Discrimination Law Association

Briefings 420-432

Volume 29

October 2006

Editorial *Legal Aid for Discrimination: The future remains unclear*

The DLA joined with many in welcoming the retreat – albeit temporary – by the Lord Chancellor in relation to government proposals for reform of legal aid.

The Lord Chancellor's turn-around came at the end of the DCA consultation on *Legal Aid: a sustainable future*, to which the DLA has responded. Juliette Nash sets out some of DLA's concerns in Briefing no 422. Having been warned of the severe impact fixed fees would have on legal aid practitioners, forcing many to close their doors, the Lord Chancellor accepted that his department would need to think again. In committing his department to working with practitioners to get a policy 'we believe is right', he made it plain to the Law Society annual conference that whatever the new policy might be, there would be no more money.

The grave harm to the fabric of society that discrimination can cause is all too well known. The Equalities Review Interim Report, offered disturbing examples relating to each of the grounds now 'protected' under our legislation. The Discrimination Law Review is looking at ways in which the law can be improved. However, laws will not make a difference if they are inaccessible to those who need to benefit from their protection.

Discrimination law is increasingly complex and the Statutory Dispute Resolution Procedures have added further complexity for discrimination cases in the employment tribunal.

A study of the experience of claimants involved in Race Relations Act employment tribunal cases, commissioned by the DTI and done by the Institute for Employment Studies, commented on the 'inequality of arms' between claimants the respondents:-

> *The fact that most claimants were not able to afford to pay for solicitors and barristers was seen to stack the odds of winning the case in the respondents' favour, regardless of the strength of the case. Respondents were able to afford solicitors, barristers, and in a small number of cases, a QC, to prepare their defence, and to fight the claimant on their behalf at Tribunal. According to the claimants, almost all of the respondents in these cases had legal representation.*

Indeed, the former Lord Chancellor, Lord Irvine, told the Parliamentary Constitutional Affairs Committee that the idea that workers can represent themselves in all employment tribunal cases is no longer tenable.

Getting legal aid for discrimination cases has never been easy, but if the government is sincere in its commitment to tackle discrimination, the solution cannot be to make it even more difficult, as would have been the case had the government proposals been implemented.

The DLA has strongly recommended that discrimination law should be recognised by the LSC as a distinct area for public funding, and that the legal aid scheme should accommodate the complexity of most discrimination cases but also the exceptional amount of time that is nearly always required in a discrimination case.

The DCA and the LSC are public authorities. They must not discriminate on racial grounds in the carrying out of any of their functions. The DCA and the LSC are both under a statutory duty to promote race equality in the carrying out of all of their functions. From 5 December 2006, a parallel duty will apply in respect of disability.

The DLA has been concerned that the now shelved proposals may have had a disproportionately adverse impact on members of ethnic minorities and people with disabilities across all legally aided areas, not only discrimination but also family, housing, mental health and immigration cases. Nothing in the consultation document or the Draft Impact Assessment indicated that the DCA had considered the impact of these proposals. Failure to do so itself would put the DCA in breach of its statutory duties.

With time to think again, it is essential that the DCA and the LSC act within their equality duties. This means carrying out a full equality impact assessment **before** they come forward with their next set of proposals, in order to develop a scheme that regulates access to justice that is not discriminatory.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

Briefings Published by the Discrimination Law Association. Sent to members three times a year. **Enquiries about membership to** Discrimination Law Association, PO Box 6715, Rushden, NN10 9WL **Telephone** *01933 228742* **E-mail** info@discrimination-law.org.uk
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Age Equality in a Diversifying Population: What can Europe do?

This article is an edited version of Robin Allen's presentation to the International Federation on Ageing's 8th Global Conference held in Copenhagen in May 2006.

Introduction

How can age equality be addressed in the context of a diversifying population? What is the role for a developed age discrimination law in building up social solidarity? What is the extent to which individual legal rights can and should contribute to policy in this area? These are the questions that this article addresses.

Age profile as a factor in social solidarity

Historically, achieving social solidarity in an age context has been easy. Across Europe and elsewhere being 'old' (however defined in any specific country) has been a qualification for special programmes of social protection tailored to fit what are believed to be the specific needs of older people. There has been little debate that older persons are deserving of this social protection. There is a huge and varied range of such social protection benefits, including such matters as state pension payments, lower rates of tax, free bus passes, winter fuel handouts, cheap travel on trains, discounts on insurance, holidays and other services.

The precise reasons for many of these benefits differ. A number of them start from a policy analysis which seeks to address a combination of disadvantages experienced by older people such as:

- older persons being economically less secure than other groups in society and with few opportunities to address this insecurity,
- a very generalized view that older persons would be disadvantaged vis-à-vis other age groups without such special benefits, and
- a view that older persons deserve these benefits because of their past contribution and their current position.

Other social protection schemes, such as public pensions systems are based on historic contributions to the state during working lives through 'pay as you go' or social insurance systems, to provide an income in later life. As such, they can be seen as deferring the receipt of income to provide for security in older age. But the age profile of Europe is changing and so many of these systems face financial pressures as enhanced longevity puts pressure on the underpinning financial model. The under-funding of such schemes is now a direct burden on other generations.

Other provisions, such as health care and other connected public services, are provided on a free or subsidised basis, by virtue of the status of being a citizen or a tax payer. Entitlement is usually based on need. Whilst entitlement is rarely age based, for many of these services, older people are high volume consumers because of their individual or collective circumstances. High volume can also, and indeed usually does, mean high cost. So the subsidization of those costs, or their complete indemnity, can be seen as a further benefit to the older generation.

These entitlements of older persons to special social protection are now under examination in the context of the current debate on demography and a perceived imbalance in the costs and benefits. The underpinning justification has often been assumed almost without argument. But now it is necessary to explore those justifications a little deeper. At their heart is the argument that older persons have worked and so contributed to society. Their economic power is diminished or diminishing. So it is said to be only fair to give them as much social protection as possible.

The restraint on politicians in developing these rights has not been one of values and principles, but a restraint of cost and the possibilities available for distributing such benefits. One restraint has been almost entirely ignored: comparative fairness has not been the central issue in this debate.

These entitlements and their rationales cannot be maintained, uncritically, long into the future. Demographic and associated economic changes mean that a much more detailed examination and justification will be necessary. This examination will

involve a comparison of the assistance that older persons deserve and need with the assistance that other age groups deserve and need.

The new demographic and economic reality

Across Europe there is a rapidly changing national age profile, which is now a key determinant of policy of member states.[1] There are many examples of this development of policy. One of the most current documents is the European Commission's Green Paper *'Confronting Demographic change: a new solidarity between generations'*.[2]

This paper, identifying the demographic changes which Europe is witnessing, calls for *a new solidarity between the generations*. It states that these changes are creating a new society whether we like it or not. The paper identifies three determinants of these unprecedented demographic changes:

- continuing increases in longevity,
- the continuing growth of workers over 60, and
- continuing low birth rates.

Bluntly the report states that there will be

- Ever fewer young people and young adults, and
- Ever more pensioners and very elderly people.

The Green Paper discusses the economic impact of this. It is expected that the overall population of Europe will grow to 2025 before starting to drop. The growth will be patchy and the downward trend will become noticeable in specific areas *much* sooner. It is predicted that between 2005 and 2030 the total working age population (18 – 64) will drop by 20.8 million. That is a huge amount of productive capacity. It is equivalent more or less to the current working population of the United Kingdom.

A change in the economic balance

These facts make it clear that there is to be a major change in the economic balance between older and younger persons. The Green Paper argues that a focus solely on the needs and deserts of ever more pensioners and the very elderly is not going to be tenable. It argues that this would create the potential for a breach in intergenerational solidarity.

The potential impact of this on social solidarity can be summarised in the context of pensions. The concept of a pension can be described shortly as either state provided social protection or a system for the payment of deferred wages. Either way it has to be funded. In the one case, by the state collecting revenue through taxes and other means. In the other, by employers or employees (or both) funding these deferred wages through payments to pension schemes.

In state schemes, the state must make decisions, both as to the extent to which it will make payments and as to the fairest way in which to impose the cost of those payments on the revenue raising systems. In employer and employee funded schemes, the acceptability of deferring receipt of wages depends on the extent to which the funds invested will grow and mature over the expected period. In each case there are underlying issues of social solidarity:

- Who is going to be taxed at what rate?
- What rate of payment is affordable without putting too great a strain on the economy?
- What savings and inflation rates are necessary to ensure that wages saved now (to be taken later as pensions) will meet the expectations of retired people?
- How long does a person want to work?
- How long does the state need them to work for?
- How can change be effected without social upheaval and with minimum disruption to the plans made over many years by workers and employers?

The answer to these questions depends on the capacity of the economy to produce an acceptable rate of return on funds invested and to support the necessary revenue raising.

A further factor in play in the wider demographic debate is the increasing diversity of our population and the fact that this affects all age groups. The notion of diversity is generally understood in the context of issues such as race and gender and this applies across age cohorts.

But in the context of a debate on ageing and social solidarity the increasing divergence of circumstances within age cohorts is equally important. Different segments of older and younger populations have widely varying levels of income and wealth, health status, skills and opportunities and so on. This divergence, if current patterns persist, is only likely to continue to

1. In the United Kingdom there is a Pensions Commission which has been set up to address just these issues. Its first report may be found at http://www.pensionscommission.org.uk/publications/2004/annrep/exec-summary.pdf

2. Brussels 16.3.2005, COM(2005) 94 final

evolve. Age policy has to recognize the importance of this.

The economic burden on younger persons

The absolutely critical question raised by the Green Paper is: what can the economy of a state produce? This of course, depends on the size and productivity of the workforce, and on the return on capital. The Green Paper pointed out that around 2009 the youngest cohort of the working age population will 'dive' below the size of the oldest cohort so if productivity and return on capital do not change much the burden will increase very fast, certainly much sooner than 2030.[3]

The Green Paper states that as the ratio of old to young changes, the burden on *younger* people to maintain the dynamo of the economy increases:

> *Today's children and young people will have to take over from larger numbers of individuals in the previous generations.*

The Green Paper did suggest that the position is not completely gloomy as:

> *Their level of education and training is markedly higher than that of their elders…This points to a potential for higher productivity and greater adaptability than was the case for previous generations.*

But, and it is a big but, it added:

> *… the Union must accept that young people are becoming a rare and yet undervalued resource. The fact is that young people are finding it hard to integrate in economic life.*[4]

The Green Paper listed five key points which contributed to the difficulties faced by young people:

- higher rates of unemployment[5],
- the higher risk of poverty among young people;
- discrimination on account of age;
- a mismatch between skills and the needs of the knowledge based society; and
- the disproportionate risk of poverty among children.

For the purposes of this paper the situation outlined in the Green Paper can be summarised thus:

- There are an increasing number of people living longer who will have increasing needs associated with their longevity,
- They will be dependent on fewer young people for the funding (and obviously also for the physical provision) of those benefits,
- Yet young people are finding, or will find it hard to shoulder this burden.

Rebalancing through equality rights

There is therefore a choice for Europe: it can continue to increase the range and depth of social protection rights on the basis of age, but it cannot ignore the fact that it all depends on younger persons taking up the burden of that provision. Neither can it ignore the increasing changes within age cohorts.

This means that the balance between old and young has to be reconsidered and the nature of the analysis has to be more penetrating reflecting the diversity within those cohorts.

One way to do that is by considering the contribution that legal rights now make and could make. Do improved systems of legal protection for all ages (but which will be specifically available for the young) materially contribute to the economic basis from which to provide the support for their elders?

In my view this is not merely an issue of economic good sense but also an issue of fairness. It is not fair to ask younger persons to shoulder a greater burden without thinking through the balance of rights that we have. If an older person wishes to complain about health care rationing – an obvious equality issue – then they must accept that a younger person must be able to complain about the intergenerational distribution of other social goods.

This is also an issue within each cohort. Some older people will be relatively well off as a result of what will be seen as an early old age pension, others will not. It would not, of course, be fair to consider removing what had become important and assumed social support from older people without recognising the effect on the lives of key segments within this section of the population. This is so whatever the reason for the decision – whether mere general economic constraints or whether there is to be a change to the intergenerational distribution of social goods.

The challenge is to transform the political necessity to secure this more fair result to a new and necessarily developing reality. Appropriate legal rights are one, but by no means the only, way to do that. In my view the current legal rules are not adequate to address the need for this rebalancing.

3. See Graph 5, op. cit.

4. See paragraph 2.1, op. cit.

5. At December 2004: 17.9% for under-25s and 7.7% for those aged 25 and over.

The equal treatment principle

European anti-discrimination law in the field of social policy is principally based on the *principle of equal treatment.* It is usually considered to have come to life with the judgment of the Court of Justice in the second *Defrenne* case.[6] This contained the first statement of the equal treatment principle as the basis for Article 119 (now Article 141 EC):

> *[Article 119] forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasised by the preamble to the Treaty.*

The basic underlying concept of discrimination has its roots in the Aristotelian principle that persons, in the same situation, should not be treated differently and those, in different situations, should not be treated alike, without some objective justification. It is usually implemented by means of legislation which says that there is direct discrimination when a person is treated less favourably on a protected ground, or indirect discrimination, where persons in a particular category are disadvantaged by a provision, criterion or practice ('PCP') proportionately more than those not in that category.[7] Only in the latter case may the PCP be objectively justified and therefore legal liability avoided. All this depends on a comparison of persons in the *same situation.*

A new comparison – a deeper view of equality

Until very recently, outside issues concerning the retirement ages of men and women, the equal treatment principle had little to do with a comparison of the position of older and younger people. We tend to see comparisons between persons at a different stage in life as somehow inappropriate.

In policy terms the situations of old and young are still seen as different and so not comparable. Different treatment through different schemes of social protection is still thought to be readily justifiable in policy terms.[8] There is still little perception of a need to challenge this in the formation of policy. So the approach to the disadvantage suffered by older persons has not been, and is still not, a profoundly comparative one. Post-retirement has been seen as bringing special difficulties which were not seen as being directly comparable to the situation pre-retirement.

Yet I do consider that policy makers in making the various different kinds of special protection were thinking about the problems of older persons from an equality perspective, if not one of equal treatment. They were trying to address what were seen to be deeper issues of 'substantive' equality.

It is a rather surprising fact that this more fundamental concept of equality, being more than just concerned with formal equal treatment, and addressing deep and/or endemic disadvantage associated with a particular position, has not been much discussed in the jurisprudence of European gender discrimination law.

But this is beginning to change and a new focus on this kind of substantive equality is emerging. It is a focus which has not yet been sharpened up. It is however important to note where it is and what it may be able to provide for the future. So at this stage we shall take a short detour to consider this aspect of European law

The Employment Directive

We now have legislation in relation to age equality in employment and occupation. This is a requirement for all member states of Europe.

The essential components required by the Directive are that direct and indirect discrimination and harassment in relation to employment and occupation are made unlawful: Article 2. This is essentially the implementation, in relation to age, of the principle of equal treatment developed in relation to gender: Article 1.[9]

The scope of application is wide and ranges from vocational training, through employment to membership and involvement in workers and employers organisations. By itself the equal treatment

6. Case 43/74 *Defrenne v. Sabena*

7. This statement simplifies the legal language without losing its essential concept. The law in relation to indirect discrimination is to some extent in a state of revision.

8. A recent and clear example of this in age context is the judgment of the House of Lords in R (on the application of *Carson) v. Secretary of State for Work and Pensions : R. (on the application of Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37.

9. This is a generalisation but a reasonably accurate one. The principle also draws on the jurisprudence of the United Kingdom in relation to race discrimination: Chopin I., and Niessen J., eds. *Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union'*, published by the Commission for Racial Equality, London, 1998.

principle makes little apparent impact on the different situations of the old and the young.[10] The provisions of the Directive would have been fair and good law whether or not there was to be any obvious change in the age profile of Europe.

What implementation of the Directive does, however, is to raise the question why should there be a *bright line* between employment and occupation in which discrimination is protected and not in relation to goods, facilities and services in which there are no requirements for any age related equality provision.

Full equality in practice

Within the Directive, there is one provision which goes beyond equal treatment and which highlights the important analytic tool for the new economic and demographic reality. This is the concept of 'full equality in practice': see Article 7.

It is a concept close to that used by policy makers in developing the individually tailored rights for the elderly to which I have referred above. It is also important in developing thinking across a broad range of equality issues and not just in relation to employment and occupation.

It is a current problem that by Article 7 Member States are *only* permitted and *not required* to adopt specific measures for full equality in practice. Where they do they must prevent or compensate for disadvantages linked *inter alia* to age, provided that the rationale for such 'positive action' is that it is '[w]ith a view to ensuring "full equality in practice"'.

Behind 'full equality in practice' lies a simple but subtle three part point of the profoundest importance for addressing fairness, equality and non-discrimination rights. In essence the European Council has recognised that

- Member States will want to and should seek to ensure full equality in practice,
- the equal treatment principle by itself will or may not secure full equality in practice, and
- this is likely to require specific compensatory or preventative measures.

In my view, the European Council stalled at the critical point, in that it failed to make this analysis mandatory, and to work out how it inter-relates with the principle of equal treatment.

At present we cannot look to the European Court of Justice for much help. There is very little jurisprudence of the Court of Justice as to what 'full equality in practice' means and entails. This provision has not yet been considered judicially, at the highest level, in relation to any of the grounds contained in this Directive – let alone in relation to age. It has only been considered in relation to equal pay between men and women.[11]

In 2004, the European Court of Justice held that the aim of a similarly worded provision in what is now Article 141 EC (ex – Article 119), concerned with gender pay equality, was true *equal opportunity.* It was there to achieve *substantive*, rather than formal, equality. This was to be achieved by reducing those *de facto* inequalities which arise in society and, thus, to prevent or compensate for *disadvantages* in the professional career of the persons concerned.[12]

It is a fact that in relation to discrimination on those grounds which have had protection for the longest – sex and race – comparatively little has been done to secure substantive rather than formal equality by reducing those inequalities which arise in society. The emphasis has been on equal treatment ensuring that men and women and persons of different racial or ethnic origin are treated in the same way when they are in the same situation and differently when they are not so situated. There is however an increasing emphasis on this with equal opportunities duties imposed on public authorities.[13]

Challenges to substantive equality for older persons

Of course an emphasis by policy makers on substantive equality can readily lead to a conflict with formal equal treatment. Thus commonly benefits have been based on pensionable age. The rationale for such provision has been to provide substantive equality for older persons (thought to be poorer and economically weak). Pension age is used as a proxy for when men and

10. Though see further below.

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

12. At paragraph [25], the ECJ said: 'The aim … is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned (see, to that effect, Case C-450/93 *Kalanke* [1995] ECR I-3051, paragraph 19, and Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 48).'

13. See e.g. Section 75 of the Northern Ireland Act 1998.

women most usually come out of the labour market.

A good example of this can be found in the case of *James v Eastleigh Borough Council*.[14] The council granted special benefits for men and women in relation to access to its swimming pool on the basis of pensionable age in the UK – which was of course different for men and women. There can be no doubt that *Eastleigh* thought that pensionable age was a good indicator of the change in the economic status of users and therefore justified the cheap rates. However the problems they got into are a very good example of the difficulty with using only the equal treatment principle to achieve equality.

The House of Lords held that this was direct sex discrimination since men and women had different pensionable ages. The point was a simple one.

- If this decision by *Eastleigh* was properly characterised as one of direct discrimination the law would not permit it to be justified.
- If on the other hand, it was properly characterised as *prima facie* indirect discrimination, then it could be.

Plainly *Eastleigh* wished to justify its actions on the basis that it could do nothing about gender discrimination in pension ages but wished to give appropriate help to the different genders – male and female – according to the substantive disadvantage associated with their perceived economic activity.

It is worth reflecting on the lessons of the litigation. *Eastleigh's* goal – substantive equality – was plainly laudable. *Eastleigh* recognised that men and women are not similarly situated economically – a fact which most would instinctively agree with and which is recorded every time the gender pay gap is restated. *Eastleigh* thought therefore men and women should be treated differently. *Eastleigh* recognised – at least implicitly – that age and gender issues are very closely associated.

What *Eastleigh* lacked was the tools, i.e. (as it turned out) the legal framework, to deal with the overlap between gender and age when addressing issues of substantive equality. This is a point which has been unconsidered in the United Kingdom (in the sense that it has not been legislated for) ever since. While there has been some consideration of this issue elsewhere the European Union, it has not yet addressed it in any legislation. Indeed current European legislation relies on single purposes and comparative tests rather than recognising the interaction of discrimination grounds.

Reconciling the pursuit of full equality in practice between different age groups with the equal treatment principle

The *Eastleigh* case may be taken as a paradigm of a wider issue. Will the pursuit of substantive equality – full equality in practice – for different age groups founder on claims of discrimination on other grounds? Is it possible to reconcile in a single unified policy and legal framework the pursuit of full equality in practice without at the same time coming up against insurmountable barriers such as claims of direct sex or other prohibited discrimination?

In *Eastleigh* the problem was resolved on the equal treatment principle by stating that either women must get the benefit later or men earlier. A mere five years was involved between the pensionable ages of men and women which determined when, according to Eastleigh's policy, the benefit was granted. In due course this disparity in state pension ages would be removed across the European Union.

However this is not just an issue of a conflict of gender rights and age rights. It is quite easy to see that other conflicts between different equality rights might arise. For instance it is well known that the health care needs of different ethnic groups may differ very markedly – in the United Kingdom this is particularly so in relation to those of Pakistani and Bangladeshi ethnic origin.[15] It is also generally accepted that health care needs rise with age. If it were decided that it was appropriate in a particular specialty to increase the provision of a particular form of health care according to an age rule it might be argued that this benefited non – Bangladeshis and Pakistanis most, since the needs of Bangladeshis and Pakistanis tend to arise at an earlier stage. This would be potentially indirect discrimination but potentially justifiable.

If however, the policy was to provide a health screen specifically for Pakistanis and Bangladeshis of a particular age – a policy which would be aimed specifically at their substantive needs – it would be unlawful direct race discrimination under domestic law and unjustifiable. At present in the United Kingdom we do not have a law against age discrimination in the

14. *James v. Eastleigh Borough Council* [1990] AC 554.

15. For instance Pakistani and Bangladeshi men and women in England and Wales reported the highest rates of 'not good health' in 2001: Focus on Social Equalities, 2004, Office of National Statistics Chapter 6, and Figure 6.12.

provision of goods and services but if we did and it was modelled on existing laws this policy would also be unjustifiable direct age discrimination.

Again it would quite easy to construct examples in which age rules which seem to purse full equality in practice hit disabled persons harder than others.

Thus the problem lies in the fact that no justification is possible on substantive equality grounds if the correct analysis is that an age based rule is a breach of the formal equality at the heart of the equal treatment rule because it is direct discrimination.

What is needed?

The major challenge ahead is to consider clearly two key legal/policy questions:

- How the overlap between different groups who are protected from discrimination should be addressed in the future?
- How should the goal of substantive equality – full equality in practice be achieved?

The new settlement between the generations

The new settlement between older and younger people which is so important for the resolution of the changing age profile of Europe seems to depend in part on this taking place. Here are some key questions:

- Why should older people get many and varied extra benefits unless the position of younger people whose work must in part pay for or provide those benefits not be considered?
- How can we create a legal framework which recognises the different transitions which people go through during life, and in the context of ongoing demographic change, which also recognises the diversity within the various population groups with some older and younger people being differentially wealthy and poor, healthy and sick and so on?

It must be recognised that social solidarity is based on both limbs of the concept of equality. The equal treatment principle can deal with formal equality, with discrimination whether direct or indirect, but it does not always achieve full equality in practice.

A legal structure which does not put the goal of full equality in practice on a par with the formal equality achieved through the equal treatment principle cannot be acceptable in the new demographic context. It must have a mechanism for resolving tensions, for saying that in a particular case the achievement of substantive equality is more important. But that will depend on a much more thorough going analysis.

So far older generations have benefited in terms of social protection from an analysis which has said that they are the most disadvantaged group. But as the demographics change some younger persons will become increasingly disadvantaged, bearing a much greater weight of the economic cost of those demographics and some older people will control large estates and incomes.

Moreover there will be places where different forms of disadvantage intersect. There will be immigrants who form a special subdivision of a cohort; there will be gender differences within cohorts. An equality analysis which does not permit an intersectional approach will be defective for that very reason. And it is not fair to expect younger persons to accept that their position is not comparable at all with older persons.

Substantive equality can therefore only be measured by reference to the burden it imposes on others. This is a new form of comparability. *It compares the burden imposed over a generational time frame.* Only in this way can, equal treatment and full equality in practice, be reconciled in the assessment of the needs and deserts of the different age groups.

In my view one good way to achieve this is to accept that a justiciable right to equality between the ages in the distribution of goods facilities and services is needed. This will bring all those extra benefits of social protection enjoyed by older persons into focus. They can, and will, then be subject to a rigorous analysis both under the principle of equal treatment and with a view to achieving substantive equality. However – and here is the sting in the tail – substantive equality is an assessment which is intergenerational and does not ignore the impact one generation has on the next.

Once this is accepted it becomes easier to see how the pursuit of equality must look comparatively and substantively across a broad spectrum of reasons for disadvantage, making it easier to deal with differences within cohorts and to deal with issues of intersectionality.

Conclusions

The pursuit of equality in relation to age matters cannot be left solely to those who are in the older age groups. Although the new demographics are making

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huge changes and greater diversity within the older cohorts, there is a risk that unless this debate is taken up through the generations it will be seen as one sided.

So this debate must engage with what is necessary to make the new society more cohesive. To test the value of any new proposed rights it must be asked: How will they secure greater cohesion between and within the different age cohorts?

At the least, this requires an awareness of the economics of change and an awareness of the need to be adaptable in response. But overall it requires that employment and occupation, *and* goods, facilities and services should all be subject to scrutiny to see how full equality in practice can be achieved. The equal treatment rule is a useful tool in achieving that but is not by itself sufficient.

It is in this context, that I consider that the time is now right to propose legal text for a European Directive on goods, facilities and services to start giving this process some momentum.[16]

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16. See http://www.ageconcern.org.uk/AgeConcern/age_discrimination_europe.asp

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Briefing 421

Sickness absence and the Disability Discrimination Act

Since the case of *Northamptonshire County Council v Meikle* [2004] IRLR 703 there has been some confusion about the reach of the Disability Discrimination Act 1995 (DDA) in relation to sickness absence and sick pay. It is an area which is often fraught with difficulties. This is the first of two articles which look at the cases on sickness absence and at the practical advice offered to employers in managing sickness absence. A second article in the next edition of DLA briefings will consider the related issue of sick pay and payment for sickness absence.

The background

The DDA prohibits discrimination in employment, from recruitment through to dismissal and post-dismissal (s4). Discrimination can take the form of direct, disability related discrimination or a failure to make reasonable adjustments (s.3A) (victimisation which is a form of discrimination and harassment are also covered but they are not relevant here). The duty to make adjustments is owed when a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer places a disabled person at a substantial disadvantage compared with people who are not disabled. The duty requires an employer to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage (s.4A(1)).

Employers will often have sickness absence management policies which, in practice, can put disabled employees at a substantial disadvantage – or the application of which may result in disability related less favourable treatment. They might include the trigger of disciplinary proceedings when a certain level of absence is reached; taking absence into account during a redundancy exercise; or ultimately dismissing for such absence. Cases such as *Northamptonshire County Council v Meikle* and *Archibald v Fife Council* [2004] IRLR 651 have emphasised not only the importance of the duty to make reasonable adjustments but also the relationship between the duty and disability related discrimination. Such discrimination cannot be justified where a reasonable adjustment would have made a difference to the reason for the treatment (s.3A(6)).

How does the Disability Discrimination Act affect such sickness absence policies?

One of the earliest cases brought to tribunal under the DDA concerned sickness absence. In *Cox v Post Office* Case No.1301162/97, an ET held that it would be a reasonable adjustment for the employer to disregard, in its absence monitoring procedure, any absence related to Mr. Cox's asthma. They considered that it was

feasible, given the resources of the organisation, for it to sustain what was a relatively low level of absence per year. A number of other tribunal cases followed suit, holding that disability related absences should be disregarded as a reasonable adjustment (see, for example, *Kerrigan v Rover Group Ltd.* Case No. 14014006/97, and *Hodgkins v Peugeot Citroen Automobiles Ltd* Case no ET/13000057/05).

The more recent case of *Pousson v British Telecommunications plc* [2005] 1 All ER (D) 34 (Aug) EAT, concerned the application of BT's poor performance attendance procedure (PPAP). The claimant (P) worked for BT as a customer adviser in a call centre. He has diabetes, which rendered him more susceptible to infections than those without it – and the Occupational Health department at BT had confirmed that his diabetes was a factor in viral infections and similar illnesses. BT used a computer-based absence logging system, reports from which would lead to the PPAP being invoked. The procedure was invoked against P on at least four occasions over a two year period. The PPAP states, however, that it is not intended to cover situations where poor performance stems from absences connected to a disability. P, however, was placed on a performance improvement action plan. This put him under significant pressure to achieve tighter times on handling calls. P was reluctant to test his blood sugar levels and inject his insulin at his desk; however, he was discouraged from leaving his desk. When he did this at his desk, colleagues complained. He had a serious hypoglaecimic attack in August 2001, as a result of his not testing with sufficient frequency; this led to a head injury, following which he did not return to work at BT and his employment was terminated over two years later.

The tribunal found that there was a link between P's level of absence from work and his disability; that the PPAP had been applied to him on a number of occasions when it should not have been because P was disabled; and that this amounted to less favourable treatment for a reason relating to his disability. They made a number of other findings on the issue of reasonable adjustments. BT appealed in relation to the finding that P had been treated less favourably for a reason relating to his disability, although the appeal was based on P not having raised issues in his claim form. The appeal was dismissed.

More recently, however, the EAT has taken a very robust approach to disability related absence in the case of *Royal Liverpool Children's NHS Trust v Dunsby* [2006] IRLR 351, Briefing no 419. Mrs. Dunsby (D) was a staff nurse who had gynaecological problems, migraine and depression. She had a number of absences, as a result of which the trust instituted its four stage sickness absence procedure. At the stage 4 hearing, prior to her dismissal, she claimed that some of her absences were due to migraines caused by her gynaecological problems, and that these would not recur because her medication had changed. D was nevertheless dismissed on the basis of her absence. She complained to an ET, alleging disability related less favourable treatment. The tribunal proceeded on the assumption that she was covered by the definition of disability under the Act itself a rather unusual step. It found that two of the related absences had been recorded as headaches by her employer; that these were said to relate to migraines caused by drugs which D had been taking for her gynaecological problem; that if they had been ignored as relating to a disability related condition, there would not have been a stage 2 review in October 2003, the review in June 2004 would have been a stage 3; and thus she would not have been dismissed in 2004. The tribunal then found that the treatment was not justified *'because but for the disability related absences, the claimant would not have been at risk of dismissal in June 2004'*. The tribunal also found that the dismissal was unfair, as it was not reasonable for the employers to treat disability related absences as part of the 'totting up' review process. The employer appealed, in particular, on the basis that justification was not properly considered by the tribunal. The EAT upheld the employer's appeal. It said that the provisions of the DDA do not impose an absolute obligation on an employer to refrain from dismissing an employee who is absent wholly, or partially, on grounds of ill health due to disability. The law requires such a dismissal to be justified so a tribunal does not answer the question whether a dismissal is justified merely by saying that it was, in part, because the employee was absent on grounds of disability – in this respect the tribunal erred in law. The EAT continued:

> *…it is rare for a sickness absence procedure to require disability related absences to be disregarded. An employer may take into account disability related absences in operating a sickness absence procedure. Whether by doing so he treats the employee less*

favourably and acts unlawfully will generally depend on whether he is justified or not.

It is precisely the question of justification that the tribunal failed to consider in this case. The EAT also upheld the appeal on the unfair dismissal point, holding that the tribunal had failed to make it clear why it was unreasonable to treat disability related absences as part of the totting up review process. There is no absolute rule that an employer acts unreasonably in treating disability related absences as part of a totting up review process or as part of a reason for dismissal on grounds of repeated short-term absence.

So where does that leave disability-related absences? Firstly, it must be noted that this case did not address the duty to make reasonable adjustments at all. It is extremely rare for a claim under the DDA not to include one for a breach of the duty to make reasonable adjustments – particularly in a case involving sickness absence. This is because a key example of an adjustment an employer may have to make is one of disregarding disability related sickness absence in determining, for example, redundancy criteria, or indeed for dismissal. The DRC's Employment Code of Practice (which must be taken into account where relevant – s.53) gives such disregarding as an example of a reasonable adjustment. At paragraph 5.20, under examples of other reasonable steps, the Code gives an example of adjustment redundancy selection criteria as follows:

A woman with an auto-immune disease has taken several short periods of absence during the year because of the condition. When her employer is taking absences into account as a criterion for selecting people for redundancy, he discounts these periods of disability related absence.

At paragraph 8.25, the code states

For example, it is likely to be a reasonable adjustment to discount disability related sickness absence when assessing attendance as part of a redundancy selection scheme.

The DRC provides the following advice to disabled people in it's publication 'Sick leave, sick pay and medical appointments':

Your employer's records should record separately disability and non-disabled-related absences, especially as it may be necessary to discount all or some disability-related absences for the following purposes: disciplinary procedures; performance appraisals, especially when linked to bonuses, ongoing professional development and pay rises; references; selection criteria for promotion; selection criteria for redundancy.

In the DRC web and CD resource aimed at employers, similar advice is given to the question

How do we record sickness related absence related to disability?

Answer: It is important that all employee sickness absence records differentiate between disability and non-disability-related absences. Whilst the Act does not require any employer to retain a disabled person indefinitely if they are constantly absent, there will be occasions where it might be considered reasonable to discount absences related to the disability.

For example, a policy that states that employees will only receive a bonus if they are not absent for more than a set number of days is likely to be discriminatory against a disabled employee who needs regular but planned time off for treatment. By discounting the absences related to the disability, such discrimination could be avoided. This can only be done if accurate records are maintained.

In particular, it may be necessary to consider discounting all or some disability-related absences for the following:

- *disciplinary procedures,*
- *performance appraisals, especially when linked to bonuses, ongoing professional development and pay rises,*
- *references – a high level of sickness absence in the past may not be any indicator of future attendance,*
- *selection criteria for promotion,*
- *selection criteria for redundancy.*

It is clear that in many cases employers do record disability related sickness absence and non-disability related absence separately – the issue being in any DDA case what is it is reasonable to do in respect of such absence. For example, in the recent case of *O'Hanlon v Commission for HM Revenue and Customs* (Appeal No.UKEAT/0109/06/MAA) – which will be covered in depth in the next edition of DLA briefings, the employer had a sickness pay policy which provided for additional paid sickness absence where employees have taken all their paid sick absence due to long term illness or injury and other conditions are met – clearly requiring such absence to be separately recorded for these purposes.

The other reason which makes the *Dunsby* case unusual is that, as indicated above, disability related less favourable treatment cannot be justified where a

reasonable adjustment would have rendered the reason for the treatment no longer material and substantial. Thus a tribunal would usually inevitably consider the duty to make adjustments before determining whether disability related less favourable treatment was justified – something not done in this case. The importance of the reasonable adjustment duty to the treatment of sickness absence is even more important when considering the nature of the duty: as emphasised in *O'Hanlon*

> *that question [of whether there has been a reasonable adjustment] has to be determined objectively…that is in striking contrast to the way in which the courts assess the question of justification with respect to disability related discrimination.*

It seems clear that the best advice to give to employers on sickness absence is to ensure that it is recorded separately and that policies are in place to address any reasonable adjustments which may be required in relation to sickness absence.

Finally, it is worth noting that those employers who are public authorities will be, from December 4th 2006, subject to the disability equality duty – requiring them to actively promote equality of opportunity for disabled people. They will need to consider the impact that any sickness absence scheme has upon disabled people's ability to participate in the workforce and thus to achieve equality of opportunity.

Catherine Casserley
Disability Rights Commission

Briefing 422

Legal aid and assistance for discrimination law

DLA members will see from the editorial that since this article was written the Lord Chancellor has withdrawn these proposals, although further proposals are expected.

The Department for Constitutional Affairs (DCA) and the Legal Services Commission (LSC) have issued a joint consultation paper *Legal Aid: a sustainable future*. This consultation paper sets out proposals for the reform of legal aid in the light of the Carter Report. These proposals would, if implemented, fundamentally alter the structure for the provision of legal aid and affect all legal aid providers. They will have a serious adverse impact on the provision of legal aid and, in particular, advice and assistance for discrimination cases.

The paper proposes that the LSC should pay for only a fixed number of hours work on each discrimination case, irrespective of its length or complexity. The Government admits that its proposals could halve its total expenditure in the Not For Profit sector on social welfare law including employment law. It could also significantly cut the income of 92% of the Not For Profit agencies it currently funds. Private practice will also see very significant cuts in its income.

Not For Profit agencies which can currently give half an hour free advice to anyone will no longer be permitted to do so.

Legal Services Commission work will be focused into fewer larger private practice suppliers.

What is happening now?

In 2003, out of 182,254 legal help cases done by solicitor agencies in London, only 1397 were in employment (0.8%). Out of 140,894 hours of legal help work done by Not For Profit agencies, only 10,507 (7.5%) were in employment. Out of the 4,292 completed employment cases reported by Not For Profit agencies in 2004-5, 13% (555) were discrimination. Discrimination had easily the longest average case length.

The proposals

The Government's suggestion of radical cuts to the funding of social welfare law cases will have a severe impact on discrimination law cases. Their proposal is that suppliers will be paid fixed fees i.e. the same amount for each case, irrespective of its complexity or length. The Government has yet to decide in employment law (including discrimination) whether to have a national rate (4.6 hours on a case) or varying

regional rates (e.g. 9 hours in London and under 3 hours in Wales).

There are unworkable exceptions for complex cases which will be of little or no practical assistance.

Effects on Discrimination Law

These proposals will create pressure on suppliers to cherry pick straightforward cases. Discrimination is rarely straightforward. Practitioners will be limited to providing basic advice and preparatory work only in discrimination cases.

Additionally, fixed fees discriminate against particular types of client. Clients who require an interpreter whether for a foreign language or sign language or have mental health problems or learning disabilities, will take far longer. Time taken for interpreters etc will eat up the 4.6 hours of time on a case leaving a client with far less 'advisor time'. They will get much less out of their 4.6 hours than other clients. This will have a significant effect on the access for justice for certain ethnic minorities as well as many disabled people. This will impact particularly harshly in relation to discrimination law.

The Carter Report upon which the cuts have been based admits that there is a risk that practitioners will cherry pick cases.

It will not be possible to manage a discrimination law case in 4.6 hours (or even 9, let alone just over 2 in Wales). In the experience of many discrimination law practices it can take well over ten hours simply to consider documents, interview the client and draft a questionnaire. In future, this will be all which discrimination advisers will be able to do for their clients. The clients will have to present proceedings and run entire discrimination cases without any assistance. This is likely to result in cases taking longer in the tribunal.

Unrepresented applicants face ever-higher barriers in the tribunals, both in preparation and hearing. As the court Civil Procedure Rules are used, expert evidence is required more often, interlocutory hearings become the norm and the legislation and case law increase, the scales of justice are weighed yet more heavily against the unrepresented party, usually the worker. Statistics clearly show that represented workers (particularly those with skilled representatives) achieve better outcomes in their cases.

The Minister has admitted that this system will have a particularly adverse impact on discrimination law. The Minister did indicate the Government might consider a special category for discrimination law, however, so far no concrete proposal on this has been put forward.

Preventative work is cost-effective

Currently Not For Profit agencies are permitted to give all callers, *whether eligible for legal help or not*, half an hour's free advice. This advice is similar to a general practitioner service. It identifies problems early and effectively. Often by early and specialist intervention a discrimination issue can be prevented from escalating or be resolved. This is particularly relevant to cases involving indirect discrimination and reasonable adjustments. It is highly cost efficient.

This service is to be cut. As a result agencies will only be able to help clients once their employment is terminated.

Effects on the practice of discrimination law in this country

Private practice is already moving away from legal aid discrimination work; these proposals can only hasten this process. As 92% of Not For Profit agencies are risking a significant cut in income from their core funder the survival of many such agencies must be in serious doubt.

The Commission for Equality and Human Rights will be simply unable to pick up the massive shortfall in discrimination advice, even if it considers this to be a priority.

Is the government breaking the law?

Suppliers of legal services and Legal Services Commission itself are 'service providers' under the discrimination laws so they are susceptible to challenge if their service is provided in a discriminatory manner. Additionally, the Legal Services Commission currently has public duties under the Race Relations Act 1976 to have due regard to the need to eliminate racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. From December 2006 they will have more duties under the Disability Discrimination Act 1995. The disability duty means that in carrying out its functions any public authority must have due regard to the need to promote equality of opportunity between disabled people and others, to eliminate unlawful

discrimination as well as taking steps to take account of disabled people's disabilities, even where that involves treating people with disabilities more favourably than other people.

Consequently if service providers and the Legal Services Commission provide their services in a way which makes it unreasonably difficult for certain ethnic minorities or disabled groups to access their services, they may be vulnerable to claims under the discrimination law whether under the Goods and Services provisions in the County Court or a judicial review.

The consequences of the cuts

The cuts will have a significant disproportionate impact on the provision of discrimination law advice and assistance. It is very likely that specialist discrimination advice will be very significantly reduced. Discrimination itself will not stop: with less fear of legal sanction it is more likely to increase.

The media and politicians have, rightly, helped raised victims' awareness of their rights and their expectations of justice. As a society we are justly proud of this. We are also proud that our laws protect us against discrimination. However, passing laws and raising awareness while drastically reducing access to justice is a recipe for bitter disillusionment amongst disadvantaged groups.

Discrimination law is important. It must be adequately funded. It should not be merely pages of legislation set out on a page and unenforceable in practice. Discrimination law must make an appreciable difference to the lives of individuals and communities.

Consultation

The Discrimination Law Association has replied to the Government's consultation on Legal Aid cuts due in by 12 October. We would urge our members to become involved in the Access to Justice Alliance currently campaigning against these proposals.

Accesstojustice2005@yahoo.co.uk

Access to Justice Alliance, c/o Citizens Advice, Myddelton House, 115-123, Pentonville Road, London N1 9LZ.

Juliette Nash

North Kensington Law Centre

Briefing 423

ECJ rules on definition of disability

Sonia Chacon Navas v Eurest Colectividades SA, ECJ, C-13/05 [2006] IRLR 706

Implications for practitioners

The definition of disability contained in DDA s.1 – and supplemented by Schedule 1, regulations and guidance – remains one of the most complex aspects of the DDA. It is also the subject of the majority of appeals to the EAT. The European Court of Justice, in a case referred from Spain, has now had cause to consider who should be covered by the prohibition on grounds of disability contained in the Employment Directive in the first case to be referred to the Court.

Background

Ms. Navas (N) was employed by Eurest, an undertaking specialising in catering. On 14 October 2003, she was certified as unfit to work on grounds of sickness and she was not in a position to return to work in the short term. On 28 May 2004, Eurest gave N written notice of her dismissal, without stating any reasons, whilst acknowledging that the dismissal was unlawful and offering her compensation. On 29 June 2004, N brought an action against Eurest, maintaining that her dismissal was not valid as it was discriminatory – based on her leave of absence from her employment for eight months. She sought an order that Eurest reinstate her in her post. In Spanish law, sickness is not expressly referred to as one of the grounds of prohibited discrimination. The Spanish court hearing the case referred the matter to the ECJ: it was the view of the Spanish court that there is a causal link between sickness and disability, and that, given that sickness is often capable of causing an irreversible disability, workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. The referring court also suggested that, should it be concluded that disability and sickness are two

separate concepts and that community law does not apply directly to sickness, it should be held that, in accordance with Community law principles of non-discrimination, sickness should be added to the attributes in relation to which the directive prohibits discrimination.

European Court of Justice

The first question was summarised by the ECJ as asking whether the general framework laid down by the Employment Directive for combating discrimination on grounds of disability confers protection on a person who has been dismissed by his employer solely on grounds of sickness. The ECJ held that

- 'disability' in the context of the directive must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life;
- by using the concept of 'disability' in the directive, the legislative deliberately chose a term which differs from 'sickness'. The two concepts cannot simply be treated as being the same.
- The importance that the Community law attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. For the limitation to fall within the concept of disability it must therefore be probable that it will last for a long time. There is nothing in the directive to suggest that workers are protected by the prohibition on grounds of disability as soon as they develop any type of sickness. A person who has been dismissed on account of sickness does not fall within the scope of the directive.

The ECJ went on to clarify the relationship between the prohibition of discrimination and the reasonable adjustment provisions in Article 5 of the directive. It held that the prohibition as regards dismissal of discrimination on grounds of disability contained in the directive precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

The second question related to whether sickness can be regarded as a ground in relation to which the directive prohibits discrimination. The ECJ rejected the suggestions of the referring court and held that the scope of the directive could not be extended beyond the discrimination based on the grounds listed exhaustively in Article 1. Thus sickness could not be regarded as a ground in addition to those specifically listed in the Employment Directive.

Comment

Whilst the Court's comments on the relationship between the anti-discrimination provisions of the directive and the reasonable accommodation provisions are particularly helpful (although of no impact in the UK, as this relationship is clear in the DDA); and the court's attention to the directive's recitals also useful for future interpretation on its provisions, the conclusion on definition of disability is extremely disappointing. Whilst it is important that, as the court pointed out, there is an autonomous and uniform interpretation of the term disability in this context, this fails to reflect the definition of disability contained in much of the existing disability legislation in member states. Given the non-regression principle contained in the directive, the judgment will not affect those definitions, nor will it have any impact on the definition of disability in the UK, which clearly covers 'sickness' so long as it is long term (or meets the provisions regarding recurrent or progressive conditions).

The judgment fails in particular to take into account the stigma which may be faced by people with disabilities, and particular chronic conditions which may not fit within its concept of disability (i.e. the social model of disability). And, whilst it is true that disability and sickness are not the same, the judgment treats them as though they are mutually exclusive concepts – which is not the case. There may be an overlap between sickness and disability – for example, MS may be considered to be an illness. It is arguable that the judgment may still leave room for some sickness to be covered – should it produce a 'limitation' – if it is probable that it will be 'long term'. Although no indication is given of what period of time this would be, N was off work for 8 months, which was clearly insufficient in this case to amount to 'long term'. The approach taken by the court may well reflect the fact that the reference contained very little factual information to put it into context – there was no information about the nature of N's illness, nor of its impact upon her life.

Catherine Casserley
Disability Rights Commission

Do service–related benefits need to be justified?

Cadman v Health and Safety Executive Case no C-17/05 ECJ

Implications

This case considers whether payments for length of service can be challenged as being indirectly sexually discriminatory. This is not an age discrimination case. Previous case law has assumed that using length of service to determine pay was justified. This important judgment makes it clear that employees can challenge whether service related pay increases are indirectly discriminatory and whether they are justified when they can show that greater length of service does not actually help employees to do a better job. The employer will then be required to justify the pay increases.

Background

Bernadette Cadman (C) is employed by the Health and Safety Executive (HSE) as a band 2 Principle Inspector. In 2001 when she made a complaint of unequal pay to an ET she was paid between £4,000 and £9,000 less than four male Inspectors employed in the same band whose work had been rated as equivalent to hers under a job evaluation study. The main reason for this differential was that the four men had longer service with the HSE.

It was accepted in the ET that on average women in this pay grade had shorter average lengths of service compared to men in the same grade. This had an adverse affect on the women's pay and conditions and so was indirectly discriminatory. The HSE argued that *Handels- og Kontorfunktionaerernes Forbund Danmark v Dansk Arbejdsgiverforening* (the *Danfoss* case) [1989] IRLR 532 established that the use of length of service as a criterion in an incremental pay scheme was generally objectively justified and so did not require any specific justification. The ECJ in *Danfoss* said:

> *since length of service generally goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward him without having to establish the importance it has in the performance of specific tasks entrusted to the employee.*

The ET did not accept this argument and concluded that the HSE had not established a permissible justification for the differential and they upheld C's claim. The HSE appealed to the EAT.

Employment Appeal Tribunal

The EAT, relying on the *Danfoss* case, ruled that the ET were not correct and that no specific justification was required to justify the use of a length of service factor in determining pay increases.

Court of Appeal

The EOC intervened in this case in the CA and provided evidence to show the way in which length of service related pay systems routinely disadvantage women in the UK.

The CA decided to refer questions to the ECJ in order to establish whether the ruling in *Danfoss* had been overtaken by subsequent case law. They referred the following questions to the European Court of Justice for a preliminary ruling:

1) *Where the use by an employer of the criterion of length of service as a determinant of pay has a disparate impact as between relevant male and female employees, does Article 141 EC require the employer to provide special justification for recourse to that criterion? If the answer depends on the circumstances, what are those circumstances?*
2) *Would the answer to the preceding question be different if the employer applies the criterion of length of service on an individual basis to employees so that an assessment is made as to the extent to which greater length of service justifies a greater level of pay?*
3) *Is there any relevant distinction to be drawn between the use of the criterion of length of service in the case of part-time workers and the use of that criterion in the case of full-time workers?*

European Court of Justice

The ECJ recognised that frequently the use of length of service provisions to determine rates of pay could be justified. They ruled that

> *As a general rule, recourse to the criterion of length of service is appropriate to attain that objective. Length of service goes hand in hand with experience, and experience generally enables the worker to perform his duties better.*
>
> *The employer is therefore free to reward length of service without having to establish the importance it has in the performance of specific tasks entrusted to the employee.*

However, they accepted that this did not mean that all length of service awards were justifiable in all circumstances. They went on to make clear that this did not and should not

> *exclude the possibility that there may be situations in which recourse to the criterion of length of service must be justified by the employer in detail.*
>
> *That is so, in particular, where the worker provides evidence capable of giving rise to serious doubts as to whether recourse to the criterion of length of service is, in the circumstances, appropriate to attain the abovementioned objective. It is in such circumstances for the employer to prove that that which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better, is also true as regards the job in question.*

This means that it is now open to women to challenge service related pay provisions which they consider are indirectly discriminatory if they can produce evidence to show that all or part of the length of service payments cannot be shown to be justified as a proportionate means of achieving a legitimate aim.

Comment

This judgment seems to have confused most of the daily newspapers. The Telegraph said that it meant 'Greater experience merits more pay' while the Guardian said that it meant 'Higher pay for long service ruled illegal'. The main message of the judgment is that length of service increases can no longer be assumed to be justified. If a woman is able to produce evidence that raises questions about whether the criterion of length of service is justifiable in the circumstances then it is open to the court to examine whether sufficient justification can be shown. It is noticeable that the new Age Regulations, reg 32(1) (which were not in place at the time that this case arose) provide a full exemption from age discrimination claims – but not for sex discrimination – for pay benefits relating to the first five years of employment. It may be that it will prove easier to justify length of service benefits during the initial period of employment compared to benefits accruing after 10 or 20 years service.

Gay Moon
Editor

Vicarious liability for harassment under the Protection from Harassment Act 1997

Majrowski v Guy's and St Thomas' NHS Trust [2006] IRLR 695 HL

Implications for practitioners

Harassment and bullying in the workplace is high on the agenda currently. Recently several high profile negligence cases of harassment and bullying in city institutions leading to breakdowns of employees have attracted substantial awards. In July this year the House of Lords ruled in the landmark decision of *Majrowski v Guy's and St Thomas' NHS Trust* [2006] IRLR 695. It clarifies that the general principle of an employer being vicariously liable for his employee's breach of statutory duty committed in the course of employment (unless the legislation in question indicates otherwise) applied to the Protection from Harassment Act 1997 (the 1997 Act).

Facts

William Majrowski (M) was employed by the Trust as a clinical audit co-ordinator. He alleged that, whilst working in that post, he was bullied, intimidated and harassed by his departmental manager because he was gay. He claimed that she was excessively critical and strict about his time-keeping and his work; that she isolated him by refusing to talk to him and treated him differently and unfavourably compared to other staff; that she was rude and abusive to him in front of other staff; and that she imposed unrealistic targets for his performance, threatening him with disciplinary action if he did not achieve them. In April 1998, M made a formal complaint against the manager under his employers' anti-harassment policy. His complaint was upheld.

In June 1999 M's employment terminated in circumstances unconnected to the harrassment of which he had complained. In February 2003 more than four years after his complaint he instituted proceedings against the Trust under s3 of the 1997 Act on the grounds that the manager's conduct amounted to harassment in breach of the Act for which the Trust was vicariously liable.

County Court

The CC struck out M's claim. In the Judge's view, Parliament had not intended to import into the 1997 Act the general principles of vicarious liability. Thus, a claim under the Act could be made only against the perpetrator of the alleged harassment, and not against his or her employer. M appealed to the CA.

Court of Appeal

The CA overturned the County Court's findings. It held that:

(i) an employer may be vicariously liable for a statutory tort committed by one of his employees, where the legislation in question does not expressly or impliedly exclude such liability; and

(ii) after close scrutiny of the 1997 Act, the Court held by a majority (Lord Justice Scott Baker dissenting) that an employer could be vicariously liable for the harassment of employees contrary to the Act.

The Trust then appealed to the HL.

House of Lords

The HL (Lords Hope, Nicholls, Carswell, Brown and Baroness Hale) agreed with the CA, but interestingly for different reasons. Their Lordships confirmed that an employer is liable for the tortious wrongs committed by his employee in the course of employment. In order for the employee to have acted 'in the course of employment', the conduct must be so closely connected with the acts the employee is authorised to do that the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of employment, see *Lister and ors v Hesley Hall Ltd* [2001] IRLR 472 HL.

They expressly found that this rule is subject to the proviso that the legislation in question does not expressly or impliedly exclude such liability. The HL then considered the application to the 1997 Act. They rejected the Trust's argument that the legislation had been intended to remedy the public order problem of stalking and Parliament had not intended for it to be

applied to the workplace.

Lord Hope pointed out the wording of the legislation itself, sections 1–7 of the 1997 Act extend to England and Wales, and the courts below focused on these sections. However, Lord Hope found that the legislation must be viewed as a whole. Accordingly, it was necessary to take into account Sections 8–11 covering Scotland. Section 10(1) inserted a new section, Section 18B, into the Prescription and Limitation (Scotland) Act 1973.

This new section permitted an extension of the three-year limitation period for actions of harassment to the date when the pursuer became aware, or it would have been reasonably practicable for him or her to become aware, *'that the defender was a person responsible for the alleged harassment or the employer or principal of such a person.'* Lord Hope's was clear that the limitation period was framed in this way to accommodate claims based on an employer's vicarious liability.

Although the provisions of the 1997 Act which apply to Scotland differ in various respects from those which apply to England and Wales, there was no suggestion that Parliament intended that there should be any difference in substance between the two jurisdictions as to the scope of the civil remedy for harassment. Accordingly, the principle of vicarious liability applied under the Act.

The Trust also submitted that Parliament could not have intended the 1997 Act to include the principle of vicarious liability, as this was inconsistent with other types of anti-discrimination legislation derived from EC Directives which release the employer from liability if he can show that he 'took all reasonably practicable steps' (reasonable steps defence) to prevent the employee from doing those acts. Lord Nicholls rejected this argument. The 1997 Act was passed before the corresponding harassment provisions in the anti-discrimination legislation, as derived from EC Directives, came into force. However Lord Nicholls noted there was a 'discordant and unsatisfactory' overlap between the 1997 Act and the non-discrimination legislation.

Comment

Where does *Majrowski* leave harassment in the workplace? This decision has been hailed as a victory for Claimants and has no doubt been met with concern by employers. Under the 1997 Act there is no need to prove connections with race, sex, disability, religion or belief, sexual orientation or age discrimination. Nor does the 1997 Act provide the 'reasonable steps defence' to employers. In addition, the six year time limit (in England and Wales) under the 1997 Act is far more generous than the 3 month limit and avoids other jurisdictional bars, such as those proscribed by the Employment Act 2002 which apply to other strands of anti-discrimination legislation.

The 1997 Act may be also more preferable for Claimants than negligence actions where currently they have to prove that they suffered a reasonably foreseeable physical or psychiatric injury. Under the 1997 Act neither forseeability nor injury is required. The Claimant needs only to show anxiety or distress – a much lower threshold.

In August this year the High Court after *Majrowski* ruled in *Green v DB Group Services BLD* [2006] EWHC 1898 (QB) that an employee who suffered two mental breakdowns following bullying campaigns at the hands of a group of mainly junior female employees and then from a male peer succeeded in both limbs of her negligence claim against the employer, for vicarious and direct liability in respect of the psychiatric injury suffered, as well as her claim that the employer was vicariously liable for harassment under the 1997 Act. Whilst no separate award was made under the 1997 Act the anxiety caused by the harassment was taken into account for assessing general damages of £35,000 out of a total award of over £800,000 in damages.

So will the floodgates now open? A Claimant will still have to show that the employee's breach was committed in the course of employment. Thus as in the case of discrimination claims, vicarious liability for harassment outside of working hours or the workplace will not necessarily be caught by the Act unless it is somehow work-related – for example, office away days/parties or indeed if the matter had been the subject of a grievance in work. Further, unlike discrimination and negligence claims, a one-off act will not be sufficient to amount to harassment – Section 7(3) of the Act makes it clear that there must be a course of conduct involving at least two occasions.

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More jurisprudence on the burden of proof

EB v BA [2006] IRLR 471 EWCA

Implications for practitioners

The Court of Appeal's decision in EB is a case in which the female Claimant/Appellant who had undergone gender reassignment surgery contended that she was discriminated against and unfairly selected for redundancy on grounds of her reassignment. It is yet another case in the succession of appellate decisions in which the operation of the burden of proof in discrimination cases. The leading judgment of Lord Justice Hooper is considered to provide some succour for Claimants and their advisers and may assuage fears that the reversal of the burden of proof in discrimination cases might be rendered practically ineffective.

Background

The Claimant, EB, was employed as a principal in the capital markets area of BA's management consultancy business from January 1997. This role was the second highest position in the capital markets area and involved a significant responsibility for finding new clients and client-handling. EB began a transition process of male-female gender reassignment in April 2000 when she began living in a female role in all aspects of her social and working life. She underwent gender-reassignment surgery on 4th November 2000. Prior to surgery EB was known to her employers, fellow workers and some external clients as male.

EB was selected for redundancy in July 2001 and was dismissed on 31st August of that year. She contended before the ET that her employers, a large financial organisation, failed to allocate contracts to her on grounds of her reassignment and then made her redundant on the basis of the consequential decline in her monthly billings. She argued that there was a clear link between the failure to allocate contracts, the downturn in her billing and her reassignment. Her employers contended conversely that the redundancy was largely due to the decline in billings and, in any event, was not on grounds of her reassignment.

Employment Tribunal

The ET focussed its attention on the Claimant's 'billability' and concluded that the burden of proof did not shift to BA for the period between the Claimant's transition to a female role in April 2000 and her surgery in November 2000. This conclusion was based upon a finding that there was no significant reduction in her billability during that period despite the fact that she had only been allocated three projects during that time. The undisputed evidence before the ET was that the Claimant's ability to bill on a particular project was dependent upon her being assigned to work on that project. Such allocation decisions were taken orally and no record was kept of the reasons for the preferment of one employee over another at that stage. It was also uncontested evidence that the senior management of BA were aware of the lack of billable work for the Claimant and took no steps to monitor or address this. The Claimant also asserted that she was not 'tagged' for projects in the relevant period (i.e. she was not provisionally selected for potential projects). The ET made no findings adverse to the Claimant in this regard. EB also made attempts during the course of the proceedings to obtain disclosure from BA of the projects and proposals worked on in the Claimant's area between transition and dismissal. The ET dismissed the Claimant's claims in discrimination and in unfair dismissal (redundancy).

Court of Appeal

In allowing the Claimant's appeal the CA re-iterated the guidance given in *Igen v Wong* [2005] IRLR 258 and stated that the ET was wrong to place the burden of proof on the Respondent only in respect of the period after the Claimant's reassignment in November 2000. The Court of Appeal took account of the ET's dissatisfaction with the quality of the evidence on central issues and it found that the ET failed to adequately analyse the Claimant's work prior to her transition. The CA stated that a rejection of EB's assertion that her transition in April (and not just her reassignment in November) had had deleterious consequences for the allocation of work to her would have required the ET to undertake a careful analysis of

the nature of the work done by the Claimant between transition and surgery and the importance of tagging. In turn, this would and should have required the Respondent to justify the fact, found by the CA, that EB had only worked on three projects out of at least 200 during the relevant period. The Court found that the ET's suggestion that the Claimant could have assisted by identifying projects to which she should have been allocated showed a failure to give proper effect to the statutory reversal of the burden of proof. On the contrary, the effect of the ET's decision was to place the burden on the employee, who often has limited means, to prove her case without proper disclosure and to permit the employer to adopt an obstructive approach to litigation. The Court remitted the case to a fresh tribunal for re-hearing.

Comment

The decision of the Court of Appeal in this case is as much a reminder of the importance of the general duties which fall upon ETs to secure fair hearings – i.e. to conduct proper pre-hearing case management and to make rational decisions accompanied by intelligible reasons – as a reinforcement of the importance of the burden of proof in discrimination cases. Many of the crucial findings of fact made against the Claimant ought not to have been made simply because the parlous state of the Respondent's evidence did not justify departure from many of the Claimant's undisputed assertions of fact. Given that background, the ET's reasons were plainly inadequate. Nonetheless the judgment of Lord Justice Hooper is an important demonstration of how acutely important those general duties are if claimants in discrimination cases are to receive the full benefit of the requirement that Respondents disprove, by cogent contrary evidence, allegations of discriminatory treatment. It is an important warning to employers that discrimination claims cannot be successfully defended by obscurantism.

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Briefing 427

Claimants have no right to choose a comparator

Cheshire & Wirral Partnership NHS Trust v Abbott and others
[2006] IRLR 546 EWCA

Implications for practitioners

The CA in this case was asked to consider whether or not the original tribunal had used the appropriate comparator group in arriving at its decision that the Cheshire & Wirral Partnership NHS Trust (the Trust) had failed to establish a material factor defence under Section 1(3) of the 1970 Equal Pay Act, thus failing to counter allegations of unequal pay from a group of its domestic staff. (A case management discussion before the ET had agreed that the question as to whether the various comparators undertook work of equal value to the claimants would not be addressed until the material factor defence on the part of the Trust had been probed and determined).

The Trust appealed the ET's decision that no material factor defence had been made out, on the grounds of the ET's use of what the Trust considered to be the incorrect comparator group, which it alleged had been chosen by the claimants for lending itself to convenient statistics.

The claimants and the potential comparator groups

Broadly speaking, three types of ancillary staff worked at the Trust; domestic staff (Ds); porters (Ps); and catering staff (Cs). In the 1970s Ds, Ps & Cs were all paid bonuses. In around 1986/1987 Ds were transferred out of the employment of the Trust under the TUPE regulations. Ds received no bonuses under their new terms and conditions with the outside contractors to whom they were transferred. Ps and Cs continued to receive a bonus, albeit this was frozen in 1988.

In 2001, Ds were contracted back in to the employment of the Trust under the TUPE regulations. Ds now enjoyed better terms and conditions than previously, but they continued to be paid no bonus. Ps and Cs continued to receive a bonus. Ds brought claims under the Equal Pay Act 1970.

The complaints in this case concerned the payments of bonuses in 2003. (The bonus system is no longer in place for this particular Trust, after agreement was reached with the relevant unions, but this is irrelevant for the purposes of the present case.)

The Ds group (from which the claimants came) consisted of 131 females and 15 males. In 2003, only one bonus was paid to the Ds group, to a male. The Ps group consisted of 20 all male porters, of whom in 2003 17 received a bonus. The Cs group consisted of 13 females and 4 males, 13 of whom received a bonus in 2003, (10 females and 3 males).

The lower courts

The ET held that the claimants were correct to pit Ds against Ps in pleading their equal pay claim; it rejected the Trust's argument that Ds should in fact have been compared to both Ps and Cs together. The ET stated in its judgement that it *'accept[ed] that the Claimant has the right to choose the comparator'*. The ET did not consider that the statistics produced by the Claimant were unsatisfactory, or fell foul of the pitfalls identified in *Enderby v French Health Authority* [1993] IRLR 591 (outlined below). The ET found prima facie cases of sex discrimination. The EAT upheld the ET's decision.

Court of Appeal

It was argued for the Trust in the CA that to look at the Ps alone as a comparator group deliberately buttressed an argument of sex discrimination, and was an artificial approach for the claimants to take.

It was also argued that a smaller pool of individuals should have been used, namely solely those relevant individuals working at the two hospitals in which the claimants worked, rather than relevant workers in the entire health authority being assessed. It was submitted for the Trust that whilst this was the proper route, in this case it would have led to a statistically too small group to be valid, and hence the claimants claims would have failed.

Both parties agreed that the ET must itself decide whether the comparator group identified by a claimant is appropriate.

Lord Justice Keene gave the leading judgment, drawing close attention to paragraph 17 of the decision of the European Court of Justice in *Enderby*, namely:-

> *it is for the national court to assess whether it may take into account those statistics, that is to say whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.*

Keene LJ held that it is necessary for the ET to safeguard against an employee choosing an artificial or arbitrary group as a comparator. The rule in *Enderby* remains highly relevant to the ET in this regard. Accordingly, there is no 'right' to choose a comparator group. Keene LJ confirmed that deciding whether or not a comparator group is appropriate is not a pure finding of fact, it is a finding which needs to be arrived at within a legal framework as a matter of logic.

Interestingly, the appropriate comparison in this case in Keene LJ's view would have been Ds compared with both Ps and Cs together; which was also the Trust's position. Keene LJ found in favour of the claimants, however, and dismissed the Trust's appeal, as he felt the end result would have been the same whichever comparator group had been used in this particular case.

Keene LJ made the point that in this type of equal pay case, comparisons should be made between the disadvantaged group and the advantaged group, and that

> *a more reliable result is likely to be forthcoming if one takes as large a group as possible, so long as that group shares the relevant characteristics and can be seen as doing work of equal value.*

In this case Keene LJ was happy with the larger number of workers having been assessed; he did not agree with the Trust that only those working at the same hospitals as the claimants should have been included. Keene LJ advised that one should strive to include all of the 'advantaged' workers in a comparator pool.

Having said this, Keene LJ made an effort to clarify that employees in small firms with a limited number of employees should not be prevented from establishing indirect sex discrimination. He warned against a conclusion that large numbers of employees are necessary for a comparator group in every case. A small comparative exercise can still be a valid one.

In this case, Keene LJ could see no prospect of an ET regarding either party's proposed proper comparator

group as anything other than predominantly male, and meeting the *Enderby* test, whichever group was used. The prima facie case of indirect sex discrimination was found and the Trust's appeal was dismissed.

Comment

Whilst a large comparator group appears preferable, and aids clearer statistical analysis, small groups are also valid. It has been emphasised that there is no 'right to choose' a comparator group in cases such as this, and artificial comparator groups will be quashed in the courts. Practitioners should take care to ensure they have analysed statistics across the widest possible group of recipients of a disputed contractual payment or benefit, and have included all relevant classes of such recipient in the statistical pools employed.

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Briefing 428

Personal liability for harassment

Gilbank v Miles [2006] IRLR 538 EWCA

Implications for practitioners

Managers may be personally liable where they fail to prevent discriminatory harassment by their subordinates.

A Claimant's fear of injury to her unborn child may increase the injury to feelings they suffer and lead to a higher tribunal award.

Facts

Ms Gilbank (G) had worked as a hairdresser at a salon operated by Ms Miles (M). The salon was owned by a limited company of which M was the sole Director. After G became pregnant she suffered harassment by her fellow members of staff and by M. In addition to abusive comments she was prevented from following medical advice regarding rest breaks and diet. When she complained to M nothing was done and the harassment continued.

Employment Tribunal

The tribunal found in favour of G. They awarded £29,000 including £25,000 for injury to feelings. This award was made on the basis of joint liability between M and the company.

Employment Appeal Tribunal

M appealed on two grounds. Firstly, that she should not have been made jointly liable for the full amount, because she had only been involved is some, rather than all, of the incidents of harassment. She argued that she could only be liable for those incidents she had been personally involved in or those which she could be said to 'aid' the harasser. Such aid, it was argued, must go beyond mere failure to act, it must involve direct assistance. Secondly, she argued that £25,000 was manifestly excessive given the facts of the cost. This argument focused on the guidance in *Vento* that focused on the time period that harassment extended over.

The EAT found that a manager who was aware of harassment, but fails to take action, does aid the harasser. Where there was a clear duty to act and knowledge of the situation, failure to act aided the harasser.

In relation to the size of the award the EAT concluded that it fell within the range of permissible awards open to the tribunal.

Court of Appeal

The CA also rejected the appeal, but on slightly different grounds. Both Sedley LJ and Chadwick LJ concluded that it was unnecessary to resort to the aiding provisions to show liability. Where a tribunal had found that a manager had failed to intervene and that the reason for this failure was discriminatory s/he should be liable for the consequences of such inaction. The manager's failure to act was itself less favourable treatment on prohibited grounds.

Arden LJ approached the case on the same basis as the EAT and concluded that failure to act could constitute aiding. There would need to be something

428 more than allowing an environment to develop in which harassment could occur, but encouraging and fostering discrimination was enough.

The CA also upheld the injury to feelings award, noting that length of service was not the only factor to be considered in determining injury to feelings. Other factors, such as the potential for injury to an unborn child, could also increase the injury to feelings.

Comment

This case is an important warning to managers about the wide scope of personal liability in discrimination cases. A manager who fails to deal with harassment by their subordinates risks being found to be personally liable for substantial damages. This may become vital where, as in this case, the employer goes into insolvency.

The CA's comments on injury to feelings awards are likely to be useful in persuading tribunals to make larger awards in cases where harassment occurred over a brief period of time. The decision confirms that the time over which harassment occurred is only one factor to be taken into account and that other factors may also justify a high award.

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Discrimination in compensation for WW2 internees: part 2

R (on the application of Diana Elias) v Secretary of State for Defence and Commission for Racial Equality (Intervenor)
[2006] EWCA Civ 1293

Implications for practitioners

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

Facts

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

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

High Court

E failed in her first argument that the Secretary of State had unlawfully fettered his discretion. The scheme was not statutory but had been set up pursuant to the common law powers of the Crown. There was no basis for saying that because the government agrees to make payments in a certain class of situations, it was obliged to consider applications from those who do not fall within the rules in a different way than it would otherwise have done.

The HC rejected her claim that she had been subjected to direct discrimination, however, E did succeed in her claim of indirect discrimination. The Secretary of State had conceded, albeit late in the day, that the criteria involved in the case inevitably involved a disparate impact on grounds of national origin, even without the relevant statistics to prove this. The HC considered that the measures here did have a legitimate aim in that the minister was in principle entitled to seek to limit the category of persons who would be eligible to claim and to choose not to extend the benefit to all British subjects. Here, the criteria which caused the disparate impact were themselves closely linked to national origins, using these criteria was by no means the only way in which the Minister could achieve his legitimate objective. He could have chosen criteria which narrowed the category of British subjects without linking them so closely with descent and national origins.

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

The Secretary of State appealed against the finding of unjustifiable indirect discrimination, E cross appealed against the finding that the discrimination was not direct discrimination and against the decision that the Secretary of State had not fettered his discretion.

Court of Appeal

The CA held that the HC were correct that there had been no direct discrimination. The birth link was a neutral criterion which applied equally to all applicants for compensation under the scheme. It was the application of these neutrally worded criteria that had the adverse impact and did put those of her national origins at a particular disadvantage compared to others not of her national origins. She had therefore been subjected to indirect discrimination.

The CA then considered whether this indirect discrimination was justified. The HC had been correct to conclude that the Government's aim of confining the payments to those with close links to the UK was a legitimate aim. However, the HC had also been correct in finding that the means used to achieve this aim were not proportionate. It was also relevant for the HC to take into account that as the issue of discrimination was not properly addressed when the compensation scheme was prepared there had been no proper attempt to achieve a proportionate solution. Hence the eligibility criteria were not proportionate, could not be objectively justified and were unlawful.

The CA confirmed HC's decision that the exercise of the Secretary of State's common law powers had not been unlawfully fettered.

However, the quashing of the eligibility criteria did not mean that E was entitled to any compensation or damages for unlawful race discrimination. Rather the Secretary of State was now obliged to prepare lawful criteria for eligibility which does take account of whether the scheme is indirectly discriminatory and if so whether this discrimination can be justified as a proportionate means of achieving a legitimate aim.

Comment

It is disappointing that the CA considered that they could not award her any compensation but rather the Secretary of State should be given the opportunity to prepare a new scheme. This makes the whole process of litigation an even longer one for someone whose suffering was experienced a very long time ago. This may well be a case of justice delayed being justice denied.

Gay Moon Editor

with thanks to Henrietta Hill of the Doughty Street Human Rights Unit who prepared the report for the High Court hearing on which this report has drawn.

Bonus payments refused to women on maternity leave

Hoyland v ASDA Stores Ltd [2006] IRLR 468, Court of Session (Inner House)

Implications for practitioners

Section 6(6)SDA provides that no claim may be brought under the SDA in respect of alleged discrimination in

> *benefits consisting of the payment of money when the provision of those benefits is regulated by the woman's contract of employment.*

This provision, together with the absence from the SDA of any provision corresponding to section 4(2)(a) RRA and its equivalents (which regulate discrimination in the terms of employment afforded to workers), ties contractual pay claims into the Equal Pay Act 1970 (EqPA) with its strict comparator approach.

Hoyland concerned a claim under the SDA by a woman who had taken ordinary and additional maternity leave that she ought to have been paid a profits-related bonus as if she had not been on leave during 26 weeks of the year in question. ASDA had paid her the bonus on a pro rata basis taking account of the weeks she had actually worked during the year.

In *GUS Home Shopping Ltd v Green and McLaughlin* [2001] IRLR 75 the EAT had upheld awards under the SDA to women denied discretionary loyalty bonuses during absence on maternity leave where the bonuses were awarded in a redundancy situation in order to effect an orderly and effective transfer of the marketing operation from the department in which staff were to be made redundant. The ET had found that the employees were not considered for the loyalty bonus because they were absent due to pregnancy, and that the failure of the employers to recognise the special status given to women in such circumstances amounted to an act of direct sex discrimination.

Employment Tribunal

Ms Hoyland's (H) claim under the SDA failed before the ET except to the extent that it concerned a sum in the region of £5 in respect of the bonus which she would have earned during her period of compulsory maternity leave. The ET accepted that the witholding of this sum involved subjecting the claimant to a 'detriment' within the meaning of section 47C of the Employment Rights Act 1996 (ERA).

Employment Appeal Tribunal

The EAT dismissed her appeal ruling that there was no entitlement to equal pay during maternity leave, and that section 6(6) SDA in any event excluded her claim. According to Bean J, for the Court, the decision in the *GUS Home Shopping* case was distinguishable, entitlement to the bonus there

> *requir[ing] the contract of employment to continue and … the employees to do no more than comply with the term of the contract of employment, namely to cooperate and show goodwill ... [It] was a special scheme within a contract of indefinite duration offering a special loyalty payment for those who continued with the contract until a specific date. As such it was subject to all the regular incidences of an indefinite contract of employment such as absence by reason of illness or leave for whatever purpose.*

Having declared that the *GUS Home Shopping* scheme was 'a long way from the present case' Bean J went on to state that:

> *Mrs Hoyland's claim falls four square within s.6(6) of the Sex Discrimination Act. The bonus was described in the scheme as 'discretionary' but does not appear to have been withheld from anyone who satisfied the qualifying requirements. The employment tribunal found … that 'if the applicant complied with the rules of the bonus scheme she was entitled to be paid the bonus. This was not a matter left to the discretion of the respondents. In addition the amount of bonus to be paid was not discretionary within the term of the scheme.' Neither we nor either leading counsel in the case could think of any circumstances, except perhaps if the company were on the brink of insolvency, in which an employee qualifying under the terms of the scheme would not be paid the bonus... The claim for sex discrimination was therefore rightly rejected by the tribunal.*

The EAT went on to state that the failure to pay a woman a bonus in respect of time spent on maternity leave could not be characterised as putting her at a 'detriment' within the meaning of s47C ERA, given that she was not entitled to the bonus (regulation 9 of the Maternity and Parental Leave, etc, Regulations

1999 providing that a woman on ordinary maternity leave was not entitled to the benefit of 'terms and conditions about remuneration'). 'Remuneration' being defined as 'sums payable to an employee by way of wages or salary'.

Court of Session

The CS dismissed H's appeal, in which it was argued on her behalf that

> *the bonus scheme operated by the respondents was described by them as 'discretionary' and, with regard to such a scheme, it cannot be said that the 'provision' of the benefits under it is 'regulated' by the appellant's contract of employment.*

The CS concluded that a bonus could be 'regulated' by a contract of employment without forming part of a contractual entitlement under it. Here, entitlement to a bonus was regulated by the contract of employment in the sense that, but for the existence of the contract, the bonus would not be paid, and it was therefore paid as a consequence of the contract's existence.

Comment

As far as the substantive claim is concerned the decisions of the EAT and the CS appear to be in line with EC law however unfortunate that law might be. The ECJ have ruled in cases such as *Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] ECR I-0475 that a woman on maternity leave cannot be compared with a working man for the purposes of an equal pay claim. And in *Lewen v Denda* C-333/97 [1999] ECR I-07243 the Court ruled that a woman could be denied a Christmas bonus entirely if she was on maternity leave when it became payable, if the bonus was

> *subject only to the condition that the worker is in active employment when it is awarded, though not 'if the national court were to classify the bonus at issue under national law as retroactive pay for work performed in the course of the year in which the bonus is awarded.'*

What is more problematic as a matter of law, are the courts' conclusions on the application of S6(6) SDA. This provision serves to exclude claims from the relatively less burdensome scheme imposed by the SDA, requiring workers instead to pursue them under the technically difficult provisions of the EqPA. The latter, but not the former, does require a real comparator (save in those pregnancy cases where equal pay claims are possible). In addition, once a claimant finds that she has wrongly placed her case under the SDA, with its relatively flexible approach to time limits, she will almost inevitably find herself out of time for an EqPA claim. So a ruling against the claimant under s6(6) SDA will not, as the CS stated, *'avoid[] an employer being exposed to double jeopardy'*, but will rather rob the claimant of a remedy for sex discrimination. Perhaps indicative of the general approach of that Court to the whole question of pregnancy-discrimination-as-sex-discrimination is the remark made by Lord Johnstone, for the Court, that it was:

> *surprised that the issue of whether there was any discrimination at all was not taken before the lower tribunals having regard to the fact that it appears that a man claiming paternity leave is in precisely the same position as a woman claiming maternity leave. It may be that some distinction is sought to be drawn because in the female's case pregnancy requires her to leave her employment temporarily, while a father, or potential father, has an option.*

This statement is unfortunately reminiscent of earlier dicta in cases such as that of Bristow J in the long-overruled *Turley v Allders Department Stores Ltd* [1980] ICR 66 (ruling that pregnancy discrimination could not amount to sex discrimination):

> *In order to see whether a woman has been treated less favourably than a man, the sense of s.1(1) is that like must be compared with like. In the case of a pregnant woman, this cannot be done. When she is pregnant a woman is no longer just a woman. She is a woman with child, and there is no masculine equivalent.*

Much water has passed under the bridge since the decisions in *Turley* and it has become clear as a matter of both European and domestic law that disadvantage associated with pregnancy is, albeit not when it concerns maternity pay, a form of sex discrimination. The *Hoyland* decision demonstrates the desirability not only of repealing the EqPA and dealing with pay claims under the SDA, by reference to real or hypothetical comparators, but also of revisiting at ECJ level the relationship between sex equality and entitlement to properly paid maternity leave.

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When is a relevant grievance raised?

Canary Wharf Management Ltd v Edebi [2006] IRLR 416 EAT

Implications for practitioners

This case clarifies that a grievance that does not refer specifically to the acts complained of may not cover the grievance requirements as set out in s32(2) of the Employment Act 2002 (EA).

The facts

Mr Edebi (E) was employed as a Security Officer. In June 2004 E wrote to his employers complaining that exposure to traffic fumes had resulted in his suffering an asthma attack. The following month E wrote to his employers stating that they had not made reasonable adjustments and referring to their duties under the DDA.

In March 2005 E sent a further letter raising complaints about his working conditions and their effect upon his health. The letter did not refer to his suffering from asthma or a belief that this amounted to a disability but did refer to his previous health complaints.

E subsequently resigned and claimed that he had suffered disability discrimination. The employer contended that the letter of March 2005 did not comply with the requirements of EA s32(2) and so a grievance had not been raised.

Employment Tribunal

The ET Chairman held that the letter raised grievances in relation to all of E's complaints. The employer appealed against this finding.

Employment Appeal Tribunal

The EAT held that the letter of March 2005 could not be said to raise a complaint of discrimination. The references to E's health were vague and made no specific reference to a failure to make adjustments or to less favourable treatment.

The EAT accepted that whilst E had referred to a previous complaint the timescale was lengthy and no reference was made to the details of the earlier complaint.

Comment

The legislation is (notoriously) silent as to what information is required to constitute a grievance. A practical approach would suggest that where the nature of the complaint is clear to the employer a grievance will have been raised. This, it could be argued, was broadly the EAT's approach in the earlier line of grievance cases (such as *Shergold v Fieldway Medical Centre* [2006] IRLR 76) where the requirements of a statutory grievance were described as 'minimal' and that the statutory grievance procedures should 'very rarely' deny the Claimant access to the ET.

However, the reasoning followed by Elias J arguably sets out a different approach. E had referred to previous complaints where his condition and the employer's obligations under the DDA were referred to. But as he had not stated that he considered his treatment to be discriminatory, a grievance had not been properly raised.

This case shows that very considerable caution must be taken in drafting a grievance. Further, comparing this case to earlier authorities, the law on what constitutes a grievance is unlikely to be reliably clear until we have CA authority (at least).

In the meantime (and, two years, after the Regulations came into force, there is no authority higher than the EAT), for practitioners advising on the drafting of a grievance, the safest approach must be to draft a grievance relating to discrimination in a similar manner as a statement of claim.

Even where an employee is able to refer to correspondence in which complaints are made, where time permits, it would be prudent to submit a further complaint marked as a grievance and clearly stating the grounds of complaint and listing and referring to the previous correspondence.

It is however, worth bearing in mind that where an employer is able to suggest that the grievance was concluded or not actively pursued, the ET can conclude that the past complaints were not

outstanding and so a 'new' grievance should have been raised in any event.

The legislation does not require a grievance to fully particularise the complaint, but it appears from this case that the substance of the grievance must be explicit.

Conclusion

Different divisions and different presidents of the EAT, Elias J and Burton J, have arguably taken different approaches to the definition of a statutory grievance. The earlier approach (see *Shergold v Fieldway Medical Centre* EAT 2005 [2006] IRLR 76, *Galaxy Showers Ltd v Wilson* EAT 2005 [2006] IRLR 83 and *Mark Warner Ltd v Aspland* EAT 2005 [2006] IRLR 87) appeared to be policy-led; the Statutory Dispute Resolution Procedures, should not bar a claimant from the ET if possible.

Such cases were criticised by employers on the grounds that, in their desire to prevent a claimant from being barred by unhappily drafted and unduly complex Regulations, the EAT left employers open to uplifts on compensation for failing to reply to something the employers (perhaps understandably) did not recognise as a grievance.

Whilst one may have some sympathy for an employer in this situation, it is strongly arguable that a claimant who had relied for their statutory grievance on something that was not clearly a statutory grievance would be far less likely to obtain any significant uplift.

The prejudice to a claimant of having their case barred is far more serious. If the time limit has passed by the time of a pre-hearing review on the grievance point (as it almost always will), the claim will be time-barred unless the ET grants an extension or the discrimination is ongoing and can be interpreted as a continuing act.

What should a practitioner do when it is too late to grieve again and a sequence of correspondence has to be 're-branded' as a statutory grievance?

Practitioners should consider *Mark Warner* in particular, the only discrimination case amongst the earlier cases. Here Clark J considered a series of correspondence between a solicitor and employer and found that *'the sequence of correspondence … must be read as a whole'*. It also worth considering Langstaff J's obiter comments in *Galaxy Showers* that where *'the substance of the complaint has been raised, and … there has been subsequent discussion between the parties about that complaint, it is likely that the requirements of the Regulations will have been fulfilled.'*

The way to reconcile the earlier case and *Ebedi* is, it appears, to consider the exact wording and timing of the correspondence very carefully indeed. The result of these cases is thus more work for the lawyers and the tribunals and less certainty for employers and employees. Not, it is to be presumed, what the government intended with these Regulations.

Juliette Nash and Jamila Duncan Bosu
North Kensington Law Centre

Briefing 432

Reasonable adjustments in a redundancy situation

Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664 EAT

Implications for practitioners

The EAT has revisited the case of *Mid-Staffordshire v Cambridge* [2003] IRLR 566, regarding what preparatory steps an employer may have to take to ascertain what adjustments may be necessary to accommodate a disabled employee.

Facts

Dr Tarbuck (T) was employed by Sainsburys as a business analyst and IT project manager. She had a history of depression. In 2002 she brought claims of disability and sex discrimination against Sainsburys (S) and these were settled on confidential terms in October 2002. Those terms provided for a phased return to work on a rehabilitation programme facilitated by the HR manager with ongoing support from S's occupational health department and psychological counselling. T returned to work in March 2003 (although reluctantly as she felt that the role that she was given, which was time limited, was not

appropriate). She worked from home for some time and had assessments by the Disability Employment Adviser at both work and home, following which equipment was obtained for her (though this was done four months following the assessment). In June 2003 T and other staff were notified that they were formally at risk of redundancy. Employees placed at risk had priority status in applying for vacant posts within their own division but T considered that this placed her under stress during her rehabilitation period. She successfully challenged her at risk status. She was then off work again as a result of her depression. In August 2003 she was interviewed for a vacancy in finance systems but was not appointed. In September her existing assignment ended and she had no job to go to. She felt that she was disadvantaged in her job search by not having 'at risk' status, and so she was formally accorded this status. In late October, a three month assignment in trading systems was arranged but she rejected this role. On 10 November she was given formal notice of redundancy. Her appeal against this was unsuccessful.

Employment Tribunal

T brought a claim of disability discrimination and unfair dismissal against S. The ET found that there had been a failure to make reasonable adjustments in several respects including failing to consult with her following her successful at risk challenge, in order to agree the particular steps to be taken to eliminate her disadvantage in the competition for jobs. The ET applied the judgment of the EAT in *Mid-Staffordshire General Hospitals NHS Trust v Cambridge*. The ET also upheld her claim of unfair dismissal, finding that the internal appeals process failed to address her complaints, particularly in relation to disability discrimination.

T appealed on the basis that the ET ought to have made other findings of disability discrimination, and that they failed properly to apply the shifting of the burden of proof. S cross appealed, on the basis that the ET were wrong to find that a failure to consult was a breach of the duty to make reasonable adjustments and that the dismissal was unfair.

Employment Appeal Tribunal

The EAT upheld the appeal and cross appeal in part, remitting the case to the ET. They dealt with the grounds of appeal as follows:

a) the first ground of appeal was that the ET misunderstood the duty to make reasonable adjustments and, as a consequence, failed to conclude that the employers should have given T priority status as a result of which she would have been appointed to the finance systems post. As the finding that priority status should not have been given under the redeployment policy 'as an immediate reaction' to the successful challenge was not clear, this ground of appeal was upheld. This matter was remitted to the tribunal for it to clarify whether it did conclude that it was not a reasonable adjustment in the circumstances for S to give T priority status in time for her to be considered for the finance systems post.

b) the EAT rejected T's submission that failure to conclude that since priority status was an adjustment that could reasonably have been made, then the burden fell to the employer to show why that adjustment had not been made,

c) the EAT held that there was no less favourable treatment and no failure to make any reasonable adjustment in relation to the EIS manager post. This was a post for which T applied, but to which no one was appointed and which S said was not filled because of the fluid and chaotic nature of the restructuring at this time. T claimed that it was a post for which she was suited. It was advertised and it was not filled. Some adequate explanation was needed as to why she should not at least have been interviewed for that vacant role. The tribunal recognised that the employers might have been willing artificially to create a job but they would have been acting wholly reasonably in not doing so. This was not an adjustment that they were required to make as part of their statutory obligation.

d) T contended that there should have been a finding that there had been a separate breach of the duty to make adjustments by not interviewing T for any of the vacant posts. Given that the ET had held that there had been a failure to make adjustments in failing to give appropriate support to T when her priority had been restored, and that the issue of whether or not she was appointed goes to quantum, the EAT held that there could be no separate and independent breach of the duty to make reasonable adjustments by failing to interview T.

Various grounds relied upon the alleged failure by the tribunal to apply the shifting burden of proof in the

manner required by *Igen v Wong* [2005] IRLR 258.

On the cross appeal, the EAT held that the tribunal were wrong to conclude that the employers failed to make a reasonable adjustment because they did not consult with T over what reasonable adjustments she might need to assist her in the process of finding alternative employment. The EAT held that it is a fundamental principle of natural justice that a party should have the right to make submissions on any issue which is the subject of the dispute and in relation to which adverse findings may be made. That did not occur in this case, at no stage was the issue raised by T as one of the potential areas where there had been a failure to make reasonable adjustments. It was not identified in the original claim and it was not in the list of issues which the tribunal had asked T's representative to produce once all the evidence had been heard.

The EAT went on to consider S's arguments that *Mid-Staffordshire* had been incorrectly decided. They considered the case of *British Gas Services Ltd v McCaull* [2001] IRLR 60 EAT, and held that the only question is objectively whether the employer has complied with his obligations or not. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee. The *McCaull* case would have to be treated as wrongly decided if the *Mid-Staffordshire* case were correct because, inevitably, if the employer is unaware of his obligations under the Act and gives no thought to them, then he will fail to carry out any necessary consultation. Accordingly, whilst it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so – because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not make reasonable adjustments – there is no separate and distinct duty of this kind. The EAT was reinforced in their view by the fact that the examples of reasonable adjustments given in s.6(3) DDA (prior to the October 2004 changes) do not include this duty. Whilst these examples are not intended to be exhaustive if there were to be an obligation of this nature imposed on the employer, the EAT would expect it to be spelt out in very clear terms. The example in the code of practice regarding the obligation to consult takes matters no further as this is question of law and the example was in any event framed to reflect the ruling in the *Mid-Staffordshire* case.

The cross-appeal on unfair dismissal was dismissed. *Post Office v Marney* [1990] IRLR 170, which suggested that a defect in the appeal process will only be relevant if a properly conducted appeal would have made a difference to the outcome was inconsistent with the judgments of the HL in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 and *West Midlands Cooperative Society Ltd v Tipton* [1986] IRLR 112 and is no longer good law. Even if a dismissal could be fair if the employee chose not to appeal, the significance of the appeal is that it may enable further matters to be advanced by the employee or representations to be made which might affect the outcome. In those circumstances the denial of that right is capable of rendering a dismissal unfair and, equally, a failure to apply the appeal process fairly and fully may have the same result. If dismissal would be likely to have occurred in any event, then that will affect compensation but not the finding of unfairness itself.

Comment

Whilst the court considered the *McCaull* case, which had not been considered by the EAT in *Cambridgeshire*, there were other cases relevant to this issue which it equally did not consider – *Rothwell v Pelikan Hardcopy Scotland Ltd* [2006] IRLR 24 in which the EAT held that consultation with the employee was a reasonable adjustment (with no consideration of the *Cambridgeshire* case) – and, to a lesser extent, *Southampton City College v Randall* [2006] IRLR 18. The EAT in *Tarbuck* also focussed heavily on consultation – which was at the heart of the finding of a failure to make adjustments – when *Cambridgeshire* focussed on an assessment of requirements – which would seem to be in reality necessary in order for an employer to get to the point of complying with the duty to make adjustments. There would appear to be no reason why such an assessment would not fall within the scope of the duty and it is perhaps unfortunate that this issue was determined without the case having been properly argued before the ET and without the cases referred to above having been raised.

Catherine Casserley
Disability Rights Commission

DLA Statutory Dispute Resolution Consultation

Please don't overlook this consultation!

Experience from practitioner group meetings and previous questionnaires to our membership shows that that the statutory dispute resolution procedures have had a catastrophic impact on discrimination law cases. They constitute a formidable barrier to justice, particularly to victims of discrimination. It is often in discrimination cases that the effect of these procedures has been at its worst.

The government has now agreed to consult on the workings of the Statutory Dispute Resolution Procedures. This is the best chance we have to influence government. We are not aware of many other organisation which can put the case of discrimination claimants in the same way that we can. We do not want the government's consultation to ignore the impact on the victims of discrimination.

The Discrimination Law Association wants to ensure that our input into this consultation reflects the experiences and concerns of our members and therefore effectively puts our case. We are therefore asking all practitioner members to fill in the DLA questionnaire a hard copy of which is included in this issue of Briefings.

When you complete the consultation questionnaire you will have the opportunity to be entered into a prize draw for the chance to win £50 worth of vouchers of your choice. If you would like to be entered into this draw, please ensure you include your contact details on your questionnaire.

Please complete the survey and return it to the DLA by post or email by **30th November 2006.**

Non-employment protection from discrimination for religion or belief and sexual orientation

Ruth Kelly, the Secretary of State for Communities and Local Government, has just announced that part 2 of the Equalities Act 2006 and the new Sexual Orientation Regulations will not be implemented in October 2006, as had been previously announced but they will now be introduced in April 2007. Part 2 of the Equalities Act introduces protection from discrimination on grounds of religion or belief in the areas of access to goods, facilities and services, education in schools, management and disposal of premises and the exercise of public functions. The proposed Sexual Orientation Regulations will cover similar areas in respect of sexual orientation, however, the the extent of possible exemptions is currently being discussed and is giving rise to some concern.

Age Discrimination: a Guide to the New Law edited by Shaman Kapoor, Law Society, 2006, 208 pages, £34.95

As DLA members will know the new age discrimination regulations came into force on October 1st 2006. These regulations, which were discussed in *Briefing* no 406, cover all aspect of employment from recruitment through to dismissal.

This book is written by a group of barristers who specialise in employment law. It covers the key concepts, recruitment, promotion and training, benefits during employment, dismissals and pensions. Usefully it contains a copy of the regulations together with a copy of the EC Employment Directive no 2000/78/EC which sets out the requirement for Age Discrimination legislation in the UK. It is a practical handbook which is clearly set out with a number of sample letters, examples and useful checklists for practitioners. However, as all the checklists and sample letters are directed to the needs of an employer one can only assume that this book is primarily directed towards an employer's perspective.

This is no doubt the first of a number of books on age discrimination. LAG are publishing *Age Discrimination: a practical guide to the law* by Declan O'Dempsey, Schona Jolly and Andrew Harrop in November and this, together with any others, will be reviewed in the next edition of Briefings.

Gay Moon, Editor

Commission for Equality and Human Rights news

Trevor Phillips has now been appointed as the new CEHR Chair. Together with the board he will now decide on options for strategic direction, organisational design and key policy issues. The Board will have a minimum of 10 and a maximum of 15 members to include a Commissioner each for Wales and Scotland and one who is or has been a disabled person. During the transitional phase (before the CEHR takes on its main functions and powers), the minimum number of Commissioners is five. The announcement of the first Commissioners is expected in November. The post of the first Chief Executive Officer has been advertised and it is hoped that this appointment will be announced in December.

It is expected that the Commission for Racial Equality will now join the new CEHR in October 2007 at the same time as the other Commissions so there will no longer be a hiatus between the joining up of each of the separate Commissions.

Trevor Phillips will be standing down from his role as Chair of the Commission for Racial Equality within the next month or two and this post is expected to be advertised shortly.

The new CEHR website (http://www.cehr.org.uk/) says that the CEHR

will provide a powerful, authoritative, single voice on equality and human rights. In addition to its legal role in enforcing equalities legislation, the body will work to ensure that organisations and individuals have access to clear and understandable information in order to foster debate, tackle issues early on and encourage a change of culture within institutions. A new helpline and website will be launched to give people clear advice on what to do if they have been discriminated against. This will make it easier to get advice on how to handle discrimination at work or in schools and, for example, what to do about homophobic bullying or what to do if you are made redundant because you are pregnant.

It is significant that the emphasis of the public statements are now on single ground issues, all mention of the CEHR being necessary because *'as individuals, our identities are diverse, complex and multi layered*' has been dropped now that the CEHR is being established. Indeed multiple discrimination was not mentioned in the Equalities Review although it is widely acknowledged to be a significant problem.

It is also significant that the emphasis in this quotation is on advice, no mention is made of legal casework which is an important element of the work of any commission. The DLA will seek to put the case for the continuation of strategic casework as a vital aspect of the CEHR's work.

Equalities Review and Discrimination Law Review update

The Equalities Review has been established to carry out an investigation into the causes of persistent discrimination and inequality in British society. It presented its interim report for consultation in March 2006.

The Discrimination Law Review has been set up to *'address long-held concerns about inconsistencies in the current anti-discrimination legislative framework'*. The Review is considering the fundamental principles of discrimination legislation and its underlying concepts.The Discrimination Law Review will consider the opportunities for creating a clearer and more streamlined equality legislation framework, which produces better outcomes for those who experience disadvantage. It was originally intended to report to the Prime Minister in Summer 2006.

The DLR says that it is concentrating on an analysis of the fundamental principles of discrimination legislation, exploring the scope for harmonisation of the current law, consideration of areas where protection is currently inconsistent, the future scope of public sector duties, updating discrimination law on grounds of sex and gender reassignment and reviewing enforcement procedures and remedies against breaches of discrimination law.

Both these reviews are now expected to produce their reports in February 2007. They have both held a number of high level seminars to discuss areas of particular concern and these will contribute to the final reports. The DLA has sent in evidence to both reviews. The Discrimination Law Review report is still expected to take the form of a Green Paper although they expect it to move speedily towards a draft Single Equality Bill in line with the Government's manifesto commitment.

Briefings

Notes and news

Abbreviations

AR	*Employment Equality (Age) Regulations 2006*	*ECHR*	*European Convention on Human Rights*	*HC*	*High Court*
CA	*Court of Appeal*	*ECtHR*	*European Court of Human Rights*	*HL*	*House of Lords*
CEHR	*Commission for Equality & Human Rights*	*ECJ*	*European Court of Justice*	*HRA*	*Human Rights Act 1998*
CRE	*Commission for Racial Equality*	*ED*	*Employment Directive*	*PCP*	*Provision, Criterion or Practice*
CS	*Court of Session*	*EOC*	*Equal Opportunities Commission*	*RD*	*Race Directive*
DDA	*Disability Discrimination Act 1995*	*EPD*	*Equal Pay Directive*	*RRA*	*Race Relations Act 1976*
DRC	*Disability Rights Commission*	*EqPA*	*Equal Pay Act 1970*	*RRAA*	*Race Relations (Amendment) Act 2000*
EA	*Employment Act 2002*	*ERA*	*Employment Rights Act 1996*	*SDA*	*Sex Discrimination Act 1975*
EAT	*Employment Appeal Tribunal*	*ET*	*Employment Tribunal*	*UN*	*United Nations*
EC	*Treaty establishing the European Community*	*ETD*	*Equal Treatment Directive*		
		GOR	*Genuine Occupational Requirement*		