monaghan, highlighted the usefulness of the approaches to equality in the Canadian and South African legal systems. Both of those jurisdictions have entrenched constitutional equality guarantees[3] which take precedence over other legislative provisions.[4] Both recognise historical

1. It is, of course, correct that the equality guarantee provided by Article 14 of the ECHR incorporated by the Human Rights Act 1998 can extend beyond the established prohibited grounds. However, the Article 14 protection is itself limited in the sense that it is merely an entitlement to equality of treatment in respect of the enjoyment of convention rights and is not a free standing right and so does not apply in respect of the law more generally.

2. See Barnard, C 'The Future of Equality Law: Equality and Beyond', pp.213-228 at pp.224-226 in The Future of Labour Law, Eds, Barnard, Deakin & Morris, Hart Publishing, 2004 for more on this and see also Collins, H, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16.

3. Article 9 of Chapter 2 of the South African Constitution provides:

Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection

disadvantage of particular groups and require positive or remedial measures to be taken by the state. Recent UK legislation and legislative proposals do indicate a willingness on the part of the government to take more seriously the potential value of positive equality duties (e.g. the equality duty in s.75 of the Northern Ireland Act 1998, the public authority duty contained in s.19B of the RRA, introduced into the DDA by s. 3 of the Disability Discrimination Act 2005 and the similar duty on public authorities in the shortly to be enacted Equality Act 2005). However, in GB these duties do not at present apply across the board and effective remedies will, it appears, continue to be a stumbling block in the absence of an enforceable right comparable to that in the Canadian and South African legislation. Protocol 12 of the ECHR, which would offer an equality guarantee in respect of all areas of legal regulation, has yet to be ratified by the UK government. The incorporation of such a provision in the UK would help to create an equality law framework which is coherent, adaptable and effective.

The other concept, important to substantive equality, which several speakers abstracted from the Canadian and South African experiences, was that of 'dignity'. Equality in these jurisdictions is inextricably bound up with the question of whether the act or actions in question threaten or imperil the dignity of the individual or group of complainants. So, as Judge Sachs indicated in his tour of significant equality cases in the South African Constitutional Court, whether the issue to be adjudicated upon is extraordinary rendition of terrorist suspects or the right of gay people to marry, the real equality question is whether the dignity of the individual is being enhanced or suppressed. Where there is historical and structural disadvantage, the concept of 'dignity' may require positive measures to be taken to secure real equality. Such measures will not, as Judge Sachs reminded us, violate the fundamental principle of equality once it is recognised that equality does not simply mean shallow equivalence. The full participation of disabled persons, minority ethnic individuals and communities, religious minorities, women, older and younger workers and gay men and lesbians, for example, may require positive measures which go way beyond the scope of the existing positive duties, precisely because of the historical disadvantage faced by these groups. An approach based on 'dignity' was echoed in the views expressed on positive action by Sandra Fredman and Lee Jasper.

The discussions about a new concept of equality – i.e. a concept which expressly encompasses notions of humanity, respect and dignity – led, almost inexorably, to a discussion about provisions which might better reflect the multiple ways in which dignity might be imperilled and/or of disadvantage suffered. Since individuals and communities are multi-dimensional, equality law should protect, reflect and take account of this. In this connection, many of the presenters highlighted the failure of formal legislative equality protection (such as the proscription of direct discrimination on particular grounds) to tackle the multiplicity of ways in which discrimination may affect an individual's lived experience. Aileen McColgan and Pragna Patel concentrated on the issue of multiple-discrimination and pointed to the ways in which the 'strand' or 'ground' based approach (e.g. separate statutorily defined grounds upon which discrimination is outlawed) can operate to splinter an individual's experience of disadvantage.[5] Though common to the anti-discrimination regimes in Canada, Ireland and the United States, the grounds based approach may be found wanting in a number of respects. It may fail to acknowledge, for example, that the discrimination

(3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
Article 15 of the Canadian Charter of Rights and Freedoms provides:
1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

4. See Moon, G, *'From Equal Treatment to Appropriate Treatment: What lessons can Canadian Equality Law on reasonable accommodation teach the UK.'*, see www.justice.org.uk/ourwork/discrimination/index.html for more on this. Note also that the provisions of Articles 20 and 21 of the EU Charter contain a similarly broad equality guarantee.

5. See also McColgan, A *'Reconfiguring Discrimination Law'*, forthcoming publication.

experienced by a disabled, Asian woman is not founded upon any one of those grounds alone but upon their coalescence in the experience of the individual complainant. The benefits of moving away from a 'prohibited' grounds approach would be manifold: claims would no longer have to be shoe-horned into existing grounds and claimants of multiple discrimination would not be required to establish each individual ground in order to enable a finding that each was a factor in the discriminatory treatment complained of.

The deficiency of an approach that prohibits discrimination only on specified grounds as a coherent inclusive scheme is perhaps best illustrated by the judicial interpretation of the Race Relations Act 1976 (RRA) and the Sex Discrimination Act 1975 (SDA). Creative interpretation of the RRA operated to permit claims made by Sikh and Jewish claimants but failed to extend, some would say arbitrarily, RRA protection to Muslims or Rastafarians who were complaining of equivalent forms of exclusion and disadvantage. This expansive impulse, however limited, was not reflected in the judicial rejection of attempts to use the SDA to prohibit discrimination associated with sexual orientation. As Aileen McColgan notes, the grounds-based approach tends to 'set in stone institutional solutions to problems of a previous era and the courts may be unwilling, or perceive themselves as unable, to shape the interpretive process so as to make such legislation fit for current purpose.'[6]

Nonetheless, there are, as many conference participants suggested, a number of potential pitfalls. The most important possible disadvantage of a 'non-strand' approach for the communities affected by discrimination and disadvantage is the potential loss of a clear public statement that discrimination on specified grounds is, wrong and must be prohibited by law. Very careful thought will need to be given to the resolution of the difficulties thrown-up by a 'non-strand' approach in submissions to the Discrimination Law Review.

The other issue of import addressed at the conference was that of the ways in which the purchasing power of the state could be harnessed to achieve greater equality in the workplace and in the provision of services to the public. It is, or should be, a major part of the way in which public authorities meet their statutory equality duties. Professor Chris McCrudden preferred the concept of 'linkage' to conditionality, and illustrated how governments around the globe had successfully used linkage between their participation in the market as purchasers and the advancement of social and ethical goals. Alan Butt demonstrated from the experience of the West Midlands Forum that where there is political will, public authorities can improve the practice of private sector employers. A group of local authorities have for a number of years applied an agreed set of race equality standards in their selection of potential contractors; once approved against these standards a contractor will be on a list shared by all authorities within the group. The speakers outlined how this linkage, the incorporation of equality considerations, can be built into the procurement process at each stage. While EU rules seek to regulate procurement by public authorities in member states in order to ensure transparency and fair competition, there is an increasing awareness, reflected in new EU legislation and guidance, of the linkages that are possible, and desirable, between public procurement and the achievement of EU social policies.

The recent EC equality directives[7] require the UK to have sanctions for discrimination that are effective, proportionate and dissuasive. The session on new remedies reinforced the requirement for stronger legislative guarantees. Again in this regard there are useful lessons from other jurisdictions. Karon Monaghan illustrated the unfavourable comparison between our current domestic remedial framework and those in South African and Canada, where the constitutional guarantees can be used to secure effective remedies. There are clear and significant obstacles to proper enforcement and no mechanism to sanction discriminatory conduct that falls outside of the proscribed grounds. Karon Monaghan and Mark Bell highlighted the approaches adopted elsewhere including the use of specialist equality courts, ombudsman systems, mandatory interim relief and other more punitive sanctions which might be used to ensure compliance with the principles of equality.

The conference raised a plethora of serious issues of

6. Ibid.

7. Article 15, Directive 2000/43/EC (Race Directive); Article 17, Directive 2000/78/EC (Employment Directive), Article 7, Directive 2002/73/EC (Equal Treatment Amendment Directive) inserting new Article 8d into Directive 76/207/EEC

391 principle, practice and policy with which we will have to grapple before the conclusion of governmental reviews of equality and discrimination law. Regrettably, the new Equality Act 2005 makes no attempt to create the coherence of protection favoured and recommended by most practitioners, interests groups, individuals and academic commentators. More over, the creation of the CEHR in the absence of a thorough revision of the existing statutory schemes appears to be a squandered opportunity. However, many of the issues covered by the conference – fundamental principles harmonisation, positive duties, and consistencies of definitions – are issues which the DTI Women and Equality Unit have identified as key areas of work in the Discrimination Law Review. There therefore remain unique opportunities to influence the legislative priorities in the coming year and we hope that having 're-imagined' equality, DLA members and others concerned with effective protection and enforcement of equality will engage actively in the process of 're-fashioning' it.

Ulele Burnham, Doughty Street Chambers,
and **Barbara Cohen**

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Statutory Dispute Resolution Procedures reviewed

The statutory dispute resolution procedures contained in the Employment Act 2002 (EA) and the Employment Act 2002 (Dispute Resolution) Regulations 2004 have now been in force for over a year. On 26th October 2005, the DLA held a practitioners' group (PG) meeting to exchange information and discuss early experiences. The discussion was very helpfully led by Naomi Cunningham and is summarised below under her headings. Due to the ongoing difficulty of interpretation and application of the procedures, the content below should not be taken as legal advice. References to regulations are those contained in the Employment Act 2002 (Dispute Resolution) Regulations 2004.

Positive experiences

The general consensus at the PG meeting was that the procedures are a disaster, hated equally by both sides and the tribunals. It was difficult to think of positive experiences. In theory, internal grievances provide an opportunity for resolving workplace problems before views get entrenched in tribunal proceedings. Unfortunately, discrimination grievances have rarely been successful in practice. It is too soon to say whether the statutory framework will increase the likelihood of a successful outcome, but this seems improbable. On the other hand, the RNIB said they had negotiated reinstatement in a couple of recent cases and felt that the employers may have engaged more with the grievance process because it was a statutory procedure. Nevertheless, the RNIB did accept that its success in handling grievances may be because of the nature of the organisation it is and the issues involved. Grievances concerning disability discrimination may feel less controversial to an employer than those concerning, for example, race discrimination.

The only other benefit is the possibility of obtaining more compensation because of the 10 – 50% uplift if the employer fails to follow the correct procedures. In turn, this can give scope for negotiation. Settlement figures usually comprise many elements (loss of earnings, injury to feelings, interest etc) and adding a range of figures for possible uplift provides one more item to bargain over.

What is a grievance letter?

An employee cannot bring a tribunal case for discrimination[1] unless s/he has previously sent his/her employer a step 1 statement of grievance. The statutory procedure requires the grievance to be in writing.[2] The regulations define a grievance as a complaint by an employee about action which his/her employer has taken or is contemplating taking in relation to him/her.[3] It seems, therefore, that a grievance simply

1. Except regarding dismissal – see below.
2. EA 2002 Sch 2 para 6.
3. EA 2002 (DR) Regs 2004, Reg 2.

amounts to a written complaint. There is no formal requirement that the complaint is labelled a 'grievance' nor that the employee sets out a request to the employer to investigate or take specific action.

The general impression of those at the PG meeting was that tribunals are taking a fairly relaxed view, as long as the letter seems to be making a complaint. This is supported by some of the early reported EAT cases. In *Mark Warner Ltd v Aspland* [2006] IRLR 87 the EAT accepted that letters before action written by a solicitor was sufficient to amount to a grievance because it set out the employee's complaints. Similarly, a letter of resignation setting out an employee's complaints can be construed as a grievance, see *Shergold v Fieldway Medical Centre* [2006] IRLR 76 and *Galaxy Showers Ltd v Wilson* [2006] IRLR 83. Sending a draft tribunal claim to the employer (before lodging the claim) could at the same time amount to sending a grievance letter. Under reg 2(2), it is irrelevant if a written communication (e.g. the step 1 statement of grievance) also deals with another matter.

Given that many grievance hearings are a charade, there could be a temptation to write a letter which is not labelled 'grievance', in the hope that the employer will ignore it and the employee will eventually receive an uplift on his/her compensation. However, those present at the PG meeting agreed this was too risky. Indeed, a higher uplift is likely to be awarded where a clearly labelled grievance letter is ignored.

If the employee has already written a vague complaint letter before seeking advice, but it is not labelled 'grievance', the PG meeting felt the best course of action was to write another, clear, grievance letter. However, since the PG meeting, further cases have been reported, which indicate that such a cautious approach may not be essential.[4]

Without prejudice letters

One reason why a letter may not stand as a grievance is because it is 'without prejudice'. A letter can be considered 'without prejudice' even if it is not labelled as such. There is a risk that a letter becomes 'without prejudice' because it amounts to a negotiation aimed at a settlement of a dispute. However, as stated in BNP *Paribas v Mezzotero*[5], the fact that the employee has raised a grievance does not necessarily mean s/he is 'in dispute' with his/her employer, as the grievance may be upheld.

Content of the grievance letter

The PG meeting felt the safest content for a grievance letter was to set out particulars in the same detail as in a tribunal claim. It was not thought to be essential under the procedures to state what the employee wants out of the grievance. However, tactically, it can focus the employer's mind or lead to a successful outcome if an achievable solution is proposed.

Employment Act 2002, section 32(4): late grievances

Usually, the step 1 grievance letter should be sent to the employer before the tribunal claim is lodged. If this is not done, the claim will be returned by the tribunal. However, as long as the claim was lodged within the normal time-limit, the time-limit for relodging is extended by 3 months. Meanwhile, under Employment Act 2002, section 32(4), the employee must send a grievance letter to the employer within 1 month of the original time-limit.

The problem is that the rules do not appear to give the tribunal any discretion to allow a late grievance. This is a particular problem in discrimination cases, where employees often have complaints going back for some time. Although tribunals have a just and equitable discretion under the discrimination statutes to allow in late claims, the claims may be blocked under section 32(4) because the related grievance is late.

Some creative arguments may be needed to get around this blockage, which was clearly not intended by the government.[6] The Disability Rights Commission are testing the point in the EAT with *BUPA Care Homes Ltd v Mrs D Cann* which has been heard recently. Meanwhile, Naomi Cunningham felt the easiest way to get around s32(4) may be to disapply the procedure altogether, e.g. by relying on the exception in reg 11(3)(c) that it was not practicable for the employee to start the grievance procedure within a reasonable period. Unfortunately this seems stricter than the 'just and equitable' test for extending time-limits for lodging a tribunal claim, and, as yet, we have no idea how strictly the reg 11 exception will be interpreted.

4. See *Briefing 393* below.

5. [2004] IRLR 508, EAT.

6. For some ideas, see Tess Gill's article in the Discrimination Lawyers' Association *Briefing 348*, February 2005.

392 Tactical considerations in the grievance process

A number of practical problems during the grievance process itself were discussed at the PG meeting. In one of the reported cases (*Noskiw v Royal Mail Group plc* 786 IDS Brief 7, ET), the employee had not brought a grievance because the employer had made it clear to him that if he did raise such a grievance, it would not be dealt with. The employment tribunal said the employee should have written his grievance letter anyway. But could he have argued under reg 11 that his employer's statement made it not practicable to follow the procedure?

In several practitioners' cases, the employee has discovered that the employer intends to bring a lawyer to the grievance hearing. This is intimidating for the employee, but also a worrying opportunity for the employer to pin down the employee with a view to the impending tribunal case. If the employee really does not want to go, the best thing to do is to write the grievance letter (so s/he is not debarred from bring a case), but not attend the meeting. The employee must understand there is a risk that compensation will be reduced if s/he wins the case. To avoid a reduction of compensation, the employee could try to fit within one of the exceptions to the procedure, for example, the harassment or significant threat exceptions. However, these are very precisely worded. For harassment, it must be shown there has already been harassment and that attending the hearing would cause further harassment. Regarding threat, it would have to be shown that 'mental' threat is included. It is doubtful whether the presence of a lawyer would in itself be enough to amount to harassment or threat. Another argument is that this could be 'exceptional circumstances', where no deduction of compensation should be made.

Tactically, it may be best to engage in correspondence with the employer and see what tone and justification emerges by way of reply. For example, the employee could initially just ask for the lawyer not to attend. If the employer insists, the letter should ask the reason for the lawyer's presence, whether s/he will be asking questions and whether the employee can bring his/her own lawyer. As a final resort, the employee could say, 'I will go ahead with the meeting if no lawyer attends, but otherwise I am not willing to attend'.

Another possible scenario is that the employee starts the statutory grievance procedure but the employer requires him/her to go through a more complex grievance process. If the employee fails to co-operate with the non-statutory elements, can his/her compensation be reduced? Section 31 suggests compensation is reduced due to non-compliance with the *statutory* procedures. Moreover, the EAT in *Shergold* (above) states that the statutory rules do not require any contractual procedure to be complied with.[7] On the other hand, a tribunal may be upset if an employee refuses to cooperate with a contractual grievance procedure and may find other ways to penalise the employee. As a general rule, it is safest to go through the procedure having started it.

Finally, there was some discussion regarding whether the employee could have compensation reduced because s/he started his/her tribunal case before the grievance procedure was finished. This concern arose because of the wording of section 31(2). This states that the employee's award can be reduced if '(b) the statutory procedure was not completed before the proceedings were begun, and (c) the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employee (i) to comply with a requirement of the procedure, or (ii) to exercise a right of appeal under it'.

Some practitioners interpreted this to mean that compensation would be reduced if a claim was lodged more than 28 days after the statement of grievance was sent to the employer, but before the grievance was heard or the employee had appealed. However, this interpretation has been criticised as incorrect, because it is possible that – through no fault of any party – the procedure has not been completed by the time the time-limit for lodging a tribunal case expires. Further, the only specific requirement, albeit in the context of whether a case is barred altogether, is to wait 28 days after sending the step 1 statement. The answer may lie in subsection (c) i.e. that compensation is only reduced if the reason for non-completion is the employee's failure to comply with a requirement of the procedure or to appeal. If the procedure is moving happily along, with the employee complying with all the requirements and notifying an appeal at the appropriate time, then the reason for non-completion at the time proceedings started is not any failure by the employee, but simply because the employee chooses to start the case as the procedure goes along.

Not all practitioners present agreed with this

7. See *Briefing 393* below.

argument, but there was a consensus that section 31(4) could be a solution where waiting any longer would mean missing a time-limit. Under section 31(4) there is no adjustment to compensation where 'exceptional circumstances' would make it 'unjust or inequitable'.

Discriminatory dismissal

The PG meeting discussed whether it is necessary to take out a grievance for a discriminatory dismissal. It seems that in the early days, tribunals were returning claims where no grievance had been taken out in these circumstances. Now they seem to be accepting these claims. Naomi Cunningham's firm view is that it is not necessary to grieve. This is because reg 6(5) clearly states 'Neither of the grievance procedures applies where the grievance is that the employer has dismissed or is contemplating dismissing the employee'.

Nevertheless, some practitioners are playing safe. Certainly where there is a grievance letter anyway concerning pre-dismissal actions, it is simple to add in a complaint about the dismissal.

Compensation: the uplift / reduction

The PG meeting discussed how a tribunal was likely to assess how much uplift or reduction to apply. The likely method was thought to be according to the nature and impact of the default. For example, under the statutory dismissal and disciplinary procedure (DDP), where an employer withholds wholly unknown allegations and the employee is unable adequately to defend him/herself at the hearing as a result, uplift is likely to be 50%. On the other hand, if the allegations are obvious to the employee anyway, e.g. because s/he has been caught fighting, the uplift may only be 10%. This approach would be similar to that for making a protective award for failure to consult in collective redundancy dismissals. Taking the analogy further, the tribunal should start at 50% and work downwards only if the employer can show appropriate mitigating circumstances.

It is unlikely that the tribunal would be influenced purely by the seriousness of the discrimination, because the uplift of compensation is designed to address lack of procedures. However, the two issues may be connected, as blatant and cynical disregard of the grievance procedure is often regarded by tribunals as indicative of serious discrimination.

It was agreed that tribunals should not be influenced by the size of the overall award, but they may unconsciously be reluctant to award 50% uplift on an already large award.

There can be tactical advantages in allowing employers to fail to meet their obligations under the procedures, since this will lead to increased compensation. Some advisers may continue to press reluctant employers to hold grievance and disciplinary meetings, without thinking through the purpose of this. Obviously if the employee thinks s/he has a genuine chance of a successful grievance or appeal outcome, that is a different matter. But pushing the employer into going through a charade is pointless.

In one practitioner's case, for example, an employer had written back to an employee who sent a grievance letter, erroneously saying that the statutory grievance procedure 'does not apply'. If the employer is clearly mistaken, is there a risk of reduced uplift on the compensation, if the employee does not say so? The PG meeting felt that it was not the job of the employee or his/her representatives to advise the employer about the procedures and the tribunal should not penalise the employee for not doing so. Apart from anything else, an employer ought morally (and probably contractually) to hear a grievance anyway, regardless of whether the statutory procedure applies.

If the employee is dismissed without following the statutory DDP, should s/he appeal? If s/he does appeal, is there a risk that the employer can make good the procedural breach? It was thought not, but there were mixed views as to whether the amount of uplift might be reduced if the employer belatedly conducted a fair appeal.

Assuming the employer does go through the correct DDP and dismisses the employee, the employee risks a reduction in compensation if s/he does not appeal. What happens if the employee has good reasons for not wanting the job back? Would these amount to 'exceptional circumstances' whereby compensation is not reduced? Or is it safest to appeal but to state 'I am doing this to clear my name' or 'I am appealing as required by the regulations'? This in turn leads to the difficult question of what happens to the 'dismissal' if the employee is in fact reinstated on appeal.

Tribunals, time-limits and listing

It is thought that the statutory dispute resolution procedures may not apply in relation to an individual

392 respondent. If this is correct, a problem could arise for example, in harassment cases, where the employee brings a grievance against the employing organisation. The time-limit is extended by 3 months against the employer but not in respect of the individual respondent. It is not possible to lodge two separate tribunal claims and consolidate them later, because a claim cannot be made against an individual respondent alone. Therefore the entire claim needs to be lodged within the original 3 month time-limit.

Tribunals seem to be listing cases for longer than previously, and this seems to coincide with the introduction of the statutory dispute resolution procedures. The reason may be that they are allowing time to deal with the complexities of the procedures. However unrelated factors may also be behind the longer listings, e.g. incorporating time to make their decisions.

Longer hearings mean higher costs, which are not covered by legal help. There are also the additional costs of going through the procedures in case preparation and dealing with cases wrongly rejected by the tribunals. These preparation costs will all be claims on the LSC contract where the client is eligible.

What is to be done

Adam Griffith of the Advice Service Alliance obtained a quarterly break down of the employment tribunal figures for 2004/5. These do show a substantial reduction during the latter two quarters in claims lodged in every jurisdiction. This is concentrated in claims where a statutory grievance would be required. Discrimination cases are down by over 50%. It is too soon to say whether this will be a lasting effect, but it is certainly very worrying.

The DTI have said they will review the procedures after two years, but what is needed is more information. The TUC are considering a survey and the Employment Tribunal National Users' Group have discussed setting up a working party. The Users' group felt it would be useful to break down those whose claims have been rejected by reference to race, sex and disability, bearing in mind the public duty which will cover the tribunal system in all areas by the end of 2006. The PG meeting felt it would be even more useful if employees deterred from bringing cases altogether could be measured.

Following from this meeting, the DLA Executive Committee has decided to circulate a research questionnaire regarding practitioners' overall experiences of the statutory dispute resolution procedures in discrimination cases. The results of the research will be used to feed into the DTI review. Please look out for the research questionnaire in the Spring. Your input will be vital.

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393 # Briefing 393

Jarndyce v Jarndyce revisited

Bleak House has recently been back on television and the story of the interminable case of *Jarndyce v Jarndyce* shown with all its awful consequences. It was timely to remind us what misery procedural wrangling causes, as this article which reviews the first eighteen months of the new Dispute Resolution provisions shows. It is clear that there are numerous traps for the unwary and in a system where 'Legal Help' only covers case preparation and is only available to a limited class of people, there will still be a large group of claimants who will stumble at the first hurdle.

However, not all is lost. In *Grimmer v KLM Cityhopper UK* [2005] IRLR 596 HHJ Prophet held that the rules of procedure cannot cut down an employment tribunal's jurisdiction to deal with a complaint which the primary legislation providing an employment right empowers it to determine. Where there is a conflict between primary and secondary legislation, the rules must give way. HHJ Prophet said:

> *What is the purpose of insisting through rules that a failure to provide all the 'required information' can lead to a claim not being accepted as a valid claim? If the*

primary responsibility for making judicial rules rests, not with the judicial body but with the executive, there is a danger that executive objectives may gain precedence over the interests of justice.

The President Burton J. took a similar view. In *Richardson v U Mole* [2005] IRLR 668 he emphasised that these new rules should not be allowed to degenerate into injustice, and called for their speedy review. These comments reflect the mounting frustration of the judiciary. The apparently draconian consequences of breaches of the rules have persuaded tribunals to steer a middle course between literal interpretation and inconsistency, but in doing so a number of problems have been thrown up in the case law.

A grievance by another name

As set out in Briefing 392 a grievance is defined as a complaint in writing. Save in certain limited cases a complaint must be made before a claim form will be accepted by the tribunal. The new pre-acceptance procedure is producing some surprising results where tribunals are rightly anxious to ensure that parties are not debarred from bringing their claim. Claimants have successfully argued in a number of cases that a letter before action written by a solicitor can amount to a grievance. Similarly, resignation letters have been held to amount to a grievance for the purpose of the statutory procedure. This produces a paradox in the workplace, issuing a grievance has traditionally implied that the employee expects some resolution to his complaint, but what does an employee expect and an employer understand when a letter before action is sent or a letter of resignation is tendered?

With the presentation of a grievance now representing a crucial step in the bringing of proceedings, it is hardly surprising that the manner in which the grievance procedure might be triggered has been controversial. After a number of widely-circulated ET decisions on the point, the first cases started to reach the EAT this Autumn.

The first of those cases was *Commotion Ltd v Rutty* UKEAT/0418/05 (13.10.05). In that case the Claimant had made an informal request for flexible working, which had been rejected. She then made a formal request under s.80(f) ERA. Her application was considered by her employer and rejected. Her appeal was also rejected and she then resigned and claimed constructive dismissal. The ET found that the letter making a formal request for flexible working constituted a grievance letter. The EAT concluded that when the Claimant made her application for flexible working, she was also complaining that her informal request had been refused. The ET was entitled to consider that as a grievance within the statutory procedure.

The judgment in *Thorpe & Soleil Investments v Poat & Lake* UKEAT/0503/05 (18.10.05) seems to have been comparatively straightforward. Within three weeks of starting work as a house manager and an estate manager of the Respondent's country home, the Claimants wrote a seven page letter to the Respondents chronicling a 'litany of complaints' and indicating that they were quitting forthwith. Another nineteen days later their solicitors wrote a letter of claim intimating a breach of contract claim. The complaint was presented to the ET a little over three months from the earliest date of termination. The EAT upheld the ET's decision that the Claimant's resignation letter had amounted to a grievance.

The decision in *Galaxy Showers Ltd v Wilson* [2006] IRLR 83 was on a preliminary hearing only. Three weeks before his resignation the Claimant had sent a letter to his employer, saying that unless his complaints were resolved, he would resign. The EAT pointed out that the statutory definition of a grievance required no particular formality and no indication of an intention to follow the complaint through to a grievance process or a further meeting. It was necessary simply to identify whether there had been a complaint. Despite the acknowledgement in their response that the Claimant had raised the issue in writing under a grievance procedure, the Respondents argued that the Claimant should have indicated that he wished to proceed further with his complaint. The EAT held that however desirable it might be to make such an indication, it was not required by the Regulations. Further, it did not matter whether the complaint was made before or after the resignation. The EAT did not accept that a second complaint after the resignation was needed in order to comply with the statutory grievance procedure. It added that the meeting held by the employer in response to the grievance had to have the purpose of discussing the grievance – it was not enough that the meeting might incidentally have afforded the opportunity to discuss the grievance.

By far the most important decision is *Shergold v*

Fieldway Medical Centre [2006] IRLR 76, where Burton J. attempted to formulate some guidelines.

The ET had found that the Claimant's resignation letter had not amounted to a grievance and that, having had a meeting with her employers at which she was told that she could lodge a grievance, she failed to do so. They dismissed her claim for failing to comply with s.32 EA. However, the President pointed out the need to guard against undue technicality and over-sophistication in the application of the statutory provisions.

He did not consider that it was the intention of the legislation either that employees should be barred from claiming in such circumstances, nor that employers should unwittingly find themselves liable for automatic unfair dismissal. He held that those sanctions should rarely be used, especially as the purpose of the legislation is to encourage conciliation, agreement, compromise and settlement rather than precipitate the issue of proceedings. He went on to give this specific guidance:

1) The statutory requirements are minimal in terms of what is required;
2) The fact that a written grievance might be set out in a letter of resignation (or any document which doubles as something else) makes no difference. Some difficulties might however arise if the resignation was to take immediate effect;
3) It is not necessary to make it plain in the writing that it is grievance or an invocation of the grievance procedure;
4) There is no requirement to comply with any company or contractual grievance procedure. Under the statutory procedure the grievance merely needs to be set out in writing. Whether that also triggers a contractual procedure will be a matter of coincidence;
5) The grievance must relate to the subsequent claim and the claim must relate to the earlier grievance. However, the wording of the grievance does not need to approach the much fuller exposition of the claim set out in proceedings – not least because under the standard procedure, the basis of the grievance does not need to be set out. It is necessary that the employer understands the general nature of the complaint made. There should not be an attempt at a sophisticated analysis of a simple written grievance. Provided that the 'general nature' of the written grievance is 'substantially the same' as the later claim, a difference by way of precise ingredients or particulars will not affect statutory compliance;
6) Whether or not the Respondent was given an opportunity to respond to the allegations is irrelevant to the question of whether the statutory procedure has been triggered.

For claimants alleging discrimination, the timing of a grievance can be very important. Historically, many employees were fearful that issuing a grievance while continuing to work for the employer may be counterproductive and lead to possible victimisation. Legal advice may amount to 'grieve early and often', but this is not a course of conduct designed to ensure a harmonious workplace. Yet it may be asked: 'how else is a claimant alleging discrimination to ensure that matters going back over several years can be heard as substantive complaints before the tribunal?' Alternatively, the Claimant will have to issue one large grievance on dismissal if he hopes to argue about any of these matters before the tribunal. It will be extremely difficult to amend claim forms to include new allegations if the precise allegation had not been the subject of a grievance. ETs appear to be taking a relaxed approach to these problems, however, only EAT decisions will clarify whether this is correct. It does not accord with a literal interpretation of the regulations.

Rejection of claim forms

Rules 1 – 3 of the 2004 Rules contain detailed provisions as to the contents of the claim and give the ET power to reject claims that do not comply. Problems have occurred with over-zealous interpretations of the requirements.

In *Grimmer v KLM Cityhopper* [2005] IRLR 596 the Claimant made a claim which she described on her ET1 as in respect of 'flexible working'. Under details of her complaint, she set out a single pithy sentence. The ET returned her form, saying that details of her claim had not been given. On appeal HHJ Prophet considered whether a rule that required rejection of the claim in such circumstances could really be consistent with the overriding objective and the safeguards contained in Art 6 ECHR. In the context of industrial relations where application forms are frequently completed by employees without professional help a technical approach would be inappropriate. He considered that the threshold for access to the ET

should be kept low. The test as to whether 'details of the claim' had been provided is whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment right falling within the ET's jurisdiction. If that test is met, there is no scope for interpreting 'details of the claim' as being 'sufficient particulars of the claim'. The ET1 was valid.

Similar issues arose in *Richardson v U Mole Ltd* [2005] IRLR 668. The Claimant failed to state that he was an employee of the Respondent, as required by Rule 1(4)(f). So the ET refused to accept his claim, although in other areas of the form he had made it clear that he was an employee. It was in any event not contentious that he was an employee. Burton J. pointed out that it was not the purpose of the Rules to drive meritorious Claimants or Respondents from the judgment seat. Rejecting claims and responses for minor omissions was not an appropriate use of the Rules. This claim should have been permitted to go forward.

Conclusion

There have been numerous procedural problems even before the main case is heard. These have increased costs and led to legalistic distinctions which can only bring law and lawyers into disrepute. One may be forgiven for thinking that we have time travelled back to the Dickensian nightmare that was *Jarndyce v Jarndyce*.

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Briefing 394

New Protection from Discrimination for Religion or Belief

Part two of the Equality Bill, which has just completed its passage through Parliament, extends the scope of equality legislation by prohibiting discrimination on the grounds of religion or belief in relation to the provision of goods, services, facilities, premises and education. It also creates a duty on public authorities not to discriminate in carrying out their public functions. It recognises that religion can be a relevant factor in certain circumstances and for particular organisations such as faith schools and religious charities. The extension of equality legislation in this area is an important contribution towards the development of more coherent and comprehensive equality legislation; it plugs an important gap in the current matrix of legal protection. However, there remain important respects in which the legislation here differs in its provisions from other equality laws, in particular, the regulations prohibiting discrimination on the grounds of religion and belief in employment.

Provisions applying to both Employment and Goods, Facilities and Services

Religion or belief includes lack of religion and lack of belief

The Bill introduces a new definition of religion and belief which makes it clear that reference to religion 'includes a reference to lack of religion, and a reference to belief includes a reference to lack of belief'. This new definition also applies to employment, thus replacing the provisions in the Employment Equality (Religion or Belief) Regulations 2003 which currently refer to religion or belief as 'any religion, religious belief or similar philosophical belief'. The amendment prevents any need to determine whether 'non-belief' constitutes a philosophical belief similar to a religion or religious belief.

The discriminator's religion of belief

The way discrimination is defined in the Bill also differs from the definition in the employment regulations. In the employment regulations article 3(1) defines discrimination as occurring where 'a persons

('A') discriminates against another person ('B') if on grounds of religion or belief A treats B less favourably than he treats or would treat other persons'. Crucially, article 3(2) of the employment regulations state that, 'the reference to religion or belief *does not include A's religion or belief*'. The central problem the drafting appears to be grappling with is to ensure that the legislation covers discrimination that B may face because of his or her religion or belief, and to prevent these provision being used to cover discrimination on other grounds (perhaps gender or sexual orientation) which may be motivated by A's religion or belief but are not related to B's religion or belief as such but to his or her gender or sexual orientation. A further potential problem could occur where A could discriminate against all people who did not share her religion or belief and not because of B's religion or religion or belief. To a large extent this problem has been resolved by the clarification that reference to religion or belief includes lack of religion or belief. The definition of discrimination in the Equality Bill seeks to provide some more clarity, it states that 'a person ('A') discriminates against another ('B')…if on the grounds of the religion or belief of B or of any other person except A *(whether or not it is also A's religion or belief)*'.

Indirect Discrimination

In relation to indirect discrimination, the employment regulations provide that indirect discrimination occurs where A applies a provision, criterion or practice, which inter alia A cannot show to be proportionate means of achieving a legitimate aim. The language of proportionality is absent from the definition of indirect discrimination in the Equality Bill. The Bill merely refers to a provision, criterion or practice 'which A cannot reasonably justify by reference to matters other than B's religion or belief' (clause 45).

Harassment

When the Equality Bill was first introduced to Parliament, it contained provisions to cover harassment as a specific form of discrimination. The definition of harassment differed from that found in the Employment Equality (Religion or Belief) Regulations 2003. However, due to opposition in the House of Lords centring on the impact of such provisions on free speech, harassment, as a separate head of discrimination, was deleted from the Bill completely. The government continues to argue for the inclusion of harassment, noting that it should be unlawful for those carrying out public functions, immigration officers, prison officers and landlords harassing people on the grounds of their religion or belief. However they have now left the matter to be considered by the Discrimination Law Review. So, as the Bill currently stands, harassment is not a separate form of discrimination. This leaves open the option of arguing that harassment is form of direct discrimination.

New Provisions applying to the supply of Goods, Facilities and Services

Scope of the Legislation

Part two of the Equality Bill extends the prohibition of discrimination on the grounds of religion or belief to the provision of goods, services and facilities. As with other areas, the legislation allows for specific tailoring of services to meet the needs of a particular religion or belief, without contravening the general principle of equality. The prohibition also extends to the disposal and management of premises, with a general exception where a landlord or near relative reside and intend to continue to reside in another part of the premises. The threshold for this exemption is kept at premises that accommodate no more than two households or six individuals.

Clause 46 (3) provides an exception in relation to the provision of goods, services, facilities, 'where a skill is commonly exercised in different ways in relation to or for the purpose of different religions or beliefs'. There are two parts to this exception: the first is aimed at allowing for goods and services such as the provision of kosher or halal meat. The clause allows for a kosher or halal abattoir to 'insist on exercising the skill in the way in which he exercises it in relation to or for the purposes of that religion or belief'. Secondly, the clause aims to ensure that an abattoir that, for example, supplies kosher meat, is not also required to supply halal meat. But here the clause imposes a subjective reasonableness test. Thus the slaughterhouse supplying kosher meat, if faced with a request to supply halal meat, is required to show that they 'reasonably consider it impractical' to do so.

Education

Where the prohibition on discrimination in education applies, it covers the school's admission's policy, the

access to any benefits, facilities or services the school provides, exclusion from the school and 'any other detriment'. However, significant exemptions operate in this area. The tradition of faith schools in Britain and the role of religion in education are important and complex issues that the legislation has to negotiate. The prohibition on discrimination does not cover all schools. In England and Wales the prohibition on discrimination on the grounds of religion or belief in education extends to schools maintained by the local education authority, independent schools and Special Schools. However, there is an exemption for state faith schools, (foundation or voluntary schools with a religious character) and independent schools with a religious ethos. In Scotland the legislation covers public schools, grant-aided schools and independent schools. Here again there is a general exemption for denominational schools. Thus, what may be termed as 'faith schools', are outside the scope of the general prohibition on religious discrimination in education. The exclusions of such schools completely from the prohibition on discrimination was criticised in Parliament as too wide. For example, while the need for faith schools to discriminate on the grounds of religion in admissions policies and in accessing some of the benefits facilities and services of the schools may be understandable, it was less clear why such schools should be able to subject their pupils to 'any other detriment' on the basis of their religion or belief.

In Britain, all state schools (whether or not they are faith schools) are required to provide religious education for all registered pupils, although parents can choose to withdraw their pupils from such classes. In England and Wales, schools, other than voluntary aided schools and those of a religious character, must teach religious education according to a locally agreed syllabus. Each agreed syllabus is required to reflect the fact that the religious traditions of Great Britain are in the main Christian, while taking account of the teaching of the other principle religions represented in Great Britain. Pupils in state schools are also required to take part in a daily act of collective worship, which shall be 'wholly or mainly of a broadly Christian character'. Schools can seek an exemption from the requirement for broadly Christian worship, for the school or for some pupils within the school where it is inappropriate because of the pupil's background. In order to accommodate this existing settlement on the role of religion in education, for those schools within the scope of the legislation, the prohibition of discrimination does not cover the content of the curriculum, nor does it cover acts of worship or other religious observance organised by or on behalf of the religious establishment.

The prohibition of discrimination in education extends beyond schools to the exercise of its functions by local or other education authorities. There are however, exemptions for the authority's functions in the provision of schools and in relation to transport provision to and from school. The latter exemption arises from the fact that local education authorities have discretion to provide subsidised transport for pupils of faith schools that are located outside the local area. While excluding the exercise of discretion in this area from the scope of discrimination law, the government expressed the hope that the discretion would be exercised in a non-discriminatory way. That education authorities would also fund subsidised transport to a non-faith school for children whose parents are strongly opposed to their attending a faith school that happens to be closer to home.

Public Authorities

In Clause 52 the Bill makes it unlawful for a public authority exercising a function to do anything which constitutes discrimination on the grounds of religion or belief. During debate in Parliament there was concern raised that this would prevent public authorities that currently make provisions for a particular faith, either to make a similar provision for all faiths or to withdraw the provision all together. Examples included Christmas lights and hospital chaplains.

There is a broad category exemption here for the activities of the two Houses of Parliament and the security services. The exemption of Parliament can be explained on the basis that Parliament is sovereign and so governs itself. The wholesale exemption of the security services as organisations, coming on top of provisions in clause 63 that provide an exemption for action taken for the purposes of safeguarding national security, seems to reinforce prejudicial assumptions that certain groups are to be regarded with suspicion and are not to be trusted.

There are also exemptions related to specific activities. The exemptions allow for discrimination on the grounds of religion or belief in the application of

immigration rules in making decisions to refuse entry clearance or leave to enter, to cancel entry clearance or leave to remain or to refuse an application to vary leave to enter or remain on the grounds that the exclusion of the person from the UK is conducive to the public good or it is undesirable to permit the person to remain in the UK. This appears to be a very broad exemption by which being of a particular religion or belief may be a basis for holding that a person's presence in the UK is not conducive to the public good. Under the terms of the Bill it seems that such an action does not need to relate to any behaviour, the holding of certain beliefs would be sufficient for the exemption to be used.

The general duty on public authorities not to discriminate in carrying out their functions does not apply to decisions not to institute or continue criminal proceedings, and anything done for the purpose of reaching, or in pursuance of, such a decision. This in particular has implications for the proposals for legislation on incitement to religious hatred where the government is proposing to give discretion to the Attorney General in the decision about whether a prosecution can be brought.

In addition to allowing claims for direct and indirect discrimination by those who face discrimination, the Bill prohibits discriminatory practices; that is 'any practice which would be likely to result in unlawful discrimination if applied to a person of any religion or belief'. This provision allows the new Commission for Equality and Human Rights to challenge discriminatory practices without the need for a direct victim of discrimination. The Commission also has power to challenge discriminatory advertising as well as pursuing those that do not discriminate themselves but instruct, cause, attempt to cause or induce or attempt to induce others to discriminate.

Religion or belief organisations

Clause 57 provides exemptions from the regulations for organisations relation to religion or belief. The exception covers any organisations the purpose of which is to practice a religion, to advance a religion or to teach the practice or principles of a religion. It also covers any organisation the purpose of which is to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief. A further exception covers organisations that aim to improve relations or maintain good relations between persons of different religions or beliefs. These exemptions do not apply to organisations whose sole or main purpose is commercial. The clause allows such organisation to discriminate in restricting their membership, participation in their activities, access to the goods, facilities and services they provide and in the use and disposal of premises they own or control. However, such discrimination is only permissible where it is 'imposed by reason of, or on grounds of, the purpose of the organisation, or in order to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief'. As an exception to the general prohibition on religious discrimination, it should be narrowly drawn. The drafting of this exemption has changed in the course of the Bill's passage through Parliament. Earlier versions of the Bill included an exemption that only allowed discrimination when it was 'necessary' as well as a far wider provision that would have allowed discrimination where it was 'expedient'. It remains unclear how courts will determining whether discrimination is 'imposed' by reason of, or on grounds of, the purpose of the organisation. Nor is it clear whether this is an objective or subjective test. The exemption extends to situations where discrimination is 'imposed… in order to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief'. It is not clear from this definition how one determines whether something does cause offence on the grounds of religion or belief. It is not clear whether this be a purely subjective test, or is there an objective element. Would the courts have to consider whether it was reasonable for persons of that religion of belief to be offended? The government has suggested that this should be a 'clear and subjective test. If something gives offence to somebody, the test is their judgement about its impact on them, their beliefs and their attitudes'.

There is a further general exemption allowing charities based on a religion of belief to provide benefits only to persons of a particular religion or belief where this consistent with the charitable instrument. Clause 60 protects charities that may not have a religious purpose stated within their charitable instrument but which requires members to assert their adherence to or acceptance of a religion or belief. It provides an exemption that allows charities to 'require members, or

persons wishing to become member, to make a statement which asserts or implies membership or acceptance of a religion or belief'. This provision is aimed mainly at ensuring that organisations such as Scouts and Guides can retain a requirement for members to assert a belief in God.

Timetable

The Bill will receive royal assent within the next few weeks, then it will become the Equality Act 2006. It is planned that these provisions will come into effect in October 2006 when the new Age Regulations are implemented. New regulations to prohibit discrimination on grounds of sexual orientation in the fields of goods, facilities and services will come into effect at the same time.

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Briefing 395

Sickness and Pregnancy – pay reduction is not discrimination

North Western Health Board v McKenna [2005] IRLR 895 ECJ

Implications

This case considered questions about the treatment of women who are absent from work with a pregnancy related illness prior to the start of their maternity leave. The ECJ's decision makes it clear that if pregnancy is bad for a woman's health, it will also be bad for her bank balance.

Background

Mrs McKenna (M) challenged her employer's sickness absence policy, on the grounds that it discriminated against her as a pregnant woman. The policy, which applied to all employees, regardless of the cause of the illness, provided that a person could take sick leave of up to 365 days paid sick leave in any 4 year period. An employee would receive full pay for the first 183 days absence in a 12 month period, with any further sickness leave paid at half pay. Since the cause of the illness was not taken into account, a woman who had one or more pregnancies with significant related illness in the four year period, was in real danger of using up a substantial part of her entitlement, and having her pay reduced.

The question raised by this scheme, and others of its kind, is whether or not the courts are willing to recognise that pregnancy related illness is a direct result of pregnancy, and therefore ought not, under current pregnancy discrimination legislation, to result in disadvantage. The consequence of that would be that M would have been able to argue for a disregard in respect of any sickness absence which was pregnancy related, preserving her rights to full pay for any other form of sickness absence.

European Court of Justice

Unfortunately, the ECJ, despite a forceful argument in favour of M by the Advocate General, have decided that the scheme, and others like it, does not constitute discrimination contrary to EU provisions.

The ECJ were asked to consider a number of questions which can be summarised as follows:

i. Is a sick leave and pay scheme such as this one within either the scope of the Equal Treatment Directive no 76/207 (ETD), or Article 141 EC and the Equal Pay Directive 75/117 (EqPD)?
ii. If the scheme is covered by either, is the operation of the scheme contrary to either, in that it sets off a period of pregnancy related illness against the whole entitlement, or in that it may lead to the reduction of her pay, because of pregnancy related sickness.

Advocate General Leger was of the opinion that the scheme should be considered as one which related to

the employees working conditions, since the matter of pay reduction was not automatic, but contingent upon her using up her sick pay entitlement at full pay. In these circumstances, it was his view that the matter should be considered as being within the ETD. He then went on to consider that the effect of the scheme was to penalise a woman for a reason which related directly to her being pregnant, and was thus discriminatory. He took particular note of the decision in *Brown v Rentokil Ltd* [1998] IRLR 445 in which the ECJ ruled that it was sex discrimination for an employer to dismiss a woman because of her sickness record, where part of her absences were the result of pregnancy related illness. In that case the ECJ had taken notice that the specific nature of pregnancy, and illness arising from it, affect women alone.

The ECJ took a different view to the AG. They determined that this was in essence a dispute about a scheme that dealt with pay, not working conditions, and that therefore the consideration fell within the ambit of Article 141 and the EqPD.

They then considered the present state of community law, and the protection afforded to pregnant women. They focussed on the nature of the protection offered by maternity leave and the fact that during maternity leave, it is lawful for a woman to be paid less than a man, without there being discrimination. They also noted the particular and specific protection that the maternity leave period and the state of pregnancy gave women, in the context of pregnancy related illness. They summarised the present state of community law as follows:

...as community law stands at present, a female worker:

- *cannot be dismissed during her maternity leave by reason of her condition, or prior to such leave, by reason of an illness related to the pregnancy and arising before such leave;*
- *may, in appropriate cases, be dismissed by reason of an illness related to pregnancy or childbirth arising after the maternity leave;*
- *may in appropriate cases, suffer a reduction in pay either during maternity leave or, after such leave, in the event of illness related to pregnancy or childbirth and arising after such leave.(paragraph 54)*

The ECJ noted in particular that there is

> *no general provision or principle thereof [that] requires that women should continue to receive full pay during maternity leave, provided that the amount of remuneration payable is not so low as to undermine the objective of protecting female workers, in particular before giving birth…*
>
> *If a rule providing within certain limits, for a reduction in pay to a female worker during her maternity leave does not constitute discrimination based on sex, a rule providing,, with the same limits, for a reduction in pay to that female worker who is absent during her pregnancy also cannot be regarded as constituting discrimination of that kind. (Paragraphs 59-60)*

The scheme would not be discriminatory, they said, provided that men were treated in the same way as women, and provided that the level of pay was not so low as to undermine the objective of protecting pregnant workers. The judgment does not indicate what this level might be.

They further noted that, once the maternity period is over, the worker must not then receive less than the minimum amount that she would have been entitled to during the course of any illness arising during pregnancy, during any period of further illness, which is affected by the fact of pregnancy related illness that arose during the pregnancy. That is, once she returns to work, her previous pregnancy related illness will have an impact on the level of her pay, despite the scheme.

Comment

This case means that a scheme which puts women who have had pregnancy related illness onto half pay is acceptable, provided that it applies to everyone, and that the resulting pay to the woman *is not so low so as to undermine the community law objective of protecting female workers*, and that secondly, that the pregnancy related illness does not result in a reduction to no pay at all at any time.

The logic employed by the ECJ in this decision is difficult to follow, and the result is one which clearly disadvantages pregnant women who are ill as a result of pregnancy, by sanctioning pay reductions directly linked to pregnancy.

Women on low pay may be able to argue that schemes which put them onto half pay at an early stage in their pregnancy do offend against the community objective by being too low. Additionally, the fact that Directive 2002/73/EC has broadened the ambit of the ETD, so that since October 2005 the term 'working conditions' can include pay, may provide some assistance to the arguments.

This approach to the issue is clearly problematic. It contrasts starkly with the approach to similar difficulties encountered by disabled people, where the UK courts have recognised that the extension of a period of fully paid sick leave can be a reasonable adjustment to make, since it can directly counter the adverse affects of disability.

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Briefing 396

Discrimination in the allocation of child benefits to immigrants

Jaroslaw Niedzwiecki v Germany: (1) Zbigniew Okpisz (2) Halina Okpisz v Germany (2005) Application No: 00058453/00: 00059140/00 ECtHR 25/10/2005

Implications for practitioners

Where there was no objective and reasonable justification for the difference in treatment in relation to eligibility for child benefit for foreigners who were, and who were not, in possession of a stable residence permit , there had been a violation of Art.14 taken in conjunction with Art.8.

Facts

The applicants (N, Z and H), in separate proceedings, complained of a violation of Art.14 European Convention on Human Rights (ECHR), the non discrimination article, in conjunction with Art.8, the article protecting family and private life, on the ground that the authorities' refusal to pay them child benefits amounted to discrimination.

N had immigrated to Germany. He was issued with a limited residence permit for exceptional purposes. The permit was renewed every two years. Following the birth of his child, N applied for child benefit. His request was dismissed as he did not have the required residence permit for the purpose of receiving child benefits. N appealed unsuccessfully.

Z and H, a married couple, had immigrated to Germany with their daughter. Their son joined them the following year. They were issued with residence titles for exceptional purposes, which had been regularly renewed. They had received child benefit until Z was informed that he would no longer be paid child benefit pursuant to the Act. Z instituted proceedings.

In separate proceedings, the Constitutional Court ruled that the legislation was incompatible with the right to equal treatment under the German Basic Law. Accordingly, the legislator was ordered to amend the Act. The proceedings were suspended pending the amendment of the Act.

European Court of Human Rights

In both cases, the ECtHR held unanimously that there had been a violation of Art.14 in conjunction with Art.8. A difference in treatment was discriminatory for the purposes of Art.14 ECHR if there was no objective and reasonable justification for it. However, contracting states enjoyed a certain margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justified a difference in treatment. The Court was not called upon to decide generally to what extent it was justified in making distinctions in the field of social benefits between holders of different categories of residence permits. It had to limit itself to the question of whether German law on child benefit as applied in these cases violated N, Z and H's rights under the Convention. The Court did not discern sufficient reasons justifying the different treatment with regard to the child benefit of foreigners who were in possession of a stable residence permit on one hand, and those who were not, on the other. The finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage sustained by N. He was awarded EUR 1,400 for pecuniary damage and costs and expenses. Z and H were awarded EUR 2,500 for pecuniary damage.

Gay Moon
Editor

Church Ministers are able to bring discrimination claims

Percy v Church of Scotland Board of National Mission (Scotland)
[2006] IRLR 195 HL

Implications for practitioners

Although this case is limited in scope, affecting only those employed as religious ministers, it is an all-important decision. For the first time ministers of the Church have employment rights that can be enforced in secular courts.

Facts

Ms Percy (P) was an ordained minister of the Church of Scotland and held the position of associate minister at a parish in Angus. She was suspended from her duties and ultimately resigned when accusations were made that she had had an affair with a member of the parish. She subsequently brought a sex discrimination claim on the basis that she had been treated less favorably than a man would have been in the same position.

Employment Appeal Tribunal

P's claim was dismissed on the basis that it fell within 'matters spiritual', which were reserved to the ecclesiastical courts under the Church of Scotland Act 1921. This decision was upheld by the EAT on the same ground, although they added that they had also concluded that a minister was not employed under a contract for employment for the purposes of the SDA.

Court of Session

The CS also upheld the ET's decision, but on slightly different grounds. The Lord President concluded that when an appointment was made to a ministry in the Church of Scotland, consisting of essentially spiritual duties, there was a rebuttable presumption that the parties did not intend to enter into binding legal relations. Without binding legal relations there could be no contract of employment and no discrimination claim.

House of Lords

The majority in the HL allowed the appeal and reversed the previous decisions. When conventional principles were applied they concluded that P was employed under a contract of services in her post as associate minister. She was engaged under a contract to personally provide services. This post, which came with duties and a salary, could be separated from her appointment as a minister of the Church of Scotland in the religious sense, which allowed her to carry out religious duties as clergy.

In relation to the Church of Scotland Act, they concluded that this gave the Church sole jurisdiction over matter of religion, but did not apply when the Church stepped into the secular sphere - including where the Church acted as an employer.

Comment

It is plainly right that members of the clergy who suffer sex discrimination are now able to seek a remedy in the courts. However, the decision is also interesting, both for its obvious effects and also for its potential long-term impact. In the short term it is now clear that clergy have remedies against discrimination and, almost certainly, other rights which attach to a contract of services.

The position of other potential employment claims is less certain. The HL did not criticize the concession that P was not an employee in the sense of being employed under a contract of service. She was therefore not able to claim for wrongful dismissal or unfair dismissal. Percy, however, has removed many of the traditional arguments that prevented religious ministers arguing that they were employees. It remains to be seen whether the courts can be pushed further to allow clergy assess to the full range of employment rights.

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Are employers entitled to keep the workplace secular?

Copsey v WWB Devon Clays Ltd [2005] IRLR 811 EWCA

Implications for practitioners

In a case concerning facts taking place prior to the introduction of the Employment Equality (Religion or Belief) Regulations 2003 [SI 2003/1660], the CA adjudicated on the fairness of the dismissal of an employee who refused to work on Sundays by reason of his Christian religion.

The Court discussed the engagement of Article 9 of the European Convention on Human Rights (ECHR), as incorporated into domestic law by the Human Rights Act 1998 (HRA) and, if Article 9 was engaged, what effect it had on the fairness of the dismissal.

Background

Mr Stephen Copsey (C), a practising Christian, was an operative in the sand processing industry for WWB Devon Clays Ltd (DC). He was dismissed for refusing to agree to be available for Sunday shift-working. On his original contract of employment, C was not required to work on Sundays. When this requirement changed, DC originally made special arrangements for C and a few other colleagues not to be required to work on Sundays. A change in the commercial demand for DCs' output, however, required DC to bring these special arrangements to an end, and C was required to agree a change in his contractual hours to include shifts on Sundays. After both union negotiations and compromise agreement talks failed, C was dismissed for refusing the contractual changes, and he claimed unfair dismissal.

C claimed that his dismissal was unfair. In particular, he argued that the facts of his case were within the ambit of Article 9 ECHR, as he had been dismissed for the manifestation of his religion, namely wishing to treat Sunday as a holy day on which he could not undertake work. He asked the ET to review the fairness of his dismissal under the Employment Rights Act 1996 (ERA), in a way which gave due consideration to Article 9(2) ECHR (the subsection of the Article which deals with the manifestation of religion, rather than the right to freedom of religion itself).

It must be noted that the judgements in this case contain no challenge or assessment of direct or indirect religious discrimination, as these were not offences under statute at the time of C's dismissal. C's claim was for unfair dismissal only.

Employment Tribunal

The ET did not find that C's dismissal was in any way connected with his religious beliefs, instead that it was due to his refusal to accept a change in contractual working hours. Accordingly, the ET found that the reasoning for his dismissal fell into the category of 'some other substantial reason' and concluded that Article 9 ECHR was not engaged. The ET found that DC had behaved fairly and reasonably, had consulted with C throughout the implementation of changes to his working patterns, and had endeavoured to accommodate C's requirements by offering him alternative positions which he refused. The ET found DCs' eventual decision to dismiss C to be within the band of reasonable responses open to it.

Employment Appeal Tribunal

The EAT found no error of law made by the ET, and supported the ET's decision that C was not dismissed by reason of his religious beliefs. When assessing the reasonableness of DCs' behaviour, the EAT emphasised the fact that C had been offered alternative positions within DC which would have permitted him to remain working for the company without Sunday shift-work being required.

The EAT held that the HRA was not applicable to private sector employers, and so had no direct impact on this case. In respect of Article 9 ECHR, however, as Section 2(1) of the HRA requires (inter alia) a court or tribunal to take account of any relevant judgement of the ECHR when determining a question which has arisen in connection with an ECHR right, the issue of the engagement of Article 9 was to be considered when assessing the fairness of C's dismissal. The EAT found that even if Article 9 were engaged, which it did not

believe was the case, it was required to follow the ruling of the ECtHR in *Stedman v UK* (1997) 23 EHHR 545. This case held that on very similar facts, Article 9 was not found to be engaged, as the employee was free to resign in order to be able to manifest his or her religion elsewhere. The EAT held that C's dismissal had been fair in all the circumstances, and C appealed to the CA.

Court of Appeal

The CA confirmed that, as mentioned above, courts and tribunals have a duty (as public bodies) under the HRA to consider the requirements of the ECHR in cases where there may be implications under the ECHR.

Mummery LJ gave the leading judgement. He reviewed the ET and EAT's assessments of the engagement of Article 9, which he did not feel had provided a complete answer to the Article 9 issue, although he agreed with the lower courts that the manifestation of his religion was not the reason for C's dismissal. Mummery LJ felt there was, however, a connection between C's dismissal and the manifestation of his religion, and the question was whether or not this connection was sufficiently material to bring the case within the ambit of Article 9(2). Whilst Mummery LJ felt there was a sufficiently material connection, he stated that his hands were tied by three relevant rulings of the ECtHR on similar facts, which he was required by the 1998 Act to follow.

Ahmad v UK (1981) 4 EHRR 126, *Konttinen v Finland* (1996) 87 DR 68, and *Stedman v UK* held, in what Mummery LJ saw as a continuous thread, that a complaining employee could always resign, if his or her required working time proved incompatible with the manifestation of his or her religion. In these cases, Article 9 was not found to have been interfered with. Despite being of the view that they were *'difficult to square with the supposed fundamental character of the rights'*, Mummery LJ approved the cases as relevant, clear and good law. Accordingly, Mummery LJ found that Article 9 was not engaged in C's case, which was on similar facts, and so the issue of the justification of his dismissal in relation to his Article 9 rights did not fall to be assessed, and the appeal was dismissed. Mummery LJ intimated that he would have found the dismissal justified, had he been called to assess it in the context of Article 9.

Mummery LJ commented that other cases relating to different ECHR Articles in the employment context had not been dealt with by use of the 'free to resign' argument, and he clearly felt uncomfortable with having to apply it in this instance. Mummery LJ mentioned the 'schoolgirl jilbab' case, where student Shabina Begum was successful in asserting her Article 9(2) rights against her school in the CA (although the case is being appealed to the HL), noting that the argument taken from the Commission rulings set out above, that Shabina was 'free to enrol in a different school at which her ECHR rights would be respected, and so her Article 9(2) rights were not engaged', was unsuccessful. *R(SB) v Head Teacher and Governors of Denbigh High School* Civ 199; [2005] All ER 396 (see Briefing 375).

Rix LJ, whilst in agreement with Mummery LJ's decision to dismiss the appeal and with the main part of his reasoning, differed in regard to the effect of the Commission's rulings, which he did not feel presented a body of consistent decisions due to differing facts. As Rix LJ did not feel there was 'clear and constant jurisprudence', and he did not believe the CA had to follow *Stedman*.

Neuberger LJ felt that an analysis of the Commission's rulings on Article 9 would assist neither the CA nor C himself, and that C's dismissal was just potentially unfair under the ERA, and should be decided by reference to that Act. Neuberger LJ commented that, were the CA to depart from the Commission rulings and analyse the effect of Article 9 on the reasonableness of C's dismissal, he would decide in favour of Devon Clays. Neuberger LJ felt a balance should be struck between employers' business needs, and employees' rights to manifest their religion.

Comment

This judgment has provided mixed messages as to the circumstances in which Article 9 will be found to be fully engaged, and if so, how an employer would need to behave in order to be found to have acted unreasonably in respect of Article 9.

It appears that all employers need to do is to attempt to accommodate employees' religious requirements, and, having done so, if an employee complains that his or her ability to manifest his or her religion remains impeded, the employee can be invited to find alternative employment. Despite C's (arguably over-simplified) submission that it was mere 'sophistry' to

decide that C was not dismissed in connection with the manifestation of his religion with clear engagement of his Article 9 rights, the courts have preferred the employer's 'right' to weigh the importance of religious manifestation against more pressing commercial demands. Mummery LJ summed up the opinion of the European Commission as *'the employer [being] entitled to keep the workplace secular'*.

Clearly, the ability to found a claim under the Employment Equality (Religion or Belief) Regulations 2003 would have affected the entire nature of this case, particularly in relation to indirect discrimination. Further case law is needed to explore the religious discrimination protections now available to employees, as such case law may draw a line under the somewhat harsh decisions being made in this area. However, as leave to appeal to the HL has been refused this case will not be challenged.

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Briefing 399

'Arrangements' given a broad interpretation

Smith v Churchills Stairlifts PLC [2006] IRLR 41 EWCA

Implications for practitioners

This case, following the lead set by *Archibald*, gives a broad interpretation to the meaning of 'arrangements' and sets out guidelines for the choice of an appropriate comparator for the purpose of assessing whether there has been a 'reasonable adjustment'. It also clarifies that the test for whether there has been a failure to make a reasonable adjustment is an objective test (s6), whilst the test for whether the disability discrimination was justified is a partly subjective one (s5).

Facts

Mr Smith (S) was a disabled person with lumbar spondylosis, a disability within the meaning of the DDA s.1, which prevented him from lifting and carrying heavy objects. S applied for a position with Churchill's Stairlifts (CS) selling radiator cabinets direct to homeowners. S was offered a position on a training course, which, if successful, would lead to a sales position. Before the start of the training course CS decided that the sales aid would be a full-sized cabinet. CS concluded that S would be unable to carry the cabinet and withdrew his place on the training course. S alleged disability discrimination.

Employment Tribunal

The ET concluded that S had not been subjected to unlawful discrimination as carrying the cabinet was not part of the irreducible minimum of the job, but was an 'arrangement' applied by CS. S was not placed at a substantial disadvantage compared with the population generally and therefore the duty to make reasonable adjustments under s.6 of the Act did not apply. The ET further found that had the duty to make reasonable adjustments arisen, it would have concluded that CS had failed to make reasonable adjustments in the form of a trial period of selling by means other than carrying a full-sized cabinet. The ET considered the question of justification for less favourable treatment in the context of s.5(1) and found that CS had a genuine commercial view that full-sized cabinets did need to be demonstrated to customers and therefore CS's decision was justified on the basis of S's inability to carry the cabinet. S appealed.

Employment Appeal Tribunal

The EAT found that the ET's decision in relation to the reasonableness of the trial period, which had been determined against S, was perverse. They concluded that it was not necessary to consider further grounds of appeal that had challenged the ET's findings on 'arrangements' and comparators. S had argued that the ET was wrong when

1) considering the scope of the 'arrangements' pursuant to s.6(1);
2) in relation to the comparative exercise required; and
3) by finding that the tribunal's decision concerning the reasonableness of a trial period and the justification for not providing one was perverse.

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Court of Appeal

The CA concluded that:

1) The ET's decision was reached before the decision of *Archibald v Fife Council* [2004] IRLR 651 which should now be applied. Had the tribunal had the benefit of *Archibald* it would have identified the 'arrangements' differently and this would have affected the comparative exercise required by s.6(1). It was only when the relevant arrangements had been identified that one could proceed to consider whether those arrangements placed a disabled person at a substantial disadvantage in comparison with persons who were not disabled.
2) The proper comparator was readily identified by reference to the disadvantage caused by the relevant arrangements. Even if the relevant arrangement had been the requirement to carry a full-sized cabinet, the proper comparators would have been the successful candidates who were subject to the requirement, but not disadvantaged by it, because they were not rejected as a result. The ET had been wrong to conclude that the arrangements as a whole made by the employers did not place S at a substantial disadvantage in comparison to persons who do not have a disability. However, if the relevant arrangements included susceptibility to withdrawal of the offer, the proper comparators were the people who were admitted to the training course. On that basis the arrangements as a whole did place S at a substantial disadvantage in comparison with persons who were not disabled.
3) Sections 5 and 6 called for different tests. The difference meant that something which might otherwise have been justifiable in the context of s.5 nevertheless resulted in a duty to make an adjustment pursuant to s.6. The EAT was wrong when it concluded that there was an 'internal inconsistency' in accepting the commercial case for the employer in relation to s.5 in isolation, but nevertheless found that it would be reasonable under s.6 for the employer to allow a trial period to see whether in fact the employer was correct about the commercial case. In the circumstances, therefore, the tribunal was right in its alternative findings on reasonableness under s.6 and justification under s.5(1). However, had the ET properly directed itself, it would inevitably have found that S had established that he was at a substantial disadvantage in comparison to persons who were not disabled. On that basis there would have been an equally inevitable finding that to allow S to sell by means other than by carrying a full-sized radiator cabinet on a trial basis was a reasonable adjustment. Accordingly CS had discriminated against S contrary to s.5(2) and s.5(1). S's appeal was allowed.

Gay Moon
Editor

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Briefing 400

Indirect discrimination and part time work

British Airways PLC v Starmer [2005] IRLR 862 EAT

Background

Prior to the introduction of the new *Employment Equality (Sex Discrimination) Regulations 2005* which introduced a new test for indirect discrimination in October 2005 a woman who wished to claim indirect discrimination on the grounds of sex had to show that a practice, criteria or provision (PCP) had been applied to her, which was to the detriment of a considerably larger proportion of women than men. She had to show that this was to her detriment and that the respondent could not justify it irrespective of sex. (See section 1(2) b SDA, prior to amendment.) In this case the EAT considered the wording of the section in the context of an application by a woman pilot to reduce her hours of work from full time hours to 50% of the full time hours.

Facts

BA had introduced a policy to enable staff to apply to work part time, in order to accommodate the personal circumstances of BA staff, many of whom had responsibility for childcare. Applications could be made

to reduce to either 75% of full time hours, or 50% of full time hours. Mrs Starmer (S) made an application to work 50% of the hours in March 2004, but BA refused this request. Instead they offered her the option of working 75% of the full time hours. The employers gave various business reasons for their decision, including the cost of training replacement pilots and the difficulty of obtaining sufficient cover from the existing pool of part time staff. They also cited the potential detrimental effect the reduced hours might have on the quality and performance of her work.

Employment Tribunal

S made a claim to the ET that she had been indirectly discriminated against on the grounds of her sex. She complained that she had been subject to a provision, criteria or practice (PCP) of working either full time or 75% of the full time hours; that such a PCP had a detrimental effect on her, and that the PCP was to the detriment of a larger proportion of women than men. In support of her argument she provided various statistics and statistical information which showed, the ET found, that the majority of the applicants for part time work were women; that a greater proportion of women than men in the pool work part time, and that women in general, rather than men, have primary responsibility for childcare. BA argued that it had business reasons as set out above, but that, in addition ,there was a legitimate health and safety concern.

The ET found in her favour, determining that there was a PCP, that the comparison showed a discriminatory disparate impact and that the BA had failed to justify the PCP. The costs that would be incurred were a legitimate business reason, but insufficient to justify the PCP. Further, they rejected the health and safety reason, on the basis that whilst it was an entirely legitimate objective, BA had simply failed to prove its case.

Employment Appeal Tribunal

BA appealed, but the EAT upheld the decision of the ET concluding that:

1. The term PCP is wider than the previously worded 'requirement or condition', thus if the claimant showed that what had been applied to her was in fact a 'requirement' it will automatically be within the wider meaning of the PCP. Here S had argued, and the ET agreed, that she had been required either to work full time, or to work 75% of full time.
2. S did not have to prove that the requirement to work 75% of the full time hours had in fact been applied to any other person. The EAT pointed out that indirect discrimination does not require the universal or even wide application of a PCP. It is enough that it is applied to the claimant. The fact that the decision about the hours of work was discretionary and that there was no absolute bar on 50% working, as was evident from the existence of a policy which in principle allowed employees to reduce their hours to 50%, did not detract from the fact that the requirement had been applied to S and that she had suffered detriment.
3. Although the statistical evidence in this particular case was not considered by the EAT to be of any great assistance, they considered that the ET had been entitled to make their own decision about it, and to find as they had done, that on the basis of the wider evidence available to them the requirement was to the detriment of a considerably larger proportion of women than men. The ET were entitled to consider oral evidence from other women; evidence about other women who had been unable to continue working and their own generalised knowledge about the position of women as carers for children in the workforce. The EAT referred to the decision of *Sinclair, Roche and Temperley* [2004] IRLR 763, which suggested that reliance could not be placed on a general assumption that women were more likely to be carers for children than men, but considered that the ET in this case had not erred in law by their findings. They placed emphasis on the fact that ETs do not sit in blinkers, and are allowed to take note of their own knowledge and experience of the industrial context.
4. The EAT recognised that the test for justification is an objective one, and thus the respondents business reasons will be respected. However, the reasons must not be uncritically accepted by the ET. Here, the EAT approved of the ET approach, that whilst there was a cost implication of training more staff, it had to be considered against the background of the wider finances of the respondent. Since the respondent produced no evidence about this, the ET was entitled to find that cost did not justify the requirement. Similarly, the EAT declined to interfere with the ETs finding that the reason why cover was

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a problem, was that BA had a recruitment freeze operating at the same time as the development of the airbus service. They found that whilst there were difficulties, these were self imposed by BA and not therefore capable of justifying the discrimination against S. They found that the ET was entitled to examine the validity and background of the respondent's business reasons as they did. The appeal was therefore dismissed.

Comment

Whilst the tests applied to establish disparate impact have changed since 1 October 2005, the claimant must demonstrate that a she has been subject to a PCP which is to her detriment. This case is a useful authority for instances when the claimant is the only person who has been subjected to the PCP, or where a one off decision has been made.

It is also important to note the comments of the President of the EAT Mr Justice Burton about the use of statistical information. Whilst he may not have found the information impressive in itself, he recognised and reaffirmed that it is entirely appropriate for the ET to take notice of information which demonstrates the relative and different positions of men and women in the workforce, and the differences in their working patterns. He also expressly accepted that an ET can take account of what they understand to be the business and workplace reality for the workforce, and, in particular, the generally accepted knowledge that women still have primary responsibility for the care of children in our society.

Advisors and representatives who require information which may support such claims should consult the Labour Force Survey, which analyses patterns of work by gender and by age.

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Briefing 401

Employer's health and safety duties towards pregnant staff

New Southern Railway v Hannah Quinn EAT/0313/05/LA November 28th 2005

Implications for practitioners

This case considers when an employer can remove a woman from her role for health and safety reasons because she is pregnant, without sex discrimination. Sections 66-70 ERA, read together with the Management of Health and Safety at Work Regulations 1999, SI No.3242 (MHSWR) allow removal from role or from the workplace in strictly prescribed circumstances. This case draws the line between lawful maternity suspension on health and safety grounds and sex discrimination.

Facts

Ms Quinn (Q) was employed by New Southern Railway (NSR) as a Duty Station Manager, having previously been a PA there. Q informed NSR that she was pregnant. A draft risk assessment outlined alterations to Q's working conditions or hours which would reduce the risks to low. The clear implication of the risk assessment was that Q could continue in her post.

Two male Station Managers discussed the risk assessment with the (male) Senior Area Personnel Manager. One of them did not understand the risk assessment; the Personnel Manager had never heard of a pregnancy related transfer before. They called Q to a meeting and told her she would be returned to her previous post as a PA. Her salary would be reduced accordingly. Two made comments to the effect that they could never forgive themselves if something happened to her baby.

Q complained about the treatment internally and issued proceedings in the ET. Six months after the meeting Q resigned and claimed constructive dismissal.

Employment Tribunal

The MHSWR reg 16(1) requires, where relevant, a risk assessment specific to pregnant or breastfeeding mothers or their babies. An employer must take action to avoid such risks reg 16(2), (3).

NSR submitted that this requirement to 'avoid'

implies an absolute obligation to avoid risk altogether, save in so far as the risk might be characterized as trivial. One of the risks relied on by NSR was a risk of assault. The Regulations had to be construed in the light of the Pregnant Workers Directive 92/85EC (PWD) which imposes an obligation which is unqualified by considerations of reasonableness or practicability.

Employment Tribunal

The ET held that the 'suspension' was not on the ground of maternity since no real regard was had to the risk assessment or to the HSWR. In reality, the adjustments suggested by the risk assessment were merely inconvenient and might have incurred additional costs. Nor was the obligation in the PWD to avoid risk, as contended by NSR, an absolute one. The risk of assault did not arise from Q's condition and could be reduced to a low risk by conflict avoidance training and ensuring other staff were on duty. It would have been reasonable to make these adjustments.

So Q was not suspended from work in 'consequence of any relevant requirement' under section 66(1) ERA. Since she had not been suspended on maternity grounds the claims under sections 70(1) & (6) ERA failed. The removal from post and reduction in salary constituted straightforward sex discrimination. The reduction in salary amounted to a series of unlawful deductions from wages. Q had not affirmed the contract or waived the breaches in the six month period after the demotion and was constructively dismissed. NSR appealed the decision.

Employment Appeal Tribunal

There were two main grounds of appeal:

1. The ET misconstrued 'avoidance of risk' in regulation 16 MHSWR. The employer argued that regulation 16 required them to 'get rid of' risk in absolute terms.
2. On the facts found, the ET was bound to find Q had affirmed her contract or waived the breach by the time she treated herself as dismissed.

The EAT first set out the procedure that an employer must follow in order to justify a maternity suspension where work poses a risk to a pregnant woman or her baby:

1. the risk must be assessed
2. risks should be avoided if possible by appropriate measures including alteration of working conditions or hours;
3. only if risk could not be avoided could the employer go on to suspend the employee, either by transferring her to another job or taking her out of the workplace altogether;
4. before removing the employee from the workplace, the employer must offer suitable alternative work if available, on terms that are substantially not less favourable than her existing terms of employment. (s67 ERA).

The EAT held that the first ground did not arise since the ET had found that Q had not been suspended for health and safety reasons. Rather, her managers had attached a label of health and safety concern to their personal feelings.

Summing up the EAT considered that,

> *since the implementation of the MHSWR Regulation 16 involves a restriction on the right of a woman to carry out her ordinary job, there must be a balancing exercise. [The employer must show] it is necessary for health and safety reasons in effect to discriminate. The principle of proportionality requires that the greater the discriminatory act, the greater the necessity must be.*

On the second ground, the EAT held that the ET's reasoning was wrong in law, since they had considered whether Q had waived her right to claim damages rather than her right to treat the breach of contract as repudiatory and claim constructive dismissal. Despite the error, the ET's findings of fact compelled it to conclude that Q had been entitled to treat herself as dismissed. Q referred in her letter of resignation to the failure to pay her full salary. The deliberate unlawful deduction from wages (which continued right up to her resignation) amounted to a repudiatory breach that recurred every time Q was paid (see *Cantor Fitzgerald v Callaghan* [1999] IRLR 234).

Comment

In its closing summary of the correct approach to implementing MHSWR Regulation 16 the EAT echoes the dictum in *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] IRLR 263 ECJ:

> *In determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by [the Equal Treatment Directive] the principle of proportionality […] must be observed. That principle requires that derogations*

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remain within the limits of what is appropriate and necessary for achieving the aim in view and requires that the principle of equal treatment be reconciled as far as possible with [the countervailing interest].

By expressly requiring that the principle of proportionality is observed and specifying the evidence an employer must bring to justify its action, the EAT has implicitly adopted the test of objective justification applied by the CA in *Hardy and Hansons v Lax* [2005] IRLR 726 (see Briefing no 383) in relation to indirect sex discrimination. Employers do not have a margin of discretion. Their acts and omissions in relation to risk assessments related to maternity suspensions will need to withstand a critical evaluation.

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Briefing 402

More on the duty to make reasonable adjustments

Southampton City College v Randall [2006] IRLR 18 EAT

Implications for practitioners

This case concerns the scope of the duty to make reasonable adjustments, and, in particular, reaffirms the breadth of the duty.

Background

Mr. Randall (R) worked as a lecturer in Southampton City College (S) from 1 September 1976 until 31 May 2003. He specialised in computer aided design and was one of 17 lecturers in the college's engineering department. R's work was very good and his students had high success rates in examinations. Since 1992, he had taught mainly mature students in classes of between 5 and 18 students. Almost all the teaching was done in a quiet classroom setting, but R was required to work for about 2 hours per week in the machine shop as a second tutor to other classes, for safety reasons. The machine shop is a large workshop containing benches and a variety of over 30 machines and it has high levels of background noise, so R had to shout.

From 1992 R experienced occasional problems with his voice. In the autumn of 2000, he was absent from work for about 3 weeks and was referred to the occupational health adviser. The report dated 16 November 2000 suggested that his lecture time be reduced. S did not implement the recommendation or disclose the report to R.

In January 2002, R went on sick leave. In February 2002 he was diagnosed as suffering from functional dysphonia. In May 2002 he returned to work and adjustments were made to his duties by S. He continued to teach small groups and mature students. An occupational health report dated 27 May 2002 recommended the adjustments to be made and that a review take place in September. No review took place and none of the occupational health reports were ever disclosed to R.

In September 2002 R was given a full teaching timetable and was not consulted about any aspect of it. No allowance was made for his condition in drawing up the timetable. R had problems teaching in the noisy machine shop and mentioned the problems several times to his line manager. On 22nd October 2002 R's voice broke down. He went on sick leave and never returned to work.

On 12 December 2002, there was a meeting between R, his line manager, Mr. Gaynor, and the human resources adviser. R asked to be allowed to return to work performing the same functions as he had in May (not undertaking classroom lecturing but doing individual tuition and student contact). Mr. Gaynor opposed this and his view prevailed.

On 20 December 2002, S undertook a restructuring process, which had been initiated by Mr. Gaynor. A post of co-ordinating lecturer in manufacturing was advertised and R applied. The job description was very similar to that issued to R in 1999. However, R was graded lowest of all the applicants based on his application form. He had not been told that there was to be a greater emphasis than before on teaching 14 to 16 year olds. R was not appointed to the post,

although another employee was given the lesser post of lecturer 'based on the experience of both candidates'.

On 30th April 2003, there was a meeting between S and R. Although redeployment was discussed at the meeting, S approached this as a hypothetical issue and R was effectively given the option of being dismissed on grounds of redundancy or applying for ill health retirement.

Employment Tribunal

R successfully applied for ill health retirement but then brought a claim under the DDA and for unfair constructive dismissal. The ET upheld both complaints.

The ET found that S had failed to carry out an appropriate enquiry and assessment to ascertain what adjustments could be made to R's working schedule on his return to work in September 2002. Amongst other things, S failed to consult the claimant as to his timetable or the hours, duration and type of lecturing which could be arranged to best accommodate his disability; and failed to make or consider making reasonable adjustments by way of amplification. In particular, Mr. Gaynor conceded in evidence that at the meeting on 30 April 2003 he had a blank sheet of paper so far as the job specification was concerned, and thus it was possible to devise a job which would take account of the effects of R's disability but harness the benefits of his long career and successful record.

Employment Appeal Tribunal

S appealed against the decision of the ET. Amongst the grounds of appeal argued was that the tribunal erred in suggesting that the employer had a duty to create a new job for R, and that there was no evidence before the tribunal to suggest that voice amplification would have been effective by way of an adjustment. The EAT dismissed the appeal. It held that the DDA does not **as a matter of law** preclude the creation of a new post in substitution for an existing post from being a reasonable adjustment. It must depend upon the facts of the case. In the present case, there was a substantial reorganisation and S had a blank sheet of paper so far as the job specification was concerned. This was a conclusion to which the tribunal could come.

With regard to the issue of amplification, the EAT found that this was one example of the sort of reasonable adjustment which the tribunal found that a reasonable employer should have considered in the light of R's history as a local councillor who used amplification when speaking at some council meetings. The EAT went on to approve the decision in *Mid Staffordshire General Hospitals NHS Trust and Cambridge* [2003] IRLR 566. It stated that there must be many cases in which the disabled person has been placed at a substantial disadvantage in the workplace but in which the employer does not know what it ought to do to ameliorate that disadvantage without making enquiries. A failure to make those enquiries would amount to a breach of the duty imposed on employer by s.6 (1).

Comment

This case again highlights the scope of the reasonable adjustment duty, as amplified in *Archibald v Fife Council* [2004] IRLR 651. It also makes it clear that the responsibility for making adjustments rests squarely with the employer who in many cases will need to carry out a proper assessment to determine what is a suitable adjustment to make for any particular employee – and this in itself is a reasonable adjustment. This is a particularly important point for those representing applicants to remember, as, if no assessment has been done, it will often not be possible for an applicant to indicate what adjustment she believes should have been made to enable her to continue in employment or to do the job to the best of her ability. In these circumstances, a failure to carry out an assessment should be pleaded as a failure of the duty.

Catherine Casserley
Disability Rights Commission

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Rothwell v Pelikan Hardcopy Scotland Ltd [2006] IRLR 24 EAT

Implications for practitioners

This case deals with the duty to make reasonable adjustments in the context of justifying less favourable treatment. It focuses in particular on the importance of consultation by management and, again, on the scope of the reasonable adjustment duty.

Facts

Mr. Rothwell (R) was employed by Pelikan (P) from June 2001 to January 2004. He worked latterly as a project engineer. When he was taken on P knew that R had Parkinson's disease. Up until his dismissal, P was very considerate in accommodating him. In 2003, his health deteriorated and he went off work ill. He was assessed by Dr Carroll an occupational health doctor who was not employed by P, though she gave regular advice on occupational health matters to them. She reviewed R and was concerned about the deterioration in his condition. She requested a consultants report from R's consultant neurologist, and this was supplied. The report was optimistic and referred to the possibility of a new treatment which might have the effect of enabling R to work for much of the day. Dr. Carroll had a meeting with R at which she discussed the consultant's report with him, but she did not give him a copy. After her meeting, Dr Carroll wrote to P advising them of her view that P would not be fit to return to work in the foreseeable future. She made reference to having obtained a consultants report and to R being about to start a new treatment but gave none of the specification contained in Dr Carroll's report and did not copy the report to P. Having received Dr. Carroll's letter, P fixed a meeting with R at which it was clear that P had decided to dismiss R.

Employment Tribunal

R made a claim to the ET for unfair dismissal and disability discrimination. The tribunal dismissed both claims. It found that although R had been treated less favourably for a reason relating to his disability, the treatment was justified. It then considered whether there were any reasonable adjustments that could be made but found that there were none. They also dismissed his unfair dismissal claim.

R appealed, the main ground of appeal being the absence of consultation with R on his fitness for continued employment prior to dismissal.

Employment Appeal Tribunal

The EAT allowed the appeal. It held that the tribunal was wrong both in relation to the disability discrimination claim and the claim for unfair dismissal. It held that a tribunal cannot make a finding that less favourable treatment is justified under the DDA unless it is satisfied that any reasonable adjustment that an employer had a duty to make under s.6 (which is now s. 4A) have been carried out. Contrary to their own findings of fact and their acceptance of the relevant terms of the Code of Practice, the tribunal found that P did consult R. This was despite the fact that it was plain that no-one from P discussed the terms of Dr Carroll's report with R at all, and despite it evidently being accepted that consultation with R did constitute a reasonable adjustment. There was, in this case, no relevant consultation. In the circumstances, the EAT substituted their decision that consultation with R prior to dismissal would have been a reasonable adjustment and thus that R's dismissal was discriminatory. The EAT also substituted a finding of unfair dismissal. It said that this was not one of those exceptional cases where an employer could show that an incapacity dismissal was fair without consultation.

Comment

This case highlights the importance of meaningful consultation with employees in any incapacity dismissal. It is extremely useful that the EAT have characterised this as a reasonable adjustment. The case re-affirms the principle that it is the employer who is responsible for decisions made in relation to employees and they should not abdicate this responsibility – whether it is in relation to whether or not someone meets the definition of disability or, as in this case, whether someone is capable of carrying on in their employment.

Catherine Casserley
Disability Rights Commission

Indirect discrimination against pregnant trainee midwives

Fletcher and Others v Blackpool & Wyre and another [2005] IRLR 689 EAT

Implications for practitioners

Trainee midwives whose bursaries were stopped during time off for pregnancy and childbirth had been subjected to discrimination. Treating someone who is pregnant, or on maternity leave, in the same way as other people in different circumstances, can amount to sex discrimination. Trainee midwives are neither employees nor workers but fall within the Equal Treatment Directive (ETD) and SDA whilst undergoing vocational training.

Facts

The claimants were three trainee midwives on a three year vocational programme, consisting of academic training and practical training in the community and NHS hospitals. They received a bursary and not wages. The ordinary practice was that bursary payments ceased when a student's attendance on the course was curtailed for a reason other than sickness for up to sixty days.

Employment Tribunal

The claimants argued that they had suffered discrimination contrary to SDA s14 which prohibits discrimination against women undergoing training. The claimants succeeded at the preliminary hearing when the ET concluded that the bursary was covered as a training scheme. At the substantive ET hearing their claims were dismissed. The ET found that the claimants had in fact been treated in the same manner as other students whose courses are interrupted and therefore had not been subjected to less favourable treatment. The claimants appealed to the EAT.

Employment Appeal Tribunal

The EAT overturned the ET decision finding that the claimants had suffered discrimination by virtue of having their bursaries stopped.

The EAT held treating the claimants who were absent due to pregnancy or on maternity leave in the same way as others, in circumstances where they are disadvantaged because of their pregnancy or maternity, is applying the same treatment to differing situations and was therefore discrimination. A complaint of sex discrimination by a pregnant woman cannot be defeated by stating that all employees are treated in the same way; this could not be a defence to their claims under s14 SDA and was discriminatory.

The EAT overturned the ET's decision upholding the claimants' claims and remitting them back to the ET for remedy. The EAT found that the claimants who had been denied financial assistance, or had felt pressured to agree to clinical hours on their return to the course soon after child birth, had suffered a detriment. The principle of equal treatment in Article 5 ETD applies to vocational training and was sufficiently broad to include a facility like a bursary payment, to assist students whilst carrying out their vocational training. The ET had erred in holding that the ETD could not be relied on here.

The EAT reiterated that women on maternity leave are in a special position and cannot compare themselves to men and women at work. The principles extracted from *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482 did not prevent a comparison being made between sickness and pregnancy in all circumstances. The *Webb* principle is to protect pregnant women. It does not prevent them comparing themselves to more favourable treatment afforded to sick men, in order to prove that a different rule is being applied in comparable circumstances and is discriminatory.

Comment

Mrs Justice Cox takes the opportunity to review the legal issues in pregnancy and maternity discrimination in both its domestic and European context. The decision further demonstrates how discrimination can occur when individuals with different characteristics who suffer a disadvantage are treated the same as others. This decision has been heralded as having far reaching implications providing new rights for many women on the NHS bursary scheme.

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STOP PRESS Equality Act and the new CEHR

The Equality Act received royal assent on February 16th. Hence all references to the Equality Bill in this issue of Briefings should be read as the Equality Act.

It is expected that the first advertisements for senior positions in the new Commission for Equality and Human Rights such as the Chair and the Chief Executive will come out soon after royal assent is received.

In November 2005 the announcement was made that the Government is proposing that the new Commission for Equality and Human Rights will be based in two sites in England, with a majority of staff based in Manchester and a significant presence in London. A number of different interest groups including the CRE and the 1990 Trust have been critical of this decision. The CEHR would also have offices in Glasgow and Cardiff and a strong regional presence throughout Great Britain.

The new provisions to prevent discrimination on grounds of religion or belief in the non-employment area are expected to be implemented from October 2006. The Government plan to put in place regulations making similar provisions to prevent sexual orientation discrimination in the non-employment area to take effect at the same time.

The Act also creates a new duty on public authorities to promote equality of opportunity between women and men, and to prohibit sex discrimination in the exercise of public functions. It is likely to come into effect from April 2007. The EOC are currently consulting on a draft Code of Guidance on the new duty. The consultation runs from February 15th to May 15th 2006. To respond to the consultation visit the EOC website at: http://eoc.dialoguebydesign.net/dbyd.asp

Age Discrimination Regulations

The Government have announced that the Employment Equality (Age) Regulations 2006 will be published in the first quarter of the year and should be laid before Parliament by Easter. They will take effect from October 2006.

Equality Review and Discrimination Law Review

The Equalities Review has carried out a consultation exercise and is planning to publish an interim report in March. It is likely that the Green Paper from the Discrimination Law Review will come out before the final Equalities Review report. The Discrimination Law Review team is in close contact with the Equalities Review team and the findings of the Equalities Review interim report will be important for the way the Discrimination Law Review is taken forward. The Discrimination Law Review hopes to publish emerging findings within the next three months. The DLA is sending in submissions to the Discrimination Law Review within the next few weeks.

New Statutory Code of Practice on Racial Equality in Employment

On November 24th 2005 the CRE published a new statutory Code of Practice on Racial Equality in Employment. The Code provides recommendations and guidance on how to avoid unlawful race discrimination and harassment in employment. It will take effect on April 6th 2006 when it replaces the CRE's current Code of Practice. The CRE say that the new Code 'reflects the law as it stands today and benefits from the considerable body of case law that has been developed since the Race Relations Act came into effect in 1977'.

Both the new and the old Codes of Practice are available on the CRE website at:
http://www.cre.gov.uk/gdpract/ employment code2005.html

ECJ considers age discrimination

The recent landmark decision in *Mangold v Helm* C-144/04 has considered age discrimination provisions in Germany. Like the UK, Germany has opted to postpone the introduction of age discrimination provisions until December 2006. However, after the directive was passed and before its implementation Germany reduced the age after which there was no protection in relation to fixed term contracts. They proposed to increase it again in 2006. The ECJ ruled that this provision was unlawful. They said:

> *It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition has not yet expired.*

This new principle will have wide implications for the implementation of EC Directives and raises many questions about the way that the UK is proposing to implement the age provisions of the Employment Directive. There will be a full report on this case in the next issue of Briefings, in the meantime the full judgement is available at:
http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-144/04&datefs=& datefe=&nomusuel=& domaine= &mots=&resmax=100

DRC launches equal treatment in health care investigation

The DRC have launched a formal investigation into equal treatment in health care for people with learning disabilities and people with long term mental health problems. The DRC say that a lot of the evidence points to the fact that these groups of disabled people have higher mortality rates (i.e. die earlier) than the overall population – not always for reasons related to their impairment. Much of this evidence is alarming and therefore the DRC have decided to use its powers to undertake formal investigations to instigate a comprehensive enquiry into this issue.

The DRC say that they are seeking to

> *scrutinise these health inequalities by shining a light on them in order to propose practical approaches to reducing inequality at a primary care level, including recommendations for national policy and implementation. We shall do this through a mix of consultation and evidence collecting techniques including questionnaires, focus groups, in depth area studies, analyses of GP databases and statistics, a formal inquiry panel and roadshow events.*

In launching this investigation the DRC have published their comprehensive evidence paper which is the foundation for this project. It pulls together existing evidence on the overall reasons for health inequalities which particularly affect people with learning disabilities or mental health problems and detailed evidence about the health of, and services received by, these groups of disabled people.

Some key findings from this evidence are –

- People with learning disabilities or long term mental health problems generally have worse physical health than other people.
- Psychiatric drugs can increase the risk of other illnesses.
- Major reviews of people with learning disabilities confirm increased risk of early death, with preventable mortality reported as being four times higher than in the general population.
- Mortality rates for people with schizophrenia or manic depression are higher than those of the general population even when 'unnatural deaths' (suicide) are discounted.

For further details see the DRC website at:
http://www.drc-gb.org/newsroom/healthinvestigation.asp

EOC investigate discrimination against ethnic minority women

In October 2005, the Equal Opportunities Commission launched 'Moving on up? Ethnic minority women at work', a major investigation into the participation, pay and progression of ethnic minority women in the GB labour market.

Previously published research shows that some ethnic minority groups face disadvantage in employment relative to the white majority. There is widespread concern about the impact of this for both individuals and the economy. The position of ethnic minority women is often subsumed within broad generalisations about 'ethnic minorities', yet ethnic minority women's experience can be affected by their gender as well as their race. There are also large variations in the position of different women within particular ethnic groups.

This investigation aims to improve understanding of the diverse experiences of ethnic minority women and the key issues affecting their participation and progression in the labour market. An important aspect of the investigation will also be to identify practices by employers that are helpful to ethnic minority women's participation and progress at work.

The EOC consider that there is clearly some commonality of experience between different groups of ethnic minority women, as well as significant differences. To ensure that the investigation's recommendations reflect this complexity, the commissioned research will focus on Pakistani, Bangladeshi and Black Caribbean women, examining the issues affecting them in some depth in order to:

- find out why women of Pakistani and Bangladeshi origin are three times less likely to be employed than white women. Given that over 90% of Pakistani and Bangladeshi women are Muslim, we are interested in particular obstacles facing Muslim women who wish to find paid employment.
- investigate why, despite high levels of economic activity, Black Caribbean women face high levels of unemployment, and obstacles to progression – particularly at senior manager level.

The EOC hopes that many of the findings will be applicable to a wider range of groups, and that others will build on this research to probe the policies and practices that may have particular benefit for other ethnic minority women.

EOC say that voluntary approach to pay reviews is failing

In January the EOC reported that after four years of promotion, just one third of large organisations have completed an equal pay review. So the EOC is calling for a new approach to close the pay gap between men and women.

The EOC's Equal Pay Review research found that there was no significant increase in the number of large organisations completing a pay review over the last 12 months. At the current rate, the government will miss its own target of having 45% of large organisations completing pay reviews by 2008.

The least activity is in the private sector, where the gender pay gap is already nearly ten percentage points higher than in the public sector. While 61% of large public sector organisations have completed an equal pay review or have their first pay review in progress, just 39% have done so in the private sector.

Across the economy, the pay gap is causing employers to lose out on women's skills. Women working full-time are earning 17.1% less per hour than men working full-time. Women working part-

time earn 38.4% less than men working full-time, a pay gap which has barely shifted over the last 30 years.

The EOC is therefore calling for fresh action to kick start change, they suggest:

- A modernisation in Britain's 30 year old pay and sex discrimination laws to require private sector employers to take action to close the pay gap, rather than waiting until individual women take cases to an Employment Tribunal. This would mirror the new 'gender equality duty' for public sector employers which the Government is introducing now through the Equality Bill.
- A light touch 'equality check' in which employers would take an overall look to see whether they had a pay gap and to identify where action might be needed. A full pay review would only be needed where there was evidence of pay discrimination. Other causes of the pay gap might include job segregation and a lack of family friendly policies, both of which have a negative impact on productivity.
- A protected 'amnesty' period for employers while they take steps to change their pay systems.

Letter to the editor

Your editorial is engagingly written, but I think it is wrong: wrong in supporting the Muslim taskforce call for a Royal Commission, wrong in linking the July terrorist attacks with the Iraq war, and more than wrong – plain foolish – in buying into conspiracy theories about the timing of Trevor Phillips' speech.

There is no reason to think that Muslims, in virtue of being Muslim, have any privileged knowledge or insight into the motives or reasons for the July attacks, or the causes of terrorism. Terrorists are not ordinary people, and an ordinary Muslim knows as much, and as little, about terrorism and its causes as your editor or any of your readers, Muslim or non-Muslim.

I tend to think the first half of your editorial was right – terrorist attacks are indiscriminate in their effects and terrorism is not an equality issue. You might have reminded your readers that terrorism against civilians is always unlawful under international law, and no political cause can be invoked to justify or excuse it. I firmly believe the British Government is no more responsible for the July attacks than the US Government was for 9/11. The terrorists alone are responsible. Talk of 'linkage' fudges that simple fact.

I do agree with you that '… images of Iraq in British Muslim homes just might have an effect on disengaged Muslim youth'. I imagine the July bombers may have taken direct inspiration from the sight of religious fanatics blowing up their fellow citizens in Iraq.

DLA members will have differing views about Iraq and the politics of terrorism. DLA should be cautious about seeming to take a position on such issues.

Gaby Charing 31 October 2005

Reply from the DLA Executive

The DLA welcomes readers' comments on the contents of *Briefings*, which the DLA publishes to inform its members of recent developments in discrimination law and to stimulate debate on current equality issues.

In responding to the letter (printed above) from Gaby Charing, may I make clear that it has never been the intention that the editorial, or any articles, in *Briefings* should express the agreed position of the DLA, unless this is specifically stated. Rather, the DLA, and the members of the elected executive involved in the drafting of editorials, view the editorials in *Briefings* as an opportunity (three times a year) to highlight matters which we believe should be of interest or concern to our members, in order to provoke wider discussion.

Gaby Charing has stated her disagreement with carefully selected parts of the editorial in the last issue of *Briefings*; other readers may agree with her, and others disagree. Recent events make plain that equality issues often overlap with what may be seen as more 'political' matters; we believe that it will continue to be right for *Briefings* to draw attention to these issues.

Briefings

Abbreviations

CA	*Court of Appeal*	*ECHR*	*European Convention on Human Rights*	*HRA*	*Human Rights Act 1998*
CEHR	*Commission for Equality & Human Rights*	*ECtHR*	*European Court of Human Rights*	*MHSWR*	*Management of Health and Safety at Work Regulations 1999*
CRE	*Commission for Racial Equality*	*ECJ*	*European Court of Justice*	*MPLR*	*Maternity and Parental Leave Regulations 1999*
DDA	*Disability Discrimination Act 1995*	*ED*	*Employment Directive*	*PCP*	*Provision, Criterion or Practice*
DDP	*Statutory Dismissal and Disciplinary Procedure*	*EOC*	*Equal Opportunities Commission*	*PWD*	*Pregnant Workers Directive 1992*
DRC	*Disability Rights Commission*	*EPD*	*Equal Pay Directive*	*RD*	*Race Directive*
EA	*Employment Act 2005*	*EqPA*	*Equal Pay Act 1970*	*RRA*	*Race Relations Act 1976*
EAT	*Employment Appeal Tribunal*	*ERA*	*Employment Rights Act 1996*	*RRAA*	*Race Relations (Amendment) Act 2000*
EC	*Treaty establishing the European Community*	*ET*	*Employment Tribunal*	*SDA*	*Sex Discrimination Act 1975*
		ETD	*Equal Treatment Directive*	*UN*	*United Nations*
		HL	*House of Lords*		