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Editorial *Missing the Point: the Equalities Review needs to think again*

Members will recall that the Government set up two reviews of equality policy in 2005: an Equalities Review, to *'provide an understanding of the underlying long-term causes of disadvantage that need to be addressed by public policy'* and a Discrimination Law Review, to consider the shape and content of any laws enacted to respond to these needs.

The Equalities Review produced its long awaited interim report on March 20th (see http://www.theequalitiesreview.org.uk/). Responses showed that people reported a perception of progress in dealing with inequalities during the past 60 years. Most responses considered that legislation was the main contributory factor to this progress. Other relevant factors were named as activism and lobbying, wider changes in society and positive images in the media. The main barriers to progress were identified as social attitudes and prejudices and lack of leadership at the top of organisations. Most people identified a need for a single Equality Act and many wanted to see an increase in awareness of the extent and nature of inequalities being experienced by people and groups.

Consequently, one of the main findings of the Equalities Review was that there is an absence of a *'strong, modern case for equality'*. Members of the DLA will surely agree: this is essential if the wider public are to understand and support the aspirations for a non-discriminatory society. But it is worrying to read also of their finding that in parallel to a general public commitment to the idea of fairness is an equally strong reluctance to take on the issue of redistribution (see British Attitudes Survey 2004). It is worrying since with such a reluctance the next gains for equality activists will be much harder to achieve. Inequality is caused by structural forces within our society. The competition for power is always going to be important. No solution which lacks a significant analysis of how the necessary empowerment will take place can have ultimate value as a useful and effective proposal.

The interim report concludes that the approach to inequality is probably hindered by the lack of objective information about current inequalities. Thus it seeks to find more 'objective' ways of describing inequalities in society. It is here that the desire to make a new contribution seems to founder on a desire to avoid repetition of what DLA members will know to be old and well worn truths. The interim report rejects equality of process, equality of outcome and equality of opportunity before coming out in favour of an assessment of 'capability'.

This analysis misses the point, and is likely to cause the debate to become bogged down into individual issues thus preventing it from addressing the underlying causes.

The EC Study on Data Collection makes this point very neatly when commenting on the need to measure the extent and impact of discrimination in Europe:

> *Discrimination is usually understood in terms of more or less isolated individual acts, as is the case also with the definition of discrimination…But while this episodic understanding of discrimination may be appropriate for many purposes, it is in itself insufficient for an indepth analysis of discrimination. This is because discrimination - or more generally and appropriately: discrimination and related disadvantage – are dynamic processes, and have a tendency to cumulate.*

The report expresses concern about the way in which debates about priorities

> *can easily degenerate into unseemly competitions between groups of disadvantaged people*

and it is critical of the way in which polarisation of the separate grounds for inequality can lead to a battle of the lobbyists, so they comment that

> *what is in fact a true attempt to remedy an unjust inequality may appear to be the action of self-interested groups to close gaps for which they are themselves responsible.*

To readers of Briefing it hardly need be said that this is less than fair to the many equality NGOs who have done so much to highlight inequalities of those groups that society is only too happy to ignore. Frankly it reads like no contribution to the debate, but rather an attempt to head off criticism.

So what should this report have said? The report needs to consider what further positive action measures would be appropriate to counter the existing inequalities that they readily acknowledge are extensive and pervasive. Fortunately, the role of public bodies and the possibility of extending public procurement is raised in the report and it is to be hoped that much more work will be put into these than into developing a 'capability' test. Much good work has already been done on this. The GLA in particular is very aware of its possibility as a tool for positive change.

Where there is no public altruistic wish to work for redistribution there are only a very limited number of ways that it can be achieved. The combination of economic self interest and legal obligation appears to be one of the best options that we have.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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Editor: Gay Moon Designed by Alison Beanland (alison@alisonbeanland.com) Printed by The Russell Press

Decisions on Equality: A Judicial Ramble

Justice Albie Sachs' speech to the DLA conference

PAUL CROFTS

Ulele Burnham with Judge Albie Sachs at the DLA Conference in December 2005

Introduction

My friend Zubeida Jaffer got married for the second time two weeks ago. The first time she and her husband were on the run. The security police were after him, and she was detained soon after. This time it was in a totally different South Africa. Her grown-up daughter was with her, and she was having a Muslim wedding, but with a difference. She phoned to prepare me for the fact that normally the Nika takes place in the Mosque. The men go there, the formal ceremony is conducted, the men come out and it is announced to the bride that she is married. Zubeida, being a Muslim feminist, was having none of that. So the Nika was in the hall where we were going to have our tea, and her friends would be present to enjoy the occasion. She felt that I ought to be prepared for the religious ceremony.

It was an interesting example of how you can maintain something that is very traditional, but adapt it to a new set of values. The most interesting feature of the afternoon was right towards the end when her nephew, who is a medical doctor and well-known stand-up comedian, entertained the audience. A largely Muslim audience, he had everybody roaring with laughter. Now I had never heard a Muslim comedian before. Muslims, according to the stereotype, do not make jokes. They are gloomy, serious, inward-looking, cut-off people and they never laugh. Here he was getting us rolling in our seats. What made it particularly interesting was I knew where he had got it from. His grandfather had been a driver for a Jewish commercial traveller, and he had picked up a whole lot of jokes which he would tell and repeat to his family. This large extended Muslim family would hear these Jewish jokes. Little Riyad grew up in a Muslim family where people laughed at Jewish jokes. Now he was telling similar jokes for his own community to laugh. With a straight face he told us the following joke: 'I am a very poor traveller and hate flying, so when I got into an aeroplane last week, I was very nervous and I started praying in Arabic. An amazing thing happened, everybody else in the aeroplane started praying. They prayed in Hebrew, English, in all the different languages. The power of prayer is quite extraordinary'. One after the other the jokes came, ebullient and painful about being a Muslim, part of a minority community. It just made one aware of the extent to which human beings are being polarised in our society through stereotyping, negative assumptions about people and, marvellously in this case, about the power of humour to deal with situations like that.

I thought Judge Stephen (Lord Justice Stephen Sedley) in his introduction was going to mention the prize he once offered to me for the best opening line of a judgment. This was in a case in which we struck down criminalisation of sodomy and I wrote a concurring judgment. The opening line was 'Only in the most technical sense is this case about who may penetrate whom where'. Now I have tried to beat that in the *Laugh-it-off* case. This dealt with the appropriation of a trademark to lampoon the trademark 'Carling Black Label'. A T-shirt used the logo with the words 'Carling Black Labour' and then made some critical remarks about 300 years of white guilt. The owners of the trademark challenged the selling of t-shirts to students and others. They won in the High Court, won in the Supreme Court of Appeal, and lost in our Court. My concurring judgments opening line was 'Does the law have a sense of humour?' For what it is worth I said humour is in fact a very important ingredient of democracy. If we get too serious it actually bottles up tensions in society. So humour is not just being funny, humour becomes an important ingredient of the open, democratic society our Constitution envisages.

Now why do I mention Zubeida's wedding and the Muslim comedian? Since I arrived in this part of the world I have constantly been reading about 'rendition' in the newspapers. This is the dark and ugly side of stereotyping, and the negative assumptions and cruel behaviour that goes with them. Some of you might have heard me speak to the English Bar earlier this year. I referred to the case called *Mohammed* in our Court. Mohammed had, it later was proved, been involved in the terrible blowing up of the American Embassy in Tanzania. He had transported the explosives. He later came to Cape Town and was working as a pastry chef, a very good pastry chef, it seemed, quiet and demure, lying low. The FBI got on to him and they were waiting with his photograph at immigration. They pounced on him and within 48 hours he was flying in an American plane to New York to face trial for murder. Now there was nothing wrong about him being flown to America to face trial for the crime that he was allegedly involved in. What was wrong was that he had not been allowed access to a lawyer, and he had been sent to the United States without getting an assurance from the American government that, if found guilty, he would not be executed. Our Court had declared capital punishment to be a violation of fundamental rights. This meant that, before extradition or deportation, he had a right to be informed that he could not be sent to a country to face trial if he was going to be poisoned, hanged, or shot by the government. This is when we came across this phrase rendition. It was called informal rendition. That was before 9/11. We had to decide what we could do. We could not demand his return, so we sent our judgment to the court that was trying him. Eventually the jury got to hear of it, and he was not sentenced to death.

The connection between rendition and these jokes by the Muslim comedian is a strong one. I can recall when I was in a youth movement in Cape Town; it was at the time of the Algerian War of Independence, French colonial troops were accused of massive use of torture. Jean Paul Sartre wrote a brilliant essay on torture. He showed that to facilitate torture of people belonging to a certain class, you had to dehumanise that class. It justified what you were doing. The people whom you were torturing were not human beings with the right to dignity; they were 'the enemy'. And they were a racialised enemy. It was important for the French torturers to feel that they were dealing with the Muslim Arab enemy. The racism was integral to the torture. One senses, in this flying of people around the world, and the way it is done in total violation of the most elementary principles of respect for human dignity and fundamental rights, that integral to it is the notion that they are not people. They are enemies. They are objects. They are instruments of another kind of world view, and 'we' are entitled to deal with 'them' in this particular way. Even inventing this word rendition, a euphemistic word for hijacking, kidnapping, a lawless transportation from one part of the world to another, is part and parcel of neutralising the reality of what is happening. In our case, when the matter came to our attention, we did take a stand. We did hold that our immigration authorities were violating the fundamental rights of a person who had no claim to pity, no claim to solidarity for what he had been involved in – he had in fact killed as many Tanzanians, and more, as he killed Americans, and he had murdered them all in a way that we repudiated totally, that was destructive of any honourable objectives that he might have had – nevertheless he remained a human being, a person, Mr Mohammed, not someone who lived his life in inverted commas, 'an Arab or Muslim terrorist,' outside the pale of human contemplation.

To add to the confusion, there is a bitter symbiosis between these lawless renditions, and the people who attack elementary principles of international law so as to provoke a schism in the world, and claiming to do so in the name of Islam. From opposite sides they both play the same kind of game. They feel that when they collapse a building and destroy thousands of people within it, they are not people who are being destroyed, but instruments of the godless West.

The very objective of the law is to reclaim humanity, the human personality, a sense of responsibility and interconnectivity of one human to the other. I might say when I read in the press the reports of the judgment from the House of Lords in the recent case denouncing the use of torture, I felt very proud to be a judge. I do not always feel proud to be judge. I feel very proud of my vocation in my Court but I do not always feel proud when I see what judges in different parts of the world are doing. But I felt very proud last week.

Cases in the Constitutional Court

At the same time as I was reading in the press about rendition, I was also reading about the Civil Partnership Act. It so happened that on December 1st

2005 I handed down judgment in the *Fourie* case. A couple had been attracted to each other. They had gone out together and set up home together. They were treated by their friends as a couple for a decade and eventually they decided they wanted to proclaim their commitment to each other in a public ceremony and get married. The problem was they were both women. They went to the Registry Office and the Registrar said, 'Sorry, the law does not allow me to marry you'. The common law was taken over from the famous *Hyde v Hyde* case in this country. Marriage is the union for life, (we have now said 'for as long as it lasts') between one man and one woman. It was the common law definition which excluded the lesbian couple from marriage. The Marriage Act allows for religious bodies to marry people in terms of the tenets of their religion, and non-religious marriage can take place in a public ceremony. The vow is pronounced, 'Do you AB take CD to be your lawful wife or husband?' and that was held to exclude, because of its gendered language, people of the same sex. So both the common law and statute made no provision for Ms Fourie and Ms Bonthuys to get married. There were various technicalities in the procedures that ended up with two cases being brought, one by them as a private couple, and another by the Lesbian and Gay Equality Project. We decided to hear the two together so we could have a comprehensive approach to the matter.

The State argued against acknowledging that Ms Fourie and Ms Bonthuys had a constitutional right to get married. It accepted that they were being discriminated against in as much as there was no provision for them to regulate their relationship with the backup of the law. But the main argument was that it is not marriage that is at fault, because marriage by its nature is a heterosexual institution that predated the law. It is an institution that just does not contemplate same-sex couples. Its argument was backed up on behalf of a body called Doctors for Life by Mr Smyth, a QC from England, as well as by Cardinal Napier and The Marriage Alliance.

Four specific arguments were presented against conceding the claims made by the applicants and the Equality Project. The first was that our Constitution does not include a right to marry. The only right that same sex couples could claim is a right not to be penalised, interfered with, or punished for living together as a same-sex couple. It was a negative right, a sphere of freedom; so they could not be penalised for their lifestyle. But it did not give them the right to actually claim the involvement of State institutions to enable them to marry.

The second argument was that marriage, by its very nature, revolves around procreation. The rights of the same-sex couples had to be balanced against the rights of religious believers, for whom marriage is a sacrament based upon the perpetuation of God-given life. The rights of believers would be violated if the concept of marriage was changed, (some said undermined or invalidated), by introducing same-sex couples into it.

Another argument was that international law had long stated that 'all men and women have a right to marry, and to found a family.' The use of the phrase 'all men and women' presupposed heterosexual couples. Therefore international law supported and required that marriage be associated with heterosexuality.

The fourth argument related to a specific clause in our Constitution. Section 15 deals with religious freedom and says that nothing in the Constitution prevents recognition of systems of family law different from those ordinarily accepted as regulating marriage law. It was clearly intended to include Hindu marriages, Muslim marriages and so on. The argument was that this provision was wide enough to presuppose and require a form of regulation of same sex unions outside of the system of marriage.

All the opponents of recognising same-sex marriages contended that the Court did not have the power to change an institution as powerful as marriage. This was beyond the scope of judicial intervention; only Parliament should have, can have, and does have, the power to reconstruct, or remodel the institution of marriage.

South Africa was constructed around apartheid, and then reconstructed around the struggle against apartheid. Apartheid divided the nation. People were overtly discriminated against in every way literally from birth (maternity homes if you had one), to death (the graveyards, if you had access). Everything was segregated. So it is no accident that in our Bill of Rights equality comes even before the right to life, even before the right to dignity. It is dealt with in quite a comprehensive clause. Not only does it contain the right to equal protection and benefit of the law, it also expressly prohibits unfair discrimination on grounds of race, colour, creed, marital status, birth, origin,

national origin, disability and sexual orientation. It was the first Constitution in the world to mention sexual orientation as a forbidden ground for unfair discrimination. So here you have got a Marriage Act and a definition that is clearly not unconstitutional in itself – I think even the most militant queer theorist would not say that heterosexuals do not have a right to get married! What was alleged to be per se constitutionally defective is the under-inclusiveness, the making invisible, the not providing for a section of the community to meet their needs, for recognition of the affection, of the mutual responsibility of their relationship, that was said to be the defect in the definition of the common law and in the Act.

So we have a very comprehensive itemisation, and a non-exhaustive one at that, dealing with grounds of unfair discrimination that are presumptively unfair and hence unconstitutional, sexual orientation being amongst them.

Now before indicating how the Court dealt with these arguments, I am going to race through some of the other cases that we have had on the equality provisions in our Constitution. Some might have resonance for you in England, while others are very specific to our situation. But what is meant by equality? It is not a self-evident proposition by any means, and it was interesting how we were forced to grapple with the essence of equality for our particular society, because it is treated so differently in so many jurisdictions. The law is very experienced and mature on questions of freedom. There are centuries of jurisprudence dealing with the issue. Yet equality jurisprudence basically dates only from the American Civil War and the Amendments after the American Civil War. It has gone through the 'Separate but Equal' doctrine and '*Brown*' in the United States, and post-World War II the Universal Declaration of Human Rights in the United Nations. For all of us who are older, this is recent times, but it is relatively immature in jurisprudential terms even for the younger members of this audience.

Two cases that forced us to grapple with what is meant by equality were as follows: Mr Hugo was sitting in his prison cell near Durban and he heard about a decree which the newly-elected President Nelson Mandela had issued. It was called a Presidential Act. It granted amnesty to all classes of prisoners. It was a kind of feudal principle in a way that the new ruler, as a sign of benevolence and great power, allows prisoners to go free. This was not just Mandela, this was our new democracy. It was a sign of optimism, of grace, institutional grace in a period of optimism. Mandela said that youths under a certain age could go free, providing they were not guilty of crimes of violence. He said that disabled people could go free. And, provided they were not guilty or imprisoned for crimes of violence, mothers of children under 12 could go free. Mr Hugo said, 'I am a father of a child under 12. Why am I being discriminated against?' So that was the one case.

The other case concerned a farmer who was being sued because of a fire that had started on his farm spread to a neighbouring farm. The Forestry Act said that if you are living in a fire-controlled zone, there is a certain onus of proof in relation to the spread of fires. If you are living in a non-fire controlled zone the onus of proof is the other way. This was said to violate the principle of equality.

Now we could not have had two more extreme examples of what equality could be. The farmer in the second case was saying, 'I am being treated differently from farmers a hundred miles away whose situation is identical to mine except I am in a fire controlled zone and they are not,' and 'I have an onus of proof which is more burdensome to me than his onus of proof'. Now is that what equality law is about? It just did not seem right to base it simply on treating like people alike. All of law classifies and distinguishes between people. It has cut-off points; you are inside or outside the law. On the other hand, Mr Hugo was raising an issue which related to the fact that he was a man and not a woman. If he had been a mother and not a father he would get out. He is being treated differently because he is what he is, a man.

So we had to find a way of distinguishing between these two classes of cases. In the surveys that we did of Indian, Canadian and American law with a little bit of European law, I could see and detect two fundamental approaches. One was based on a rational/irrational distinction in classifications, the rationality approach. The other was what I call a human rights approach. The human rights approach was not looking so much at equalizing treatment of people classified in different ways by the law, it was looking at patterns of discrimination, hurt, marginalisation, advantage, disadvantage found in society in countries throughout the world, that required some to be remedied.

We found Canadian law was particularly helpful and instructive. Their whole approach to equality is basically that of anti-discrimination law. This means you look at the patterns of discrimination, inequality, marginalisation, disadvantage, oppression, call it what you will, in society. If a measure is designed to minimise, to react against, to mitigate, to undermine these patterns of inequality, then it is for equality. This can be done in all sorts of ways. It can be through negating overt discrimination: intentional unequal pay for the same job just because you are a woman; blacks not allowed; Hindus and dogs keep out. Or it could be a measure that actually takes account of race, gender, or disability: to put obligations on those exercising power, access, be it economic opportunities, be it education, or whatever, to take active steps to overcome the disadvantages that exist. It is a totally different philosophy from 'treat everybody in the same way'.

The distinction between the Canadian position and the American position, the majority position of the US Supreme Court, was very striking. When we decided that the fire controlled zone versus the non-fire controlled zone had nothing to do with what equality is really about, we then had to say, 'Well what is equality really about?' We picked up a phrase from a Justice Claire L'Heureux-Dubé in the Canadian Supreme Court, often referred to as the Dissident Judge. She said equality law is about human dignity. Accordingly, a measure that affirms and supports human dignity, which is being assailed because you are being categorised or stereotyped in a particular way, because of who you are, or because of your closely held personal characteristics, is not anti-equality. Is your dignity being enhanced or being suppressed? This means that affirmative action, providing it is done in an appropriate way, is absolutely consistent with equality principles, because it is enhancing the dignity of people who have been historically and systematically excluded. It means also that, as they hold in Canada, rules dealing with the way men prisoners are searched, and women prisoners are searched could be different. For socio-cultural or biological reasons they could be different, and requiring or permitting a respectful treatment of women's bodies in a society in which women's bodies have been subjected to so much ill-treatment and abuse, taking account of that factor is not something that is in any way is injurious to the men.

When it came to Mr Hugo the majority of our court held, applying what we regarded as a substantive view of equality, that he was not being unfairly discriminated against. He was not imprisoned because he was a man. It is a social reality produced possibly by centuries of discrimination that women are the major care givers and tend to bond more closely with children. Ideally each case should be looked at on an individualised basis and the close care giver whether it is male or female, father or mother, should have been entitled to the benefit of the amnesty. The historic patterns of disadvantage were disadvantage against women not disadvantage against men, so this measure was not tracking a pattern of historic advantage and disadvantage, and reinforcing it.

It was a controversial decision, but the real choice would have been allowing 400 women out or allowing nobody out because there was no way that the President could have released 15,000 male prisoners in one go at that stage. Whether people agree with the outcome or not, the fact was that he put the emphasis on substantive equality rather than formal equality. The emphasis was on the impact of a measure, so we did not require any intention to injure, that is not what really counts. What is the actual impact? We, and our Constitution, include indirect discrimination as being as discriminatory as direct discrimination. The facts of the subsequent impact of the discrimination and the whole philosophy ultimately ending up with, does the measure enhance human dignity and equality in that way or does it undermine it? That is the South African philosophy on equality.

We had a whole bunch of other cases on gender. None of them really dealt with exclusion of women from jobs or from education, the kind of classic gender discrimination matters. Yet each one dealt very intensely with the lives that men lead and the lives that women lead.

In *Baloyi*, the issue was how to interpret the statute responding to domestic violence. In doing research on this I came across some very startling debates in Canada, the clash, as Justice Rosie Abella, now on the Supreme Court, put it, between civil rights and human rights. What! Civil rights versus human rights?! We have grown up in a world where the struggle for civil rights, for the vote, for freedom, and the struggle for equality, and non-discrimination, was all part and parcel of the same thing. Now it turns out that in fact there is a tension between the two. How can you get a tension

between fundamental civil rights and basic human rights? The tension was highlighted in the House of Lords *Rape Shield* case. In Canada the battle was between the Trial Lawyers Association and women's legal groups. It actually got very harsh and even certain families were split, husband and wife. Civil rights insist on your right to free speech. If you get hate speech, freedom of speech says you deal with it through better speech. Human rights demand you limit its impact on human dignity by imposing legal limits the extent to which you can limit hate speech. The big issue here relates to religious speech. The right to dignity of the offended communities who historically have been susceptible to stereotyping, to hurt, to marginalisation, to being excluded and made to feel they are not full members of the society, on the one hand, their right to dignity. And on the other hand, the right of other people to say what they damn well like 'this is a free country; I can say what I like'. It is not always easy to balance out the two, as I am sure you have found in the debates over the religious speech issue.

In the case of the Domestic Violence Act, it was the extent to which the accused, in this case the husband's, right to a fair trial, had to be balanced against the right of the wife, who claimed to be the victim, to be protected. The gender dimension came in a double way. The first was that our international obligations as a country, South Africa, require us to take appropriate effective measures to prevent violence against women. There is an express clause in our Constitution protecting the right to bodily integrity of everybody and to be free from violence from public or private sources. So that is one matter where, in terms of our Constitution, the language may be gender neutral, applying a substantive approach to interpretation, the reality [there are women who beat up their male partners, or beat up their same sex partners] is that overwhelmingly domestic violence involves male physical power, aggression, neurosis, anger, frustration being taken out against the bodies, the souls, the minds of women.

So that was the one gender dimension. But the other gender dimension was in the law enforcement agencies themselves. An inadequacy, a failure of the law enforcement agencies to take domestic violence seriously, 'Oh it's a matter between yourselves, resolve it.' Many of the cases would be quite calamitous, women being killed, people going to hospital very seriously beaten up. It is not a racial thing, it is not a class thing, and it is not a continental thing. Look at the literature from the United States, read John Stuart Mill speaking in Parliament in the 19th century in this country, and you find an extraordinary, alarming and terrifying ubiquity of abuse of that kind. So the equality dimension came in two ways – the physical terrorisation of women and the right to be free from fear is something central to gender equality, but also the instruments of the law themselves were infected by the very discriminatory notions not being taken as seriously as they ought to be.

This required an interpretation of the Act that would make it effective. But that did not mean the civil rights, the right to a fair trial, would be excluded. In particular, we wanted to protect the presumption of innocence which is such a fundamental, central part of a right to a fair trial. We found a way of interpreting the statute that assisted the complainants and the prosecutions by means of summary proceedings without the lengthy delays an ordinary trial would have, to give a breathing space to the parties so that other family law remedies could kick in, and to allow questioning of the accused that might interfere, to some extent, with the right to silence, if he had broken the restraining order given against him. But at the end of the day, if the judicial officer had a doubt as to whether or not he had violated the order, he had to be given the benefit of the doubt. We did not want to sink the presumption of innocence as required by our Constitution, in order to achieve the effective protection of women as required by international law and by our Constitution.

The other case was where we extended the duty of care of the police and prosecuting authority who had allowed a slightly psychotic guy to be released on bail. They had been told, 'this man is going to do it again'; he attacks women. He did it again, and she barely escaped with her life. He went to prison for a long time, but that was not the issue. The victim sued the police and the prosecuting authorities for negligence. The state argument was that there is a kind of immunity – that goes with their job. The duty of care did not extend to anybody who might be injured as a result of their releasing this person on bail. Again there was a tension, because progressives have favoured allowing a person, presumed innocent until proved guilty, to be released on bail. But here they had been warned. And we extended the duty of care in the light

of our constitutional obligations to protect women against violence. I still remember the interesting dialogue that took place where a Ms Kentridge, the daughter-in-law of Sidney Kentridge, was arguing for one of the amici in this case and she said, 'Justices it might not be relevant, but I was working late last night in my chambers, and when I drove home I stopped at the traffic light and a very kindly policeman came up to me and said, 'Madam, you should not be driving alone at night at this hour,' and I thought if it was my male colleague doing the same he would not have said that'. My colleague on the bench, Justice Yvonne Mokgoro, said, 'It also might not be relevant, but if I get into a lift, and I am on my own and a man gets in, and we are alone together, I feel apprehensive'. It was saying something about our country, about our world, about the setting in which this duty of care had to be evaluated. We did not say that the victim had a right to claim damages; we simply said the duty of care has to be extended in the light of constitutional values, to take account of a duty in particular when you are releasing somebody who has shown a propensity for attacking women. When you are releasing him and you have been warned about him, the prosecuting authorities and the police are not automatically immune. The duty of care can operate. It went to trial and she actually won her case, and became quite famous in our country.

The next case was not dissimilar. A young woman had a fight at a party with her boyfriend. She stormed out and went to a local petrol station to telephone her mother to come and fetch her. It was about three in the morning. There were three uniformed policemen who had come in to buy some cigarettes at the petrol station and they said, 'What is the matter?' and she said, 'I am stuck'. They said, 'Alright, we will drive you home'. They helped her into the van and she half fell asleep. When she woke up she discovered she was being manhandled. They took her out into a field, and the three men raped her. Eventually she got home. The police were sent to jail. They are serving life sentences, but that was not the issue. The issue was: could she sue the government for vicarious liability? Could she sue the Minister of Justice? The argument was that these were policemen on, in the terrible phrase, a frolic of their own. They were not acting in the course of their employment. Their employment did not require them to give a lift home to her, and certainly not to rape her. But we said no, she trusted the fact that they were in uniform. She was a member of the public relying on the fact that they were police, doing what they were doing, to give her protection, to take her home. We held that the Ministry of Justice was vicariously liable. Now all that is against the background of the equality principle in our Constitution applied in concrete situations to amend and develop the common law.

A case in which our Court divided, and I unhappily found myself in the minority, related to prostitution. We upheld the right of Parliament to prohibit brothels. Whether it is a good policy or not a good policy to do so would be a legislative question, and we did not say there was a privacy right, a commercial sex activity right constitutionally protected against legislative intervention. We looked around the world. We were required to take account of the practices of open democratic societies throughout the world, and there are not many that legalise prostitution and even fewer that legalise brothels. The question was whether the Sexual Offences Act, which made it an offence to receive money for performing sexual services, was constitutional or not. Appearing gender neutral, it was accepted that basically it was aimed at women. Although you get men who are prostitutes, you say 'a male prostitute'. In other words, prostitution, as such, is seen as women providing sex for money to men.

The privacy argument was argued. We held unanimously that, to the extent that the women go into the public domain, they do not completely extinguish their privacy rights, but they diminish their privacy rights, it is not a purely private, intimate, family thing protected by the Constitution.

There was an equality argument. Some of us held that the law in fact was proscribing what women were doing and women were being sent to jail, but not the Johns, the clients, the men. That is not in the statute itself, but that was the practice. The majority of judges said, if the practice of the police is to prosecute only the women, not the men, that is not the fault of the law, and you can not challenge the law on that basis. The minority (I wrote together with my colleague Kate O'Regan) said that it is a practice of the police that picks up on traditions of inequality based on the concept of the red-blooded male, who is being seduced and attracted by the rather wicked temptations of the woman, who is earning money from it. It is one of those invisibles. We had masses of evidence. Some very, hard-line feminists from the United States, said

prostitution is the ultimate form of women's subordination. And very powerful and emotional arguments came from women's groups in South Africa saying that the women who are prostitutes are exploited by the police, exploited by their customers, now they were being exploited by the law. The law failed to provide them with some protection, to protect their health, and to ensure that they were treated on an equal basis with the men. So it was not as though there was a woman's position, and a man's position. Feminists divided. Even our law clerks divided, with many of the female law clerks feeling quite militant on what they could just see, while some of the men could not see what the problem was, because the law on the face of it was absolutely equal.

Another case where we were unanimous, dealt with the apparent tension between cultural rights on the one hand, and equality on the other. It's the *Bhe* case, concerning the provision in a statute which applied African customary law to succession, intestate succession. It was based on the principle of male primogeniture: the oldest son would inherit. If there was no son, it could be a cousin, an uncle, or a very distant male relative. A very well chosen case, well chosen from the point of view of the applicants, that of 'the wicked uncle', who sold the house in order to pay for the funeral expenses of the deceased, and left the two girl children and their mother homeless. We struck down that statutory provision, to the extent that it incorporated an interpretation of customary law that was totally patriarchal. The sorrow to us was that there is a living customary law that's much more equal, that's much more infused with the values of our contemporary society, but how do you get to it? It's not recorded, and by its nature customary law is practical, and it evolves; and the minute you reduce it to codes and simple rules like we are used to, it's losing some of its innovative and adaptive quality.

In terms of cases involving race, it was mainly white men who sued. The first case was very poignant. It was just after the change, we were a still new court, and it dealt with subsidies for school children to be bussed from farms in rural areas to the towns. These were white school children going to beautiful schools in the towns, and the buses would drive past little black kids walking bare foot to their miserable farm schools. The subsidy was cut off in the middle of the year, the bus companies had already been contracted, and we held that to be unconstitutional. The subsidy was a totally unsustainable, involving discriminatory provision of state resources. But we said you can't cut it off in the middle, you have to give a hearing to the school principals involved; you have to give them a chance to adapt in the middle of the school year. So administrative law principles guaranteed in our Constitution, the right to audi alteram partem, the right to a hearing, and the right to fair dealing; in those circumstances, because it was for a limited transitional period, temporarily regulated the right to equality, which had to be dealt with on an organised, planned, and long-term basis.

I'd better get back to *Fourie*, because we've got quite a few more cases: dealing with cohabitants, marital status; but let me get back to *Fourie* and conclude with that. In terms of the right to marry, there isn't an express right to marry in the Constitution, but there is a right to dignity, there's a right to equality, and any measure which prevents people from marrying because of their sexual orientation, is not acceptable in an open and democratic society. The claim about international law, we held that the statement 'every man and woman has the right to set up a family', was descriptive not normative; it wasn't intended to be exclusionary of same sex couples, it just didn't contemplate them. In any event, international law concepts evolve. In 1984 colonialism was accepted as part and parcel of the international situation; there are a whole range of new values that have taken over. The procreation argument, well, many couples marry with no intention of procreating, others are beyond the age of being able to procreate. That was easily dealt with. The section 15 argument was a rather technical one, but that was a permissive clause not requiring that an alternative means be found for same sex couples; it could possibly have some relevance in terms of the mechanisms adopted by Parliament, but wouldn't constitute an obligatory route in itself for recognising same-sex relationships.

The most difficult one to deal with, not because of pure legal logic but in terms of meaning for society, was the meaning that marriage has for believers: intense emotional identification of self and the disturbance of a vision of the world, if same sex couples are allowed to marry. Now how do you deal with that? We decided first of all that that can only relate to the remedy, you can't deny people fundamental rights simply because acknowledging their fundamental rights might result in some degree of distress or upset to others. In fact, the

very notion of fundamental rights presupposes the necessity for courts to intervene in a counter-majoritarian situation; otherwise you don't need fundamental rights, you don't entrench them, and you don't give the courts the special power and obligation to defend those rights, if you can simply leave it to majoritarian opinion to do so.

I had a rather extraordinary experience at that stage. The Chief Justice was asked during our recess, to attend a conference of Christian advocates from Africa in Johannesburg. He happened to be going to Fiji where he's been involved in constitutional pacification, if you like. He wasn't available. I was on recess duty, and I said, 'Well, I'll be willing to go, but I'm not sure that I would be the right person'. I think he was quite keen for me to go, so that it wouldn't be claiming a kind of Christian connection if he went, (he happened to have been the child of itinerant Christian preachers). So I went, and there was a hall bigger than this filled with people wearing the costumes and dress of all of Africa, united by a Christian fervour. It was very powerful, very intense, and obviously very meaningful. I told the story of the moment in which I had to take the oath as a judge. I said I was alphabetically challenged, Sachs, I came right at the end, so I was the last one; and one by one my colleagues took the oath. Most swore, they raised their right arms and said, 'So help me God'. They used five different languages of South Africa. Some affirmed, and when you affirm you put forward your left hand and simply affirm. I grew up in a family that had resisted what my parents regarded as the imposition of religion; they fought very hard to be freethinkers, and I grew up in that environment. Most of my conscience was shaped on a question of belief, not on race: My mother worked for Moses Kotane, an African leader; I was named after Albert Nzula, a trade nationalist, who would have been named after Prince Albert of this country; so race wasn't an issue for me. But in a school that was half Jewish half, Christian, to say of course I'm a Jew, but I don't believe in all the things that I've heard that Jews believe in; and not to pretend to believe simply because of peer pressure, required quite a lot of courage of that little Albie. I felt it would be so disrespectful to the other boys at the school, to religion, to God, if God existed, to pretend I believed when I didn't believe. It was very, very tough; and I said this to the African Christians. I said now I had to decide how was I going to take the oath: 'As it came to me, yes the last one, I raised this right arm, because if I'd simply affirmed I would have had to put forward my left hand, I wanted to raise this right arm, the one blown off by a car-bomb in the struggle against apartheid, because if I'd simply affirmed I would have had to put forward my left hand, I wanted to raise this right arm, because the right arm represented the most sacred part of my body; it represented our struggle, the people who died so that we could get a Constitution; and the most honourable oath I could make, would be the oath signalling my commitment with the right arm; and I raised the right arm and I said, "So help me God"'. And the audience stood up, and they cheered. The next day, when I took them around our wonderful new Constitutional Court building, they literally hung on to me. I had to rush off to speak to Childline, a children's group, and I was late; and they said, 'No, no, you can't go, we have to pray for you'. It was one of those prayers, you know, that goes on, and on, and on, and on; and then I was just about to leave, and they said, 'No, we must lay on hands'. And so they kept me for further precious minutes.

Now I mention this to say that religion does matter, it has to be taken seriously. You can't simply say the Constitution involves a secular society, and religion is simply something out there that is private to the individual. Of course it's private to the individual, but it's more than that. It's part of public life, it's very strong in our country, people singing choruses of Nkosi Sikelel' iAfrika, God Bless Africa. You see these Springbok rugby players, these big burly white front-row forwards singing God Bless Africa, and Nkosi Sikelel' iAfrika, and it unites the country, it's very unifying. The question was, how to not just bulldoze through with enlightenment certainty, a decision that was clearly appropriate for the law; but to take a decision that would do the most to advance the claims to full emancipation, and equality, and participation in public life; joyfully, in the case of the nuptial ceremony of lesbian couples and gay men couples. What would most advance that? One colleague, Kate O'Regan, said, 'Equality now.' But the majority said, 'This is a matter that should go to Parliament. Parliament has a responsibility and a duty to be involved; and we believe that the secure advancement and recognition of same-sex unions would be far more enduring, far more lasting, far more significant, and far more accepted by the general population, if Parliament put its

405 imprimatur on it'. We gave Parliament one year to do that, and we said, 'If Parliament doesn't do it within one year, automatically the marriage vow will be changed to include the words 'or spouse' after wife or husband, and automatically same sex couples will be able to enjoy the benefits of the Marriage Act'.

What was the response? One of the strongest legal correspondents accused us of cowardice, and said Kate O'Regan should get a medal. Others, including, the Archbishop of Cape Town said it was a very sensitive judgment, and that, 'We, as a church, maintain the right to debate and discuss amongst ourselves, what it should be; but we're not being compelled by the decision of the court, to change our own church practices, that's an internal matter'. Our judgment suggested that the principle of reasonable accommodation meant that in the case of marriage officers in the public sector, for whom it would be against their conscience to marry same sex couples, the state should find a way of relieving them of that choice, and have people who could do it happily and openly. And so it was. A good journalist accusing us of cowardice on the one hand, and other commentators saying it was Solomonic (I enjoyed that one – my dad was Solly, so I'm a son of Solomon), and sensitive. I'll leave it to you when you see the decision as to how you feel it ought to be evaluated. I'm not persuaded by the criticism that we were cowardly; in some ways it's easier to be a brave, defiant judge, to say to hell with the rest of the world, let the heavens fall, than it is to look at the broad picture, and to do what you feel will most securely advance the interests of a section of the community that's suffered gross forms of marginalisation and invisibilisation. In any event it will be over to you to decide who got it right.

Thank you.

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The Age Regulations: an introduction

In this article Barbara Cohen who is writing the age discrimination chapters of the forthcoming Discrimination Law Handbook (2nd edition) provides a brief introduction to the new age discrimination regulations.

On 1 October 2006, when the Employment Equality (Age) Regulations 2006 (SI 2006 No. 1031) (the AR) come into force (parallel regulations for Northern Ireland are expected but not yet finalised) the UK government will have completed the transposition of the EC Employment Directive 2000/78 (the directive).

This article is intended as an introduction to the AR, including quite complex new rules on retirement. ACAS has published a 60-page Guide for Employers, 'Age and the Workplace: Putting the Employment Equality (Age) Regulations 2006 into practice' which includes some information also useful for employees and an 8-page Guide for Individuals, 'Age and the Workplace'.

What is 'age'?

'Age' is not defined in the directive or in the AR. The AR protect people of all ages – young and old – against age discrimination.

To state the obvious, unlike other grounds of discrimination, a person's age is constantly changing, without any deliberate act on their part. Thus a person moves from being too young or young to being old or too old – and what is 'too young' or 'too old' varies depending on the activity. Age groups may be wide, for example 'over 21', 'under 65', or narrow '18-21'. The ACAS guidance suggests that for age monitoring employers could use age bands 16-21, 22-30, 31-40, 41-50, 51-60, 60-65, 65+. There are various proxies for age, such as pensioner, senior citizen, student, 'baby-boomer', as well as a terms reflecting particular age-related stereotypes, such as 'mature' or 'lively', as well as various pejorative terms such as 'yob', 'yuppie', 'juvenile', 'long in the tooth' 'over the hill', 'past it'.

Conversely, chronological age is often used as a

proxy for other characteristics. Reference to a particular age group may be a shorthand for characteristics such as experience, fitness, reliability, ability to learn, flexibility. To make decisions based on age, rather than to evaluate individuals' actual experience, fitness, ability to learn etc. will be direct age discrimination unless one of the exceptions in the AR applies or the test for justification of direct discrimination is satisfied (see below).

Basic structure of the Age Regulations

In enacting the AR, like the other measures transposing the EC equality directives, the government has relied on s. 2(2) of the European Communities Act 1972, using regulations rather than primary legislation. While this has expedited the passage of equality legislation, it has limited its scope to that of the directive; it has also restricted parliamentary scrutiny and the opportunity for amendment or debate. For example, in the case of the AR, as the directive does not specifically prohibit discriminatory advertisements, there is no such provision in the AR, unlike the RRA, SDA and DDA, although one of the problems most frequently highlighted is job adverts that refer to age, or an age proxy, as an essential requirement.

The AR apply to the public and private sectors. They prohibit direct and indirect discrimination, harassment and victimisation in the areas of employment and employment related activities, qualifying bodies, trade unions and employers' organisations, partnerships, vocational training and further and higher education. Like other anti-discrimination legislation, the AR provide a right to redress in the employment tribunal and the county/sheriff court, including where the relationship has come to an end. The regulations include the statutory questionnaire procedure and the shift of the burden of proof. By amendment of the Equality Act 2006 the AR are added to the list of equality and human rights enactments in respect of which the CEHR has powers to issue codes of practice, to use its powers to conduct inquiries or investigations, to assist complainants and to make arrangements for conciliation.

The main provisions of the AR apply to 'employees', defined in Reg.2(2) as persons employed *under a contract of service or of apprenticeship or a contract personally to do any work*. The AR provide parallel protection for other workers such as police constables, office holders, partners, barristers/advocates, those in Crown employment and relevant members of the staff of the Houses of Parliament. Certain provisions, notably those relating to retirement apply only to 'employees' as defined under s.230 of the Employment Rights Act 1996 (ERA), and provisions concerning occupational pension schemes specifically apply to employees and other workers. None of the provisions of the AR apply to service in the armed forces.

The AR prohibit direct discrimination by 'A' against 'B' *'on grounds of B's age'*; this is in contrast to the directive that prohibits to discrimination 'on grounds of … age….' , and to the RRA, which prohibits discrimination 'on racial grounds' or the 2003 regulations that prohibit discrimination 'on grounds of' sexual orientation/religion or belief.

The definition of indirect age discrimination refers to *'persons not of the same age group as B'* and states that *'age group'* means *'a group of persons defined by reference to age, whether by reference to a particular age or a range of ages'.* (Reg. 3(3) (a)).

The positive action provisions in Reg. 29 permits positive action, affording access to training or encouragement to '*persons of a particular age or age group'* to prevent or compensate for *'disadvantages linked to age suffered by persons of that age or age group'.*

In order to approximate the directive's protection *'on grounds of age'* the AR provide that *'the reference …to B's age includes B's apparent age.'* (Reg. 3(3) (b)). What will be relevant is whether B suffered less favourable treatment because of assumptions (accurate or otherwise) about B's age. B will not be required to disclose her or his age, and it will not be a defence that B was of a different age than she or he appeared or that A had inferred she was.

Had the AR prohibited discrimination more widely on grounds of age as the Directive requires it would have provided protection comparable to cases such as *Showboat Entertainment Centre Ltd v Owen* [1984] IRLR 7 or *Weathersfield Ltd v Sargent* [1999] IRLR 94 under the RRA. Regulation 5 misleadingly headed 'instructions to discriminate' prohibits less favourable treatment of B because B refused to carry out a discriminatory instruction or complains about such instruction.

Many of the provisions of the AR are almost identical to those in other anti-discrimination legislation, notably the Sexual Orientation and Religion or Belief Regulations. What is unique is the

far wider scope for age discrimination to be lawful, either in all cases or when certain conditions are satisfied. This article will attempt to highlight those provisions of the AR that offer a different regime of protection or that involve matters not covered in the other regulations.

When is age discrimination lawful?

The directive includes, for all grounds, exceptions for genuine occupational requirements (GOR) (Art. 4), positive action (Art.7) and measures necessary for public security, public order, protection of health etc. (Art. 2(5)). For the ground of age there is a further main exception: Art. 6 (1) of the directive permits age discrimination where it can be objectively justified:-

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

The AR reflect the directive in three ways:

a) specific exceptions for GOR, positive action and national security;

b) a set of statutory exceptions, including 'retirement', age bands for national minimum wage, service-related benefits, enhanced redundancy payments and life insurance cover for retired workers, all of which the DTI suggest, in their accompanying Explanatory Notes, are objectively justified under Art.6(1). Whether, if challenged, all of these blanket exceptions can be justified may be a matter for the ECJ, who, in *Mangold v Helm* (see Briefing no 407) have given clear indication that the test of proportionality must be carried out for *'every derogation'*

c) a definition of direct age discrimination which, like indirect age discrimination, can be justified

The AR (Schedules 8 and 9) repeal existing legislation that is discriminatory on grounds of age but cannot be justified under Art.6 (1). This includes repeal of upper age limits for complaints of unfair dismissal and for redundancy payments.

Justification of age discrimination

Potentially, the most significant feature of the AR is the provision in Reg. 3(1) that allows both direct and indirect discrimination to be justified, applying the same test of legitimate aim and proportionality:

> *For the purpose of these Regulations, a person ('A') discriminates against another person ('B') if –*
>
> *a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or*
>
> *b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not o f the same age group as B but –*
>
> *i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and*
>
> *ii) which puts B at that disadvantage,*
>
> *and A cannot show the treatment or, as the case may be, the provision, criterion or practice to be a proportionate means of achieving a legitimate aim.*

It is expected that decisions of the UK courts (*Hampson, Hockenjos*) and the ECJ (*Bilka-Kaufhaus*) on indirect discrimination and the recent ECJ decision in *Mangold* (see Briefing no 407) will provide a baseline for assessing when directly discriminatory acts can be justified – weighing the discriminatory effects against the importance and benefit of the legitimate aim and whether that aim could be achieved by less discriminatory means.

Main statutory exceptions:

a) Exception for retirement

The most controversial feature of the AR is the adoption of age 65 as a default retirement age, so that it will not be unlawful age discrimination for an employer to 'retire' an employee age 65 or over. (Reg.30) The government appear to be satisfied that this major exception is within Art. 6(1) of the directive as meeting a legitimate aim of social policy, namely to meet the concerns of employers regarding workforce planning and to avoid adverse impact on occupational pensions and other work-related benefits. (DTI Explanatory Notes paras. 99 – 101). The government has agreed to review the impact of the default retirement age in 2011 (DTI consultation document 'Coming of Age' para. 6.4.)

The AR set out procedures for retirement and introduce new sections into the ERA specifying when a dismissal is for 'retirement' as well as further amendments to specify when dismissal for retirement will not be unfair (see below).

Whether or not the reason for dismissal is retirement, the dismissed employee will be able to complain that the dismissal was discrimination on any of the other protected grounds.

The retirement exception from age discrimination protection and the new procedures for retirement dismissal only apply to employees working under a contract of service or apprenticeship as defined in s.230 ERA, to Crown employees and to relevant members of staff of the Houses of Parliament. Compulsory retirement at a fixed age of other workers, such as police officers, office-holders, barristers/advocates, partners within a firm, will be unlawful age discrimination unless it is justified under Reg.3(1).

b) Exception for recruitment of older people

Like the legislation on other grounds, the AR (Reg. 7(1)) make it unlawful for an employer to discriminate against a person

a) *in the arrangements he makes for the purpose of determining to whom he should offer employment;*
b) *in the terms on which he offers that person employment; or*
c) *by refusing to offer, or deliberately not offering, him employment.*

However, under Reg. 7(4) neither (a) nor (c) applies

- to a person whose age is above the employer's normal retirement age (NRA), or, without a NRA, above 65 or
- to a person who, within 6 months from the date of his application for employment would reach the employer's NRA or, without a NRA, age 65,

where the person, if he were recruited by the employer, would be subject to the default retirement exception in Reg. 30 (see above).

Thus the exception does not apply to police officers, office-holders, barristers or partners of a firm or to anyone who does work under a contract for services.

The government's rationale is that if any job applicants are of an age that the employer would be able to dismiss them for retirement before, or as soon as, they begin employment, then the employer should be able to reject such applicants from the start.

The exception enables an employer to discriminate on grounds of age against applicants for employment; it does not allow older applicants to make a case for being employed in line with that which the AR say must be given to existing employees who have a right to request not to retire. This exception does not permit discrimination on any other protected ground, for example gender, race or disability.

c) Exception for national minimum wage

Another exception under the AR is the age-based scheme for minimum hourly rates of pay under national minimum wage legislation. Employers will continue to be able to pay 16-17 year olds less than they pay employees over 17 and to pay people aged 22 and older more than they pay 18 -21 year olds as an exception to the prohibition of direct age discrimination. (Reg. 31)

This exception only applies, however, where the employee receiving the lower wage is paid less than the adult hourly minimum rate. Currently the minimum hourly rates are £3.00 for employees aged 16 and 17, £4.25 for those 18 to 21 and £5.05 for those aged 22 and older. An employer can pay an adult employee £9 per hour but to come within the exception allowing differential rates based on age the most the employer can pay an employee under 22 is £5.04. Where the lower paid employee receives more than the adult minimum rate, or where there are different age-based rates within one of the statutory age bands, for example paying an employee aged 19 less than an employee aged 21, this will be direct age discrimination unless the employer can justify doing so under Reg. 3(1) as a proportionate means of achieving a legitimate aim.

d) Exception for benefits based on length of service

Consultation showed general support for allowing employers to continue to provide some benefits to their workers based on length of service, including salary increments, additional leave or sick pay entitlement, company car or staff discount. Employment benefits based on length of service are potentially indirectly discriminatory on grounds of age, since older workers are more likely to have completed the required length of service.

The AR (Reg. 32(1)) include a full exemption for any age discrimination that may result from the award of benefits based on length of service for the first 5 years. After that, in awarding benefits an employer will only be able to use the criterion of length of service which disadvantages workers with shorter service, if it reasonably appears to them that the way they use such a criterion *'fulfils a business need of [their] undertaking*

(for example by encouraging the loyalty or motivation, or rewarding the experience, of some or all of [their] workers).' (Reg. 32(2))

Thus benefits based on length of service are a statutory exception for any period of service; to provide such benefits after 5 years of service involves a subjective test based on the employer's 'reasonable' perception of the needs of their business; the employer is not required to meet the justification test for indirect discrimination under Reg.3(1).

The AR prescribe how a worker's length of service is to be calculated. (Reg 32 (3) – (7))

It should be noted that this exception under the AR does not create an exception or provide justification for indirect discrimination on grounds of sex or any other ground.

e) Exception for provision of enhanced redundancy payments

The redundancy payments scheme under the ERA is based on both age and length of service, thus potentially both directly and indirectly discriminatory on grounds of age, but the government appears to be satisfied that it is objectively justified under Art. 6(1). This exception allows employers to be more generous without risk of acting unlawfully.

The AR (Reg. 33) allows an employer to give an enhanced redundancy payment to a qualifying employee that is less than she or he gives to another qualifying employee if both amounts are calculated in the same way, or an employer may give enhanced redundancy payments only to employees with at least 2 years continuous employment. Enhanced redundancy payments are based on the statutory redundancy payments scheme and may be calculated

- by ignoring the statutory maximum week's pay or adopting a maximum above the statutory 'cap', or
- by using a multiplier other than one either for the amount allowed per year or the total amount.

Without this exception any of the options for enhanced redundancy payments would be indirectly discriminatory on grounds of age, since older employees are more likely to have longer periods of employment and thus more years that must be counted and, more multipliers of a week's pay available to be enhanced.

Occupational pensions – non-discrimination and exceptions

The AR prohibit discrimination by trustees and managers of occupational pension schemes in their treatment of members or prospective members (Reg.11). Schedule 2 requires all schemes to have a non-discrimination rule.

Schedule 2 also exempts from the prohibition of direct and indirect age discrimination a wide range of rules and practices of pension schemes, including qualifying for admission to a scheme, use of age criteria in actuarial calculations, different rates of members' and employers' contributions, different ways of determining entitlement to benefit. For this purpose the government has relied on Art. 6(2) of the directive:

> *...Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.*

Retirement dismissal

Key terms for understanding the retirement provisions are:

Normal retirement age (NRA) in relation to an employee is the age at which employees in the employer's undertaking in the same position are normally required to retire. As 'normal retiring age' has been a barrier to claims of unfair dismissal, the courts have frequently been asked to determine what this is for particular employees. See, for example, *Cross and another v British Airways plc* [2006] EWCA Civ 549, *Waite v Government Communications Hq* [1983] ICR 653, *Brooks v British Telecom plc* [1992] ICR 414, *Barclays Bank Plc v O'Brien* [1994] ICR 865. Once the AR come into force, any decision based on an employee's NRA that is lower than age 65 will be unlawful unless it can be justified under s.3(1).

Intended date of retirement (IDR) is the date notified by the employer under the procedures prescribed in Schedule 6 to the AR on which they intend the employee to retire, or the date identified as such by the employee in a request not to retire, or a later date by agreement or following consideration of the employee's request or appeal.

Retirement Procedure – Schedule 6

Annexes to the ACAS guide include helpful flow charts and sample letters (for employers).

1. Notification by the employer

Under para.2, an employer who seeks to retire an employee must notify the employee in writing of

- the employee's right to request not to retire and
- the IDR

not more than 12, or less than 6 months, before the IDR.

This notification is required regardless of whether there is a NRA or any contract term referring to retirement or any other notification regarding retirement or the right to request not to retire.

There are transitional arrangements in Schedule 7 that will apply where an employee would retire after 1 October 2006 but before 1 April 2007.

An employee may complain to an ET that her or his employer has failed to comply with the duty to notify her or him under para.2 (para. 11).

When the employer fails to notify the employee 6 months before the IDR, the employer has a continuing duty (para. 4) to give this same notification in writing until 14 days before the date of termination.

2. Employee's right to request not to retire ('right to request')

Under para. 5, if the employer's notification of the right to request and the IDR was not later than 6 months before the IDR, then the employee's request must be given to the employer not less than 3 months, but not more than 6 months, before the IDR. Otherwise the employee's right to request continues until she or he retires.

The employee's request not to retire on the IDR must state whether she or he wants to continue working

- indefinitely,
- for a stated period, or
- until a fixed date.

If no notification of the IDR has been received from the employer but the employee has reasonable grounds to believe the employer intends to retire her or him on a certain date, the employee may request not to retire on that date.

A request must be in writing and must state that it is made under para. 5, Schedule 6. Only one request may be made in relation to one IDR.

The employee is not required to set out the reasons why she or he wishes to work beyond the IDR, but is not prevented from doing so. Giving good reasons in her or his request could short-cut the procedure if, on considering the employee's reasons, the employer agrees to the request. The request could include proposals for different working arrangements or for varied hours or responsibilities.

3. Employer's duty to consider employee's request

If an employee exercises her or his right to request then she or he cannot be retired until at least the day after the employer gives the employee notice of the decision regarding her or his request.

Where the dismissal would otherwise occur before the employer had complied with their duty to consider the employee's request, the employee's contract of employment will continue, and the IDR will be the day after the employer gives notice of the decision.(paras. 10 and 1(2)(e))

An employer has a duty to consider the employee's request not to retire (para. 6) and must meet with the employee to discuss this request within a reasonable period after receiving it. (para. 7). The employer is not required to hold a meeting:

- if they agree to the employee's request; or
- if it is not practicable to do so within a reasonable period, and the employer considers any representations made by the employee.

The employer must notify the employee of their decision as soon as reasonably practicable after the meeting, or after consideration of representations if no meeting takes place. This notice must be in writing and dated. No time limit is specified, but the dismissal cannot take place until at least the day after this notice is given. If the employee's request is accepted the notice must state whether the employee's employment will continue indefinitely or for a fixed further period; if the request is refused it must confirm the date dismissal is to take effect. The employer is not required to give reasons.

4. Employee's right of appeal

The employee may appeal to the employer as soon as reasonably practicable (no time limit) against their decision to refuse the employee's request not to retire or to fix a period of employment shorter than the period

she or he had requested. (para 8). The notice of appeal must be in writing and dated and must set out the grounds for appeal.

The employer must hold a meeting with the employee to discuss the appeal (para 8(3) – (7)). Following the meeting the employer must consider the employee's representations. If no meeting is held, the employer must consider the employee's representations. The employer must give notice of their decision as soon as reasonably practicable. The employer's notice must be in writing and dated.

5. Employee's right to be accompanied

The employee has a right to be accompanied at the meetings to discuss her or his request and her or his appeal (para 9); this can be by a TU representative or any other person of the employee's choice who is employed by the employer. The employee must request to be accompanied. The companion can confer with the employee and speak at the meeting but may not answer questions on the employee's behalf. The meeting should be at a time when the employee's companion is able to be present.

The employee can complain to the ET (para. 12) if the employer does not, or threatens not to, allow her or him to be accompanied. Both the employee and her or his companion can complain to the ET (para 13) if they suffer any detriment because the employee requested to be accompanied.

When is a dismissal for reason of retirement?

The AR insert new sections into the Employment Rights Act 1996 (ss. 98ZA – 98ZF) that state when *retirement* must be, can never be, or may be, the reason for a dismissal.

- Where retirement is to be taken as the only reason for the dismissal, it will not be possible for the dismissed employee to challenge the employer's reasons;
- If the reason for dismissal is not retirement, the employee is able to challenge the dismissal under the AR;
- When the reason, or principal reason, for the dismissal is retirement and certain statutory procedures are followed, the employee will not be able to claim that the dismissal was unfair.

1. **Retirement will be the only reason for dismissal of B by A**, and B will not be able to claim that she or he was dismissed for any other reason, only if A has notified B under para.2 (see above) and:
   a) where B has no NRA, the dismissal is on or after B reaches 65 and on the IDR;
   b) where B's NRA is age 65 or above, and the dismissal is after B's NRA and on the IDR; and
   c) where B's NRA below age 65 is objectively justified under the AR, and the dismissal is after B's NRA and on the IDR.

2. **Retirement will not be the reason, or any reason, for the dismissal of B by A** if:
   a) B does not have a NRA and is dismissed before reaching age 65; or
   b) B has a NRA and she or he is dismissed before reaching the NRA; or
   c) the NRA is below age 65 and is not objectively justified under the AR; or
   d) there is an IDR, but the dismissal of B takes effect before the IDR.

3. **It will be for the ET to determine whether retirement is the reason for the dismissal of B by A** in any of (a), (b) or (c) under 1 above, where **A has not notified B under para.2.**

For this purpose the ET must have regard to whether A ever notified B of B's right to request and the IDR, if so when, and whether A met with B or otherwise considered B's request.

Barbara Cohen

ECJ rules on age discrimination

Mangold v Helm Case C-144/04 [2006] IRLR 143, ECJ

Background

German law regulates fixed-term employment contracts as required by EC Directive 1999/70 on fixed term work. Paragraph 14 of the relevant statutory provisions (the TzBfG) says that fixed-term contracts may only be concluded if there are objective grounds for doing so. Moreover, in the absence of objective reasons, the term of a fixed contract may not exceed two years or be renewed more than three times within that period. However, objective justification is not required where the employee has reached the age of 52 when starting the contract (unless the employee was recently employed on a permanent contract with the same employer).

Mr Mangold (M), then aged 56, agreed a contract to work for Mr Helm (H) starting on 1 July 2003. Paragraph 5 of his contract explicitly stated that it was based on the exception in TzBfG para 14. M brought proceedings claiming that paragraph 5 of his contract was incompatible with the age provisions of the Employment Directive (ED). The national court referred the matter to the ECJ for a preliminary ruling.

European Court of Justice

Under article 6(1) ED member states can provide that certain age discrimination is lawful if it is *'objectively and reasonably justified by a legitimate aim, including legitimate employment policy … and if the means of achieving that aim are appropriate and necessary'*. The ECJ accepted that the purpose of the German legislation was to promote the vocational integration of unemployed older workers, in so far as they face

considerable difficulties finding work. The legitimacy of such an aim could not be doubted. However, the means of achieving that aim went beyond what was appropriate and necessary. The principle of proportionality means that every derogation from the individual right not to be discriminated against must reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued. The problem here was the exclusion of a significant body of workers based purely on their age, without consideration of other factors such as the structure of the labour market in question or the personal situation of the person concerned. The rule applied to all 52-year-old workers without distinction, whether or not they were unemployed before being offered the contract and regardless of for how long.

The ECJ ruled that the age exception in paragraph 14 of the TzBfG could not be justified under article 6(1).

It was immaterial that the date for implementation of the directive had not yet passed. Like the UK, Germany had taken up the permissible delay for implementation of the directive until December 2006.

i) In an earlier decision, *(Case C-129/96 Inter-Environnement Wallonie [1997] ECR I-7411)* the ECJ had already held that during the period prescribed for implementation of a directive, a member state must not take measures that are liable to compromise the aims of that directive.

ii) The ED provides that where a member state exceptionally enjoys an extended period for transposition of the directive, it should be progressively taking concrete measures to bring its legislation into line to meet the result required by the directive.

iii) The directive itself does not lay down the principle of equal treatment but provides a framework for combating discrimination in employment on specified grounds including age. The source of the principle of equal treatment is international instruments and the constitutional traditions of member states as described in the preamble to the directive. Thus the principle of non-discrimination on grounds of age must be regarded as a general principle of EC law. These principles must be applied when national rules such as the TzBfG come within the scope of EC law.

Comment

The ECJ ruling is very much to be welcomed:-

a) It establishes a very stringent baseline for application of the justification of direct age discrimination in article 6(1) of the Employment Directive. There has been much concern about the breadth of this unique provision and its transposition into domestic law in the Employment Equality (Age) Regulations 2006 (see Briefing 406 above). It makes it very clear that the test of whether the means adopted for achieving a legitimate aim are 'appropriate and necessary' or 'proportionate' cannot be satisfied by reliance on generalisations or stereotypes; every derogation from an individual right must balance the need to avoid discrimination with needs of the discriminator in pursuing his/her legitimate aim. It reinforces the primary obligation on employers to avoid discrimination and to adopt the least discriminatory means of achieving their desired aim.

b) It clarifies that the obligation to prohibit discrimination on grounds of age is not dependent on the date specified in the directive for transposition. The principle of equal treatment and non-discrimination is a general principle of EC law that is derived from international instruments and constitutional traditions. This means that the obligation on national courts to apply the principle of equal treatment in any context in which EC law is engaged is not dependent on transposition of a directive into national law, but is, and has been, a permanent obligation. (See also comment in 149 Equal Opportunities Review 31 regarding the Advocate General's opinion in *Adeneler v Ellinikosw Organismos Galaktos*, concerning the date from which a national court must interpret its domestic law in accordance with a directive). The full implications of this are yet to be tested.

Further, for member states such as Germany and the UK which elected to delay transposition, there is an obligation during this extended period to progress towards effective legal protection against age discrimination, and hence to avoid measures contrary to this objective.

Tamara Lewis and Barbara Cohen

Note: this report is based on a report by Tamara Lewis in Legal Action, May 2006.

Maternity leave and continuous service

Sarkatzis Herrero v Instituto Madrileno de la Salud Case

C-294/04 – ECJ – [2006] IRLR 296

Background

The Equal Treatment Directive 76/207/EEC (ETD) implements the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Article 2 states that less favourable treatment of a woman related to pregnancy or maternity leave shall constitute discrimination. Article 3 says that there shall be no discrimination in relation to employment and working conditions.

It has long been established that it is automatically sex discrimination to disadvantage a woman for a reason relating to her maternity leave and that there is no requirement to rely on a male comparator in order to prove it. Over recent years the ECJ has considered how extensive the protection of women on maternity leave is in relation to their working conditions.

In *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS) v Thibault* C-136/95 [1998] IRLR 399 a woman who was deprived of the right to an annual assessment of her performance and therefore of the opportunity of qualifying for promotion to a higher pay grade as a result of absence on account of maternity leave, was discriminated against on grounds of her pregnancy and maternity leave.

In *Mahlburg* [2000] IRLR 276 it was found to be contrary to Article 2(1) of the ETD for an employer to refuse to appoint a pregnant woman to a post on the ground that a statutory prohibition on employment arising on account of her pregnancy would prevent her from being employed in that post from the outset and for the duration of the pregnancy.

In *Land Brandenburg v Sass* [2005] IRLR 147 the ECJ held that with regard to career advancement during maternity leave, taking statutory maternity leave should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it.

Sass seemed to be at odds with UK statutory maternity leave provisions. Under the Maternity and Parental Leave Regulations 1999 (MPLR) Regulation 17, an employer is not under any obligation to count a woman's time on Additional Maternity Leave (AML) as service for the purpose of seniority and most other contractual rights. Continuity and thus seniority are preserved during AML for statutory purposes only (e.g. length of service for the redundancy calculation but not for the purposes of, for example, calculating a loyalty bonus).

This case is very relevant to the question of whether Regulation 17 is discriminatory. Here the ECJ was asked to consider whether a woman was discriminated against where she had been appointed to a new post during her maternity leave but had to wait until the end of her maternity leave for the purposes of calculating seniority in the new role.

Facts

Carmen Sarkatzis Herrero (H) applied for a post with the Spanish National Institute of Health and was successful. She was asked to take up her post within 1 month, when she would have been on maternity leave. The Institute agreed to extend the date she was to start work to the end of her maternity leave. However, her request that her seniority be calculated from the date of her appointment, including the days on which she was on maternity leave, was not agreed.

H brought a claim for sex discrimination against the Institute, claiming that failure to allow her seniority to run from the date she was appointed to the new role was discrimination as a result of taking maternity leave.

Reference to the ECJ

The Spanish courts referred three questions to the ECJ of which questions one and three asked:

1. Should a woman on maternity leave who obtains a post in the public service enjoy the same rights as other successful applicants?
2. Is a public servant who takes up a post whilst on

maternity leave entitled to assume the rights and benefits associated with that post notwithstanding the fact that the relevant domestic law suspends these rights until the employee actually starts work? [As does the UK during AML].

The ECJ declined to consider the second question which related to the fact the H had previously been a temporary employee of the Institute. It considered this to be irrelevant to the issues.

European Court of Justice

The ECJ confirmed that the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment. Thus a woman on maternity leave who is treated unfavourably because of that absence suffers discrimination on the grounds of her pregnancy and of that leave respectively.

The ECJ observed that the aim of the ETD is to achieve substantive, not formal equality. So Articles 2(1) and 3 must be interpreted as precluding any unfavourable treatment of a female worker on account of or in connection with her maternity leave, irrespective of whether the employment relationship is new or ongoing.

The Court added that

the fact that other people, in particular men, may, on other grounds be treated in the same way has no bearing on the applicant, since the deferment of the date on which her career was deemed to have started stemmed exclusively from the maternity leave to which she was entitled.

ECJ held that when a female employee is on maternity leave at the time of her appointment, deferring the start of her career, for the purposes of calculating her seniority to the date she actually took up the post, is discrimination on the grounds of sex contrary to European Community law.

Comment

In the UK the question has always been whether the UK's statutory provisions on maternity leave in the Employment Rights Act 1996 and the Maternity and Parental Leave Regulations 1999 are discriminatory, Regulation 17 in particular.

This case seems to put it beyond doubt that Regulation 17 is discriminatory in relation to the entitlement to accrue seniority during AML. Further, it strengthens the argument for claiming that a woman on AML is entitled to benefit from all her statutory and contractual rights and not just those set out in Regulation 17. There are two problems:

1. The ECJ said in *Boyle v EOC* [1998] IRLR 717 that not all contractual rights accrued; this case in not mentioned in *Herrero*,
2. The ECJ has also been clear that an employee on maternity leave is not entitled to her full pay.

It may be that the distinction to make is between broad rights arising from continuity such as seniority, the right to have a pay review, promotion etc and the right to specifics such as the company car.

This case also raises the interesting question of whether MPL Regulation 18, the right to return to the same job after AML, or if that is not reasonably practicable the employer may allocate a different job, is discriminatory. This particular issue would benefit from the right test case as the EOC has recently confirmed that thousands of women are adversely affected on return from maternity leave each year.

Michele Balfe
Palmer Wade Solicitors, 1-3 Berry Street, London EC1V 0AA
020 7017 1440

School pupil's rights to manifest their religion or belief

R (on the application of Begum (by her litigation friend, Rahman) v Headteacher and Governors of Denbigh High School 2006 UKHL 15

'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life.' **Lord Hoffmann**

'Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them.' **Baroness Hale**

Implications for practitioners

This case concerns a Muslim pupil, Shabina Begum (SB), who claimed that her right to manifest her religion had been breached along with her right not to be denied an education. In reaching its decision, the HL assessed whether or not SB could have manifested her religion in the way she wished to at a different school. The HL also looked at the extent of SB's school's efforts to accommodate SB's particular religious manifestation of choice: the jilbab, a long coat-like garment covering the entire body including the arms.

Broadly speaking, the two-pronged approach (looking at the alternative options available to the complainant, and looking at the efforts of the 'accused' body to accommodate the required religious manifestation) now appears to be the accepted judicial method of assessment in religious manifestation cases.

This decision is in line with the CAs' earlier decision in *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, an employment case. In *Copsey* it was held that an individual Christian man's right to manifest his religion would not be interfered with where he could have resigned and opted to take a role elsewhere which did not require the Sunday working he objected to. (Whilst the European Convention on Human Rights (ECHR) could not be used directly to challenge the actions of the private sector employer in this case, the CA were required to make their judgment in accordance with the requirements of the ECHR when assessing the EAT's decision, the latter being a public body performing a public function).

In both this decision and that of the CA in *Copsey*, close attention has been paid to the employer or school's efforts to accommodate the manifestation of religion in question. Both were praised for their efforts in this regard in both cases, despite their efforts not having led in either case to an unfettered ability for the individual in question to manifest his or her beliefs.

In this case, some of the HL's judgments found that SB's manifestation of her religion was not interfered with, as she had the ability to leave the school in question, and apply to those nearby schools which would permit her to wear the jilbab. The judgements in this case which decided that SB had had her rights interfered with still asserted that the school's sensitivity and religious consultation on the issue of school uniform showed justification for such interference.

Facts

SB had attended Denbigh High School (the School) since September 2000. She wore a shalwar kameeze throughout this time, without complaint.

The School, a secular institution, had taken time and care to draft a uniform policy respectful to the race and religion of its pupils and their families. Indeed, consultation took place with parents, students, local Imams and community leaders, in light of the fact that a high proportion (over 70%) of its students, staff and governors were Muslim, including the School's Headteacher. Both SB and her family had been made aware prior to SB commencing at the School of the requirements of the School's uniform policy.

In September 2003 SB attended School wearing the jilbab. SB, her brother and a male family friend who was also in attendance insisted to the School that this was what SB wished to wear, and that she no longer considered the shalwar kameeze with a headscarf to be

in accordance with her religion, as a maturing female. The School insisted that SB respect its existing uniform policy, and ordered that she return home to change. SB never returned to school, and instead commenced legal action.

Various meetings, further consultation with Muslim advisory bodies and lengthy legal correspondence took place. No resolution was found. The advice to the School following its further religious consultation was that its current uniform policy was acceptable, and was sufficiently in accordance with the tenets of moderate Islamic dress.

The journey through the courts

In 2004 SB was unsuccessful at first instance with her application for judicial review of the School's decision not to permit her to wear the jilbab.

The high court was firstly asked to consider the alleged 'exclusion' of SB from the School. The School's insistence upon its uniform policy clashed with SB's wish to wear the jilbab, and SB argued that this rule effectively excluded her, in the formal education law sense. The court was asked if any such exclusion breached her rights under article 2 of the First Protocol of the ECHR, namely the right not to be denied an education.

Secondly, it was asked to consider the lawfulness of the School's uniform policy itself. SB considered wearing the jilbab to be a manifestation of her religion. SB asserted that her rights under article 9(2) of the ECHR had been unjustifiably interfered with by the uniform policy. Both claims failed, and SB appealed.

In 2005 the CA found in SB's favour, ruling that the decision made by the School had not been procedurally correct. It considered that the School had not asked itself the right question when considering whether the decision to refuse SB the right to wear the jilbab would interfere with her freedom of religion and if so, whether its actions were justified. The CA stated that accordingly, notwithstanding the merits or otherwise of the School's decision, it had to be quashed. The School, with the intervention and support of the Secretary of State for Education, appealed.

House of Lords

In March 2006 Lords Bingham, Hoffmann, Nicholls, Scott, and Baroness Hale unanimously allowed the School's appeal.

Lord Bingham, giving the first judgement, made it clear that the decision of the HL was not to be seen as an overarching decision concerning the wearing of Islamic dress in schools in the UK, or a guide as to whether or not individual schools should permit the jilbab to be worn. He noted that some concern had been expressed by the School and its students that to permit the wearing of the jilbab could cause tensions between the various sections of Muslim society present at the School. The School had been keen to avoid the development of sub-groups of pupils by way of dress, due to previous problems with conflict between racial and religious groups defined in this way.

Should the decision-making process affect the validity of the decision?

Lord Bingham and Lord Hoffmann criticised the CA's analysis of whether or not any alleged interference with SB's human rights by the School had been proportionate in scope and effect. They said that this approach was appropriate for judicial review cases involving domestic law but should not be applied to the Human Rights Act 1998 (HRA). The CA had stated it felt that the School had not answered a clear set of questions examining the requirements of the HRA, when deciding whether SB's rights had been infringed and whether it should alter its position on the jilbab. The CA had, accordingly, decided that the School had mis-directed itself in law, and so the first instance decision was overturned.

Lord Bingham recounted how the CA went as far as asserting that the School's decision could well be correct, had the proper decision-making process been followed, but as it had not, the decision was consequently flawed and could not be deemed to be proportionate.

Lord Bingham felt that the CA was mistaken to find that the School's decision was disproportionate, if they felt it possible that the decision itself could be correct. The Secretary of State, intervening at the House of Lords stage in support of the School, described the CA's analysis as *'a fundamental misunderstanding of the Human Rights Act'*.

He emphasised that the imperative in the ECtHR had never been to analyse whether or not a challenged decision or action was the product of a defective decision-making process. The focus, he said, is properly whether or not the applicant's Convention rights have

been violated. Case law did not support the CA's decision or reasoning on the question of the School's proportionality. It was his view that *'what matters…is the practical outcome, not the quality of the decision-making process'.*

Justification of any infringement of SB's rights

Although deciding that no interference with SB's rights had in fact taken place in this case, as his judicial counterparts had found interference, Lord Bingham went on to assess possible justification.

Quoting the case of *Sahin v Turkey* (2005) 41 EHRR 8, Lord Bingham assessed the proportionality of the School's alleged interference with SB's rights under Article 9. He set out

> *the need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others…and the permissibility on some contexts of restricting the wearing of religious dress.*

As the School had not rejected SB's request out of hand, but in fact had taken further advice from Imams at local mosques, Lord Bingham found that the School had taken 'immense pains' to devise a uniform policy which respected Muslim beliefs, but did so in an *'inclusive, unthreatening and uncompetitive way'.* He found the School's interference with SB's rights to be fully justified.

Breach of SB's right not to be denied an education?

In respect of SB's alleged exclusion from the School, and the alleged breach of her right to an education, Lord Bingham found that an exclusion had not taken place. He held that SB's non-attendance was due to her unwillingness to comply with a rule the School was entitled to enforce. Lord Bingham reiterated the fact that SB could have attended a different school where her religious convictions could be accommodated.

Other judgements

In a brief speech, Lord Nicholls agreed with the decision to uphold the School's appeal, and agreed that the School's decisions had been justified, but stated that he was not sure that no interference with SB's rights had taken place. He commented that those of his judicial colleagues finding no interference may have under-estimated the disruption that a move to another school (in order to accommodate SB's beliefs) would have caused her, and that his colleagues may have over-estimated the ease with which SB could have been accepted at any such other school.

The tone of Lord Hoffmann's judgement appears somewhat angry; he seems to have been unimpressed by SB's approach to the situation she found herself in. He states that SB's family had made a decision to send SB to a school at which her manifestation of her religion could only be accommodated by *'throwing over the entire carefully crafted [uniform] system'.*

Lord Hoffmann states that, whilst the wearing of the jilbab to a mixed school was clearly a manifestation of SB's religion, her relevant right was not infringed

> *as there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one. Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life.'*

He reiterated this point later, stating that '*people sometimes have to suffer some inconvenience for their beliefs'.* He therefore found no interference with SB's article 9 rights, and stated that he would have found sufficient justification, should he have been required to analyse it.

Lord Scott found that there had been no interference with SB's article 2 or article 9 (2) rights. He felt that considerable thought had gone in to the School's uniform policy, in particular what would be appropriate for the School's female pupils to wear.

Quoting from *Kalac v Turkey* (1997) 27 EHRR 552, Lord Scott stated that *'in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account'.* Lord Scott also reiterated that arrangements could have been made for SB to attend a different school in her area, which permitted her to wear the jilbab. As he had found no interference with SB's Convention rights he felt no need to assess hypothetical justification.

Baroness Hale agreed with Lord Nicholls in deciding that SB's right to manifest her religion was indeed interfered with, but finding that the School's behaviour had been justified.

Interestingly, Baroness Hale acknowledged in her

judgement the effect of adolescence on an individual's choice-making and moral autonomy. Baroness Hale stated that, whilst an adolescent's lack of full autonomy may help justify any interference with that individual's religion or belief, it will still count as interference.

Analysing new and different factors to those discussed by her colleagues, Baroness Hale discussed the particularly female perspective of wearing the jilbab or hijab. She compared the well-rehearsed criticisms of covering the female shape in this way as being 'oppressive' and 'fundamentalist', with the individual Muslim female's keenness to declare control and ownership of her body, and to enjoy her place within Islamic society in this way. Baroness Hale described the adoption of the jilbab or hijab as a *'highly complex autonomous act'*.

Commenting on the difficult role of the School, Baroness Hale stated that:

> *young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them. This particular school is a good school…it is also a mixed school. That is what led to the difficulty. It would not have arisen in a girls' school with an all-female staff.*

Baroness Hale relied upon commentator Professor Frances Radnay to identify the polarised concerns relating to the prohibition of 'veiling' in the educational sphere. Prof. Radnay asks if a prohibition on veiling in education allows the young unveiled woman to freely discover, if she so wishes, *'the feminist freedom of state education over...patriarchal dominance',* or, if it in fact violates her individual autonomy and cultural diversity, being likely to encourage voluntary segregation in its effect on school choices made by deeply religious families. Prof Radnay recommends balancing these two conflicting priorities, when attempting to find harmony in the specific situation concerned.

In allowing the School's appeal, and finding the School's behaviour justified, Baroness Hale commented that the School's uniform policy was a *'thoughtful and proportionate response to reconciling the complexities of the situation.'*

Comment

There has been much criticism of the (now overturned) CA decision. However, the HLs' decision raises some concerns about its approach to the HRA, which can be summarised as follows:-

1. Lord Bingham and Lord Hoffmann categorically state that when considering breaches of the HRA, the Courts should not concern themselves with the decision-making process and should focus only on the substantive decision at the end. This is an apparent distinction between human rights breaches and other public law provisions. It is generally accepted in domestic law that state bodies must ask the right questions, consider what is relevant and exclude what is irrelevant. If such consideration is not given **and** it is possible a different result might have been achieved, the decision must be quashed. We suggest that there is no reason why a different standard should be applied to public authorities in their application of the ECHR. In SB's case, the School should have asked firstly: whether the uniform policy interfered with a convention right; and, secondly, what was the legitimate aim it was pursuing by interfering with that right. It should also be noted, as was the case in *Chassaguou v France* [2000] 29 EHRR 615 paragraph 15, that where the legitimate aim is the protection of the rights of others that are not convention rights *'only indisputable imperatives can justify interference with enjoyment of a Convention right'*.

   It was suggested by Lord Hoffmann that the CA approach meant that schools would be obliged to have a human rights textbook to hand. However, he failed to acknowledge that schools are required to interpret the law in other areas. For example, uniform policy is subject to the RRA and access issues must be considered in line with the DDA. Schools must have a full grasp of the law relating to exclusion or special education needs. So why should the HRA be any different?
2. The HL emphasised the need to allow schools to make their own decisions on the basis that they are better placed to make a decision and this was what Parliament intended. This may be the case, but surely the role of the Court is to ensure that the decision-maker has applied the correct guiding principles. By applying the 'wrong' principles the decision-maker may reach a very different decision to the one it would otherwise have reached.
3. Lord Bingham and Lord Hoffmann pointed out that they had not been referred to any case where a state

was found to have violated the ECHR because it had not adopted the proper decision-making process. However, they failed to acknowledge that the ECtHR adopts a standard test when considering justification:-

a) is the restriction 'proportionate to the legitimate aims pursued'; and

b) are the reasons given by the national authority relevant and sufficient enough to justify the restriction?

In applying those standards, the Court must be satisfied that they conformed to the principles of the ECHR and they were based on a proper assessment of the relevant facts. If the relevant standards are not applied, then the national authority is unable to demonstrate it has adopted an acceptable balance between a right guaranteed by the Convention and the more nebulous notion of the rights of others.

It is clear from the HLs' decision that the Judges felt that the School was doing its best to find the right balance between encouraging the notion of community and protecting young girls from peer pressure on the one hand, whilst allowing freedom of religion and diversity on the other. However it is possible that it would have decided on a different balance had it asked itself the right questions:

- if the legitimate aim was the protection of the 'rights and freedom of others', what were those rights and did they justify interference with a fundamental Convention right?
- Were the uniform rules really necessary and proportionate to the aim identified by the School?

The HL clearly took the view that the School had done more than enough. However, if it failed to apply the correct principles, one cannot be sure that it reached the right result.

Shah Qureshi
Solicitor, Webster Dixon LLP,
sq@websterdixon.com

Joanna Bragg
Solicitor, Webster Dixon LLP,
jlb@websterdixon.com

Time limits for part time workers pension rights when there is a TUPE transfer

Powerhouse Retail Limited v Burroughs and ors [2006] IRLR 318 UKHL

Implications for practitioners

The question of when time starts to run, for time limit purposes, is obviously of key importance to the parties to any employment dispute. In most cases the issues are reasonably clear, but that is far from the case where equal pay and pensions rights are concerned. A mark of the complexity is the fact that it has taken the best part of 12 years for a clear determination of the legal position in this case. The claimants originally filed their originating application to the employment tribunal in 1994, and the House of Lords handed down judgement in 2006.

The decision of the House of Lords is straightforward. It is this:

Where a claimant has had her employment transferred, whilst her employment contract continues, her rights to bring a claim under the equal pay act in respect of her pension rights with the transferor which are specifically excluded from the transfer, accrue at the point of the transfer, and the 6 month limit starts to run from the transfer date. In so finding, the HL is upholding the decision of the original employment tribunal. The result is that the women who had worked part time and been denied access to the pension scheme until a change in the law, and whose employment had transferred upon privatisation cannot now claim any of the backdated pension contributions.

Background

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

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

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

Here the difficulty for the employees arose because whilst their employment had been transferred, their pension rights had not, and they had not sought a remedy in respect of equal pay arising from their pension rights until the termination of their contract much later. The employees argued that, because of the intended effect of TUPE on contracts of employment, time should not start to run until the end of the contract. The fact that the pension rights did not transfer should not affect this. The EAT agreed. The Court of Appeal held that the EAT were incorrect. Since the pension rights did not transfer, the rights were based wholly on a previous contract, and therefore time started to run at the point which that contract came to an end, which was the point of the transfer. The HL has now reached the same conclusion.

Catherine Rayner
Tooks Chambers, 8, Warner Yard, Warner Street, London EC1R 5EY.
020 7841 6100

House of Lords rules that upper age limits for Unfair Dismissal and Redundancy compensation are not indirectly discriminatory

Rutherford and Bentley v Secretary of State for Trade and Industry [2006] UKHL 19

Implications for practitioners

The House of Lords has held that the upper age limits that prevent employees over 65 from bringing complaints of unfair dismissal and redundancy to an ET do not have adverse disparate impact and therefore do not need to be objectively justified. The HL declined to refer the matter to the ECJ for clarification of the issues.

The result is that the relevant provisions of the Employment Rights Act 1996 (sections 109(1) (b), 156(1) (b), 119(4) and 162(4)) still apply. It is likely that the large number of ET claims by individuals over the age of 65 that were stayed pending the outcome of the litigation will now be dismissed or withdrawn.

House of Lords

The main issue for the HL was how to assess disparate adverse impact within the pool of people to whom the legislation applied. The peculiarity of the case was that the group 'advantaged' by the legislation (approximately 26 million individuals) was proportionately much larger that the group 'disadvantaged' by the legislation (approximately 300 thousand individuals). The relevant percentage comparisons for the groups were 98.58% of males and 99.01% of females were advantaged by the legislation, whereas 1.42% of males were disadvantaged by the legislation compared to only 0.99% of females. This meant that a comparison of the advantaged groups would seem to suggest that there was no discrimination, whereas a comparison of the disadvantaged groups would suggest that there was discrimination. The key issue therefore was whether it was the advantaged or disadvantaged groups that should be compared.

Three of their Lordships (Lord Scott, Lord Rodger and Lady Hale) essentially concluded that there was no adverse impact because the provisions applied equally to all those over the age of 65. They did not go on to consider whether a comparison of the advantaged or disadvantaged groups ought to have been undertaken. Whether their reasoning will be considered persuasive authority in cases of indirect discrimination will have to be viewed in the light of future cases.

However, both Lord Nicholls and Lord Walker accepted as the starting point that the 'pool' for comparison was all those in the workforce. They further accepted that the advantaged group was those under the age of 65 and the disadvantaged group was those aged 65 and above.

There was no European or domestic precedent where the alternative choice between comparing the advantaged and the disadvantaged groups was determinative of the issues. For this reason, Lord Walker indicated that the case would be resolved largely as a matter of principle.

The reasoning of Lord Nicholls is brief and straightforward. He appears to consider both the statistics for the advantaged and disadvantaged groups. He concludes on the basis of the statistics, in the context of a scheme that applies to the entire workforce and where only 1.2% are affected by the cut off, this does not establish the necessary degree of disparate impact.

The reasoning of Lord Walker is more extensive and makes some interesting points. He seems to draw a distinction between direct discrimination and indirect discrimination in considering the numbers of people affected by the legislation. Whereas in direct discrimination it will be unlawful where one individual is disadvantaged even if a large number of people are advantaged, Lord Walker states that such reasoning does not apply to indirect discrimination. In cases of indirect discrimination such as this case where the disadvantaged group is much smaller than the advantaged group, the objective mathematical comparison should still be undertaken without any modification. He appears to suggest that the primary approach should be to compare the advantaged groups, although he recognises that there may be circumstances

411 where a comparison of the disadvantaged groups may be illuminating. However he does not specify what these circumstances might be. Although Lord Walker resolves the issue in the case, he is ultimately unsuccessful in setting down principles that will provide guidance in future cases.

Comments

The difference between the approaches of Lord Nicholls and Lord Walker illustrates the difficulties of attempting to set down a formulaic test for assessing adverse disparate impact. The preferable approach for courts and ETs to adopt should be in line with that set out by Advocate General Lenz in *Enderby* (Case C–127/92) [1993] ECR I–5535, at paragraph 15:

> *The purpose of a conceptual scheme [of direct and indirect discrimination] is to comprehend methods by which women are placed at a disadvantage in their working lives and not to create additional obstacles to claims being made before the courts in respect of sex–related pay discrimination. For this reason, a formalistic approach should not be adopted when categorising actual instances where women are placed at a disadvantage at work.*

Between the two approaches, it is Lord Nicholls who comes closest to following the approach suggested by AG Lenz. He uses the pools and considers both the advantaged and disadvantaged groups for illumination in order to comprehend the situation in the instant case before coming to an overall conclusion as to the existence or otherwise of indirect discrimination. It is suggested that this approach is likely to be the most helpful in providing guidance to ET when considering adverse disparate impact.

The relevance of this judgment should not be overstated since it was based on the old test in which the relative proportions of different groups was key to determining whether there was prima facie discrimination. In the future cases will turn on whether a particular provision criterion or practice puts a person of a particular protected group at a 'particular disadvantage'. This will require further and more detailed analysis and the House of Lords did not attempt to engage with this. Finally it is important to note that they did recognise that these provisions may be unjustified age discrimination, though they expressed no decided views on the matter.

Paul Troop
Tooks Chambers, 8, Warner Yard, Warner Street,
London EC1R 5EY.
020 7841 6100

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Less favourable treatment of part time workers

Matthews and ors v Kent and Medway Towns Fire Authority and ors
[2006] IRLR 367 UKHL

Facts

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

Law

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

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

Reg 2(4) sets out that

> *a full time worker is a comparable full time worker in relation to a part time worker if, at the time when the treatment that is alleged to be less favourable to the part time worker takes place –*
> *a) both workers are-*
> *(i) employed by the same employer under thesame type of contract, and*
> *(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience…*

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

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

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

Employment Tribunal

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

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

Court of Appeal

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

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

However, the ET and the EAT were correct to conclude that the part time firemen and the full time firemen did not do the *'same or broadly similar work'*. The ET had been entitled to find that in addition to fire-fighting and responding to other emergencies there are *'measurable additional job functions'* carried out by full time firemen which are not carried out by part time firemen. These include educational, preventative and administrative tasks. This entitled the ET to consider that they did not do the *'same or broadly similar work'* even before account was taken of the differences in their qualifications and skills, entry standards, training and promotion prospects.

House of Lords

The majority of the House of Lords (Lords Nicholls, Lord Hope and Baroness Hale) held that regulation 2(4) set out the conditions that had to be satisfied in order to determine whether a full-time worker with whom a part-time worker sought to be compared was a comparable full-time worker. So where both part-time and full-time workers were employed under contracts that answered to the description given in the same paragraph under reg.2(3), they were both to be regarded as employed under the same type of contract for the purposes of reg.2(4). They pointed out that the underlying purpose of the agreement annexed to the Council Directive 97/81 was to ensure that it was not left to the employer to decide whether or not to treat persons falling within the same category differently. So to satisfy the requirements of regulation 2(4)(a)(i) it was necessary to find that both workers were employed under contracts that fit into one or other of the listed categories in reg.2(3). Retained firefighters and full-time firefighters were both employed under a contract that was neither for a fixed term nor a contract of apprenticeship. That was a type of contract of the kind described in reg.2 (3) (a).

Turning to Regulation 2(3) (f) they held that this was a residual category that was not designed to allow employers to single out particular kinds of part-time working arrangements and treat them differently from the rest. This meant that the list in reg.2(3) was clearly designed to define different categories of working relationships, within which part-time and full-time workers were to be regarded as comparable. Each category contemplated the possibility of both full-time and part-time workers in that category. Thus the categories were designed to be mutually exclusive.

Turning finally to reg.2 (4) (a) (ii), this identified the matters to be inquired into. One had to look at the

412 work that both the full-time worker and the part-time worker were engaged in and ask whether it was the same work or was broadly similar. But that question had to be directed to the whole of the work that the two kinds of worker were actually engaged in. They held that the ET had failed to appreciate that the question of whether the two kinds of worker had a similar level of qualification, skills and experience was relevant only in so far as it bore on the exercise of assessing whether the work that they were actually engaged in was the same or broadly similar. The ET had failed to ask itself whether those characteristics showed that they were each contributing something different to that work. The tribunal treated the fact that there were differences in the levels of skills and experience as an additional factor leading to the conclusion that comparability could not be established, without assessing the extent to which those differences affected the work that the two different kinds of worker were actually engaged in. That defect in its reasoning amounted to a misdirection on a point of law.

The ET had not given sufficient weight to the extent to which the work on which both groups of firefighters were engaged was the same work. The tribunal's conclusion that the job of the full-time firefighter was a fuller, wider job than that of the retained firefighter was not the end of the exercise. It still had to address the question posed by the statute, which was whether, notwithstanding the fact that the job of the full-time firefighter was a fuller and wider job, the work on which both groups were engaged could nevertheless be described as broadly similar. Accordingly, it was not open to the tribunal to conclude that the work of the full-time firefighter was not comparable with that of the retained firefighter. The case should be remitted to the tribunal for reconsideration of whether the retained and full-time firefighters were engaged in the same or broadly similar work.

Comment

This decision made it clear that the there had been a fundamental problem in the approach to these regulations in the past. It was almost inevitable that a part – time and full – time worker would not do identical work. The approach was therefore not equivalent to an equal pay enquiry. The issue was a broad comparison. This is important since the regulations permit justification of pay differences even if there was direct discrimination within the concept in the regulations. Therefore practitioners need to be prepared to look at this kind of discrimination in a very different way from the traditional starting point in sex or race discrimination. The comparison is therefore to be seen as having been conditioned by the nature of the concept in the regulations.

Robin Allen QC
Cloisters, 1, Pump Court, London EC4Y 7AA
ra@cloisters.com

413 # Briefing 413

Purposive interpretation necessary for the construction of 'on racial grounds'

Redfearn v Serco Ltd [2006] EWCA Civ 659

Implications for practitioners

In this important decision on the meaning of 'on racial grounds' in the Race Relations Act 1976 the Court of Appeal have made it clear that Courts must take into account 'the anti-discrimination purposes for which the legislation was enacted'.

Facts

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

R was elected as a local councillor for the British National Party (BNP). After representations from unions and other employees, R was dismissed on health and safety grounds, with little or no procedure. It appeared that S's reason for dismissal was the reaction or expected reaction from Asian colleagues and patients

and that this might lead to violence. R did not have the necessary one year's continuous service to bring a claim for unfair dismissal and hence he brought claims for direct and indirect race discrimination. He lost on both counts at first instance; the ET found that he was dismissed on health and safety grounds, not 'on racial grounds'. He appealed.

Employment Appeal Tribunal

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

However, it is the EAT's reasoning in the direct discrimination case that gave rise to concern. The case turned on how 'on racial grounds' should be interpreted. S argued that a complainant could not take advantage of the Act when he was dismissed for discriminatory behaviour. However, the EAT found that motive for treatment of a complainant is irrelevant. The EAT found that 'on racial grounds' could be interpreted sufficiently widely to encompass less favourable treatment of a worker because he held racist views.

The EAT accepted that the logical consequence was that an employer who dismisses an employee who racially harasses another employee would be liable under the Act.

Court of Appeal

The CA overturned this controversial decision. They noted that although the circumstances in which the decision to dismiss R were taken included racial considerations this did not mean that it was taken 'on racial grounds' for the purposes of the RRA. They ruled that:

1) The ET were right to decide that R had not been dismissed 'on racial grounds'. The CA held that:
   Regard must be had to the anti-discrimination purposes for which the legislation was enacted, the context of the direct discrimination provisions, the language in which those provisions were drafted and the consequences of adopting one possible interpretation of the expression 'on racial grounds' rather than another possible interpretation. (para 35)

   Hence an employer, who was not pursuing a policy of race discrimination, or who was pursuing a policy of anti-race discrimination, could not be liable for race discrimination. The CA considered that the ruling in *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7 had been extended too far:

   *The ratio of **Showboat** is that the racially discriminatory employer is liable 'on racial grounds' for the less favourable treatment of those who refuse to implement his policy or are affected by his policy. It does not apply to this case so as to make the employer, who is not pursuing a policy of race discrimination or who is pursuing a policy of anti-race discrimination, liable for race discrimination. (para 45)*

   Racial considerations were relevant to S's decision to dismiss R but it did not mean that it was right to characterise S's decision to dismiss R as being 'on racial grounds'. R was no more dismissed 'on racial grounds' than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer. They commented that:

   ...any other result would be incompatible with the purpose of the 1976 Act to promote equal treatment of persons irrespective of race by making it unlawful to discriminate against a person on the grounds of race. (para 46)

2) R had not been subjected to direct discrimination on the ground that S had adopted race-based criteria for dismissing him. R was not treated less favourably on the ground that he was white but on the ground of a particular non-racial characteristic shared by him with a tiny proportion of the white population, that is membership of, and standing for election for a political party like the BNP. Properly analysed, R's complaint was of discrimination on political grounds, which fell outside the anti-discrimination laws.
3) the indirect discrimination claim failed because R had not identified a 'provision, criterion or practice' that W had applied equally to persons not of the same race or colour.

Gay Moon
Editor

Appropriate comparators for Equal Pay claims

Armstrong and others v Newcastle upon Tyne NHS Hospital Trust
[2006] IRLR 124 EWCA

Implications for practitioners

The principle of equal pay for like work requires the claimant to identify a valid comparator. Where there is another person or group of people who are employed on like work with the same employer, this is a relatively straightforward exercise. However, privatisation, contracting out and transfers all mean that groups of workers can start out working in the same employment, but subsequently work for different employers.

This is something which many employees in the National Health Service and other public sector workers have significant experience of, with changes in health trusts and mergers of trusts meaning that their employer may have changed several times in recent years. This was the situation for the women domestic workers, who claimed pay equality with porters in the case of *Armstrong and ors v Newcastle upon Tyne Hospital Trust* which the CA have now considered.

Background

Here, the female workers wanted to use a particular group of male workers as their comparators.

Initially the women domestics and the male porters had both been employed by the same employer, the Newcastle Health Authority, which paid both groups a bonus. In 1985 the domestic work, but not the portering was put out to tender, and although an in-house tender was accepted, the domestic staff lost the right to a bonus. The porters continued to be entitled.

In 1991 the four hospitals in the area were divided between two trusts, but in 1998, the two trusts merged to become the Newcastle and Tyne Hospital Trust. The mainly female domestic staff, claimed equal pay with the mainly male porters, arguing that they should be entitled to the bonus. The matter went to the employment tribunal, which decided, in a somewhat circular argument, that the two groups were not in the same employment because they worked at different establishments at which different terms and conditions operated. The different terms and conditions included, of course, the lack of a bonus for the women domestic staff.

Court of Appeal

The CA was asked to consider whether or not the comparators were appropriate, so that the claim could proceed. If a man and a woman are employed on like work but are employed at different establishments can the lower paid woman still claim equal pay with the man?

The answer is yes, but only if she can demonstrate that any inequality in pay arises from a single source. The argument is that there must be one body or organisation which can correct the inequality.

The CA has upheld the decision of ET that the women were not able to rely on the argument that any inequality in pay arose from a single source, under article 141 EC because the hospitals had essentially different employment regimes. At the same time, the CA determined that the genuine material factor defence put forward by the employer in response to the claim brought by a different group of employees had been wrongly rejected by the EAT.

This of course raises the question of what is meant by 'attributable to a single source'. Does it mean that the women must show that at the point of her claim, her pay and conditions are the responsibility of a single organisation, which must take responsibility for remedying any pay inequality that it inherits, through a TUPE transfer for example? Or does it mean that the woman's claim can be defeated by an examination of the history of the events leading to the inequality, with the argument that the source of the inequality or the cause of the inequality is a past difference?

In this case, the CA accepted that there had been some harmonisation of terms and conditions of employees after the transfer, but did not accept that this meant there was evidence that the trust had responsibility for all the terms and conditions of the

relevant groups. Thus, the ET was entitled to find that there was not a single source.

Comment

The argument seems fundamentally flawed. If the employer has taken on responsibility for a group of employees, and has entered into harmonisation of some areas, then they clearly have both the power and the responsibility for all the terms and conditions of all employees. Whilst the historical cause of the inequality may not be their fault, the power to remedy it is clearly within their power. It is arguable that the emphasis of the ECJ decisions on the point is that it is the present power to remedy the inequality, and not the historical cause of the difference, that should be examined.

It is illogical to then say that this is largely a matter of choice for the employing body. Who else, one is tempted to ask, is responsible for terms and conditions, if not this body?

Catherine Rayner
Tooks Chambers, 8, Warner Yard, Warner Street, London EC1R 5EY.
020 7841 6100

Briefing 415

More on the definition of disability

Millar v Inland Revenue Commissioners [2006] IRLR 112 CS

Implications for practitioners

The definition of disability in section 1 of the Disability Discrimination Act 1995 (DDA) continues to be the subject of many of the appeals which reach the higher courts. The Disability Discrimination Act 2005 amended the definition contained in the DDA 1995 so that anyone who has HIV, cancer or MS is automatically deemed to be disabled for the purposes of the Act. In addition, and of particular importance to those with mental health problems, the requirement that a mental impairment consisting of a mental illness must be a 'clinically well recognised' mental illness has been removed. This should assist considerably those with mental health issues who wish to use the Act. The following case concerns the vexed question of physical symptoms which may be the manifestation of a mental impairment. It was heard prior to the changes brought about by the 2005 Act regarding mental impairment.

Facts

Mr. Millar (M) was an administrative officer for the Inland Revenue (IR) in Edinburgh. In 1998, he had a fall following which he was briefly unconscious. He then began to experience drooping of his left eyelid, sensitivity to bright light, and headaches. He went off work ill as he had difficulty in using his VDU screen. He was seen by a consultant neurologist and a consultant ophthalmologist but no abnormalities were noted. He suffered difficulty in coping with situations where he was exposed to particularly bright light. He experienced problems with driving a car, being unable to drive at night due to the glare of headlights, in watching television, which he could only do for relatively short periods of time, and in operating a computer because of the glare from the VDU.

Mr Millar was dismissed in May 2002 on the basis of his unsatisfactory attendance. He brought a tribunal claim on the basis of disability discrimination.

Employment Tribunal

The ET rejected his claim on the basis that he was not disabled within the meaning of the DDA 1995. The ET relied in particular on the cases of *Rugamer v Sony Music Entertainment Ltd* and *McNicol v Balfour Beatty Rail Maintenance Ltd* [2001] IRLR 644 EAT, holding that the applicants situation was similar to the condition of the applicants in those cases and that, in the absence of any evidence which would enable them to determine whether there was a mental impairment which satisfied the test of being a well-recognised illness, M was not disabled.

Court of Session

The EAT dismissed an appeal against the ET's decision, and the applicant appealed to the Court of

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Session. M argued that

a) impairment was nothing more than the presence of something that limited or restricted the ability of the individual to do certain things and that
b) in considering whether or not there was a physical impairment, it was not necessary to identify a particular cause of it. If it were necessary to go behind the fact of the physical condition presented by an applicant and show its cause, there would be an increased burden of proof on the applicant.

The CS held that the ET had erred in finding that the applicant was not a disabled person within the meaning of the Act. Lord Penrose held that the appellant established facts and circumstances from which it was open to the ET to find that he had an impairment in terms of the Act. The question on which the parties joined issue was related to the nature of that impairment. Lord Penrose went on to hold that physical impairment can be established without reference to causation and, in particular, without reference to any form of 'illness'. The distinctions focussed in paragraph 1 of Schedule 1 of the Act in the case of mental impairment have no counterpart in the treatment of physical impairment. Many forms of physical impairment result from conditions that cannot be described as 'illness'. Genetic deformity, for example, may not be a manifestation of illness in any sense. A deficit resulting from trauma has its origins in an event that may have required medical intervention. For example, an amputee does not have an illness. Where there is an issue as to the nature of the impairment, it is a matter of fact whether it is physical or mental in character. If an applicant is to avoid the test in paragraph 1 schedule 1 (clinically well recognised) it is incumbent on the applicant to demonstrate that it is physical in character.

Comment

The ET failed to express any view of the medical evidence nor did it make any express findings of fact about the applicant's condition. The ET failed to make the core findings of fact necessary for a decision on the circumstances of the case. Whether or not the circumstances are close to those dealt with in the previous cases, the appellant was entitled to have findings in fact on the evidence before the tribunal.

This case builds very usefully on the case of *College of Ripon and York St John v Hobbs* [2002] IRLR 185 EAT (which was cited) in which Lindsay J stated

> *...The Act contemplates...that an impairment can be something that results from an illness as opposed to itself being the illness...it can thus be cause or effect.*

It is clear that an applicant will have to prove that she has an impairment, either physical or mental, which has a substantial and long term adverse effect on her ability to carry out normal day to day activities. However, she will not have to show the cause of that impairment i.e. why she has it.

Catherine Casserley
Disability Rights Commission

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Briefing 416

Can a failure to make 'reasonable adjustments' amount to a breach of contract?

Greenhof v Barnsley Metropolitan Borough Council [2006] IRLR 98 EAT

Implications for practitioners

A failure by an employer to make reasonable adjustments often results in an employee feeling so undermined and unvalued that they resign. When they do, to what extent will the employer's breach of the duty to make adjustments be a breach of the employee's contract of employment? The *Greenhof* case addresses this issue.

Facts

Mr. Greenhof (G), who has a history of clinical depression, joined the Barnsley Metropolitan Borough Council (BMBC) as an apprentice in 1974 aged 16. He progressed through the ranks to become a general foreman. As was demonstrated by his promotions, his work was satisfactory.

Towards the end of 2001, he was asked to secure properties owned by BMBC that had been occupied by drug dealers and drug users. The properties were full of the detritus of drug taking and they posed a risk to his health as well as to the health of the team with which he was working. There were needles, razor blades and blood. This caused significant distress and stress to the claimant and his team, as a result of which the claimant suffered stress and was off work for some time. Shortly after he went off sick, he received his ultimate promotion to project manager. Whilst he was off sick, he was called to a meeting in relation to suspicions of materials being removed from a site without authority. Disciplinary proceedings were not taken against him but he had to give evidence against two other employees. Having returned to work, he then suffered a relapse on 15 June and he was then absent from work until October 2003 with depression. He returned to work at the beginning of October and began to prepare himself for taking on his role as project manager. The BMBC suggested that he might like to take a lesser role doing technical support which would not be as stressful for him. G interpreted this as meaning that he was not allowed to return to his substantive post. In February 2004, he resigned from his job, claiming that he had been discriminated against because he was ill.

Employment Tribunal

G brought a claim of disability discrimination and unfair dismissal against the respondent. The ET found that G had suffered disability discrimination. In particular, it found that he had been pressured into taking a lesser role following his return to work in October and that he should have been given such duties as would not cause stress, with the help of other project managers so that he would have been able to continue his work with reasonable adjustments.

The ET dismissed the claim of unfair dismissal, though. They held that his contract was not undermined by any conduct of the part of the respondents sufficient to enable him to leave on account of it.

Employment Appeal Tribunal

The EAT upheld G's appeal. It held that in this case, the ET found unequivocally that there had been a serious breach of the obligation on the part of the respondent over a period of time to make reasonable adjustments, as it was obliged to do under the DDA. It therefore followed that this was almost bound to be a breach of the implied term of trust and confidence which the claimant would be entitled to treat as being a repudiatory breach of contract, as he purported to do. The EAT went on to say that there may be circumstances in which there can be a breach of the obligation to make reasonable adjustments which might not be regarded as repudiatory, but that they did not see how, having made the finding that it did in the present case, there was any way in which the respondent's conduct could be regarded as anything other than repudiatory. The EAT substituted for the ET's decision a finding that G had been unfairly dismissed.

Comment

This case shares some similarities with the case of *Nottinghamshire County Council v Meikle* [2004] IRLR 703, one of the leading cases on the duty to make reasonable adjustments. Both cases show how significant the duty to make adjustments is and the serious consequences of an employer breaching the duty – not only a failure to get the most out of an employee and to enable them to do their work to the best of their ability, but also resulting in a potential (and probable) breach of the implied term of trust and confidence, entitling an employee to resign and claim both a breach of the DDA and unfair dismissal.

Catherine Casserley
Disability Rights Commission

When a request for flexible working can amount to a formal grievance

Commotion v Rutty [2006] IRLR 171 EAT

Implications for practitioners

An application for flexible working under the terms of the Employment Rights Act (ERA) section 80F may constitute a formal grievance for the purposes of the statutory procedures.

When considering whether an application for flexible working was wrongly refused a tribunal could examine the factual basis on which it was refused, in order to determine whether the decision was made on incorrect facts.

Facts

Mrs Rutty (R) had become responsible for the care of her grand-daughter. Her hours at work had been shortened, but she found that the reduction was insufficient and wished to move to a three day week. Initially she made an informal request, which was refused. Commotion Ltd (C) wanted employees to work standard hours and days, in order to promote good team spirit and high morale. When her informal request was denied R made a formal application for flexible working under s80F ERA. The request was also denied, as was R's appeal against the decision. R then resigned, arguing she had been constructively dismissed.

Employment Tribunal

R's claim was made on the basis of indirect discrimination, constructive unfair dismissal and unreasonable rejection of her s80F request. She was successful on all these heads. The ET rejected C's submission that R was barred from her discrimination and unfair dismissal claims because she had failed to put in a grievance. The s80F request was found to be sufficient to satisfy the requirement to grieve.

In considering the application for flexible working the ET examined the factual basis for C's concerns. They concluded that there was no reason to think that granting R flexible hours would have had a negative effect on morale. In particular they said '*There has not been a shred of evidence that proper enquiry and proper investigation was carried out by the respondents when dealing with this request'.*

Employment Appeal Tribunal

In relation to the grievance issue the EAT found that, as a matter of law, a single document could be both a s80F application and a written grievance. Thus it was a matter of fact for the tribunal, whether this particular document was both. The ET having concluded that it was, the EAT would not interfere.

The appeal was also put on the basis that the tribunal had erred in making an objective assessment of C's reasons for rejecting the flexible working request. While the EAT accepted that the tribunal cannot examine whether an employee acted fairly or reasonably, they said that preventing any examination of the facts would render the provision useless. A tribunal was entitled to say whether the ground of refusal asserted by the employer was factually correct. This would include, for example, whether the reason given for the refusal was an honest one. It also included showing that there was some factual basis for the request being refused. In this case the ET had been right to examine whether there was any evidence to support C's view that flexible hours would lower morale. When they concluded that there was not, they were right to find that the refusal was based on incorrect facts.

Comment

It is unfortunate that the legislation does not allow ETs to make an assessment of the reasonableness of employers' decisions on flexible working within the ERA. This decision confirms that employers should have objective evidence to support their decision. Advisors should also be aware of the potential - as in Mrs Rutty's case - for claims under other provisions, particularly the SDA.

This case continues the welcome trend of EAT case

law applying commonsense to the definition of grievances for the purpose of the dispute resolution rules. It is important, however, not to be misled by this case into thinking that a formal grievance is needed before bringing a claim under s80F. Claims for flexible working are not covered by the dispute resolution regime, which will only become relevant where, as in R's case, there are other claims.

Michael Reed
Free Representation Unit
michael.reed@freerepresentationunit.org.uk

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ETs do have discretion to extend time limits

BUPA Care Homes (BHN) Ltd v Cann and *Spillett v Tesco Stores* [2006] IRLR 248 EAT

Implications for practitioners

The dispute resolution regime has not removed the power of tribunals to extend time in accordance with previous rules.

Background

In this case the EAT heard two conjoined appeals arising from decisions on the impact of the Employment Act 2002 and its regulations on time limits. These cases raised the possibility that the introduction of the new procedural rules on time limits had overruled the previous rules allowing tribunals to extend time, without providing for their replacement. This would have left tribunals unable to allow claims out of time, regardless of the circumstances.

The Employment Act s32(2) sets out rules that prevent claims being brought without the required grievance procedure being started. Section 32(4) further requires the grievance be initiated within one month of the 'original time limit' for making a claim to a tribunal. Section 33 provides for regulations to alter existing time limits where the grievance procedure applies. This power has been exercised in the Employment Act 2002 (Dispute Resolution) Regulations 2004.

The difficulty in these cases arose because regulation 15 of the regulations increased the time limits, without making any explicit provision for further extension by tribunals, which previously had power to extend the time limit on either just and equitable grounds or where it had not been reasonably practicable to bring a case in time, depending on the type of claim. The legal position is further complicated because the effect of regulation 15 is restricted to the 'normal time limit', which is defined as the time limit within which the tribunal does not have to exercise its discretion or make findings of fact in order to accept jurisdiction. This expressly excludes extensions of time.

Arguments were therefore put forward in these cases that no power to extend time existed. This argument focused on the meaning of the 'original time limit'. Did it mean the previous three month time limit, as the normal time limit did? Or did it mean the three months, plus the tribunal's power to extend time?

Employment Appeal Tribunal

The EAT concluded that parliament did not intend to implicitly repeal the tribunal's power to extend time. The original time limit should be read to include the tribunal's power to extend time. In particular they found it was significant that the terms used differed between in the Act and the regulations. This indicated that their legal meaning differed. Therefore 'original time limit' should be more widely construed than the explicitly restrictive 'normal time limit'.

Although the EAT regarded straightforward statutory interpretation to be sufficient to settle the matter they also noted that the DTI guidance took the same view and that European law required access to the remedy for discrimination.

Comment

It is regrettable that it has been necessary for judicial time to be spent considering whether any court has the power to extend time to bring a claim. It would be outrageous for claimants to be denied access to the tribunal on a time limit point without considering the reason for the delay. Given the DTI's guidance it does

418 not seem that the government intended such a result. Therefore while the EAT's judgment is welcome, it exposes, again, the deficiencies of drafting in the Employment Act and its regulations.

Michael Reed
Free Representation Unit
michael.reed@freerepresentationunit.org.uk

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Relationship between disability related absences and sick leave

Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 351 EAT

Implications for practitioners

This case combined a claim for disability related discrimination and unfair dismissal. The relationship between absences for disability related illnesses and absences for other illnesses was considered by the EAT, as well as the need for justification to be made out, and for the tribunal to make clear its considerations on the issue of justification.

Facts

Mrs Dunsby (D) worked as a staff nurse assigned to the paediatric intensive case unit of the Respondent's hospital. From 2003 she had a series of illnesses resulting, in one year, absences totalling 38% of her working time. On a review by the employer's occupational health service it was concluded that her problems centred on her personal life. The problems included stress related to her personal life and childcare; gynaecological complaints; and migraines. Medication for her gynaecological problems had, on two occasions, caused the migraines. The employer had recorded these simply as 'headaches'.

As a result of the number of days absence D had taken due to illness, she had worked her way through the four stages of the employer's sickness absence procedure and was dismissed on the grounds of her sickness absence record.

Employment Tribunal

The case was complicated by a rather unusual direction from the ET Chairman. He directed that the hearing should deal with, firstly, liability for unfair dismissal; and, secondly, on the assumption that the claimant was disabled within the meaning of the DDA for all three conditions (gynaecological problems, depression and migraines) –

a) whether the dismissal was for a reason related to disability; and
b) whether if so, whether it was justified.

Following this direction the ET found that the dismissal was for a reason related to (assumed) disability because the employer had failed to discount the two days absence in relation to the disability related migraines from the total period of absence due to illness that the D had taken. It found that if these two days had been deducted, D would not have been dismissed as she would not have reached the fourth stage of the sickness absence procedure.

The ET went on to find that the decision to dismiss was not justified – i.e. was not for a reason that was material to the circumstances of the case and substantial –

because but for the disability related absences the claimant would not have been at risk of dismissal …

Employment Appeal Tribunal

The EAT had no trouble in deciding that this last point was an error of law: rather than considering the reasons put forward by the employer and determining whether they were material to the circumstances of the case and substantial, the ET seems just to have repeated the facts which led them to conclude that the dismissal was for

a disability related reason. As the EAT noted, this is the starting point for an enquiry into justification, not its conclusion.

The DDA – the EAT noted – does not prohibit an employer from dismissing a disabled employee as a result of an extended period of sickness absence related to the disability. The key question is whether the dismissal itself was justified.

Further, it was noted, the employer did not act unreasonably – as the ET had found – in deciding to take account of absences due to a disability related illness when reviewing an employee's overall absence record in the context of a possible dismissal.

The EAT also sounded a note of caution regarding the ET's direction to proceed on the basis of assumptions:

> *…while we do not absolutely rule out the possibility of a hearing on assumptions, we caution against it and we say that it should be undertaken only with the clearest possible agreement as to what the issues are to be at the main hearing and how the main hearing is to be conducted.*

Comment

Although not altogether surprising in its conclusions, this case does give some useful guidance for the common type of case where there is a mixture of non-disability related illness absence and disability related illness absence. The implications of this judgment for employers is that they can feel confident in looking at all absences globally in determining whether dismissal might be a possibility, rather than attempting to treat each type of illness absence in a different way. There is also clear reinforcement of the principle that the DDA does not prevent dismissal on the grounds of extended or repeated periods of absence simply because the extended absence is for a disability related reason. The balance is provided by the need for grounds of justification to be made out clearly, and the reiteration of the principle that the ET should carefully consider – and make clear in its reasoning – what are the grounds of justification.

The EAT did not appear to consider the application of the 'reasonable adjustment' provisions to this situation.

Sophie Garner
St Philips Chambers, Birmingham

EOC investigates the position of ethnic minority women at work

In April 2006 the Equal Opportunities Commission published early findings from its ongoing investigation into ethnic minority women at work, which show that:

- Pakistani women face a pay gap at least 10 percentage points higher than that of white women, whilst the pay gap for Bangladeshi women is at least 5 percentage points higher. A quarter of Pakistani and Bangladeshi women work in wholesale and retail, where the median pay for sales assistants, for example, is £5.15 per hour, £4.61 less per hour than average earnings for women working full time.
- Working Black Caribbean women are 8 percentage points more likely to have a degree than white women. Yet only 9% of Black Caribbean women are managers/senior managers, compared to 11% of white women. Job segregation is more of an issue too: almost a third of all Black Caribbean women work in health and social work, compared to less than a fifth of white women.

They are therefore calling for action to be taken remedy the persistent inequality facing ethnic minority women in the workplace.

Age Concern and three other European Age Bodies launch a proposal for a Directive on Discrimination on Grounds of Age in relation to Goods Facilities and Services

The proposal was launched in Copenhagen at the 8th World Conference on Ageing organised by the International Federation on Ageing. The proposal calls for a Europe wide move to address the issue of discrimination in relation to the provision of goods facilities and services following on the research carried out by Age Europe on discrimination across member states. It is expected to be brought before the European Parliament in the Autumn for further discussion.

See:

http://www.ace.org.uk/AgeConcern/5C6C162157A240FA83CB51CB92ABD6C8.asp

Arcadia Group faces disability legal challenge

The Arcadia Group – one of the country's biggest clothing retailers – is facing court action for not making its Burton store in Stafford accessible to disabled customers. The DRC says it is also concerned that other Arcadia stores in the country may be breaking the law – such as Top Shop, Top Man, Miss Selfridge, Dorothy Perkins, Wallis, Burton and Evans – after Arcadia admitted that 40% of its stores are not physically accessible to disabled people.

The ECJ are asked to rule on whether discrimination by association with a disabled person is prohibited under the Employment Directive

The Employment Tribunal has decided to ask the European Court of Justice whether the Employment Directive 2000/78/EC prohibits discrimination at work of a mother of a severely disabled boy. The precise question has yet to be formulated but the decision in principle was taken in a decision sent to the parties on the 23rd May 2006 in *Coleman v Attridge Law*. The answer may take up to 18 months to come from the ECJ.

Length of Service Payments will need to be justified

The Advocate-General has given his Opinion in *Cadman v Health and Safety Executive* which was argued in the ECJ in the Spring. In his Opinion it will be necessary for employers to justify differences in payments between men and women as a result of pay schemes that are based on additions for length of service. However in a surprising twist the AG has suggested that the ruling of the ECJ should be prospective and not retrospective. The Opinion can be found at:

http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit &alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=cadman&domaine=&mots=&resmax=100

Are the George and Victoria Crosses unlawfully discriminatory?

This was the question posed by the Trinidad High Court when it ruled that the Trinidadian medal the Trinity Cross was in breach of the International Covenant of Civil and Political Rights because it could not be worn or accepted by strict Muslims and Hindus.

See

http://www.trinidadexpress.com/index.pl/article_news?id=160954576

CRE report on sites for Gypsies and Irish Travellers

The findings of the CRE's inquiry into local authorities' race and community relations work around sites for Gypsies and Irish Travellers was released in May. Their report shows that relations between Gypsies and Irish Travellers and other members of the public are a particular cause for concern, with people from these groups often leading separate, parallel lives.

Gypsies and Irish Travellers have the poorest life chances of any ethnic group in Britain today, with health and education outcomes well below the national average. It was this dual concern for poor race relations and inequality that led the CRE to launch their inquiry. The inquiry found many local authorities are failing to promote equality and good race relations around Gypsy sites with consequences for the local community as a whole.

Gypsies and Irish Travellers live in, or pass through, 91% of local authority areas. In over two-thirds of these areas there are tensions linked to unauthorised encampments and developments, or general public hostility. Most local authorities said they had taken no steps to address these tensions in a long term way, despite their statutory duty to promote good race relations.

The report's key recommendations for local authorities are that:

- Local authorities need to provide strong local leadership regarding Gypsy sites, and allocate responsibility at a senior officer level.
- They need to develop a strategic and long-term approach to site provision and enforcement as part of overall strategy on housing, linked to health, education and an overarching communications strategy.
- Proactive work should be carried out to promote good community relations and build integrated communities.
- Local authorities need to ensure the same standards of services for Gypsies and Irish Travellers as for the wider community - both in what they provide and what they expect from Gypsies and Irish Travellers.
- Other local, regional and national bodies need to provide encouragement and support to local authorities to take this work forward. Gypsies and Irish Travellers also have an important role to play.

For further details see www.cre.gov.uk

DRC launches investigation into public sector fitness standards

Regulations and procedures governing entry to, and work in, teaching, nursing and social work are to be subjected to the first detailed legal review of their compliance with the Disability Discrimination Act. The review will form part of a Formal Investigation being undertaken by the Disability Rights Commission which begins on Monday 22 May 2006.

This 12-month Formal Investigation will look into how training, qualifying and working practices within these professions may be posing challenges to the entry and progress of disabled people.

The DRC has focused on fitness standards in public sector professions because:

- disabled people are far less likely to be working in professional occupations like teaching, nursing and social care than non-disabled people;
- disabled people are still less likely than non-disabled people to be employed in the public sector;
- employers, colleges and regulatory bodies have difficulty deciding who is fit to work, study or register, and cases that the DRC has seen show there is a potential for disability discrimination when these decisions are made.

The Formal Investigation will have three elements:

- an analysis of the legislative and regulatory frameworks and associated legal cases;
- an investigation of how decisions are made about whether people are considered fit to train and work in teaching, nursing and social work;
- research on the issue of non-disclosure of impairments and long-term health conditions. For example, do people regularly refrain from telling their employer, college or regulatory body about their impairment or long-term health condition? If so, why, and what effect does this have on their career?

Briefings

Notes and news

Abbreviations

AML	*Additional Maternity Leave*	*ECHR*	*European Convention on Human Rights*	*HL*	*House of Lords*
AR	*Employment Equality (Age) Regulations 2006*	*ECtHR*	*European Court of Human Rights*	*HRA*	*Human Rights Act 1998*
CA	*Court of Appeal*	*ECJ*	*European Court of Justice*	*IDR*	*Intended Date of Retirement*
CEHR	*Commission for Equality & Human Rights*	*ED*	*Employment Directive*	*NRA*	*Normal Retirement Age*
CRE	*Commission for Racial Equality*	*EOC*	*Equal Opportunities Commission*	*PCP*	*Provision, Criterion or Practice*
DDA	*Disability Discrimination Act 1995*	*EPD*	*Equal Pay Directive*	*RD*	*Race Directive*
DRC	*Disability Rights Commission*	*EqPA*	*Equal Pay Act 1970*	*RRA*	*Race Relations Act 1976*
EA	*Employment Act 2005*	*ERA*	*Employment Rights Act 1996*	*RRAA*	*Race Relations (Amendment) Act 2000*
EAT	*Employment Appeal Tribunal*	*ET*	*Employment Tribunal*	*SDA*	*Sex Discrimination Act 1975*
EC	*Treaty establishing the European Community*	*ETD*	*Equal Treatment Directive*	*TUPE*	*Transfer of Undertakings (protection of employment) Regulations 1981*
		GOR	*Genuine Occupational Requirement*	*UN*	*United Nations*