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Editorial *Equalities Review*

The Equalities Review has just been published (see www.theequalitiesreview.org.uk) with some fanfare, but its importance for future policy is yet to be decided. The Review was established to provide an understanding of the long-term, underlying causes of disadvantage, make practical recommendations on key policy priorities and inform the modernisation of equality legislation and the development of the CEHR. How well has it done all three?

Its survey of aspects of the equality landscape (where statistical data are available) presents a very bleak picture. We are told, for instance, that:

- The average net weekly earnings of Bangladeshi men is half that of white men,
- In 2005, while 42.5% of all pupils received five or more A*-C grades at GCSE, only 9% of Gypsy/Roma pupil attained this result,
- The hourly gender pay gap for women is 17%, but for part time women it is 38%,
- Women's average income in retirement is only 57% of the average for men,
- Disabled people are 30% more likely to be out of work compared to non-disabled people.

There is a raw and wintry feel to the repetition of these statistics that would incite any caring reader to action. The Report makes clear that, contrary to popular belief, the situation for many groups is not improving or improving far too slowly. Its estimates, at the current rate of progress, of the time needed to eradicate critical inequalities severely challenges any complacency among policy makers and makes urgent action the only possible response.

For instance, at the current rate of progress the employment penalty will disappear:

- For mothers with children under 11 *In 2025*
- For disabled people *Possibly never*
- For Pakistani and Bangladeshi women *Definitely never*

Future demographic changes, including increased numbers of people over 65, disabled people and people from ethnic minorities or mixed race, will make the challenges even greater.

What remedies does the Review offer?

Chapter 3 concludes with lists of recommendations for tackling persistent discrimination, most addressed to government and the public sector, for long-term phased strategies, for data-collection and monitoring and specific education policy solutions.

The final chapter of the Review proposes 'ten steps to greater equality':

- Defining equality
- Building a consensus on the benefits of equality
- Measuring progress towards equality (linked to the triennial CEHR State of the Nation report)
- Transparency about progress (required for the public sector and mainly voluntary for the private/voluntary sector)),
- Targeted public sector action on persistent inequalities
- A simpler legal framework
- More accountability for delivering equality
- Using public procurement and commissioning positively
- Enabling and supporting organisations in all sectors
- A more sophisticated enforcement regime.

These proposals, though superficially logical, on closer examination reveal some serious inconsistencies. Where these occur in relation to the law they do raise real concerns, since the third objective of the Review is to inform the modernisation of equality legislation.

We agree that equality legislation should be *'simpler, more coherent and more outcome-focused'*. The Report, however, also calls for softer legal measures with wider *'less process-orientated'* equality duties, stating that a single Equality Act must make *'a dramatic reduction in the use of process-based requirements: this is not the place for bureaucratic prescription'*. It would be a matter of concern to the DLA if this implies any watering down of individual protection. The Report then calls for the law to recognise the range of organisations covered – small, large, public, private etc. – a sure recipe for increased complexity, not the simplification that we, and the Report's authors, are seeking.

The authors appear to be confused about current positive action provisions. They suggest that employers can never advertise that they wish to increase the number of women or ethnic minorities they employ. Yet such statements are often made (and generally lawfully made) in recruitment advertisements. No law is broken by encouraging women or ethnic minorities, including proactive steps well beyond how or where a job is advertised, provided the potential employer does not select on grounds of their gender or ethnic origin or any other prohibited ground.

The Report is right to suggest that the current positive action provisions are too restrictive. Whether the changes it proposes, for example, accelerating recruitment of women and ethnic minorities to the Metropolitan Police in order better to reflect the ethnic and gender profile of London, do in fact come within EC law and whether they are the most appropriate needs further discussion.

Members will find aspects of this Report to welcome – including the emphasis on building a consensus on the benefits of equality, on data collection used to target recommendations and priorities for action and public procurement used to encourage equality.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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Multiple discrimination:

How real are the problems and what are the solutions?

In 2003 Patricia Hewitt, then Secretary for Trade and Industry noted:

> *As individuals, our identities are diverse, complex and multi layered. People don't see themselves as solely a woman, or black, or gay and neither should our equality organisations.*

Perhaps she should have added 'nor should our equality laws'. While the problems of multiple discrimination are now widely recognised by those working in the equality field little has been done to address the problems to which it gives rise. The Government's Equalities Review has just produced its final report on how to 'provide an understanding of the underlying long-term causes of disadvantage that need to be addressed by public policy' in relation to equality and diversity. In doing so it should address the problems of multiple discrimination as well as those of single-issue discrimination. People have multiple identities; their identity is not limited to a single characteristic. Increasingly our recognition of disadvantage within society acknowledges a combination of causes. Ethnic minority people may find themselves discriminated against not only because of their racial or ethnic origin but also because they are women, or disabled, or gay or old or any combination of these. Yet, the law only focuses on one of these factors at a time. It is often not possible to separate these different aspects of a person's identity, the discrimination that a black woman experiences, for example, may be wholly different from that experienced by a black man or a white woman. In a way this single-issue approach is itself a form of discrimination. Sandra Fredman has observed 'The more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection.'[1]

1. *Double trouble: multiple discrimination and EU law*, Sandra Fredman, European Anti-Discrimination Law Review, Issue no 2, 2005, p13-18 at p14.

2. [1983] IRLR 166.

What is multiple discrimination?

Multiple discrimination occurs where discrimination is the result of a combination of two or more protected grounds.

It can occur when someone experiences discrimination on different grounds but each type of discrimination occurs on separate occasions. Secondly, it can be additive, so that a series of attributes are required and if you lack one you lose one point but if you lack two you will lose two points thus increasing your chance of failure in achieving this objective. An example of this could be found in the case of *Perera v Civil Service Commission* (no 2)[2] where an employer set out a series of requirements for a potential post-holder. Mr Perera was refused a job because of a variety of factors which were taken into account by the interviewing committee – his experience in the UK, his command of English, his nationality and his age. In this case the lack on one factor would not prevent him getting the job, but it would make it less likely, and the lack of two factors would increase the probability that he would not get the job.

The third type occurs when the discrimination involves more than one ground and the grounds interact with each other in such a way that they are completely inseparable. This is often called 'intersectional discrimination' and it currently has no remedy under UK law. This is because UK discrimination law requires a person wishing to claim discrimination to compare his/her treatment with someone not of the same sex/race/religion or belief/sexual orientation/age and the courts have ruled that the comparison can only be with a single characteristic; not with multiple characteristics. So, for example, the Race Relations Act 1976 s 1 (1)(b) sets out that the comparison must be with 'persons not of that racial group'. Additionally, in operating the comparison s3(4) sets out that it must be ensured that 'the circumstances in the one case are the same, or not materially different, in the other'. The other anti-

discrimination laws have a similar provision.[3]

At present none of the current legislative provisions dealing with discrimination in the United Kingdom expressly address multiple discrimination. Additive discrimination, where a person is discriminated against, for example, on grounds of their gender and, separately, on grounds of their race, can be addressed as each separate element or ground can be considered. However, where the essence of the discrimination is based on the intersection of more than one prohibited ground and these grounds are totally interlinked and inseparable, current legislation is wholly inadequate.

Concerns have been expressed about whether it is possible to legislate to enable claims of multiple discrimination to be brought without creating considerable problems to the operation of equality law. So the questions are: should any new equality legislation specifically recognise and address multiple discrimination? And if so, how?

Intersectional discrimination

Although the problem of intersectional discrimination is believed to be widespread there have been few cases where it has been raised directly. In practice, lawyers will tend to take up cases on the strongest ground available to them and ignore the other aspects. They will craft the case to meet the limitations of the law. However, historically it is clear that a few cases were successful in arguing intersectional discrimination at the tribunal level and did have both grounds recognised.[4]

However, in 2004 the issue of the correct way to deal with intersectional discrimination was considered in *Bahl v the Law Society*.[5] Here an Asian woman claimed that she had been subjected to discriminatory treatment both on the grounds that she was Asian and on the grounds that she was a woman. The Employment Tribunal that first considered her case ruled that she could compare herself to a white man, so that the combined effect of her race and her sex could be measured. However, both the Employment Appeal Tribunal and the Court of Appeal ruled that this was an incorrect interpretation of the law. Lord Justice Peter Gibson ruled:

> *In our judgment, it was necessary for the ET to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference, which it did in favour of Dr Bahl on whom lay the burden of proving her case. It failed to do so, and thereby, as the EAT correctly found, erred in law.*[6]

This judgment makes it clear that each ground has to be separately considered and a ruling made in respect of each even if the claimant experiences them as inextricably linked. As a Court of Appeal judgment it will continue to bind the lower courts and tribunals.

The European Context

Any answer to the 'problem' of multiple discrimination must operate within a European law context. No solution which is contrary to European law would be permissible. However, it is possible to legislate to prohibit multiple discrimination in a way that is based on our current legal framework and which is compliant with the EC Directives.

There is no doubt that the absence of any specific provision in the relevant European anti-discrimination Directives is a deficiency. This has been recognised and recently the European Commission has commissioned a study of the causes and effects of multiple discrimination which is being undertaken by the Danish Institute for Human Rights who will be visiting the UK in April to hold a series of seminars with relevant stakeholders.

Yet it must also be noted that the EC Directives do recognise that different grounds may intersect, sometimes in a context in which there is a conflict of rights and sometimes in a way in which there is double disadvantage.

Recital 14 of the Race Directive, for instance, says:

> *In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.*

Moreover it is clear that the purpose of the Employment Directive (2000/78/EC) as set out in Article 1 contemplates that all forms of discrimination

3. See SDA s 5(3), SOR reg 3(2), RBR reg 3(3) and AR reg 3(2).

4. See, for example, *Mackie v G & N Car Sales t/a Britannia Motor Co* ET case no 1806128/03 and *Ali v N E Centre for Diversity & Racial equality & Bux* ET case no 2504529/03 – examples provided by the EOC.

5. [2004] IRLR 799.

6. Ibid, para 137.

on the protected grounds must be protected

> *The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment,*

particularly when Article 2(1) is read with it, as this states that

> *For the purpose of this Directive the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.*

These two Articles set the aim of the Employment Directive.

We know also from the Recitals that the Employment Directive is intended to work with the provisions already made in relation to race and gender: see Recitals 2, 3, and 10 in particular.

Moreover, the higher status of the principle of equal treatment as a fundamental principle of EU law, of which Article 1 of the Employment Directive is just a specific application, was made clear in the ECJ's judgment in Case C-144/04 *Werner Mangold v Rüdiger Helm* of the 22nd November 2005.

In the Employment Directive itself Articles 4 and 6 consider the position where there is intersection with other rights; Article 4(2) considers the intersection between religion and other rights, but perhaps more importantly, Article 6(2) recognises that age and sex discrimination can have a close relationship and connected effect.

Thus it is clear that combating all discrimination whatsoever on the grounds identified in these non – discrimination directives requires consideration of the way in which the various grounds can intersect. Thus the directives could be viewed as requiring multiple discrimination to be adequately covered.

Can effect be given to multiple discrimination in domestic legislation?

The question is: how should domestic legislation provide a remedy for multiple discrimination? One frequently repeated question is how do you carry out a comparison where it is alleged that a person has suffered multiple discrimination? Indeed the issue of comparison has much vexed those considering these issues and is central to resolving this conundrum.

However it is arguably much less of an issue than has been supposed. This is because the question who is a correct comparator is a *second* order question following on from the first question: why did the alleged discriminator act (or fail to act) in the way that they did? This was made quite clear by Lord Nicholls in *Shamoon v Royal Ulster Constabulary*:[7]

> *in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue)…Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining…Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined…This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason?*[8]

This analysis makes it clear that the 'reason why' test has an important part to play in the analysis of any direct discrimination case. In cases of multiple discrimination a direct comparator is unlikely so a hypothetical comparator will have to be constructed. Whilst it is not impossible to construct a hypothetical comparator who does not share any of the prohibited characteristics with the claimant this may be one of the situations in which it is preferable to ask the question why the claimant was treated as she was.

This was also supported by Lord Scott's judgment in the same case:

> *107. There has been, in my respectful opinion, some confusion about the part to be played by comparators…Comparators come into play in two distinct and separate respects.*
>
> *108. First, the statutory definition of what constitutes*

7. [2003] IRLR 285.

8. Ibid, paras 7,8 and 11.

discrimination involves a comparison: '... treats that other less favourably than he treats or would treat other persons'. The comparison is between the treatment of the victim on the one hand and of a comparator on the other hand. The comparator may be actual ('treats') or may be hypothetical ('or would treat') but 'must be such that the relevant circumstances in the one case are the same, or not materially different, in the other' (see Article 7[9]). If there is any material difference between the circumstances of the victim and the circumstances of the comparator, the statutory definition is not being applied. It is possible that, in a particular case, an actual comparator capable of constituting the statutory comparator can be found. But in most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator. In Khan[10] one of the questions was as to the circumstances that should be attributed to the statutory hypothetical comparator. It is important, in my opinion, to recognise that Article 7 is describing the attributes that the Article 3(1) comparator must possess. 109. But, secondly, comparators have a quite separate evidential role to play. Article 7 has nothing to do with this role. It is neither prescribing nor limiting the evidential comparators that may be adduced by either party. The victim who complains of discrimination must satisfy the fact finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground eg. sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, eg. under Article 7, by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was treated less favourably than she would have been treated if she had been the Article 7 comparator.

Thus, it can be seen that the role of the comparator can be over-emphasized. Its initial role is to establish that there has been less favourable treatment, the secondary, evidential role, is, in effect, optional as it is one of a series of different ways of proving that discrimination has occurred. Indeed, this second limb of the question could easily be replaced by the 'reason why' discrimination occurred and such a question could encompass several grounds without any difficulty.

Forensic considerations may include comparisons of course. Treatment of a comparator will often be critical evidence of discrimination, but it should not be an essential element in the definition of discrimination. The employer may point to his or her treatment of others as evidence of his non–discriminatory approach. However, the issue for the court or tribunal will be:

Is the apparently non–discriminatory treatment of others forensically relevant, where the complaint is that it was some special combination of grounds – and not a single ground – which was causative of the treatment under scrutiny?

The answer may be yes or no. It will be for the court or tribunal to assess this.

Existing comparable situation provisions

Arguably, the new equality legislation should not include a provision equivalent to RRA 3(4), SDA 5(3), RBR reg 3(3), SOR reg 3(2) and AR reg 3(2) which imposes a very strict test to identify a comparator. Such a provision is unnecessary and its inclusion puts too great an emphasis on finding a specific actual, or hypothetical, comparator.

It is worth noting that of all the EC countries that have implemented the equality directives none has a provision equivalent to these provisions of our current discrimination legislation. Such a provision is not required for full implementation of the EC directives. The omission of this clause does not entirely remove the comparative element in the definition of

9. i.e. article 7 Sex Discrimination (Northern Ireland) Order 1976 – this is in identical terms to section 5(3) SDA (footnote added by author).

10. Chief Constable of the *West Yorkshire Police v Khan* [2001] 1 WLR 1947 HL (footnote added by author).

discrimination because in order to establish 'less favourable treatment' or a 'detriment' a comparative assessment has to be made, and treatment of a comparator will often be relevant evidence of discrimination.

An example

Suppose a Turkish woman complains of direct discrimination against a company recruiting employees. In such a case, the fact that the company has employed non-Turkish women and Turkish men does not by *itself*, disprove this, it only shows that they do not always exclude Turks or women.

Thus the woman may be able to show that it is the fact of the combination that was critical. This may be a cultural matter, in the case for instance, of a Cypriot rag trade business; it may also be that there is a religious overtone to this – that Turkish women do not fit in to the business in the same way as men or non-Turkish women. Here the answer to the question 'what is the reason why this treatment occurred?' answers the question who is in a comparable situation.

What reforms are needed?

The evidence for multiple discrimination is clear and widespread. The best solution is far less clear or obvious and requires careful consideration. If the reality of discrimination and inequality in the 21st century is to be tackled the law must find a workable solution. In the context of current UK law and the imperative to operate within the EC Equality Directives there do appear to be a number of adjustments to our existing provisions that could be made.

Firstly, multiple comparisons should be expressly permitted, allowing the Courts to combine consideration of two or more grounds. In Canada, although they have a rather different definition of discrimination compared to that used within the UK, they have clarified that a discriminatory practice includes one that is based on more than one ground:

> *For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.*[11]

A similar provision could be included in any new single Equality Act. As the comparison may become more complex with each additional ground it might be prudent, as least initially, to limit the number of grounds that could be combined perhaps to a maximum of three grounds.

Secondly, the omission of clauses requiring that 'the circumstances in the one case are the same, or not materially different, in the other'. This would lessen the need to show a hypothetical comparator and put more emphasis on the 'reason why' the discrimination occurred. It should be noted that this wording does not entirely remove the comparative element in assessing whether discrimination has occurred, as, in order to establish 'less favourable treatment' or a 'detriment', a comparative assessment has to be made. Such a provision does put too much emphasis on finding a specific, hypothetical or actual, comparator.

Thirdly, it could be clarified that in awarding damages for cases of multiple discrimination the amount awarded in relation to injury to feelings can be increased to reflect the number of grounds in question.

A final comment on Directives

These solutions would comply with the relevant anti–discrimination directives; the lesser emphasis on 'finding' a comparator is entirely in line with the directives, a comparative element is retained in the formulation in the test for direct and indirect discrimination and, arguably, a further hindrance to the effective application of equality law has been removed.

It is worth remembering that each directive does provide that:

> *Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.*

Provisions to remove unnecessary procedural hurdles and to fulfil the objective of the directives of 'putting into effect in the Member States the principle of equal treatment' would not be contrary to the directives.

Gay Moon
Head of the Equality Project, JUSTICE

11. Canadian Human Rights Act 1998, section 3(1).

Parents' rights at work: changes where the expected week of childbirth or the adoption is on or after 1 April 2007

In this article Camilla Palmer, co-author of Maternity and Parental Rights: a guide to parent's legal rights at work, 3rd edition, LAG, sets out the changes to parents rights at work which will take effect from April 1st 2007.

Overview of changes

Where the expected week of childbirth (EWC) or placement for adoption is on or after 1 April 2007 the following are the main changes to parents' rights at work:

- Removal of the length of service requirement for entitlement to additional maternity leave (AML). Where the EWC is before 1 April, there is a qualifying period for AML of 26 weeks (calculated as at the 14th week before the EWC). Note that there is no change to entitlement to ordinary or additional adoption leave (OAL/AAL), which still has a qualifying period of 26 weeks.
- The extension of statutory maternity and adoption pay from 26 to 39 weeks.
- An increase in the notice period which employees must give of their intention to return to work before the planned date of return from maternity or adoption leave from 28 days to 8 weeks.
- The removal of the small employers' exemption in relation to the right to return after AML or AAL.
- The introduction of 'keeping in touch' (KIT) days which enables employees on maternity or adoption leave to work for up to 10 days without losing pay or bringing the leave to an end.
- Provision for employers to make reasonable contact with employees on maternity or adoption leave.
- The extension of the right for employees to request flexible working to care for adults. This is similar to the existing provisions for children under 6.

The statutory provisions

The Maternity and Parental Leave etc and the Paternity and Adoption Leave (Amendment) Regulations 2006 (SI 2006/2014) amend the Maternity and Parental Leave etc Regulations 1999 (MPLR) (SI 1999/3312) and the Paternity and Adoption Leave Regulations 2002 (SI 2002/2789) (PAL).

The government have produced two leaflets, one for employees (URN 06/1886), and one for employers (URN 06/1887: September 2006). These leaflets set out, in brief, the obligations of both parties and are a useful summary, though they have no legal force. For example, the employers' leaflet states '**You must** provide facilities for your employee to rest and to store expressed milk. The risk assessment identifies any health and safety risks to your employee as a breastfeeding mother or to her child. If there is a risk **you must** remove it'. The employees' leaflet stated that 'Your employer must conduct a risk assessment and remove risks or make alternative arrangements to protect your safety, and your baby's safety, when you are at work'. The idea is that pregnant women can use the tear-off 'Employer's section' at the back of their leaflet to give to their employer.

Additional maternity leave and notice provisions

All employees whose EWC is on or after 1 April 2007 who are entitled to ordinary maternity leave, i.e. have given the required notice, will be entitled to AML, irrespective of their length of service (reg 4 MPLR). As before, notice (of pregnancy, EWC and start of maternity leave) must be given by the end of the 15th week before the EWC and the employee can vary the start of maternity leave but she must give 28 days'

notice before the new date or the original date, whichever is earlier. Once the employee has given notice, the employer must write to her within 28 days notifying her of the date her maternity leave will end.

The difference between ordinary and additional maternity leave still remains, so that for the first 26 weeks the employee will be on OML and for the second 26 she will be on AML. The distinction exists because firstly, the employee's right to return is different after OML than after AML and, secondly, the employee's rights during leave are more extensive during the ordinary maternity leave period.

If the employee wants to return before the end of her maternity leave (which will be her AML) or adoption leave s/he must now give 8 weeks notice of the date of return. If s/he returns without giving 8 weeks' notice an employer can postpone her maternity leave period for 8 weeks or up to the end of the AML or adoption leave, whichever is earlier. This means that an employee who wants to return at any time before the end of her/his 52 weeks maternity/adoption leave must give 8 weeks notice. If the employee wants to change further her date of return, s/he must give 8 weeks' notice. The employer's right to delay the employee's return does not apply, however, if the employer has not notified the employee of the date that her/his AML/AAL ends.

Keeping in touch and working during maternity and adoption leave

Reasonable contact

Employers may make reasonable contact with employees during maternity and adoption leave (MPLR 12A (4), PAL Regs 2002 reg 21A (4)). The DTI guidance says that the employer should agree with the employee what kind of contact there will be, e.g. to inform the employee about any changes happening at work, including job vacancies, and about opportunities for her/him to work or attend training or other events.

Failure to inform a woman on maternity leave of a job opportunity in which she may be interested may be sex discrimination. In *Visa International Service Association v Paul* [2004] IRLR 42 EAT the claimant succeeded in her claim for sex discrimination and constructive dismissal after she resigned having not been informed, while on maternity leave, about the creation of two new posts in her department, even though the tribunal found that she had no chance of obtaining the post. The failure to keep her informed of developments and job opportunities in her department during maternity leave was a fundamental breach of contract entitling her to resign. The dismissal was held, both by the tribunal and EAT, to be automatically unfair (under s99 Employment Rights Act 1996) and discrimination. Compensation of £25,943.73 plus interest was awarded.

Similarly, in *Athis v The Blue Coat School* [2005] UKEAT/0541/04 27 April 2005 11.8.05 a teacher, who was not promoted onto the next pay spine while she was on maternity leave, won her discrimination claim. Although no-one was consulted, she had not known about the notice in the staff common room setting out the criteria for promotion so was unaware that she could make representations to the Head before the decision was made.

Working during maternity and adoption leave

Employees will be able to work for up to 10 days during their statutory maternity and adoption leave period without losing statutory payments for that week or ending their leave (MPLR 1999 reg 12A). Such work must be agreed between the employer and employee and there is no compulsion on the employer to provide work or on the employee to undertake it. The work may be for 10 consecutive days or 10 single days and can include training. The days worked do not extend the leave period.

An employee is not allowed to work during the first two weeks (four if she works in a factory) after the birth.

An employee is protected from any detriment or dismissal for undertaking, considering undertaking or not undertaking to work. Thus, an employee must not be disadvantaged in any way if s/he does not want to work during her leave period.

Although the employee does not lose statutory pay there are no provisions about whether the employee will be paid at her normal rate during the days she or he works. The DTI guidance simply says that the parties will have to agree how she will be paid. Arguably, the employee should receive, at the very least, the minimum wage.

The difficult question is whether an employee, who is not paid what she would expect to receive for a day's work, can make a claim under the Equal Pay Act 1970. It is usually difficult to make such a claim as the courts

have consistently held that a woman on maternity leave is in a 'special position' and cannot claim equal pay during her maternity leave (see *Gillespie* and *Alabaster*). However, it is arguable that for the period that she is actually working, she should be treated like any other worker and paid at the same rate. If the employee is receiving statutory pay the employer can offset this against her normal pay.

Removal of small employer exemption

This provision, which allowed employers with 5 or fewer employees exemption from s99 ERA (Regulation 20(6) of the 1999 regulations), has been repealed. Thus, employees working for small employers will be protected from automatically unfair dismissal in the same way as other employees. A dismissal for reasons connected with pregnancy, childbirth, maternity or adoption leave will be automatically unfair and discriminatory. Note that Regulation 20(7) has not been repealed so that it would not be unfair dismissal if an employee unreasonably refuses or accepts an offer of work from an associated employer.

Although under the ERA it is not automatic unfair dismissal for an employer to offer an employee an equivalent job after AML (not OML) where it is not reasonably practicable for her to return to exactly the same job, this may still be sex discrimination if the reason for the change in job is related to her pregnancy or absence on maternity leave.

Maternity pay

Maternity and adoption pay will be payable for 39 weeks (instead of 26 weeks). The government's intention is to extend pay to 52 weeks, i.e. the full length of maternity and adoption leave. The start of SMP and Statutory Adoption Pay (SAP) will also coincide with the start of the maternity leave, which will usually be the date the employee has notified the employer that she wishes to start her leave and it may be calculated on a daily rate. Previously SMP was paid weekly starting on a Sunday.

From April 2007 the standard rate of SMP, adoption and paternity pay will be £112.75 per week. This will also be the rate of maternity allowance.

As from 14 January 2007 there are no age-related qualifying conditions for either SMP or maternity allowance.

Flexible working

Since April 2003, employees have had the right to request flexible working to care for children under six, or disabled children under 18 (Section 80F of the Employment Rights Act and the flexible working regulations). This is to be extended to 'care' for adults (The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006 No. 3314 amend the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 SI 2002/3236).

The DTI have updated their guidance which is available on the website in 3 parts (www.dti.gov.uk/employment: URN No: 06/2158/A1-A3).

To be eligible to make a request a person must:

- be an employee,
- have worked for their employer continuously for 26 weeks at the date the application is made,
- not be an agency worker or a member of the armed forces,
- not have made another application to work flexibly under the right during the past 12 months.

Carers of adults who are in need of care must be, or expect to be, caring for a spouse, partner, civil partner or relative; or, if not a spouse, partner or a relative, live at the same address as the adult in need of care.

A relative is a mother, father, adopter, guardian, special guardian, parent-in-law, son, step-son, son-in-law, daughter, step-daughter, daughter-in-law, brother, step-brother, brother-in-law, sister, step-sister, sister-in-law, uncle, aunt or grandparent and includes adoptive relationships and relationships of the full blood or half blood, or in the case of an adopted person, such of those relationships as would exist but for the adoption.

There is no definition of 'care' for adults. Thus, there is no particular level of care required in order to show the person is in need of care. The DTI sets out the sort of care-giving activities that carers of adults are likely to be involved in which include:

- help with personal care (e.g. dressing, bathing, toileting);
- help with mobility (e.g. walking, getting in and out of bed);
- nursing tasks (e.g. daily blood checking, changing dressings);
- giving/supervising medicines;
- escorting to appointments (e.g. GP, hospital, chiropodist);
- supervision of the person being looked after;

- emotional support;
- keeping the care recipient company;
- practical household tasks (e.g. preparing meals, doing shopping, domestic labour);
- help with financial matters or paperwork.

This is not an exhaustive list and the DTI guidance recognises that there will be different needs so that carers of older people may need to ensure proper eating, while carers of people with mental health problems may need to order and supervise medication. Those in paid work may need help getting to work.

The regulations have amended the definition of partner so that 'partner' means the other member of a couple consisting of:

a) a man and a woman who are not married to each other but are living together as if they were husband and wife, or
b) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners.

Finally, the regulations provide that an application must be made before the day on which the child concerned reaches the age of 6 or, if disabled, 18. Under the old regulations the application had to be made 14 days before the birthday.

A difficult question is whether carers of children aged between 6 and 18 are excluded from the right to ask for flexible working if the child is not 'disabled' even though if they were over 18 their carer would be entitled to apply for flexible working. A disabled child is defined as one entitled to Disability Living Allowance (Flexible Working Regulations 2(1) as amended by the Amendment Regulations).

Indirect discrimination and flexible working

It has long been established that where an employer either imposes 'inflexible' hours (child unfriendly hours) or refuses a worker's request for flexible working to care for a child, this may be indirect sex discrimination unless the employer can justify objectively the hours or working pattern required. The most common example is the refusal of part-time work, but it can also cover many other working patterns. The claimant must show that the criterion or practice (to work long hours etc) puts or would put women at a particular disadvantage when compared to men and puts the claimant at a disadvantage. This is relatively easy to prove as there is plenty of evidence that it is women who bear the main responsibility for caring for children so are less able to work long hours, overtime etc.

The same principles could apply to carers of adults. Government statistics show that women are more likely to be carers than men – 18% of the workforce as opposed to 14% (Source: National Statistics www.statistics.gov.uk). Carers UK (www.carersuk.org) have also published figures showing that women are more likely than men to be carers in all age groups under 75 years. A quarter of all women aged 50-59 and about a sixth of all men provide unpaid care.

Paternity leave: further changes in the pipeline

Originally the government intended to introduce additional paternity leave for employee father and partners at the same time as the other changes but this has been delayed. The Work and Families Act 2006 provides a new right for employed fathers or partners of a mother or an adopter to take 26 weeks leave to care for a child under the age of one. The idea is to enable the mother to return to work after 6 months and the father or partner to take the remaining leave. The regulations have not yet been published and it is not clear when they will be implemented except that this will not be before 2009.

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Sickness absence and the DDA – Part 2 – sick pay

Sickness absence policies were addressed in the last issue of Briefings. In this article Catherine Casserley considers another issue which arises in relation to disability and sickness absence, the issue of payment when someone is off sick.

The issue of payment while on sick leave was first addressed by the Employment Appeal Tribunal (EAT) in the case of *London Clubs Management v Hood* [2001] IRLR 719. Mr Hood was employed as an inspector on the gaming floor of the Golden Nugget casino. His contract of employment provided that 'payment for absence through illness will only be made at the discretion of the club director (or equivalent at head office).' In 1995, Mr Hood developed 'cluster headaches', which interfered with his sleep and affected his ability to cope with his job. In 1998, he was paid sick pay for 39 1/2 days of sickness absence.

In 1999, however, as there was a high level of sickness amongst all employees, the club manager decided to exercise her discretion not to pay sick pay generally. Accordingly, Mr Hood was not paid sick pay when he was absent for two weeks due to his cluster headaches. He was treated no differently in this respect than other employees in his grade.

Mr Hood complained that the decision not to pay him sick pay amounted to unlawful disability discrimination. An ET upheld his claim, finding that the employers had unlawfully discriminated against Mr Hood on grounds of his disability within the meaning of s.5(1) of the DDA and by failing to make a reasonable adjustment contrary to s.5(2).

The EAT upheld an appeal against the ET's decision. They held that the tribunal erred in finding that the employers treated the applicant less favourably for a reason related to his disability within the meaning of s.5(1) DDA when they failed to pay him when he was off work due to sickness. The tribunal had been wrong to base its decision on the premise that the treatment complained of was the failure to pay the applicant wages ordinarily due, rather than the non-payment of sick pay.

The tribunal should have considered whether the applicant was refused sick pay for a reason which related to his disability rather than whether he was not receiving pay ordinarily due for that reason. The ET had found as a fact that the manager had exercised her discretion not to pay sick pay generally and it was for that reason that she stopped paying sick pay to the applicant. Consequently, if the tribunal had asked the correct question the only conclusion open to them would have been that the reason for the treatment was the application of the policy on sick pay. That reason did not relate to the applicant's disability. Accordingly, the finding that the employers discriminated against the applicant contrary to s.5(1) could not stand. In addition, the ET failed to give adequate reasons for its decision that the employers' failure to pay sick pay amounted to a failure to make a reasonable adjustment contrary to DDA ss.5(2) and 6. It was not apparent from the tribunal's decision that it had considered whether the applicant was placed at a substantial disadvantage by the non-payment of sick pay in comparison with persons who were not disabled.

For a duty under s.6(1) to arise at all, the arrangements made by an employer must place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. In the present case, the evidence indicated that non-disabled employees also had significant periods of unpaid sickness absence. In those circumstances, it was not open to the tribunal to assume that the applicant had more absences than persons who were not disabled and thus was placed under a substantial disadvantage by the non-availability of sick pay. If the tribunal had expressly considered the issue, it may have made additional findings of fact to enable it to determine whether the applicant had been placed at a substantial disadvantage. The case was remitted for reconsideration of this issue.

Whilst there was concern at the time of the *Hood* case about the conclusions of the EAT, this issue did

not feature significantly in cases until the Court of Appeal considered the issue of sick pay as part of the case of *Northamptonshire County Council (NCC) v Meikle* [2004] IRLR 703. In this case, NCC had conceded that a reduction in Ms. Meikle's sick pay to half pay amounted to less favourable treatment for a reason relating to her disability, and the issue was one of justification. Ms. Meikle was on sick leave following her employer's failure to make reasonable adjustments to enable her to continue in her teaching job. The CA found that there was less favourable treatment when the applicant's pay was reduced while she was off sick, even though the reduction was in line with the employer's sick pay policy.

Following the *Meikle* case, there has been some confusion as to when or indeed whether an employer will be obliged to keep a disabled person on full sick pay (or indeed full pay).

The EAT has addressed this issue directly in the case of *O'Hanlon v The Commissioners for HM Revenue and Customs* [2006] IRLR 840. Ms. O'Hanlon began work with HM Revenue and Customs in September 1985. She was diagnosed as having clinical depression in 1988. She began to have long periods of absence from work from 2001. In the four years to 15 October 2002, Ms. O'Hanlon had a total sickness absence of 365 days, comprising 320 days relating to her disability and 45 days of sickness absence unrelated to her disability. From December 2002 until August 2003 she had only 3 days absence which were not related to her disability. She has a further period of absence from 4 September 2003. The revenue recognised that she had difficulty with the commute to her office in Welwyn Garden City, so she was transferred to Hertford with effect from February 2004. In 2004, she had a few days off which were disability related, as well as short absences unrelated to it.

The Revenue's sick pay rules provide as follows: employees are allowed full pay for a maximum of six months in any 12 month period and half pay for a further maximum period of 6 months. This is subject to an overriding maximum of 12 months of paid sick leave in any period of four years. After that, employees are entitled to be paid a pension rate of pay (the amount of pension they would be entitled to if they had been retired on ill health grounds) or half pay, whichever is less, unless they have less than two years pensionable service, in which case the absence is unpaid.

Under this scheme, Ms. O'Hanlon has been on pension rate of sick pay for all absences since October 2002. She raised a grievance in February 2005, though her trade union representative, on the basis that the absences caused by her depression should not be included in the overall sickness absence record when calculating sick pay. Her grievance was not upheld, on the basis that it was contrary to the sick pay policy. Ms. O'Hanlon brought a claim to the employment tribunal. Her claim was based on a failure to make reasonable adjustments and disability related less favourable treatment: she claimed that she should receive full pay for all disability related absences or alternatively that she should have received full pay for all non-disability related absences. The employment tribunal considered 4 issues:

- Do the employer's sick pay rules, resulting in reduced rates of pay after 26 and 52 weeks respectively, constitute a provision criterion or practice which places Mrs. O'Hanlon at a substantial disadvantage in comparison with people who are not disabled?
- If so, has the Revenue taken such steps as are reasonable in all the circumstances of the case to prevent the provision criterion or practice having that effect?
- Do the reduced payments made to Mrs. O'Hanlon when off sick constitute less favourable treatment for a reason relating to a disability?
- If they do, is the treatment in question justified?

The tribunal found that Mrs O'Hanlon was placed at a substantial disadvantage by the Revenue's sick pay rules, but that the adjustment which was sought to address the disadvantage was not a reasonable one; in reaching this conclusion, it took into account in particular the evidence of the Revenue that total cost of providing the same benefit to all disabled employees would be just under £6 million a year; it also held that that there was no disability related less favourable treatment; and that even if there was, it was justified.

Mrs. O'Hanlon appealed to the EAT against the 3 findings against her, whilst the employer cross appealed on the finding that the sick pay rules placed Mrs. O'Hanlon at a substantial disadvantage.

The EAT allowed part of Mrs. O'Hanlon's appeal in relation to disability related discrimination but dismissed the rest. The cross appeal was also dismissed. Following a thorough consideration of the relevant case

law, the EAT came to the following conclusions:

- on the question of whether Mrs O'Hanlon was subjected to substantial disadvantage, the Revenue's cross appeal was dismissed. The tribunal had reached the correct conclusion on this matter. The EAT said that the only conceivable basis on which it could be said that the Tribunal erred in law is if it could be argued that the duty to pay money to someone absent sick from work falls outside the scope of the section 4 duty. However, this was a matter considered and resolved in favour of the employee by the Court of Appeal in *Meikle v Nottinghamshire County Council* [2004] IRLR 703.
- The appeal against the finding of the tribunal that there had been no failure to make a reasonable adjustment was dismissed. In particular, it was appropriate for the tribunal to consider the potential cost of such an adjustment if applied to all disabled people.
- The EAT went on to consider whether a claim for full sick pay could ever be considered a reasonable adjustment. The EAT stated that it would be a very rare case indeed where the adjustment said to be applicable here, 'that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability related absences,' would be considered necessary as a reasonable adjustment. The EAT did not believe that the legislation has perceived this as an appropriate adjustment, although it explicitly did not rule out the possibility that, in exceptional circumstances, it could be. This conclusion was reached for two reasons: firstly, that the implications of this argument are that tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Whilst they must do this to a certain extent in relation to all reasonable adjustment claims, there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. The EAT went on to ask: 'on what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the Tribunal will know precious little about? The Tribunals would be entering into a form of wage fixing for the disabled sick.' Secondly, the EAT held that the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. None of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled.

  The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.
- The EAT allowed Mrs. O'Hanlon's appeal against the finding that there was no disability related less favourable treatment. The EAT distinguished the case of *Hood v London Club Management*, as it turned on its own facts. The EAT had no doubt that the analysis in *Hood* cannot run when the claim is for ordinary pay, or indeed sick pay where full pay is given for a period of sickness. The decision of the Court of Appeal in *Clark v Novacold* then requires a comparison with someone who has not had the disability related sickness absence. Such a person would not have suffered the loss of pay since he would not have been absent for over twenty six weeks. It was the disability related sickness absence which took the Appellant over the sick pay threshold. The employment tribunal had wrongly compared Mrs O'Hanlon with a non-disabled person who was absent for the same length of time as she had.
- The EAT upheld the tribunal's finding on justification. If the objective test for imposing a reasonable adjustment to the sick pay policy did not bite, then there was never any real possibility that the more subjective test of justification would not be satisfied. That is not inevitably so in all cases, but in the view of the EAT it is here where the same failure to pay full pay lies directly behind both discrimination claims. The Tribunal found that there were powerful economic reasons for the rule

adopted. It would cost a very significant sum to pay full pay to all disabled employees absent sick in circumstances where their pay would otherwise be reduced. That must be a basis for a reasonable employer taking the view that, in line with the *Jones* case, there was a material and substantial reason for the discrimination.

The case has been appealed and is due to be heard, we understand, in March this year – so this matter is not yet closed.

In the interim, however, it is fair to say that whilst it is debateable as to whether or not the payment of sick pay acts as a 'positive disincentive' to return to work, it is true that the focus of the DDA and, in particular, the duty to make adjustments is on keeping disabled people in work. That is not to say, though, that adjustments to a sick pay scheme may never be required, as acknowledged by the EAT, or that paid time off – such as for a period of rehabilitation – may not be required. Generally, though, providing that all reasonable adjustments have been made to enable a disabled employee to remain in the workplace, and that time off for rehabilitation, if necessary, has been given, an employer is likely to have fulfilled its obligations under the DDA. It is notable that in this particular case, the employer had made adjustments on three occasions to assist Mrs. O'Hanlon in returning to work. They had twice reduced her hours so as to enable her to return to work without facing the immediate strain of full time employment, and they changed her location so as to reduce the pressures from commuting. Further, it was not suggested in any way that her absence could be attributed to any failure on the part of the employer to take steps to assist her in her return to work. By contrast, in the *Meikle* case, liability arose because of the failure to make reasonable adjustments to enable Mrs. Meikle to return to work. This had the knock-on effect of rendering the failure to give her full pay unjustified.

It is also worth noting that in the case of *Fowler v London Borough of Waltham Forest* UKEAT/0116/06/DM, which has recently been handed down, the EAT followed the case of *O'Hanlon*. The claimant had been absent from work for 4 years, for a disability-related reason, and there was no likelihood of his returning to work in the immediate future. The EAT upheld the decision of the ET that payment of wages and sick pay beyond that provided for in the respondent's sick pay policy did not constitute a reasonable adjustment within the meaning of (what was then) s.6 DDA. As with *O'Hanlon*, the EAT held that save in exceptional circumstances, payment of wages or sick pay to a disabled person absent from work could not constitute on its own a reasonable adjustment because it could not be said to facilitate a return to work. Further, in most cases it would be reasonable for an employer to decide that it was appropriate to pay those employees who attended work and not to pay those who did not. Any difference in treatment therefore between disabled employees and those who were not would be justified.

Whilst a firm conclusion on payment of sick pay will need to await the decision of the Court of Appeal, it is safe to say that whatever the outcome of *O'Hanlon*, employers do need to consider their sick pay schemes very carefully. They must also ensure that they make all the necessary reasonable adjustments to retain disabled employees.

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Burden of proof provisions revisited

Madarassy v Nomura [2007] EWCA Civ 33

Background

On 26 January 2007 the Court of Appeal handed down its judgment in the long-running case of *Madarassy v Nomura*. Mrs Madarassy's appeal was dismissed as were the appeals in two other cases heard at the same time, *Brown v Croydon LBC* (2006/0480) and *Appiah & Anor v Bishop Douglas RC High School* (2005/2495).

All three appeals concerned the application of the provisions on the burden of proof in discrimination cases set out in SDA s 63A, RRA s 54A, DDA s 17A(1C), SOR reg 29, RBR reg 29 and AR reg 37. In summary, where the claimant proves facts from which a tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed discrimination ('Stage 1' or a 'prima facie' case) the tribunal shall uphold the complaint unless the respondent proves that he did not commit that act (i.e. the burden of proof is on the respondent at Stage 2).

Implications for practitioners

After *Madarassy* the main implications for practitioners are:

1. An appeal will not succeed just because the *Igen* guidelines have not been followed in sequence, paragraph by paragraph, by a tribunal. A variety of approaches are permissible, including one which starts at 'Stage 2' and works backwards.
2. A claimant will have to work harder than has previously been thought to be sure of establishing a prima facie case. The Court came tantalisingly close to defining its components but sadly more clarity is needed.

The facts

Andrea Madarassy was made redundant by Nomura in 2001 not long after she returned from maternity leave. She started proceedings for sex discrimination and unfair dismissal in the ET in late 2001. Her claim, which comprised a large number of allegations of discrimination, was dismissed by the ET apart from a claim that the absence of a health and safety risk assessment was discrimination. The EAT dismissed the majority of her appeal but referred three points back the ET for reconsideration together with the H&S point. The appeal to the CA comprised a number of points, the main one being that the ET had misdirected itself on the burden of proof. Other points included issues arising from time limits, the H&S issue and the fact that the ET appeared to be looking for a male comparator in a pregnancy discrimination case.

Court of Appeal

The unanimous decision of the Court was written by LJ Mummery. The CA has said that the guidance on how to apply the burden of proof provisions set out in *Igen Ltd v Wong* [2005] IRLR 2258 still holds and does not need amendment. However, its status is as guidance only and exactly how the burden of proof provisions are applied will depend on the circumstances of the case. There is no strict formula for how the ET should approach the evidence. Moreover *Igen* is not authority for saying that the burden of proof passes to the respondent as soon as the claimant can show a difference in sex (or race etc.) and a difference in treatment. More evidence is needed from the claimant before a tribunal can conclude that there is a prima facie case.

Some guidance was provided on how to identify the prima facie case:

1. the facts that the claimant must prove are not simply that the respondent 'could have' committed discrimination, 'Could conclude' must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it'.
2. The tribunal may, and inevitably will, look at all of the evidence before it in one go and as well as evidence this will include, explanations put forward by the respondent as to why the tribunal should conclude that there is no prima facie case to answer. Section 63A does not prevent a tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing or rebutting the claimant's evidence of discrimination. What is a reason and what is an

explanation should not be agonised over, it is just semantics.

3. A tribunal should assume that there is no adequate explanation if one is not put forward but there is no statutory presumption that there is no adequate explanation.
4. The comparator, real or hypothetical, must be in the same, or not materially different, relevant circumstances as the claimant.

In terms of procedure, the Court approved the approach of Elias J in the EAT in *Laing v Manchester City Council* [2006] IRLR 748. He said that it may well be that it is best first to ask the respondent to explain 'the reason why' rather than addressing Stage 1 first. To do so was not an error of law and was a sensible way to approach the evidence in some cases, particularly where the comparator is hypothetical,

Although there is no need for a comparator in pregnancy/ maternity cases, the Court said that evidence of how a man might be treated might be used for illustrative purposes.

Comment

Most commentators are agreed that the decision of the CA is confusing. The question is whether the judgment is so scrambled as to make the whole unhelpful to the extent of undermining *Igen* or whether there are some parts which provide useful guidance. Some say that all that is now clear is that (1) where *King* gave a tribunal the choice of whether to draw an inference, section 63A says that a tribunal must do so and (2) there is no longer an opportunity for a tribunal to attribute to the respondent a non discriminatory explanation where one is not provided.

I think that the decision does a little more than this although it is disappointing for claimants that during most of the 'timeline' that is the hearing the burden will be on them to prove the Stage 1 case. At the end of its findings of fact the tribunal will consider the respondent's explanation if the question 'why did this happen' remains unanswered. There is a danger that in more cases than before a tribunal will never ask this question because it considers that the claimant has not produced enough evidence to get over Stage 1.

The most confusing part of the judgment is the way it looks at the 'absence of an adequate explanation' question. It says *both* that the respondent's explanation can be taken into account at stage 1 *and* that the tribunal should assume no adequate explanation which appears to be contradictory. It is dangerous to assume that there is any logic in this contradiction.

It is clear that (1) more appeals will be needed to establish what was meant, and (2) the Court of Appeal does not think that the 'assumption of an adequate explanation' is there to assist the claimant to shift the burden of proof at an early stage. This is simply inconsistent with *Igen*.

However, the CA has emphasised that *Madarassy* has not changed the law and that *Igen* is still the main authority on how to interpret the burden of proof. Also, the Court has already emphasised the weight of the burden on employers to provide cogent explanation in *EB v BA* [2006] IRLR 471.

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Briefing 437

Disclosure prohibited by law

Barracks v Coles and another [2007] IRLR 73 EWCA

Implications for practitioners

This case involved a challenge to the refusal of disclosure of information. In practice, the majority of practitioners are unlikely to come across a situation where they are unable to request, on a Claimant's behalf, the disclosure of information where the Respondent can raise national security interests to justify the refusal. However, the case does raise an interesting point on the burden of proof and negating the inference of discrimination.

Background

Ms. Barracks (B), a black woman was employed in 1991 by the Metropolitan Police as a police constable.

In 2004, B applied for a position as a field intelligence officer on the newly formed Operation Trident Desk, an operation which had been set up in response to the disproportionate high levels of gun related murders in London's black communities. B's application for the position was unsuccessful and instead, a white officer was offered the post.

B sought feedback to her application and was told by Chief Inspector Coles 'it is inappropriate for you to join Trident' and 'I can't tell you why that is. It is a difficult position.' B consequently requested a more detailed explanation and when her employer refused to comment further, she brought a claim for direct race discrimination.

Employment Tribunal

The police denied that B had been subjected to racial discrimination and submitted that the reason for her being unsuccessful was that B failed the vetting check. They asserted that they were unable to provide any further explanation as they were prohibited by law.

At a case management discussion B requested disclosure and the ET chairman subsequently made an 'unless' order requiring the police to provide more information as to why B was not considered for the position and/or to notify the Tribunal of the legal basis of its claim that it was prohibited by law from providing further information. If the police failed to provide this information then their response to the claim would be struck out without further consideration of the proceedings.

Employment Appeal Tribunal

The police appealed. Before HHJ Anstell, sitting alone, the EAT allowed the appeal. The case was remitted to the ET for a hearing on the merits without the particulars sought by B.

Counsel for the police, David Pannick QC applied a three pronged argument. Firstly, he contended that the question of B receiving a fair hearing by her not obtaining disclosure did not come into it as the police, in not providing the requested information, ran a risk of losing the case in that they disabled themselves from defending the allegation. Secondly, he argued that there were other well recognised situations such as in public interest immunity claims where disclosure is not permitted. Thirdly, there were statutory procedures available in exceptional cases whereby sensitive information could be disclosed to the court although not the claimant.

Following on from this submission, HHJ Anstell arrived at his decision by holding a 'disclosure meeting' where the police and their legal team were present but not B or her legal representatives. HHJ Anstell was satisfied in this meeting that the police were prohibited by law from revealing not only the reasons for B failing the vetting check, but also, why the Police were prohibited by law from providing any further explanation.

The EAT rejected B's counsel's view that non disclosure prevented B from enjoying her right, under Article 6 ECHR, to a fair hearing, and her right under Article 7 RD to an effective judicial remedy for race discrimination. B appealed.

Court of Appeal

The CA agreed with the EAT and remitted the matter for a substantive hearing without the disclosure of evidence sought by B. The Court found that the tribunal had been incorrect to order disclosure which they were prohibited to do by law. The Court directed that the correct approach was for the tribunal to consider disputes about non-disclosure as they arose during the course of the substantive hearing.

The Court made it clear that should the need arise at the substantive hearing, B could make legal submissions to the tribunal on the legal and evidential position, should the police refuse to answer a question put by B in cross-examination or to produce a document relevant to their case. It commented that these submissions could relate to the inferences to be drawn from the evidence, to the burden of proof and as to the legal entitlement of the police to refuse to answer B's questions or request documents, which includes the ECHR and EC arguments.

The CA also directed that when the tribunal heard the case, it should disregard HHJ Anstell's comments on his finding at the 'disclosure meeting' as the CA found that such a meeting should not have occurred, that it should not have been held on the appeal from the unless order but at the substantive hearing after the tribunal had heard all the evidence.

Comment

Obviously, the burden will be on B to prove her case. B has to prove facts from which the tribunal could, apart

from s.54 A of the 1976 Act, conclude, in the absence of an adequate explanation, that the police had discriminated. However, if B proves those facts, the tribunal is then required by s.54 A to uphold the complaint, unless the police prove that they did not commit the act of discrimination.

Whilst B may have a difficult hurdle to overcome, if she succeeds, the police may have an equally difficult time, with limited evidence, to put forward a case to negate the inference of discrimination.

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Briefing 438

When an employee is entitled to compensation for injury to feelings

Assoukou v Select Service Partners Ltd & Others [2006] EWCA Civ 1442

Implications for practitioners

This case raised the question of whether an employee was entitled to compensation for injury to feelings for sex discrimination when he was no longer eligible to work by law and when he had suffered injury to feelings as a result of that prohibition. Interestingly, the CA's award in respect of injury to feelings was below the guidelines set out in the case of *Vento v West Yorkshire Police* [2003] IRLR 102.

Background

Mr. Assoukou (A) brought proceedings before the ET complaining of unfair dismissal and sex discrimination against his former employer, Select Service Partners Limited. The employer was late in submitting its defence and was consequently debarred from defending those claims.

Employment Tribunal

The ET upheld A's complaints. It made a basic award of £160.80 in respect of the unfair dismissal claim but did not make any compensatory award for injury to feelings on the grounds that A was not allowed to work. It transpired that A's entry into the UK was subject to the supervision of the Home Office's Immigration and Nationality Department. A letter from the Secretary of State prohibited A from taking employment after 29 October 2005. A's employment had terminated on 20 October 2005.

Employment Appeal Tribunal

A appealed and although he failed to turn up for the hearing, the appeal went ahead in his absence. The EAT dismissed his appeal commenting that there was no ground upon which the ET's decision not to make a compensatory award could be challenged in law. The EAT also commented that it was not surprising that the ET had not awarded the employee any compensation in respect of injury to his feelings, given its findings that the employee could not work for his employer following the Home Office's decision to prohibit A from taking employment. It also held that A's anger and frustration in respect of the fact that the employer no longer employed him did not stem from the sex discrimination claim but from the decision that the Home Office prohibited A from working. A appealed.

Court of Appeal

The CA found that as A had suffered anger and frustration, as described by him before the ET and in the pleadings. He was therefore entitled to an award of compensation. The appropriate amount was held to be £500.

Comment

The case confirms that if a contract of employment becomes unlawful or illegal, an employer can still be liable for acts of discrimination occurring before that date, which would include compensation for injury to feelings. However, in assessing injury to feelings a tribunal needs to distinguish between any injury to feeling caused by the lawful termination and any caused by the unlawful discrimination.

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Associative disability discrimination point correctly referred to European Court of Justice

Attridge Law and S Law v Coleman [2007] IRLR 88 EAT

Implications for practitioners

The EAT has dismissed an appeal against a decision by an ET to refer questions directly to the European Court of Justice for a preliminary ruling on whether associative disability discrimination is covered by the Employment Directive (ED). This case could, ultimately, have significant implications for the rights of carers and others who are 'associated' with disabled people. There are currently 6 million people providing unpaid care in Britain – most of them women.

European Law

- Article 1 ED provides:
  'The purpose of this Directive is to lay down a general framework for combating discrimination **on the grounds** of religion or belief, **disability**, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'
- Article 2(1) of Directive 2000/78 provides:
  'For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the **grounds** referred to in Article 1.'

Facts

Miss Coleman (C) has a 4 year old son who is disabled, but she herself is not disabled. Her son has significant support needs resulting from congenital laryngo-malacia, broncho-malacia and apnoeic attacks. C alleges that her employer failed to grant her flexible working opportunities in contrast to mothers of non-disabled children working for the same employer. This led to her resignation. C claims that she was unlawfully discriminated against by her employer due to her son's disability.

The claimant is not disabled but she complains that she has been subjected to disability discrimination on the grounds of being the carer of a disabled person, namely her son (who, it is accepted, is disabled within the definition set out in the DDA 1995). It was argued on behalf of C that discrimination **by association** with a disabled person is covered by the ED (which prohibits discrimination 'on the grounds of' disability). Further, it was submitted that the DDA, as amended by Regulations (SI 2003/1673) which were brought in to ensure that the DDA fully implemented the disability strand of the Directive, must also be construed in this way.

Employment Tribunal

At a pre-hearing review, the ET Chairman ordered that the question of whether discrimination by way of association with a disabled person (or 'associative discrimination') is prohibited by the ED should be referred to the ECJ for a preliminary ruling. The employer appealed against that reference order, arguing that the wording of the relevant provisions of the DDA makes it clear that the Act is designed to protect those who are disabled from discrimination and that it is not possible to construe the DDA in such a way as to include protection from associative discrimination, whatever the true interpretation of the Directive.

The EAT, however, agreed with the ET that the DDA is capable – without distorting the words of the statute – of interpretation in a way which is consistent with an interpretation of the Directive which includes associative discrimination and which is consistent with the domestic Courts' responsibility to arrive at a construction which ensures that the Directive is fully effective (as Parliament presumably intended when passing the amending Regulations). The EAT held that the ET had been entitled to conclude that, in order to determine the preliminary issue of whether the Claimant could bring a claim of associative discrimination under the DDA, it was first necessary to obtain the ECJ's opinion as to the proper interpretation of the Directive, before deciding whether the DDA should be construed in this way.

The EAT also made the important point that

reference is necessary not solely where, whichever way the point is decided, it is conclusive of the case, but also where it is required to do justice.

European Court of Justice

At the ECJ any member state can send in observations about the case as well as those from the parties and the European Commission itself. Currently the ECJ received observations from Greece, Italy, Lithuania, The Netherlands, Sweden and the European Commission as well as from the Applicant. They have received nothing from either the Respondent or the UK government who are now out of time to put in any observations.

Comment

Should the ECJ rule that the Directive does not prohibit associative disability discrimination then Miss Coleman's claim will be struck out. The Directive is not directly enforceable between the parties and it is common ground that the DDA does not, on its face, prohibit associative discrimination. However, if (a) the Directive prohibits associative discrimination and (b) the DDA can be read consistently with such a construction of the Directive, then the Claimant establishes a valid cause of action.

In the meantime, the DRC is currently advising that if an individual believes that they have been discriminated against in employment (or a related area) because of their association with a disabled person – even though they themselves are not disabled – they should follow the statutory dispute resolution procedures where they apply and/or submit a claim under the provisions of Part 2 of the DDA in the employment tribunal within the relevant prescribed time limitation period. They should then ask the tribunal to stay the case pending the outcome of this reference to the ECJ.

Additionally, the DRC has submitted to government proposals on a new definition of disability. The proposed definition would cover discrimination on the basis of a person's association with a disabled person.

Martin Crick
Disability Rights Commission

Briefing 440

Direct discrimination in disability cases

High Quality Lifestyles Ltd v Watts [2006] IRLR 850 EAT

Implications for practitioners

The concept of direct discrimination was introduced to the DDA relatively recently, by means of the Disability Discrimination Act 1995 (Amendment) Regulations 2003. There has been little caselaw on the scope of direct discrimination. The only case to reach the EAT so far on this question is a case involving someone with HIV.

Facts

This case concerned Mr Watts (W) who successfully applied for a post as a support worker in January 2004. His employers provide specialist services to people with learning difficulties, autistic spectrum disorders and those who present with severely challenging behaviour. Occasionally support workers are scratched and bitten by service users, sometimes drawing blood. W was diagnosed as HIV positive in June 2000. He did not disclose his condition initially but when he was promoted to the post of acting shift leader in 2004, he did disclose his condition to his manager and allowed his employers to contact his consultant. His consultant reported that the risk of onward transmission of HIV from occupational exposure is very small. However, W was told that a risk assessment would be carried out. He was also told that it was likely that he would be dismissed as a result of the risk assessment. In addition, he was asked if he would agree to his HIV status being disclosed to the local social services department and to all staff – to which he was not prepared to give consent. Shortly afterwards, he was suspended on the basis of dishonesty regarding the non-disclosure of his medical

condition. The risk assessment – which was not commissioned specifically in respect of W, but about HIV more generally – found that occurrences of injuries resulting on broken skin were relatively common. Following receipt of this, W was dismissed on the basis of his position being 'untenable' in the light of the risk assessment. An internal appeal against the decision was rejected. W brought a claim of discrimination under the DDA, claiming that both his suspension and his dismissal were discriminatory, as was the fact that his condition had been disclosed to other staff members.

Employment Tribunal

The ET held that there had been direct discrimination against W by his employers when they dismissed him and, additionally, there had been disability related discrimination by suspending then dismissing him, and in breaching his confidentiality. The employers appealed.

Employment Appeal Tribunal

The EAT upheld the appeal. They held that the ET erred in finding that the claimant had been directly discriminated against because he was HIV positive, rather than because of the risk of transmission of that condition to others. In determining whether a person has been treated less favourably on the ground of his or her disability, the comparator may be, but need not be, the same comparator as is envisaged for the purpose of disability related discrimination. This is because s.3A(5) focuses upon a person who does not have 'that particular disability'. The circumstances of the claimant and of the comparator must be the same 'or not materially different'. One of the circumstances is the comparator's abilities but since this is prefaced by 'including', it follows that more circumstances are relevant than simply the comparators abilities. In the present case, the tribunal failed to impute relevant circumstances to the hypothetical comparator. Assuming, as the ET correctly did, that the comparator has the same 'abilities, skills and experience', the comparator must also have some attribute, whether caused by a medical condition or otherwise, which is not HIV positive. This attribute must carry the same risk of causing to others illness or injury of the same gravity, here serious and possibly fatal. If the ET found that the comparator would have been dismissed, then the claimant has not been less favourably treated. The EAT went on to say that in any event, the ET's finding as to whether the claimant was suspended and dismissed because of his condition rather than because of the risk of that transmission to others were inconsistent and its conclusion that there had been direct discrimination was perverse. The finding was set aside and the claimant's case on this ground dismissed.

With regard to the disability related discrimination, the EAT upheld the decision of the ET. The tribunal plainly decided that the employers did not act reasonably because they failed to carry out a proper investigation or adequate risk assessment of the situation created by the claimant's condition. Although the threshold for justification is low, there was a sound basis for the ET's conclusion.

In respect of the disclosure issue, the EAT found that the ET had erred in finding that the employers had subjected W to a detriment by disclosing his HIV condition to others. Disclosure to W's line manager, who was attending a meeting in place of the area manager, was not a breach of confidentiality. W therefore suffered no detriment and there was no breach of the DDA.

Comment

Direct discrimination in the context of disability is but one of three means by which a disabled person may be subjected to discrimination. It is particularly important in tackling prejudice and assumptions made about disabled people – as illustrated very well by the first instance decision of *Tudor v Spen Corner Veterinary Centre Ltd and anor* (where a woman who had a stroke and became blind was dismissed in circumstances where, it was held, a person who telephoned her employer to report a broken leg would not have been dismissed). It is not without its limits though. Whilst in relation to sex and race, for example, the 'relevant circumstances' which have to be materially similar between the complainant and the real or hypothetical cannot include those directly related to the ground of discrimination complained of, it appears that such a restriction does not apply in the context of direct disability discrimination – as illustrated by this case.

Disability related less favourable treatment, on the other hand, is a much broader concept, which, although subject to justification, is particularly powerful when coupled with the duty to make

reasonable adjustments (and it is important to remember that where compliance with the duty would have removed any potential justification, then such justification cannot be relied upon). Thus where direct discrimination is pleaded it is also important to plead both a failure to make reasonable adjustments, where applicable, **and** disability-related less favourable treatment.

Catherine Casserley
Disability Rights Commission

Briefing 441

When time starts to run

Virdi v Commissioner of Police of the Metropolis and anor [2007] IRLR 24 EAT

Facts

Mr Virdi (V) was a police sergeant of Asian origin. He has poor eyesight with a 20% impairment in his eyesight overall, though the vision in his left eye is much worse than in his right. Because of his poor eyesight, he requested that a reasonable adjustment be made for him in the promotion exams. No adjustment was made and he failed one of the examinations that would lead to his promotion. There was a scheme, though, which would allow V to gain promotion other than by doing exams. He applied to take part in this scheme. He took part and his case went to a Central Review Panel, but he was not promoted. He appealed against this decision and the appeal panel met and reached a decision on June 2. V was informed that he had been unsuccessful on June 3.

V employed solicitors to file claims of direct race discrimination and victimisation on his behalf. These claims were lodged with the Tribunal on 2 September 2005. On November 18th he amended his claim to add a claim of disability discrimination against the 2nd respondent, the Central Police Training and Development Authority, the statutory body responsible for running the examinations.

Employment Tribunal

At a preliminary hearing the chair ruled that the claims were out of time and that it was not just and equitable to extend the time limit. The chair concluded that time started to run from the day that the decision was made, June 2nd, not from the day that he was informed of the decision of the appeal panel, consequently his claims were lodged a day late. Secondly, she decided that it was not just and equitable to permit the time limit to be extended as V was 'very familiar with the tribunal process and there is no explanation for the delay'.

Employment Appeal Tribunal

V appealed on two grounds, namely, that his claim was not out of time because time did not start to run until he was informed of the decision in question and secondly, if it was out of time then it was just and equitable to allow his claim. On the disability discrimination claim he argued that it was just and equitable to allow his claim to proceed.

V argued that the claims were not out of time as the Appeal Panel had made their decision on 2 June, but they had not communicated their decision to him until 3 June. Therefore, he claimed, the three months' time limit to submit a claim ran from 3 June. Hence, his claims were not out of time. Elias P rejected this argument saying,

> *...I concede that there is much to be said for time not beginning to run until an employee is made aware of the decision which confers the cause of action. But that is not how the legislation has been drafted; the question is when the act is done, in the sense of completed and that cannot be equated with the date of communication…It follows that the claim was a day late.*

Therefore, the time limit began to run from the date when the decision was taken not to promote him. V's appeal was unsuccessful on this point.

However, the EAT held that when a discrimination claim has been submitted out of time, an ET, in exercising its discretion as to whether the claim should

441

be extended on a 'just and equitable' basis, must consider any fault of the claimant. In this case the EAT considered that the claimant was not at fault, and that he could not be held responsible for the failings of his solicitors. They said:

> *... it is not legitimate for a Court to refuse to extend time merely on the basis that the solicitor has been negligent and the claimant will have a legal action against the solicitor.*

In this case the availability of a legal action against his solicitor was an important consideration in the exercise of the ET's discretion as to whether to extend the time limit. The EAT ruled that, in general, where the solicitor is at fault that should not reflect adversely on the claimant. They ruled that it was just and equitable to extend time for the race discrimination and victimisation claim. However, since the disability discrimination claim was more substantially out of time it could not be said that the only possible exercise of discretion was to extend the time limit, consequently this aspect of the case would be remitted to a different ET to determine whether it was just and equitable to extend the time limit.

Eleanor Williams
Capital Law
Capital LLP, Cardiff

442

Briefing 442

Coping strategies' in disability

Commissioner of Police of the Metropolis v Mr GS Virdi
UKEAT/0338/06/RN

Facts

This case is linked to the earlier case in Briefing no 441. Mr Virdi (V) is a sergeant in the Metropolitan Police. He has poor eyesight. He has 20% impairment in his eyesight overall, though the vision in his left eye is much worse than in his right. He has reduced his driving significantly and can only read if he takes breaks. The question was whether he was disabled.

Employment Tribunal

The ET expressly referred to the fact that V had coping strategies. For example, he would move his head when crossing the road or trying to recognise someone, and he would need to rest for some time after reading for a period or when using a computer. His reading span was limited to about thirty minutes.

The ET considered the cases of *Vicary v British Telecom plc* [1999] IRLR 680 and *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19. The ET concluded that the *Leonard* case says that the ET must not focus on coping strategies. It should focus on what he cannot do. The *Vicary* case says that a Tribunal must not make the mistake of taking the efforts that a person makes to mitigate the effect as impacting on the severity of the disability. This led her to conclude that he had a disability which had a substantial adverse effect.

Employment Appeal Tribunal

Elias P considered paragraphs A7 and A8 of the Guidance on 'matters to be taken into account in determining questions relating to the definition of disability.'

> *A7. Account should be taken of how far a person can reasonably be expected to modify behaviour to prevent or reduce the effects of impairment on normal day-to-day activities. If a person can behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities the person would no longer meet the definition of disability.*

A8 sets out that coping strategies must be taken into account when it comes to deciding if an individual is disabled or not. So, a person who suffers from stress may stutter. If that person avoids having to speak in stressful situations, then he may control his stutter. This would be a coping strategy. But, sometimes, he may have to speak in stressful situations. Then, he would have no coping strategy to mask his disability. In assessing whether he has a disability, account should be

taken of his coping strategy.

Paragraph C19 of the same Guidance deals specifically with eye sight. It states:

> *If a person's sight is corrected by spectacles or contact lenses, or could be corrected by them, what needs to be considered is the effect remaining while they are wearing such spectacles or lens in light of a level and type normally acceptable to most people for normal day to day activities.*

Two previous cases before the EAT, *Vicary v British Telecom plc* [1999] IRLR 680 and *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19, are authority that a Tribunal must focus on what the claimant cannot do, or can only do with difficulty, rather than what the claimant can do. The original chair had taken these two cases to mean that, as V could read, only with difficulty, he was disabled within the meaning of the DDA.

The appeal by the Commissioner conceded that V had a physical impairment which had a long term effect on his ability to carry out normal day to day activities. But the Commissioner disputed whether the effect was substantial.

Elias P stated at paragraph 19,

> *In my judgement there is no doubt that the Tribunal has fundamentally misinterpreted the effect of those two decisions [Vicary and Leonard]…I do not see, even on the most charitable of constructions, one can read the words [in the way the Tribunal has]. The directions [the Chair] has given herself in relation to coping strategies and mitigation involves a clear error of law and contradict the guidance in A7.*

The EAT held that the Tribunal did misunderstand the significance of coping strategies. Since that error may have affected the Tribunal's conclusion that the claimant was disabled, the appeal was upheld and the matter remitted to the Tribunal for reconsideration.

Eleanor Williams
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Capital LLP, Cardiff

Briefing 443

Discrimination on grounds of race and sex

Network Rail v Griffiths-Henry [2006] IRLR 865 EAT

Facts

Ms Griffiths-Henry (GH) was employed as an area finance controller by Network Rail (NR). She started work in September 2002 as an area finance manager and was promoted to area finance controller in April 2003. She was away on sick leave at the end of 2003, and then again from March 2004 until she had a phased return to work in August 2004 when she was put under a new manager. Between June 2003 and July 2004 there was a major re-organisation of NR's business which resulted in a TUPE transfer of 15,000 employees. Following this there was a redundancy process and consequently nine area finance controllers were competing for five jobs. All the candidates apart from GH were white men.

Each candidate was assessed according to a set of skills based criteria; this was done by looking at their CVs, their expressed job preferences and the Manager's assessment of them. The Manager's assessment was based on his knowledge of the candidates. GH was assessed to be the second lowest of the job candidates; she was therefore not offered one of the posts. She claimed that she had been subjected to discrimination on grounds of sex and race and that she had been unfairly dismissed.

Employment Tribunal

The ET noted a number of shortcomings and inconsistencies in the way that she had been assessed compared to some of the other candidates. They said:

> *…there was a difference of race and sex and a difference of treatment. It follows that the claimant has proven facts from which we could conclude, in the absence of an adequate explanation, that the respondent committed an act of discrimination.*

The ET noted that NR's explanation for her non-selection was that they had carried out 'an exercise based on objective criteria which were non-

discriminatory' however, they found that it was 'tainted by subjectivity' and was therefore not an objective process. They concluded that she had been subjected to discrimination on grounds of race and sex and she had been unfairly dismissed. NR appealed on the basis that the ET were not entitled, on the evidence, to find that discrimination could be inferred, they did not appeal against the finding of unfair dismissal.

Employment Appeal Tribunal

The EAT looked first at whether there was a prima facie case of discrimination. Elias P commented:

> *We note that in Dresdner Kleinwort Wasserstein Ltd. v Adeboyo [2005] IRLR the EAT (Mrs Justice Cox presiding) suggested obiter that an employee would be able to establish a prima facie case if he were black, was at least as well qualified as the white comparator, and was not promoted. We would accept that this could be the case, but it would depend on the circumstances. If there were only two candidates, which we think the judge probably had in mind, we would respectfully agree. But obviously the case becomes weaker where there are a number of candidates and the unsuccessful black candidate is rejected along with a number of equally well qualified white candidates. There is then no distinction between all the unsuccessful candidates and the justification for inferring a prima facie case is significantly weaker.*

Nonetheless he concluded that the combination of her non-selection and the selection of five equally qualified white men taken together with the inconsistencies in the appointment process did mean that a prima facie case had been made out. The EAT therefore ruled that the ET had been correct to rule that it fell to NR to explain why they had selected five white men.

The ET at this second stage then has to determine why the employer acted as he did. In assessing the weight of the burden imposed on the employer Elias P commented:

> *...it seems to us that the burden imposed on the employer will depend on the strength of the prima facie case. A black candidate who is better qualified than the only other white candidate and does not get the job imposes a greater burden at the second stage than would a black candidate rejected along with some others who were equally qualified...*

The EAT accepted that there was some evidence which could have led to a finding of race or sex discrimination, however, the fact that there were inconsistencies in the way that the selection criteria had been applied did not, of itself, mean that there had been discrimination although it would justify a finding of unfair discrimination. They therefore remitted this aspect of the case to the ET.

Another ground for the appeal was that the ET did not separately consider the grounds of race and sex. Whilst the EAT did not accept that the ET had done this, the EAT reaffirmed the *Bahl v Law Society* [2004] IRLR 799 ruling that the ET must consider the evidence with regard to each ground separately.

Comment

The approach taken by the EAT in this case is undoubtedly retrogressive. The problem is that it fails to take into account the intention behind the burden of proof regulations to make employers explain what has happened in the context in which they may have discriminated. What Elias P says is 'obvious' is perhaps less obvious when it is realised what is intended by the absence of an adequate explanation. If there is an assumed absence of an adequate explanation at the first stage then there is no good reason for the failure to select the black candidate, in such assumed circumstances it is for the employer to provide an explanation. If the employer has attempted to make a properly objective decision in selecting the successful candidate this should prove little problem. If his reasons are subjective then he will have to prove that they were not on racial grounds. The burden is then on him.

Elias P in re-affirming his ruling on *Bahl* fails to take account of this change in the burden of proof. It may be that the way now lies open to argue that once a prima facie case of race and sex discrimination (for example) has been established this will be sufficient to justify a finding of sex and race discrimination if the employer fails to provide an adequate explanation.

Gay Moon
Editor

Without prejudice protection under the spotlight

Brunel University and Professor Schwartz v Professor Vaseghi and Ms G Webster
UKEAT/0307/06

Two areas of employment law which often cause concern to practitioners and employers are considered in this case; addressing employee grievances, and attempting the settlement of tribunal matters through Without Prejudice discussions. This case examines their relationship with the public interest and need for justice in race discrimination claims. The EAT judgment clarifies that a further potential layer of protection for settlement discussions by the Without Prejudice doctrine has been stripped away.

Facts

In 2004 Mr Vaseghi (V) and Ms Webster (W) brought separate ET claims of race discrimination against Brunel University (BU). Immediately prior to the ET hearing, BU's Counsel engaged the claimants' advisors in settlement discussions. The settlement discussions did not prove successful, and the cases proceeded to the ET.

After the hearing was concluded, Professor Schwartz (S) issued a newsletter commenting upon the use of Brunel University resources for the defence of ET cases, which he felt was regrettable. In a further newsletter in March 2005 S again referred to the cost of defending the cases brought by V and W, and stated that the funds of the claimants' Union had been used to support *'futile litigation'…'to the detriment of everyone concerned'. S finished his article by vowing that 'the University will defend its reputation against unfounded allegations, especially when these are accompanied by unwarranted demands for money, as in both EAT cases'*. (The EAT cases referred to here were the claims brought by W and V). These newsletters were circulated to students and staff employed by BU.

The claimants raised grievances against S in respect of his comments. The University convened a panel to address the grievances, which took evidence from a Professor Sahardi who had led the University's team at the tribunal. He described the settlement discussions which had taken place to the Panel. The grievances were not upheld. The Panel reasoned that as V and W had decided to proceed with their claims when only financial compensation remained an issue (non-financial points having been agreed during settlement discussions), S's comments were justified.

V and W raised fresh tribunal claims of victimisation in respect of the comments. In their responses to the claims BU and S made reference to the grievance hearings which had taken place and the report detailing Professor Sahardi's evidence. No issue of admissibility of Without Prejudice evidence arose in the pleadings at this stage.

V and W's witness statements in respect of the victimisation claims included direct evidence from their advisors during the original tribunal hearings as to the nature of the Without Prejudice discussions which had taken place, along with reference to the grievance hearings and report.

Employment Tribunal deals with admissibility issue

The tribunal was asked to make a preliminary decision as to whether the grievance hearing report (referring to the evidence of Professor Sahardi) and the evidence of the original solicitor was admissible. The ET decided that the report of the grievance hearings was admissible, as the respondents had waived Without Prejudice protection by referring to it in their response.

However, the ET found that direct evidence of the original discussions was inadmissible although it failed to provide clear reasoning for this decision.

BU and S argued that both the grievance report *and* the witness evidence of the original discussions should be inadmissible. V and W argued that all of the contested evidence should be admissible. The matter was appealed and cross-appealed to the EAT.

Employment Appeal Tribunal

Distinction between verbal or written settlement discussion evidence?

The EAT concluded that the tribunal's decision to admit the written grievance report (which referred to the verbal discussions) was correct, but its decision not

to admit the solicitor's evidence of the original verbal discussions was an illogical 'partial waiver'. Both parties at the EAT agreed that the EAT should decide on the admissibility of both types of evidence without distinction. Whatever the difficulties in proving the content of verbal Without Prejudice discussions, the EAT confirmed that rules concerning their admissibility should be the same as for written evidence of settlement efforts.

Existing law

The EAT reiterated the existing law in respect of Without Prejudice protection, confirming that coverage is afforded to attempts to compromise actual or pending litigation, with no need for the label of Without Prejudice to be explicit where efforts are being made to compromise an actual dispute. The EAT confirmed that Without Prejudice protection had applied, originally, in this case.

'Unambiguous impropriety'

The respondents used previous case law to try to show that Without Prejudice protection should only be lost when one party behaves with 'unambiguous impropriety', arguing that there was 'insufficient impropriety' in this case for the parties to have lost Without Prejudice protection.

Assessing this argument, HHJ Ansell referred to a phrase first used in *Jones v Tower Boot* [1997] IRLR 168, namely the 'very great evil of discrimination' which was referred to again in Mrs Justice Cox's judgment in *BNP Paribas v Mezzotero* [2004] IRLR 508, and which went on to underpin the decision in this case. In the *Mezzotero* case, Mrs Justice Cox preferred to look at the 'abuse exception', as opposed to the test of 'unambiguous impropriety', when being called to assess if Without Prejudice cover was lost, noting that it would be unappealing to have to 'grade' levels of impropriety when applying the historical test.

The abuse exception

V and W argued that their situation fell within a similar abuse exception to that described in the *Mezzotero* case, as the comments made by S were clearly either unambiguous impropriety, or abuse of the doctrine of privilege; both tests were clearly met in this case. V and W also argued that they would suffer severe prejudice, as highlighted by the original tribunal, in respect of bringing their victimisation claims if S's comments were rendered inadmissible. Additionally, the public policy behind protecting individuals from instances of victimisation should outweigh any Without Prejudice protection.

The EAT ruled in favour of V and Ws' arguments, stating in a return to a familiar theme that

> *it seems to us that in discrimination cases the necessity of getting to the truth of what occurred and if necessary eradicating the evil of discrimination may tip the scales as against the necessity of protecting 'without prejudice' privilege.*

Comment

It is clear that the EAT's approach to Without Prejudice protection in discrimination cases now requires that Without Prejudice discussions should be treated with an equal level of care and attention to the law as any open correspondence taking place. Any suggestion that Without Prejudice protection has been abused by a respondent party, particularly to administer more alleged discrimination or victimisation, may well render the protection lost and indeed incur further claims. The protection is not a safety blanket; it will only operate as such if a Without Prejudice deal is done in a wholly non-discriminatory and non-victimising manner.

Without Prejudice discussions should be taken on with the benefit of legal advice, where possible, and with the utmost integrity. Respondent clients would be well advised to treat all Without Prejudice discussions as potentially disclosable to a tribunal, and take great care to advise their teams to adopt a non-judgmental tone and approach to all matters, even after their conclusion.

Whilst the broad principles set out in *Mezzotero* remain unchanged (i.e. an actual dispute is required in order to engender Without Prejudice protection for genuine settlement efforts), this case confirms that Without Prejudice protection will not be secure where it is sought in order to conceal the 'evils' of discrimination or victimisation.

Shah Qureshi, Partner, and Joanna Bragg, Solicitor
Webster Dixon LLP

Sexual orientation regulations on provision of goods and services

Background

During the passage of the Equality Act 2006 (which contains in Part 2 provisions prohibiting discrimination on grounds of religion or belief in the provision of goods, facilities and services, education and public functions) there was significant pressure to provide similar protection on the grounds of sexual orientation. As a result the Government agreed to introduce regulations at the same time as the provisions on religion and belief are commenced. These regulations have not yet been published although they are expected to be laid before Parliament very soon. This news item sets out what the Government say that they intend to put into the regulations. The next issue of Briefings will include a fuller article setting out the provisions of the new regulations.

These regulations will prohibit discrimination on the grounds of sexual orientation in the provision of goods, facilities, services, education, premises and the exercise of public functions.

Religious organisations

The activities of religious organisations which are closely associated with doctrine – such as worship and teaching – will be capable of benefiting from an exemption from the sexual orientation regulations. The exemption will not be available to organisations whose sole or main purpose is commercial. The exemption will not be available where religious organisations deliver a service to the public, for a public authority.

Religious adoption agencies

The regulations will apply to religious adoption agencies but they will be given until the end of 2008 to adjust. This is in order to: prevent any disruption to services currently being provided to adoptive parents and children; ensure that much valued and needed services do not close overnight and that their is no overall reduction in services in the long run. In the interim, there will be a new statutory duty on agencies to refer gay, lesbian and bisexual couples to agencies who are able to assist. The Prime Minister has commissioned an on going independent assessment of the issues agencies will need to address in the transition period and the impact the regulations have on adoption services.

Schools

There will be no exemptions for teaching in schools, including faith schools. The government say that these regulations will not impact on anybody's freedom to express their views in an appropriate manner – and that includes doctrinal belief. What they will do is address discrimination of young people because of their sexuality or that of their parents.

Public sector

The regulations will allow for separate services in both the voluntary and public sector to continue to address the specific needs of lesbian, gay and bisexual people.

Charities

Some charities may need to be able to continue to work exclusively with and for lesbian, gay and bisexual people in line with the terms of their charitable instruments. These will be exempt. Additionally, clubs or associations which exist in order to provide a genuine benefit or opportunity to a group linked to their sexual orientation should be permitted to include the sexual orientation of a person in their membership criteria. There are comparable provisions in discrimination legislation for the other grounds.

Schools

The situation as regards sex education will not change. Schools are obliged to develop their sex education in consultation with parents to make sure lessons have the widest support possible. Parents will still be able to withdraw their children from sex education should they choose to do so.

Schools will still be able to teach about traditional family values. This will include describing religious teaching with regard to marriage, homosexuality or homosexual sexual practice, in the course of acts of worship on school premises, religious education classes or in other contexts where such an explanation is appropriate and relevant.

Sexual orientation regulations on provision of goods and services *continued*

Northern Ireland

Northern Ireland has a separate equality law framework from the rest of the UK which is nevertheless very similar to that of Great Britain. The Equality Act 2006 included separate order-making powers to outlaw discrimination on grounds of sexual orientation for Northern Ireland and Great Britain. The Northern Ireland regulations were developed by the Office of First Minister and Deputy First Minister and commenced 1 January 2007. These included protection from harassment on the grounds of sexual orientation outside the workplace (which will not be expressly included in the GB regulations). A judicial review of the Northern Ireland regulations is presently underway.

Religion or Belief sections of the Equality Act 2006

The Equality Act 2006, part 2, sets out new provisions to provide protection from discrimination on grounds of religion or belief in respect of the provision of goods, facilities and services, education and public functions. The scope of these new provisions was discussed in Briefing no 394.

These provisions make provision for a different definition of 'religion or belief'. As from April 2007 this will apply to all religion or belief discrimination cases whether in respect of employment (S77) or in relation to the provision of goods, facilities and services, education and public functions (s44).

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

Disability Equality Duty

The Disability Equality Duty came into force on December 4th 2006.

This legal duty requires all public bodies to actively look at ways of ensuring that disabled people are treated equally. All of those covered by the specific duties must also have produced a Disability Equality Scheme, which they must now implement.

Gender Equality Duty

The Gender Equality Duty will come into force on April 6th 2007.

All public authorities must demonstrate that they are promoting equality for women and men and that they are eliminating sexual discrimination and harassment.

The next issue of Briefings will include an article on these Duties.

Law Centres Federation sexual orientation training CD

The CD 'Pride not prejudice' focuses on discrimination and harassment at work on the grounds of sexual orientation. It explains the Employment Equality (Sexual Orientation) regulations which were introduced in December 2003 and describes how they protect people in the workplace. It also provides information on the options available to deal with discrimination and harassment.

Free copies of the DVD are currently available – please contact Savita Narain at the Law Centres Federation on 020-7121 3320 or email savita@lawcentres.org.uk.

Discrimination Law Review

This much postponed report is due to be published as a Green Paper later this month. If and when it is published the DLA will hold a consultation meeting to discuss the DLA's response with members. More information will be available through our e-news service.

Challenge to Age Regulations referred to European Court of Justice

Age Concern – with its member-ship organisation Heyday – has brought a legal challenge to provisions of the Employment Equality (Age) Regulations that allow Mandatory Retirement Ages. The High Court has accepted that the case should been referred to the European Court of Justice which will be asked to rule on the correct interpretation of the Employment Directive that underpins the Regulations. As we went to print the precise questions have not been agreed but they are likely to cover the way in which Article 6 of the Directive works, the test for direct discrimination and the possibilities for justification.

Advocate-General's Opinion in Spanish Age Discrimination case

On 15 February 2007 Advocate-General Mazak delivered his Opinion in Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA*. The case concerned Spanish legislation which permitted collective agreements in certain industries to provide for automatic retirement at age 65 where the employee had worked for a sufficient time to be entitled to a full pension. The referring Spanish court had asked whether such a provision had to be objectively justified in a way which was consistent with the principle of equal treatment in relation to age in the Employment Directive. The Advocate-General considered that it did not because Recital 14 of the Directive stated that it was without prejudice to national provisions laying down retirement ages. This Opinion is bound to be influential when the ECJ comes to give its final ruling. However it is not clear whether the court will follow the Opinion which seems to take a different approach to the fundamental nature of the prohibition on age discrimination to that which the ECJ took in C 144/04 *Mangold*. Moreover the Advocate-General based his Opinion on the fact that the provision led to mandatory retirement and could not therefore be equated simply with dismissal. The full decision of the ECJ is likely to follow in a few weeks.

Age Discrimination strategic case strategy meeting

Since the Employment Equality (Age) Regulations 2006 came into force on October 1st 2006 practitioners and advisors will be considering what age discrimination cases they should be bringing. Tribunal rulings and case law have a key role to play in defining the extent to which these regulations do, or do not, provide important new rights and protections for employees, would-be employees and learners.

The DLA together with TAEN (the Age and Employment Network) and JUSTICE are holding a meeting to discuss a strategic case strategy for age discrimination cases. This will provide an opportunity for the advice sector, legal professionals and age organisations to work together to establish and operate a Strategic Case Strategy.

Robin Allen QC and Declan O'Dempsey have agreed to lead a discussion on the possible issues that practitioners and advisors can look out for in order to test important aspects of the new law.

The meeting will be held at the **Disability Rights Commission**, 3rd Floor, 14, Gray's Inn Road, London WC1X 8HL between **5 and 7 p.m.** on **April 18th 2007**.

There are a limited number of places if you would like to come please could you apply direct to TAEN at taen@helptheaged.org.uk

Disability Agenda

The DRC has just launched the Disability Agenda, which sets out the major challenges, over the next ten years, for public policy in respect of disabled people and their families and recommendations for how to meet them. The Disability Agenda calls for more family-centred policies to create more opportunities and greater investment in public services to deliver what people need.

The Agenda contains over 160 recommendations to Government, chief amongst these are:

- eradicating the link between child poverty and disability by 2020;
- developing a social care system fit for the future;
- developing in the context of the single Equality Act, a simpler, fairer legislative framework with an evidence-based approach to promoting positive attitudes, whilst promoting and enforcing the law;
- reducing 'in-work' poverty;
- engaging more disabled people in learning and skills; and
- rooting out employment discrimination.

For more information go to: www.disabilityagenda.org

EOC Judicial Review of GB implementation of Equal Treatment Directive

The Equal Opportunities Commission has commenced judicial review proceedings against the Government in relation to the way that they have implemented the amended Equal Treatment Directive (ETD). The EOC believes that under the Government's regulations women may not enjoy the full protection against sexual harassment and pregnancy discrimination required by the Directive, and that they could lose aspects of existing maternity rights already established in UK case law.

The EOC is also concerned that the lack of clarity in the scope of the regulations could produce confusion and uncertainty for both employers and employees about the extent of their legal rights and obligations, leading to expensive, stressful and time consuming litigation. The EOC is looking to the court to remedy the defects in the regulations and to provide employers and individuals with clear guidance about their rights and responsibilities.

The case was heard on February 27th and 28th in the High Court. The EOC sought a judicial review of the following aspects of the implementation of the Directive:

- The definition of harassment in the regulations is too narrow, and does not reflect the broad protection in the Directive, which is intended to ensure that women in the workplace are not subjected to any unwanted conduct related to their sex which violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. For example, the regulations appear to give no apparent protection to women harassed by clients, even when their employer knows of the harassment and could take steps to prevent it but doesn't. In the EOC's view, the Directive gives this broader protection. Harassment by clients is a particular problem in the hotel and restaurant sector, which employs 670,000 women.
- Women's rights during maternity leave are also unclear as a result of the new regulations. Women and their employers now do not know whether a woman is protected if she is not consulted about a change to her job while on maternity leave, or if she falls behind a queue for promotion because her time on additional maternity leave is excluded from length of service calculation.
- Pregnant women did not previously have to show that they had been treated worse than they would have been before they were pregnant – the need for, in legal language a so-called 'comparator'. But under the new regulations they may have to. Women have different needs when they are pregnant, so it does not always make sense for a woman to compare her situation with what would have happened had she not been pregnant.

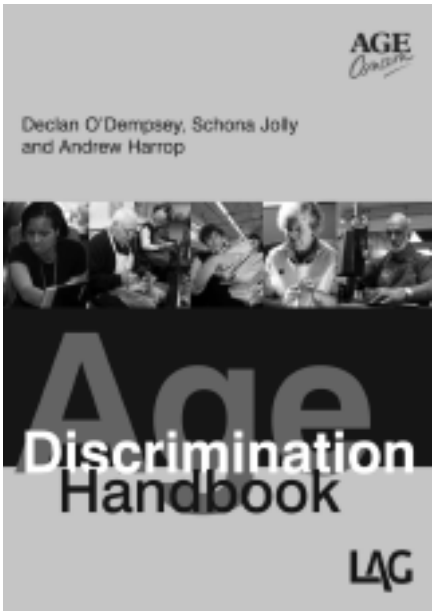
IMPORTANT – EXTRAORDINARY GENERAL MEETING

As there were insufficient members at the EGM and PGM held on the 31st January to be quorate for the vote to amend the DLA aims (the DLA requires 20 voting members to be present) the meeting has been rescheduled for **Tuesday May 8th** 2007 starting at 6pm.

We hope to combine this meeting with a discussion on the DLA's response to the Discrimination Law Review Green Paper which is due to be published later in March.

The meeting will be held at the **Disability Rights Commission, 14 Gray's Inn Road, London, WC1R.**

Age Discrimination Handbook by Declan O'Dempsey, Shona Jolly and Andrew Harrop, 2006, 760 pages, £35.00.



Institutional ageism is alive and well. In the first chapter of LAG's Age Discrimination Handbook the authors Declan O'Dempsey, Schona Jolly and Andrew Harrop demonstrate clearly how ageist stereotypes and prejudices support and reinforce the widespread discrimination experienced by older people.

The authors had two main goals: to provide advisers with a practical tool to assist them in representing their clients under new age discrimination legislation and to give all readers an understanding of how such legislation came into being. Most readers will agree that they have been successful in achieving both.

The book is primarily a guide to using the Employment Equality (Age) Regulations 2006 to challenge age discrimination. It is also contains guidance on the age discrimination provisions in the EC Employment Directive 2000/78. The inclusion of the history of the EC and UK legislation, and the major controversies along the way, gives this book added value as a guide to using UK and EC law.

For example, some knowledge of the prolonged debate on the question of whether there should, or should not, be a default retirement age (which the authors suggest, via 'the rumour mill' was decided in the CBI's favour by the Prime Minister) should assist practitioners to understand the various ways in which the regulations allow employers to make decisions based on age and, accordingly, to find gaps and loopholes which may provide protection for their clients.

The authors very ably overcame what might have been a serious hurdle, namely to write a guide to age discrimination legislation before the legislation had come into force, by providing a very clear guide to anti-discrimination legislation generally. Thus an adviser who was just starting off in the field of equality could use the Age Discrimination Handbook as their initial primer. It is a useful reference book on the basic concepts of UK anti-discrimination legislation and the ways in which the courts have dealt with issues such as direct and indirect discrimination, harassment, shift of the burden of proof and remedies, citing relevant case law under the SDA 1975 and RRA 1976. It also includes helpful explanations of EC legislation generally and practical guidance on referring cases to the European Court of Justice. The latter is of course is highly relevant since the authors frequently query whether the UK has properly transposed the age discrimination provisions of the Directive. (See news item on page 31 regarding the early reference to the ECJ of the Heyday case challenging the default retirement age and mandatory retirement procedures as non-compliant with the Directive).

Another unique feature of this book is its final, forward-looking chapter. It reminds readers that the government has undertaken to review the default retirement age in 2011 (assuming that this government or any that replaces it will also remember this undertaking) and indicates the kind of evidence that should be considered in such a review. It also discusses the prospect of protection against age discrimination being extended beyond the fields of employment and further and higher education or, perhaps more likely, a public authority age equality duty being proposed as part of the Discrimination Law Review.

The most significant gap in this excellent book on age discrimination is in relation to discrimination experienced by young people. The Directive and the

Age Discrimination Handbook by Declan O'Dempsey, Shona Jolly and Andrew Harrop, 2006, 760 pages, £35.00.

UK legislation are not limited to older workers as is the case in the US, but protect persons of any age. While undoubtedly ageism more frequently disadvantages people over 50, new entrants to the labour market and workers in their teens and twenties also meet a range of age-based barriers, and there is less in this handbook for advisers of younger workers. It might also have been helpful in the detailed chapter on remedies to have included the author's views, albeit untested, regarding the ways that tribunals and courts might deal with compensation for age discrimination.

It is important to mention that, in addition to nearly 500 pages of information and guidance, the book contains the full text of the regulations, the EC Directive and the ACAS guidance for employers on the Age Regulations. There is a detailed precedent for a questionnaire in a hypothetic 'retirement-plus' case and a model letter requesting to work beyond normal retirement age. The authors recognise that the law is always changing; for example, the last minute changes to the pension provisions in the regulations came too late to be included. To ensure that up-to-date information is available, there is a link to the website www.ageconcern.org.uk/agediscriminationlaw where information on new developments can be found.

Barbara Cohen
Vice Chair, Discrimination Law Association

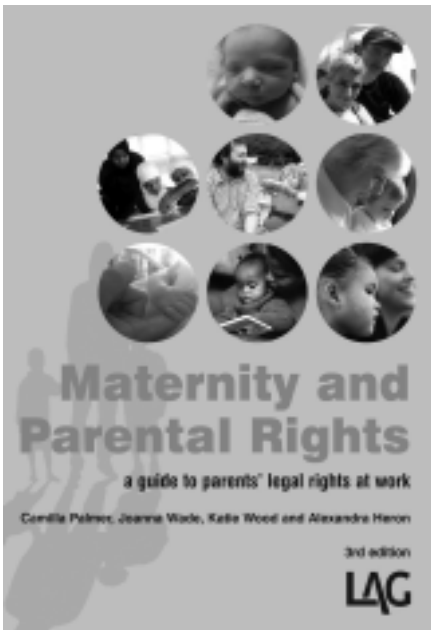
Maternity and Parental Rights: a guide to parents' legal rights at work by Camilla Palmer, Joanna Wade, Katie Wood and Alexandra Heron, 3rd edition, 2006, 880 pages, £35.00.

Since the original issue of this book there has been a step change in the quantity and quality of protection offered to pregnant women and, to a lesser extent, parents at work. In many ways maternity law itself has been made simpler and easier. But the length of this book – over 780 pages compared to the original slim volume – shows that it is now much harder for the busy practitioner to hold all the information in their head and they need a reliable and accessible guide to help them fit a patchwork of laws to the messy but fascinating reality of people's lives.

As society has changed, so has maternity law. In fact, it is merely 'maternity law' no longer. For a parent with problems at work relating to their family, there are a plethora of possible rights and solutions – maternity leave, paternity leave, parental leave, emergency dependents leave, flexible working rights, indirect sex discrimination and more. In this book, material is included according to how useful it is, rather than the origin of the law. For instance, there is a chapter on part time working which, although not theoretically a maternity issue, is highly relevant in practice. Essentially, the authors have done what every practitioner needs – they have done all the hard work of gathering and sifting the information and putting it into an accessible format.

The early chapters – overviews of maternity protection and discrimination law – are highly recommended. Practitioners are perhaps prone to grabbing 'the maternity book' when presented with an immediate problem relating to, for instance, parental leave in relation to a disabled child. They read the relevant paragraphs in great detail and then don't look at the book again till the next problem presents itself. These overview chapters are well worth reading whether your experience of maternity law rivals that of the authors or if you are about to advise your first

pregnant worker. This area of law, even more than most employment law, has grown organically from different sources over the last 35 years.



The book includes good sections on the under-used health and safety rights and a thought-provoking section on breastfeeding. There is a good section on time limits – usually a knotty problem in discrimination and especially in family-related cases where the problem often extends over a lengthy period.

There is an invaluable chapter on most practitioners' least favourite issue – the Statutory Dispute Resolution Procedures – including wise advice not to rely overmuch on EAT decisions which may yet be overturned by the Court of Appeal. There is an extremely useful list of maternity and family rights which are not covered by the Statutory Grievance Procedure (SGP) – assuming a SGP applies when it does not can be an irreparable error.

There are excellent chapters on money during and after pregnancy. Employment advisors can too often be unfamiliar with the Social Security system and this book takes you through what is available (from free milk to Sure Start grants) and how to apply. This can make a material difference to the quality of advice given.

There are lists of useful websites, checklists, precedents and even a table of Statutory Maternity Pay dates till May 2007. There are key points for each chapter, boxes and flow charts of relevant rights and procedures. The book provides a table of cases, statutes, statutory instruments and European legislation each referenced to the relevant paragraph in the text. All invaluable time-savers for practitioners.

The authors do not make bare assertions of the law with no backup leaving the weary practitioner to trawl through statute and/or case law in search of the authority. Almost everything is thoroughly provided with fully annotated footnotes. Also very helpful are the large number of cases, many unreported.

To sum up, whatever maternity or parental issue presents itself, it should be in this book and it shouldn't take long to find.

The book is well priced at £35 and offers excellent value for money to practitioners whose needs outrun their library budget.

Inevitably in almost all employment law, and particularly in the fast-moving world of family and maternity law, books go out of date. However, this is a well-timed book and it contains the law both before and after the major changes of April 2007.

Juliette Nash
North Kensington Law Centre

Briefings

Notes and news

Abbreviations

AAL	*Additional adoption leave*	*ED*	*Employment Directive*	*PAL*	*Paternity & Adoption Leave Regulations 2002*
AML	*Additional maternity leave*	*EOC*	*Equal Opportunities Commission*		
AR	*Employment Equality (Age) Regulations 2006*	*EPD*	*Equal Pay Directive*	*RBR*	*Employment Equality (Religion or Belief) Regulations 2003*
		EqPA	*Equal Pay Act 1970*		
CA	*Court of Appeal*	*ERA*	*Employment Rights Act 1996*	*RD*	*Race Directive*
CEHR	*Commission for Equality & Human Rights*	*ET*	*Employment Tribunal*	*RRA*	*Race Relations Act 1976*
CRE	*Commission for Racial Equality*	*ETD*	*Equal Treatment Directive*	*RRAA*	*Race Relations (Amendment) Act 2000*
CS	*Court of Session*	*EWC*	*Expected week of confinement*	*SAP*	*Statutory adoption pay*
DDA	*Disability Discrimination Act 1995*	*GOR*	*Genuine Occupational Requirement*	*SDA*	*Sex Discrimination Act 1975*
DRC	*Disability Rights Commission*	*HC*	*High Court*	*SMP*	*Statutory maternity pay*
DTI	*Department of Trade and Industry*	*HL*	*House of Lords*	*SOR*	*Employment Equality (Sexual Orientation) Regulations 2003*
EAT	*Employment Appeal Tribunal*	*HRA*	*Human Rights Act 1998*		
EC	*European Commission*	*KIT*	*Keeping in touch*	*TUPE*	*Transfer of Undertakings (Protection of Employment) Regulations 1981*
ECHR	*European Convention on Human Rights*	*MPLR*	*Maternity & Parental Leave Regulations 1999*	*UN*	*United Nations*
ECtHR	*European Court of Human Rights*	*OAL*	*Ordinary adoption leave*		
ECJ	*European Court of Justice*	*OML*	*Ordinary maternity leav*		