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Editorial *Discrimination Law Review: more work needed*

Most readers will know that on the 12th June the Discrimination Law Review published its Green Paper: **A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain.** How many have yet read it?

The timing of publication seems to offer one very disturbing message about the Government's commitment to the process of discrimination law review. For the consultation will end on the 4th September so the consultation must take place over the holiday season, just when the current Commissions are winding down, and the new CEHR is not yet operational. The Green Paper had been long awaited it is true, but publication now, seems to suggest a degree of indifference to the product of the consultation that is sought.

In an age of spin, a Green Paper, whose arrival is heralded by news headlines greeting it as a charter for breast feeding mothers and women golfers seeking full membership of their golf clubs, hardly encourages hope for a profound analysis. In any event these proposals can not really be the subject of much consultation since both were added to the Green Paper to reflect the Government's obligation to implement the EC Gender (Goods and Services) Directive in December 2007.

They have little or nothing to do with the main thrust of the Discrimination Law Review whose stated task has been to consider the fundamental principles of discrimination legislation and its underlying concepts and do a comparative analysis of the different models for discrimination legislation, investigate different approaches to enforcing discrimination law, develop an understanding of the evidence of the practical impact of legislation – both within the UK and abroad – in tackling inequality and promoting equality of opportunity, and investigate new models for encouraging and incentivising compliance. In any event creating a simpler, fairer and more streamlined legislative framework in a Single Equality Act is about more than just implementing EC Directives.

So it is perhaps not surprising that there were very mixed re-actions to its content. While the Disability Rights Commission commented that this Green Paper has *'conspicuously failed to measure up to its terms of reference'* the Equal Opportunities Commission similarly noted *'today's Green Paper has missed a real opportunity to tackle the pay gap'*.

And while the Commission for Racial Equality has rather more mildly noted that *'the Green Paper needs to improve through this consultation, if we are to get the modern simple equality legislation relevant to today's society'* the DRC has argued that:

> *Clear, comprehensive and **effective** new equality legislation is vitally needed to inject new momentum into the battle for real equality for disabled people, older people, women and men, transgender people, lesbians and gay men and people of different religious beliefs.*

So what does the Green Paper propose? Firstly the techie stuff: it makes a series of detailed proposals to harmonise and simplify the law. In particular, it proposes to unify the definitions of indirect discrimination, to introduce the concept of genuine occupational requirement for all the prohibited grounds, except disability, and to adopt the same objective justification test for all the existing indirect discrimination provisions.

Then there are the proposals to streamline provisions in a way which may cause them to lose some of their strength. Thus the Green Paper proposes a single public sector equality duty for at least gender, race and disability and possibly for sexual orientation, religion or belief and age as well. However, the price for this simplification of equality duties is an overall dilution of the existing duties.

The theme here is 'light touch regulation' which risks becoming so soft touch as to be imperceptable. Professor Chris McCrudden has criticised these proposals as failing to establish the necessary preconditions for such a regulatory scheme – a proper evidence base and effective external monitoring as well as a requirement to engage with the appropriate stakeholders.

Provisions to deal with multiple or intersectional discrimination are dismissed with the assertion *'we do not have any evidence that in practice people are losing or failing to bring cases because they involve more than one protected ground'*. Although this has not stopped them from using the concept of multiple discrimination to justify the setting up of the CEHR or, in this paper, the need for a single equality duty.

Other parts of the Green Paper are to be welcomed, particularly the commitment to deal with the thorny issue of age discrimination in the provision of goods, facilities and services. This is not yet an EC requirement though it may well become so soon as the Age Lobby in Brussels press for change there.

Much work still needs to be done if we are to convince the Government to put in place a single Equality Act fit for the 21st century.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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New equality duties

The introduction of the duty to promote race equality marked a move from reactive, individually focussed anti-discrimination legislation to a proactive duty designed to put race equality at the heart of public authority functions. Whilst not without its critics, the race duty has nevertheless transformed the landscape of equality legislation and practice. December 2006 saw the introduction of the disability equality duty – aiming for a similar sea-change in the treatment of disability as an equalities issue. The disability duty builds upon the race duty, with its requirement, for example, that public authorities set out and implement actions to promote disability equality and evidence gathering arrangements. In April 2007, the gender equality duty came into practice. This too builds upon both the race and the disability equality duties, setting out and implementing gender equality goals and planned outcomes.

The following two articles consider the latest of these duties.

Briefing 445

The Disability Equality Duty for the public sector

Introduction

The Disability Discrimination Act 2005 amended the Disability Discrimination Act 1995 (DDA) to insert the disability equality duty – known as the general duty – into the Act. The duty is aimed at tackling systemic discrimination, and ensuring that public authorities build disability equality into everything that they do. This article examines the requirements of the duty and looks at how it might be used more generally in litigation carried out on behalf of disabled people.

What is the disability equality duty

The DDA s. 49A says that public authorities must, when carrying out their functions, have due regard to the need to:

- Promote equality of opportunity between disabled people and other people;
- Eliminate discrimination that is unlawful under the Act;
- Eliminate harassment of disabled people that is related to their disability;
- Promote positive attitudes towards disabled people;
- Encourage participation by disabled people in public life;
- Take steps to take account of disabled people's disabilities, even where that involves treating disabled people more favourably than others.

The DDA also gives the Secretary of State, or in Scotland, the Scottish Ministers, the power to introduce regulations setting out more specific duties which may assist public authorities in meeting their general duty. These duties, known as the specific duties, are set out, in relation to England and Wales, in the Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) and, in relation to Scotland, in the Disability Discrimination (Public Authorities) (Statutory Duties) (Scotland) (SI 2005 No 565). These duties apply only to the authorities which are listed in the regulations. The key aspect of the duties is the requirement to produce a Disability Equality Scheme.

Who is covered by the duties?

The general duty applies to all public authorities, including those who may carry out some public functions (but only in so far as those functions are concerned). This would include, for example, a private security firm which runs a prison. There is no list of authorities which are subject to the general duty, as there is in the Race Relations Act 1976 (RRA) – rather the definition of a public authority follows that contained in the Human Rights Act 1998 (HRA).

As readers will be aware, the **definition of public authority** for the purposes of the Human Rights Act – and in particular the matter of when an authority is carrying out a function of a public nature – has been the subject of considerable litigation and of a number of reports by the Joint Committee on Human Rights. A relatively narrow approach has been taken to this issue in a series of Human Rights Act cases, most notably in the Leonard Cheshire case. The issue was the subject of a case before the House of Lords recently (*YL and Birmingham City Council & Ors*) where the Department for Constitutional Affairs (now the MOJ) intervened to effectively argue that the *Leonard Cheshire* case had been wrongly decided. The Disability Rights Commission (DRC) also intervened, not only to support a broader interpretation of public authority but also to raise the issue of the disability equality duty and to ensure that the court was aware of the other contexts in which function of a public nature is used. The DRC submissions indicated that the scope of public authority for the purposes of the Disability Equality Duty is likely to be a broader concept than that of a public authority for the purposes of the HRA. However, unfortunately the HL has reaffirmed that providing care for the elderly was a private matter, not a 'public function' within the HRA.

Those bodies that are covered by the general duty include government departments and executive agencies, ministers, local authorities, schools, governing bodies of colleges and universities, governing bodies of schools, NHS trusts and boards, police and fire authorities, the Crown Prosecution Service and the Crown Office, inspection and audit bodies and certain publicly funded museums.

The specific duties apply only to those authorities which are listed in the regulations.

The general and specific duties apply in England, Scotland and Wales. The specific duties in England and Wales are the same in all key respects as the duties which apply in Scotland, except that there are different arrangements in relation to education due to differences in legislation. The DRC has produced a Statutory Code of Practice for England & Wales and a separate one for Scotland.

The general duty came into force on 4 December 2006. Those public authorities who are subject to the specific duties, apart from some exceptions set out below, have to have **published** their Disability Equality Schemes by 4th December 2006. Primary schools in England must publish their Disability Equality Scheme by 3rd December 2007, and all schools in Wales must publish their schemes no later than 1st April 2007.

What does the general duty mean?

The general duty requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities. This is framed as a requirement on authorities to give due regard to disability equality in its various dimensions set out above.

Public authorities are expected to have 'due regard' to the six parts of the general duty. In all their decisions and functions, authorities should give due weight to the need to promote disability equality in proportion to its relevance. The statutory code of practice produced by the DRC and referenced above states that 'due regard' comprises two linked elements: proportionality and relevance. This requires more than simply giving consideration to disability equality.

Proportionality requires greater consideration to be given to disability equality in relation to functions or policies that have the most effect on disabled people. Where changing a function or proposed policy would lead to significant benefits to disabled people, the need for such a change will carry added weight when balanced against other considerations.

Disability equality will be more relevant to some functions than others. Public authorities will need to take care when assessing relevance, as many areas of their functioning are likely to be of relevance to disabled people.

What do the specific duties say?

The specific duties contained in the regulations referred to above require all those public authorities who are listed to:

- Publish a disability equality scheme showing how it intends to fulfil its general duty and its specific duties;
- Involve disabled people in the development of its scheme;
- Review the scheme at least every three years;

The disability equality scheme should include a statement of:

- How disabled people have been involved in developing the scheme.

- The steps which the authority will take to fulfil its general duty (the action plan).
- Arrangements for gathering information about performance of the public body on disability equality.
- Arrangements for assessing the impact of the activities of the body on disability equality.
- Arrangements for making use of the information gathered in particular in relation to reviewing the effectiveness of its action plan and preparing subsequent disability equality schemes.

Public authorities must also:

- Take the steps set out in its action plan.
- Put into effect its arrangements for gathering and making use of information.
- Publish an annual report which includes a summary of the actions set out in the scheme that it has taken, the result of information gathering and the use it has made of such information.

There are also duties placed on certain Secretaries of State, Scottish Ministers and the Welsh Assembly to report on progress towards equality of opportunity within their sphere and to put forward proposals for better co-ordination of action to bring about further progress towards equality of opportunity – this report to be made every three years.

Enforcement

The general duty has no specific enforcement method attached to it. A public authority may be subject to a judicial review as it would for breach of any other statutory duty. A breach of the specific duties is actionable by the Disability Rights Commission, which can issue a compliance notice stating that the authority must meet its duties and that it must tell the DRC what it is doing to comply with its duties. The notice can also request information regarding the authority's performance. A compliance notice can be enforced in the county or sheriff court. The Commission for Equality and Human Rights (CEHR) will, when it comes into operation in October this year, have slightly more enhanced powers to deal with enforcement of the duties.

Use of the duties in litigation

The aim of the disability equality duty is to mainstream disability into all aspects of a public authority's functions. Similarly, the duty itself can be mainstreamed into cases brought against public authorities on behalf of disabled people.

In the employment field, someone who is bringing a claim of discrimination against a public authority can, when completing a questionnaire, ask for a copy of the authority's disability equality scheme, as there may be steps in the scheme which have not been taken which may be relevant. Information regarding evidence gathering, or monitoring, of employees, and patterns of disadvantage amongst disabled employees or applicants, may also be relevant. Similar requests can also be made in the post-16 education field (by means of disclosure, as there is no questionnaire procedure in relation to education) and in relation to public authority services, functions or housing (via the Part 3 questionnaire procedure, or the general rules of disclosure).

A particularly important aspect of the duty is the conducting of impact assessments. In order for a public authority to demonstrate that it has had due regard to the need to promote disability equality, it will in practice need to produce an impact assessment of a particular policy or practice, or decision. Impact assessments can be requested as a matter of course where decisions of public authorities are being challenged – and support for the need for impact assessment can be gained from the two cases listed below.

Similar duties to those relating to disability have been in place in relation to race since 2001, but there has been little consideration of the duties in the courts. In the case of *R (on the application of Diana Elias) v Secretary of State for Defence* [2006] IRLR 934, the court considered the race duty for the first time. Mrs. Elias was born in Hong Kong in 1924 and registered as a British subject. She and her family were interned by the Japanese until the liberation of Hong Kong in 1945. As a result, she suffered serious psychological effects. However, she could not benefit from the UK government's non-statutory compensation scheme for those who were interned by the Japanese, because, so far as civilian internees were concerned, the scheme was restricted to 'British civilians'. For the civilian internee to qualify, they either had to have been born in the UK or have a parent or grandparent born in the UK. She brought proceedings for judicial review claiming that the criteria adopted operated as direct discrimination on grounds of national origins or, alternatively, that

445 they were indirectly discriminatory and could not be justified.

As well as holding that the scheme was indirectly discriminatory, the Court held that the Secretary of State was also in breach of his duties under s.71 RRA as amended, which requires specified persons, in carrying out their functions, to have due regard to the need to eliminate unlawful racial discrimination. The court said that given the obvious discriminatory effect of the scheme, the Secretary of State could not possibly have properly considered the potentially discriminatory nature of the scheme and assumed that there was no issue which at least needed to be addressed. Nor was it sufficient that there was careful consideration of the policy during the course of the litigation. The purpose of s.71 is to ensure that the body subject to the duty pays due regard at the time the policy is being considered – that is, when the relevant function is being exercised – and not when it has become the subject of challenge.

In the more recent cases of *R v BAPIO Action Ltd* and *Dr Imran Yousaf v Secretary of State for the Home Department and Secretary of State for Health*, [2007] EWHC 199 (Admin) the High Court held that there had been a breach of s.71 of the RRA when the Home Office failed to conduct a proper impact assessment on a change to immigration rules regarding overseas doctors. The judgment states:

> *If there had been a significant examination of the race relations issues involved in the change to the Immigration Rules, there would have been a written record of it. In my judgment, the evidence before me does not establish that the duty imposed by section 71 was complied with.*

In the disability field, the duty might be cited in a case challenging potentially discriminatory legislation. On a more micro level, claims against a local authority for a breach of statutory duty in relation to assistance in the home for a disabled person may well involve an authority failing to promote disability equality – and thus amount to a breach of the disability equality duty as well as its duties under the NHS and Community Care Act 1990 and/or the HRA.

The DRC has already produced the two codes of practice referred to above and these are available from the website (www.drc-gb.org and/or www.dotheduty.org). In addition, a considerable amount of guidance is available – on both aspects of the duties – matters such as involvement, evidence gathering – as well relating to specific sectors (e.g. for housing providers).

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Disability Rights Commission

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The Gender Equality Duty for the public sector

The Gender Equality Duty (GED) was introduced by ss84-86 of the Equality Act 2006.[1] It came into force on 6 April 2007. It follows the Race Equality Duty (RED) which came into force in April 2001,[2] and the Disability Equality Duty (DED) which came into force in December 2006 (see Briefing no 445).

The GED follows the same basic pattern that appears in the RED and the DED that includes a general duty and specific duties.

The General Duty

The 'general duty' is set out in s76A of the SDA, and it provides that a public authority shall, in carrying out its functions, have due regard to the need –

- to eliminate unlawful discrimination and harassment;
- to promote equality of opportunity between men and women.

The definition of 'public authority' for the general duty is wide, including all those bodies whose functions are of a public nature.[3] (see *Briefing* no 445 above for a further discussion of the meaning of 'public authority'). This contrasts with the scope of the specific duties, which only apply to those public authorities that are listed in the Schedule to the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 (the Regulations). It also contrasts with the RED under which both the

general and specific duties apply to a defined list of public authorities.

In line with the 'positive' approach that is envisaged as the future of equality legislation, the general duty requires a proactive, rather than a negative or passive, stance on the part of public authorities. The aim is to encourage public authorities to address equality issues in their decision making processes at a strategic level, rather than taking a reactive approach after the event to individual discrimination cases. This involves considering and taking into account gender issues at an early stage in the planning of policies, new initiatives and service delivery. Merely discussing gender equality at meetings where relevant decisions are being taken is unlikely to be sufficient. Instead, a more comprehensive approach is required involving the gathering of information, analysis of it in the light of the proposed decision, and then planning in order to avoid or minimise gender imbalance.[4]

The EOC Code of Practice on the GED (the Code) notes that the three strands of the general duty – to eliminate unlawful discrimination, to eliminate harassment and to promote quality of opportunity between men and women – support each other and overlap,[5] but one of the key problems that will arise in the implementation of the GED, it is suggested, will be controlling the hostile reaction – for example, in an employment context, from male colleagues - that often follows attempts to take positive action. The answer to this may well be the point that is made later on in the Code where the success factors in 'gender mainstreaming' are set out, the first being *'on-going top level commitment and willingness to commit resources to achieving gender equality'*. What is essential, therefore, to the fulfilment of the GED is a 'buy in' by the entire workforce to the idea of equality of opportunity, and the accountability of senior employees.

When it comes to issues of funding for the implementation of the general duty the Code is equally clear: *'It will not be acceptable for a public authority to claim that it does not have enough resources to meet the duty. This is because meeting the general duty is a statutory requirement'*.[6] The answer, it seems, is to 're-prioritise' resources.

Implementation of the general duty would include comprehensive gathering and analysis of information and looking at the impact of all the public authority's public functions – whether in relation to the provision of goods or services – or simply in the employment of its staff. Consultation with stakeholders, impact assessments, planning and implementing gender equality objectives and reporting and reviewing are all steps that will help ensure compliance with the GED.[7] These steps – being some of the specific duties – are legal requirements only for those public authorities that are listed in the Schedule to the Regulations, but the Code notes that even for the wider group of public authorities bound by the general duty only, carrying out the steps will be of assistance in ensuring compliance.

In considering the GED and planning its implementation, a public authority is able to balance 'proportionality' and 'relevance' against the need to promote gender equality. Thus a large inner city local authority is likely to have significantly higher levels of resources than a small rural district council and this might affect, for example, the way in which it can deliver training, or the extent to which it can offer services to the homeless or those experiencing domestic violence. Thus, it may not be proportionate to offer the same level of services to everyone, regardless of their gender or their need to call upon those services. Similarly, in many of the functions a public authority may have to undertake, gender is of little or no relevance. Examples given in the code are traffic control and weather forecasting. What the GED does require is that someone within the public authority consciously addresses the issue of gender at the point when 'public function' decisions are made.

Specific duties

As noted above, the specific duties apply to a defined list of public authorities, which are listed in the Schedule to the Regulations. The specific duties are set

1. Which inserted the new provisions ss76A-76E into the Sex Discrimination Act 1975

2. The general duty came into force on this date; the specific duties came into force in December 2001.

3. Public Authorities that are specifically excluded from this duty are lists in s76A(3)-(4)

4. Consideration of the GED involves consideration of transgender issues as well as those issues that have an impact upon men or women.

5. Code of Practice, para. 2.6

6. Code, para. 2.28

7. Code para. 2.33

out in reg. 1 of the Regulations, the first of which is to prepare and publish a Gender Equality Scheme (Scheme) by 30 April 2007 that sets out the public authority's objectives and how it intends to meet the GED in the next three years. Given the requirements under both the DED and the RED to produce similar schemes, it is envisaged that one scheme could be produced by public authorities to cover all three duties. The Code notes that the duties are not exactly the same, and due regard would need to be taken of the differences. In drafting a single equality scheme care would need to be taken to ensure that all the requirements of the different duties are adequately met.

In addition to the publication of a Scheme, the specific duties cover:

To consider, when setting objectives, the need to address any gender pay gaps

Given the provisions of the Equal Pay Act 1970 and recent awards that have been made under it, this is an obvious point for a public authority to consider and include in its objectives. The factors that lead to gender gaps in pay are well known, but with the introduction of the specific duties, including the requirement to collect and collate information on gender issues, the process of review will presumably speed up. Accessing a copy of the Scheme and referring to this specific duty when considering an equal pay claim may well provide useful information for claimants, even if it is limited to showing that no adequate review has been undertaken.

To gather and use information on how the authority's polices and practices affect gender equality

The guidance in the Code[8] suggests that a much more comprehensive gender profiling exercise should be conducted than has hitherto been usual in many organisations. This should, in addition to bald statistics about numbers of women in the workplace, include looking at factors such as the gender breakdown of staff requesting flexible leave, the gender pay gap, return rates following maternity leave, and issues and barriers facing transsexual people. In addition, comprehensive information also needs to be gathered in relation to the services provided by the authority: for example, are there patterns of gender imbalance in usage of a particular service? It is emphasised in the Code at paragraph 3.22 that the duty requires not merely the collection of information, but also the need to analyse and use it.

To consult stakeholders and take account of relevant information

In drawing up its scheme, a public authority has a specific duty to ensure that all relevant stakeholders are consulted and their views taken into account. Consultation would seem to be an obvious and basic part of any strategic development exercise, which – it is hoped – public authorities would be doing already. The Code goes on to emphasise the benefits of consultation, for example, the greater ownership of the Scheme. It is recognised that the consultation process should be tailored to the resources of the public authority concerned.[9] The Code points out that where there is gender imbalance, this may carry on into the consultation exercise itself and so care should be taken with the methods of collection to help ensure all relevant groups feel able to participate.

Undertake gender impact assessments

There is no prescribed method of undertaking a gender impact assessment, and indeed the Code notes that the assessment need not be an onerous exercise. It is made clear that relevance needs to be considered before deciding the level and extent of assessment required i.e. how likely is it that this decision making process/service provided would reveal gender imbalance? Any unintended consequences should also be considered in the assessment. The Code[10] also cautions that even through an adverse impact on one sex is revealed through the assessment, it might not be necessary to alter the policy in question. This will depend, again, on the questions of relevance and proportionality.

Implement the actions within three years

The GED requires public authorities to set out the plan for implementation of its objectives, and to complete that plan within a three year framework. In certain circumstances – where it would be unreasonable or impractical to do so – the obligation to implement the actions, gather information or use the information need not be carried out. The category of situations in which it can be considered unreasonable or impractical to implement actions is not wide. The provision

8. Code, para. 3.12
9. Code, para. 3.29
10. Code, para. 7.71

addresses situations where there have been unforeseen difficulties, or an unexpected escalation of costs.

To review and revise the scheme

The scheme has to be reviewed in detail every three years with necessary revisions to objectives – based on consultation and impact assessments – being introduced.

Applicability of GED to Private Organisations

As the GED attaches to the functions carried out by the public authority rather than the organisation itself, it follows that the public authority remains responsible for compliance with the duty even if that function is outsourced to another organisation (private, voluntary, or another public authority).

Chapter 5 of the Code makes recommendations as to how the issue of gender equality can be addressed in the tender process. This can include requiring the tenderer to state how it has taken into account the provisions of the SDA and the EqPA in preparing its tender. The Code[11] also points out that under regulation 23 of the Public Contracts Regulations 2006, a public authority is permitted to exclude from consideration any tender from a tenderer who has had findings of 'grave misconduct' made against it: this could, it is said, include employment tribunal findings of discrimination.

Enforcement

The GED has the potential to bring sweeping change to institutions in which inequalities have become embedded. But the effectiveness of the changes will only be successful to the extent that they are seen to be enforceable. The CEHR will take responsibility for monitoring compliance from late 2007.[12] For the general duty s32 of the Equality Act 2006 gives the CEHR power to issue compliance notices requiring a public authority to comply with the duty or to provide information required under the GED. Compliance notices can only be issued after an assessment has been carried out. In relation to a failure to comply with specific duties, the EOC can issue a notice requiring compliance within 28 days where there is already evidence of a failure to comply. In relation to cases where insufficient information has been supplied to assess compliance, a notice can be issued requiring the service of information to enable assessment to be carried out. The information has to be supplied on a date specified up to three months from service of the notice. With the enforcement of both the general and specific duties, failure to respond to compliance notices can result in the EOC/CEHR seeking a court order requiring the organisation to comply. The expectation is that prior to taking any steps towards formal enforcement, there should have been communication and informal correspondence between the enforcing authority and the organisation in default.[13]

With both the specific and general duties, compliance issues can also be addressed by way of judicial review, taken either by an individual or the EOC/CEHR.[14]

Experience with the RED has shown that although most public authorities have eventually got around to publishing a race equality scheme, the extent to which the general and specific duties are incorporated into the daily activities of the organisation differs widely from authority to authority. As noted above, the general duty under the GED applies to a wider group of organisations than the defined list of public authorities who are subject to the RED. Whether this means that there will consequently be more difficulties in enforcement remains to be seen.

The hope, if not the expectation, is that compliance with all three duties will eventually become part of the ingrained public authority culture. This approach is in line with the view of the CEHR that the way forwards is to encourage organisations to address gender issues for themselves, rather than being subject to ever more draconian anti-discrimination legislation that requires enforcement by litigation. The old adage 'you can take a horse to water …' springs to mind here, and it will be interesting – from a discrimination lawyer's point of view – to see whether the CEHR's approach will be any more effective in changing attitudes towards gender equality than the original discrimination legislation was.

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11. Chapter 5, page 47
12. Until later this year, most of the compliance enforcement will be undertaken by the EOC
13. Code, para. 4.6
14. s30 Equality Act 2006

The Equality Act (Sexual Orientation) Regulations 2007

The Equality Act (Sexual Orientation) Regulations 2007 (the regulations), which prohibit sexual orientation discrimination outside the employment context,[1] came into force on 30th April 2007 at the same time as the parallel provisions of Part 2 of the Equality Act 2006 in relation to religion or belief (for details of these see Briefing no 394).

The new measures outlaw discrimination on grounds of sexual orientation in the provision of goods, facilities and services, education, the use and disposal of premises and the exercise of public functions. The power to make regulations to prohibit such discrimination derives from s.81 of the Equality Act 2006 and was a belated attempt by the government, under pressure from Stonewall and other similar interest groups, to place sexual orientation on the same footing as other statutorily prohibited forms of discrimination.[2] The Department for Communities and Local Government has also produced guidance on the Regulations entitled '*Guidance on the New Measures to Outlaw Discrimination on Grounds of Sexual Orientation in the Provision of Goods Facilities*' (the guidance). The enactment of the regulations does attempt, albeit imperfectly, to harmonise the levels and scope of protection across all strands of discrimination. However, the resulting addition to the multitude of legislative anti-discrimination instruments does not do enough to recalibrate the inherently inconsistent statutory framework. This short article provides a broad overview rather than a detailed critique of the regulations.

Definitions

The definition of sexual orientation for the purposes of the regulations is 'an individual's sexual orientation towards (a) persons of the same sex as him or her, (b) persons of the opposite sex, or both' replicates the definition found in s.2(1) the *Employment Equality (Sexual Orientation) Regulations 2003* (SOR). The prohibited forms of discrimination are, classically, direct discrimination (reg. 3(1)), indirect discrimination (reg. 3(3)) and victimisation (reg. 3(5)-(6)).

The definition of direct discrimination in regulation 3(2) explicitly outlaws discrimination on the basis of *perceived* sexual orientation. Whereas it has always been assumed[3] that detrimental treatment on the basis of perceived orientation contravened the SOR, regulation 3(2) states in terms that 'a reference to a person's sexual orientation includes a reference to a sexual orientation he is *thought* to have'. The guidance also makes clear that discrimination by way of association is unlawful in the context of the new measures. Examples of direct discrimination given in the guidance include the refusal of entry to, or hostile treatment in, bars, pubs and restaurants and the denial of shared accommodation in hotels, guesthouses and bed and breakfast establishments.[4] As far as indirect discrimination is concerned, the guidance indicates that a company's refusal to provide customers who have had an HIV test with access to services might indirectly discriminate against gay men.

Significantly, there is no prohibition against harassment comparable to that found in the analogous Northern Ireland Regulations.[5] The reason given by the government for excluding this now well recognised form of discriminatory conduct was that the complex question of how harassment should apply across all discrimination strands was to be considered as part of the Discrimination Law Review. The government excluded harassment protection despite the Joint Committee on Human Rights' workable suggestion that the regulations contain a more precise and narrow definition of harassment than the Northern Ireland provision which would avoid potential conflict with the ECHR right to freedom of expression and provide the necessary protection.[6]

Areas in which discrimination is proscribed

Access to Goods, Facilities and Services

The regulations outlaw discrimination, as described above, in relation to the provision of goods, facilities and services (GFS) (reg.4), the disposal and management of premises (reg.5), in educational

establishments (reg. 7) and in relation to the performance of public functions (reg. 8).

Unlawful treatment in GFS provision includes the refusal to provide services, the provision of inferior service, or provision in a less favourable manner or on less favourable terms than would normally be the case. Examples of such service provision given in regulation 4 are:

- access to and use of a place that the public is permitted to enter,
- accommodation in hotels and boarding houses,
- facilities for banking and insurance,
- recreation entertainment or refreshment,
- transport or travel, and
- professional or trade services.

This provision has generated much interesting debate about the impact on pubs, clubs and bars with predominantly lesbian and/or gay clientele. It is fairly commonly accepted that such social spaces serve the morally defensible function of creating an environment in which lesbians and gay men (and often trans-gendered persons or others who perceive heterosexual social clubs to be hostile environs for those whose sexuality or form of gender expression is non-conformist) can enjoy each others company free from derision or ridicule.

Many commentators have criticised the symmetry of the GFS provisions on the basis that they could potentially destroy these 'pockets of safety' which many lesbians and gay men value. There is of course a very good argument that equality protection ought not to be thought to be coterminous with parity of treatment where one group (in this case those of same-sex sexual orientation) has created semi-exclusive social spaces in response to historical exclusion from the mainstream. The guidance suggests that the targeting of lesbian, gay or bisexual service users will not infringe the regulations. However, the refusal to provide services to heterosexuals or an advertisement which 'implies that clients of a certain sexual orientation are unwelcome' will be unlawful. In essence, if the interpretation provided in the guidance prevails, the need for what I refer to as 'pockets of safety' will be satisfied either by the self-restraint of potential heterosexual service users or by a change in societal homophobia which obviates the need entirely.

The GFS provisions do not apply to arrangements under which a person takes others into his/her home as if they were a family member (Reg. 6(1)). This exemption, reasonably, respects the privacy and family life of those who would wish, for example, to have lodgers or au pairs of a particular sexual orientation.

Disposal and management of premises

Regulation 5, which is concerned with the disposal and management of premises, prohibits:

a) the refusal to sell or rent the premises to a particular person;
b) the offering less generous terms; or
c) discrimination against people on a list of those requiring housing: for example, by giving priority to people of a certain sexual orientation, or deliberately overlooking those of a certain sexual orientation.[7]

Reg 5 also prevents the managers of premises from discriminating against a tenant or other occupier on grounds of sexual orientation by eviction, refusal of access to a benefit or facility, less favourable access to such a benefit/facility or subjection to detriment. This is an important social housing measure which will offer some redress to lesbians and gay men who might otherwise find themselves homeless as a result of unjustifiable homophobia.

Exemptions to reg 5 include:

- that a landlord or near relative lives in another part of the same premises (reg 6(2)(a)) when premises include parts that the landlord or near relative would share with the tenant Reg. 6(2)(b)) and the premises are of a size where no more than two households, or six individuals, can live in the premises in addition to the landlord or near relative or
- disposal by person who owns an estate or occupies the whole of the premises and does not use an estate agent or advertisement for the purposes of disposing of the interest in question (private sale or letting).

As with the GFS provisions, the exemptions to reg. 5 are intended to be protective of privacy in the home.[8]

Public Functions and Public Authorities

The prohibition in reg 8 against discrimination by public authorities in the carrying out of public functions mirrors s.19B RRA and the corresponding provisions of the DDA and SDA. Reg 8 fills a gaping hole in the equality of public service provision for lesbians, gay men and/or bisexuals in hospitals, prisons and mental health services, for example. There is much anecdotal evidence that the absence of redress in

relation to public functions had left homophobic prejudice in these important areas of social activity intact (examples include hospital staff preventing the gay or lesbian partner of a patient from attending meetings/appointments reserved for the 'family' of the patient). The failure to include harassment may, however, render the public function prohibition less effective in prisons and young offender institutions where much offensive conduct will specifically be harassment. It is true that the direct discrimination provisions may be sufficient in such circumstances but the justification for excluding harassment appears particularly flimsy in this context.

Educational Establishments

All maintained and special schools and academies and independent schools in England and Wales, and all public and grant-aided schools in Scotland, are covered by the regulations.[9] This will mean that responsible bodies and governing bodies of schools will need to ensure that there is no direct or indirect discrimination or victimisation of gay, lesbian or bisexual pupils or the children of gay, lesbian or bisexual parents. Local Authorities are also prevented from discriminating in the exercise of their functions.

Exemption for Religious organisations

Specific provision is made in the regulations to avoid undue restriction of the activities of religious organisations. Despite the protestations of the religious right, in my view, the regulations more than adequately protect the right to freedom of thought, conscience and religion contained in Article 9 ECHR. There is no requirement for ministers to perform same-sex marriages or to admit gays, lesbians or bisexuals to religious organisations. Indeed, it could be said that the regulations strike an acceptable balance between a respect for religious rights and placing justifiable limitations upon the extent to which the manifestation of religious beliefs may be permitted to have an adverse impact on the lives of others.

Regulation 14 states that an organisation the purpose of which is to:

- practice, advance, teach the practice or principles of any religion or belief; or
- to enable persons of a religion or belief to receive any benefit or engage in any activity within the framework of the religion or belief;

will not act unlawfully if it:

i) Restricts membership of the organisation (reg 14(3)(a));
ii) Restricts participation in the activities of the organisation (reg 14(3)(b));
iii) Restricts the provision of GFS in the course of such activities (reg 14(3)(c)); or
iv) Restricts the use or disposal of premises owned or controlled by the organisation (reg 14(3)(d))

on grounds of sexual orientation.

Similarly, ministers of religion will not fall foul of the regulations if they restrict a person from participating in certain activities or using certain services of an organisation covered by the reg 14 exemption. However, in order for such a restriction to be lawful, the activities and services restricted must be 'carried on in the performance of [the minister's] function in connection with or in respect of' a religious organisation as defined by regulation 14(1). In other words a minister could not rely on this exemption if s/he prevented a gay, lesbian or bisexual person from taking part in a sporting event organised by him/her outside of the auspices of his her ministering role in relation a religious organisation.

The regulations do, however, place further limits on religious organisations' right to treat persons in a way which would otherwise amount to sexual orientation discrimination. Therefore, the kinds of restrictions permitted by regulation 14 must also satisfy further threshold criteria in order to be lawful. The relevant criteria are that the restrictions must be imposed either where necessary to comply with the doctrine of the organisation or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (reg 14(5)). As suggested in *R (Amicus & ors) v Secretary of State for Trade and Industry* [2004] IRLR 430 in relation to the employment SORs, these criteria are to be interpreted narrowly rather than widely.

The guidance provides useful examples of the kinds of activities which can lawfully be restricted on grounds of sexual orientation. Such activities include the attendance at prayer groups or confirmation/marriage preparation sessions. Notably, the exemptions in regulation 14 are not available to religious organisations which deliver GFS on behalf of or under contract with a public authority or which are primarily commercial organisations. In consequence, adoption

agencies which are primarily commercial will not be able to benefit from the exemptions in regulation 14 (subject only to special temporary exemptions in the regulations for voluntary fostering and adoption agencies until December 2008) even if they market themselves as having a religious ethos.[10]

Provisions relating to specific kinds of association/organisation

As referred to above, special provision is made for voluntary fostering or adoption agencies which satisfy the reg 14 criteria or act on behalf, or under the auspices, of a religious organisation. In response to the voiced concerns of catholic adoption agencies at the time that the regulations were being debated, the government has permitted such agencies to lawfully restrict the GFS provision on grounds of sexual orientation until 31st December 2008 provided that they make referrals to other providers of similar services.

Membership rights in relation to private clubs and associations are covered by the regulations (reg 16). There is however an exception for associations whose main object is to allow benefits to be enjoyed by persons of a particular sexual orientation (reg 17). Charities are also exempt in so far as they are established to confer a benefit on a group by virtue of sexual orientation. These exemptions, whilst the preservative of what I have described above as 'pockets of safety', may pose difficulties which are not easily resolvable. For example, how easy will it be to prevent private members clubs from restricting membership to straight persons on the basis that 'the affairs of the association are so conducted that the persons primarily enjoying the benefits of membership are of the sexual orientation in question' (reg 17)? There is plainly a danger that the regulations may be used to enforce an invidious form of social segregation based upon sexual orientation.

Enforcement

The regulations make similar provision in relation to discriminatory advertisements, practices, instructions to discriminate and special needs as is made in other statutory anti-discrimination instruments. The enforcement of the advertisement/practices provisions will be done by the CEHR whilst other claims, save for certain immigration claims; can generally be brought in the County Court pursuant to reg 20. Remedies and time limits are the same as those which apply other GFS discrimination cases (6 month time limit and any remedy available in tort plus injury to feelings).

Miscellaneous

There are specific provisions in relation to Contracts (reg 26), Insurance (reg 27) and Blood Donation (reg 28). Whereas specific consideration of these provisions is beyond the scope of this article, it is anticipated that the Blood Donation provisions (which authorise the refusal to accept blood from a person on the basis of an a risk to the public assessed by reference to clinical or epidemiological or other data) may give rise to issues of indirect discrimination against gay men.

Ulele Burnham
Doughty Street Chambers

1. Sexual orientation discrimination in the employment context is dealt with by the Employment Equality (Sexual Orientation) Regulations 2003.
2. Part 2 of the Equality Act 2006 contains primary legislative provisions prohibiting analogous forms of discrimination in respect of Religion and Belief.
3. In consequence of the provisions of the explanatory notes to the SOR.
4. See Guidance, p.8
5. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, SI 2006/439.
6. See paras. 54-59 of the *Sixth Report of the Joint Committee on Human Rights*. It is worth noting that many of the employment tribunal cases brought under the SOR were cases of harassment. This suggests that harassment is a particularly invidious form of sexuality discrimination.
7. See p.15, Guidance.
8. See Guidance, p.15.
9. See p.17, Guidance.
10. See p.20 of the Guidance.

Khan revisited: better protection from victimisation

St Helens Metropolitan BC v J E Derbyshire & ors [2007] IRLR 540

Implications for practitioners

The House of Lords were unanimous in this important case on victimisation in concluding that where an employer pressurises an employee complaining of discrimination to settle or abandon her claim this can constitute victimisation. An employer is entitled to take steps to protect its own interests but only if this does not result in the claimant suffering a detriment. Whether the borderline has been crossed is a question of fact for the Tribunal.

Facts

The House of Lords allowed the appeal of Mrs Derbyshire and 37 other women. They had complained that two letters sent by their employer to all employees in their division, and to the claimants themselves, setting out that the consequences for all staff if their claims for equal pay succeeded would be redundancies and a threat to the school dinner service were aimed at getting the women to abandon their claims and went beyond legitimately protecting the employer's interests and, instead, constituted victimisation.

The 38 catering staff who worked in the school meals service, along with 470 other women, had brought equal pay claims back in 1998. The Council made a settlement offer which was accepted by the 470 but rejected by 38 women who decided to continue to the ET, where they were successful. Some two months before the claims were due to be heard, the claimants received two letters from the Council. The ET concluded, among other things, that one letter contained what in effect was a threat in that it *'spelt out a danger that if the claims were not dropped it might deprive children of school dinners, and that they might cause redundancies among their colleagues'*. The tribunal also found that the letter *'amounted to an attempt to induce the acquiescence of individuals despite the view of their union'*. It went on to conclude that the letter was intimidating.

The women, supported by their union, the GMB, brought claims against the Council under s4(1)(a) SDA for victimisation. They stated that the letters were aimed at getting them to abandon their claims and caused them distress and reproach from colleagues. The Council contended that they were merely made an 'honest and reasonable' attempt to achieve settlement and that the letters were not because the women had brought equal pay claims.

Employment Tribunal, Employment Appeal Tribunal and Court of Appeal

The ET ruled in favour of the women, concluding that the tests set out in the SDA were satisfied: by sending the letters, the woman had been less favourably treated than other employees who had not brought and continued equal pay claims. They had suffered a detriment, namely distress and reproach, and the purpose of the letters was to get the women to abandon their claims. This judgment was endorsed by the EAT but overturned by the CA. The CA (by a majority, Mummery LJ dissenting) concluded that the ET in deciding whether the treatment 'was by reason of' the protected act should have applied the test set out in the HL in *Chief Constable of West Yorkshire v Khan* [2001] IRLR 830, and considered whether the letters represented *'an honest and reasonable attempt by the Council to compromise the proceedings.'*

On appeal to the HL, the EOC, CRE and DRC intervened to assist the HL in explaining the complex legal background under domestic and European law and in particular the judgment of the ECJ in *Coote v Granada Hospitality Limited (Case-185/97)* [1998] IRLR 656 which was not considered by the CA.

The approach agreed on by all was spelt out by Lord Neuberger who, while finding the conclusion in *Khan* correct, suggested that *'its juridical analysis and subsequent interpretation are not entirely satisfactory'* for three reasons:

- the 'honest and reasonable employer' defence spelt out in *Khan*, is not found in the legislation itself;.
- the reasoning in *Khan* seemed to place a somewhat uncomfortable and unclear meaning on the words 'by reason that'.

- under the victimisation provisions, it is primarily from the perspective of the alleged victim that one determines the question whether or not any 'detriment' (in this case, in section 6(2)(b) of the 1975 Act) has been suffered. However, the reasoning in *Khan* suggests that the question whether a particular act can be said to amount to victimisation must be judged from the point of view of the alleged discriminator.

He concluded that in determining whether the less favourable treatment is 'by reason that' it is necessary to consider why the employer has taken the particular act (in this case the sending of the two letters) and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused detriment, one must view the issue from the point of view of the alleged victim, he held:

> *A more satisfactory conclusion, which in practice would almost always involve identical considerations, and produce a result identical, to that in Khan, involves focusing on the word 'detriment' rather than on the words 'by reason that.' If, in the course of equal pay proceedings, the employer's solicitor were to write to the employee's solicitor setting out, in appropriately measured and accurate terms, the financial or employment consequences of the claim succeeding, or the risks to the employee if the claim fails, or terms of settlement which are unattractive to the employee, I do not see how any distress thereby induced in the employee could be said to constitute a detriment.*

In reaching that conclusion he placed weight on the decision of the ECJ in *Coote v Granada Hospitality Limited* which was not cited in *Khan*. It was significant that the ECJ focused in paragraph 27 on the purpose of the relevant Directive (76/207/EEC) as being to require victimisation legislation not to be limited merely to dismissal. This was on the basis that that was *'not the only measure which may effectively deter a worker from making use of the right to judicial protection'*. In other words, the ECJ focused on the effect of the relevant act on the alleged victim, rather than the purpose of the alleged discriminator when carrying out the act.

Baroness Hale added to this analysis by commenting that this was *'a classic case of blaming the victims'* and the actions of the Council were *'no ordinary attempts to settle'* and *'the victims of long standing and deep-seated injustice should not be made to feel guilty if they pursue their claims for justice'*. She commented upon the special position of equal pay claims and claimants:

- *Equal value claims are enormously complex, often involve a great many employees and go on for a very long time… during this time, people still have to work together. The whole idea is that they should be able to go on doing so, not only while the case is going on, but also in the future. This makes the protection from victimisation given by s4 Sex Discrimination Act 1975 all the more important.*
- *Equal pay claimants are peculiarly vulnerable to reproach and worse from colleagues who fear the effects of their claims upon their own positions. However anxious the employers may be to settle, they should not exploit that vulnerability in their attempts to do so.*

In summary, the guidance on the purpose of victimisation provisions was:

- The purpose is to protect those seeking to assert their rights, otherwise if there was no protection, the right not to be discriminated against would be of little value or no value if once the person claimed legal redress if an alleged discriminator could then interfere with the proceedings and undermine the integrity of the judicial process.
- The purpose of victimisation provisions in the various domestic and European legislation is the same and should be interpreted consistently.
- European law requires that people who bring equal pay and sex discrimination are given effective protection against dismissal or other adverse treatment as a reaction to their complaints. The purpose is to secure that they are not deterred from pursuing their claims or punished if they have done so. (Baroness Hale, para 35).
- The ECJ in *Coote* looked at the employer's conduct from the standpoint from the employee's interest not the employer. The employer is entitled to take steps to protect his own interests but he must not seriously jeopardise the employee's right to pursue her claim. It is the employee's interest in pursuing the claim that provides the test of what is and what is not 'reasonable.' (Lord Hope, para 26).

As to what action an employer could take to settle a claim, the following advice was given:

- While the Council had been entitled to take steps to settle the claims, the Council should have considered how the action they took would be seen

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through the eyes of the employees.

- 'Employers must avoid doing anything that might make a reasonable employee feel that she is being unduly pressurised to concede her claim. Indirect pressure such as reproach from colleagues is just as likely to deter an employee from enforcing her claim as a direct threat'.
- An alleged victim cannot establish detriment merely by showing she had suffered distress; such distress would need to be objectively reasonable in all the circumstances. (Lord Neuberger, para 68).
- Employers have some latitude to argue his case or to settle claims. (Lord Hope, para 23).
- Employers can send letters pointing out the consequences of the claims succeeding or suggesting settlement. (Lord Neuberger).
- Whether the borderline has been crossed is a question of fact for the Tribunal. (Lord Hope, paras 27-28).

Comment

This important decision gives very useful guidance on the purpose and scope of the law on victimisation. Applying the approach of the ECJ in Coote, it correctly approaches the issue from the point of view of the victim and the test is one of whether the principle of judicial protection is infringed.

Tess Gill
Old Square Chambers

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Briefing 449

EOC successful challenge to SDA harassment and pregnancy amendments

Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] IRLR 327

Implications for practitioners

In this case the EOC argued that the Government had failed to comply with its obligation to implement the Equal Treatment Directive 2002/73/EC[1] when it amended the SDA from 1 October 2005 in relation to the provisions for harassment and for pregnancy and maternity leave.

Harassment

Article 2(2) of the Directive defines 'harassment' as:

> *where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*

SDA s4A(1) provides that a person subjects a woman to harassment if:

> *a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect:*
> *i) of violating her dignity, or*
> *ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her…*

The EOC argued that the SDA definition of harassment, which is the based on the definition of direct discrimination (i.e. 'on the ground of her sex'), meant that a complainant had to show that the conduct was directed towards her because she was a woman and this wrongly imported a causative test that was only appropriate in cases of direct discrimination, i.e. the need to show that the complainant's sex was the reason for the treatment.

The second part of the challenge was to the question of third party liability and the House of Lords comments in *Pearce v Governing Body of Mayfield School* [2003] IRLR 512 that an employer was not liable for the acts of third parties, so is under no obligation to prevent harassment by third parties unless the failure to act was discriminatory itself. The High Court said that so long as s4A SDA was framed in terms of unwanted

conduct 'on the ground of her sex' an employer would not be liable even if it failed to take any action to stop harassment by others.

The High Court held that s4A(i)(a) should be amended to eliminate the issue of causation. This means that the SDA must be amended to make it clear that:

- The harassment need only relate to sex, thus there is no need for a woman to show that the unwanted conduct was directed towards her because she was a woman, nor that a man would be treated differently.
- The harassment does not need to relate to the complainant's sex but could relate to the sex of another employee, male or female, provided it creates an offensive environment. As Burton J said *'there could be harassment of a woman if the denigratory conduct, directed towards another party related to sex, but not of a sexual nature, had the effect of creating a humiliating or offensive environment for her'*;
- Harassment can include the failure by an employer to prevent harassment by a third party such as a client or customer. Thus, an employer will be liable for the conduct of a third party, such as where it knowingly fails to protect an employee from repetitive harassment by a customer.

The High Court dismissed the EOC's argument that the objective test in s4A(2) SDA was a breach of the Directive. The Court held that the complainant's perception could not be the sole and determinative issue as to whether conduct is regarded as violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The conduct complained of must be objectively unreasonable as well as being offensive to the recipient.

Implications for other definitions of harassment

This decision will apply to all other areas of discrimination so the equivalent definitions will also be incompatible with the various Directives.

Pregnancy and maternity leave: the 'comparator' question

Section 3A SDA provides that:

a person discriminates against a woman if

a) at a time in a protected period [i.e. from beginning of pregnancy until end of maternity leave], and on the ground of the woman's pregnancy, the person treats her less favourably than he would treat her had she not become pregnant; or

b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably than he would treat her if she were neither exercising nor seeking to exercise, and had neither exercised nor sought to exercise, such a right.

Thus, a pregnant woman must make a comparison with herself when she was not pregnant. The EOC argued that there was no need for a comparator at all. This was long established by ECJ decisions such as *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482, which held that pregnant women are *'in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or that of a woman actually at work'.*

The High Court held that the need for a comparator in s3A SDA breached the principle of regression and the section should be amended to remove the need for any comparator.[2] This applies in relation to discrimination on grounds of pregnancy and maternity leave. Thus, a claimant need only show unfavourable treatment related to pregnancy or maternity leave. In some situations this may mean that an employer must treat a pregnant woman more favourably, such as where she has a pregnancy related absence.

Rights during maternity leave

The EOC challenged the exceptions relating to terms and conditions during maternity leave which are set out in s6A SDA. There was no challenge to the well established principle that a woman on maternity leave is not entitled to normal pay during her maternity leave.[3] The challenge was on two grounds:

1) That s6A(1), which provides that it is lawful to deprive a woman on ordinary maternity leave of any benefit from the terms and conditions of her employment relating to remuneration, was a breach of the decision in *Lewen v Denda* [2000] IRLR 67. This held that a woman on OML is entitled to any bonus payable in respect of the two week compulsory maternity leave.
2) That s6A(3) and (4) make it lawful to deprive a woman who is on additional maternity leave of any benefit from the terms and conditions of her employment, except:
   - maternity-related pay,

- the implied term of trust and confidence,
- notice of termination,
- redundancy compensation,
- disciplinary or grievance procedures and
- membership of a pension scheme.

The EOC argued that, under s6A, the following examples set out in the Fact Sheet produced by the Women's Unit, would be lawful under s6A – and wrongfully so, i.e.

- failure to take into account length of service during AML;
- lack of consultation in relation to redundancy;
- lack of consultation about a reorganisation or changes effecting the woman's job or working conditions during AML ;
- failure to inform a woman about pay rises, bonuses, promotion or vacancies during AML,
- a failure to appraise or give an annual assessment to a woman during AML.

The EOC relied on the ECJ judgment in *Land Brandenburg v Sass* [2005] IRLR 147 where the ECJ held that it was discriminatory to ignore a woman's full service during her maternity leave (and instead limiting it to the minimum period of 14 weeks laid down by the Pregnant Workers Directive) in terms of calculating her seniority. In *Sass* the ECJ held:

> *Accordingly, if a national court reaches the conclusion that the maternity leave provided for … is such statutory leave intended to protect women who have given birth, the whole of that leave must be counted towards the qualifying period to be completed in order to be classified in a higher salaried grade, to prevent a woman who has taken such leave from being placed in a worse position because of her pregnancy and her maternity leave, than a male colleague who started work in the former GDR on the same day as she did.*

The High Court held that *Sass* bindingly enshrines European Law so that to deprive a claimant of protection from discrimination in relation to the examples set out above in the Fact Sheet was regressive and unlawful.

It is not clear whether all rights (apart from pay) should continue during AML as well as under OML. In *Sass* the ECJ held that the ETD provides that where the maternity leave was for the protection of a woman's biological condition and the special relationship between her and her child.

> *… Community law requires that taking such statutory protective leave should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it and cannot lead to discrimination against that woman.*

Following this principle, arguably all rights provided during OML should continue during AML – apart from remuneration which is generally replace by statutory maternity pay.

Sass was followed by *Sarkatzis Herrero v Instituto Madreleno de la Salud* [2006] IRLR 296 where the ECJ held:

> *…. The Aim of Directive 76/2007 is substantive, nor formal equality, [that] Directive must be interpreted as precluding any unfavourable treatment of a female worker on account of maternity leave or in connection with such leave, which aims to protect pregnant women, and that is so without it being necessary to have regard to whether such treatment affects an existing employment relationship or a new employment relationship.*

Principles governing implementation of a Directive

The High Court summarised the principles set out in *R (Amicus – MSF) v Secretary of State for Trade and Industry and Others* [2004] IRLR 430 saying that:

> *Although Member States are free to choose how a Directive is implemented, they must adopt in their national legal systems all the measures necessary to ensure that the Directive is fully effective, in accordance with the objective which it pursues: **Von Colson v Land Nordrhein – Westfalen** [1984] ECR 1891 at 1906-7, paragraphs 15 and 18. It is inherent in Article 249 EC, and is clear from **Von Colson** and later authorities, that a Member State is not required to copy out the exact wording of the Directive. It has considerable flexibility in implementation, provided that the requisite result is achieved.'*

The need for certainty

The EOC emphasised the need for certainty, i.e. clarity, which the government said was one of the purposes of the amendment to the SDA. The High Court stressed the need for *'clarity and certainty, and comprehensibility, by employees and employers alike'*.

And the amendments?

The government have said that they intend to introduce regulations to amend the Employment

Equality (Sex Discrimination) Regulations 2005 with effect from 1 October 2007. However, this judgment has not been appealed and applies even before the amendments are introduced.

Conclusions

This decision highlights the importance of taking into account EC law when interpreting UK anti-discrimination legislation. Often EC Directives provide more far reaching rights for complainants and they are crucial to an understanding and interpretation of UK anti-discrimination law.

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Legal Action Group 2006

1. Which amended the ETD 76/2007/EEC
2. Article 1.8e.2: provides 'The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by member states in the fields covered by this Directive.'
3. *Gillespie v Northern Health and Social Services Board* [1996] IRLR 214.

Briefing 450

Guidelines to prevent disability discrimination in education appeal hearings

R (on the application of T by his mother and litigation friend) and Independent Appeal Panel for Devon County Council (Defendant); Governing body of X College, Interested Party [2007] EWHC 763 (Admin) QBD 4/4/2007

Background

The DRC, having recently conducted a review of education and the DDA, has expressed concern about the fact that appeal hearings concerned with exclusions from school are dealt with by the independent appeal tribunals. These consist of a non-legal membership, producing decisions which often have limited reasoning. This case concerns one such decision. It also provides a useful summary of the approach to exclusion issues where a breach of the DDA is claimed.

Facts

T is a 15 year old boy with Asperger's syndrome. When he started at X college, in 2002, the college was warned of this diagnosis and of its potential impact, in particularly *'T…can act impulsively and can over react to situations and although he is a gentle boy he may hit out and land himself in trouble because of this'*. On 4 May 2006, T assaulted a teacher, GS. The previous day, GS had confiscated a cap T was wearing. T was temporarily excluded from the school initially, and the exclusion was subsequently made permanent. A school Disciplinary Committee upheld this decision and T's mother appealed to the Independent Appeal Panel.

Independent Appeal Panel

The panel met on 28th June to consider the appeal. At this meeting, T's mother indicated that T had received inadequate support and had suffered from bullying. She also provided letters written by a Dr H, indicating the effect upon T of his Asperger's and a number of other statements. The decision of the panel – to uphold the decision of the college – was notified in a letter to T's mother dated 29 June 2006. T sought judicial review of the decision.

The grounds for review identified 5 grounds of

challenge (see below), all based on inadequacies in the decision letter. The panel resisted the application, and amongst the evidence relied upon was a statement from the Panel Chairman which in effective sought to supplement the decision letter.

High Court

Mr Justice Walker upheld the Claimant's action on the following basis:

Ground 1 – that the Panel had failed to engage with the analysis required under the DDA concerning whether the college had complied with its obligations under that Act. Mr. Justice Walker held that there was common ground as to the process which the DDA required the Panel to adopt. They should decide:

- Firstly whether T was disabled within the meaning of the DDA,
- Secondly, whether the college had treated T less favourably than it treats or would treat others, the appropriate comparison being with a child who was not disabled and who had behaved properly (rather than a child who was not disabled but who had behaved as T had done) see *M School v CC, PC & Another* [2004] ELR 89 at paras 38-46 per Silber J,
- The third question was whether the exclusion arose for a reason which related to T's disability. If so, in order to avoid discriminating against T it would be necessary for the college to show that permanent exclusion was justified,
- In order for the treatment to be justified, it must be material to the circumstances of the case and substantial,
- The panel must ask if the duty to make adjustments was complied with and, if not, in order to justify the college's treatment of T, a seventh question, whether the treatment would have been justified even if the college had complied with its duty, had to be answered affirmatively.

Nowhere in the decision letter did the Panel expressly ask or answer any of these specific questions. The Panel Chairman's witness statement made it plain that the Panel did not find that the exclusion arose for a reason relating to his disability. On this basis, even if 'grounds' connotes something less specific than 'reasons', the basic ground of the decision was simply not set out in the decision letter.

Whilst Justice Walker recognised that the decision maker was a part time lay tribunal, any degree of latitude afforded to the panel could not extend to the identification for the first time, some 4 months after the decision letter was written and after the grant of permission to apply for judicial review, of the fundamental ground upon which the decision was based. The failure of the Decision letter to grapple even by inference with the question which arises under the DDA was so fundamental a failure that it would not be appropriate to permit the decision letter to be supplemented in this way. Without such supplementation, the decision letter plainly failed to address relevant legal questions under the DDA and the decision must be quashed.

Grounds 2 and 3 were that that the panel failed to have regard to (Ground 2) the DRC Code of Practice and (Ground 3) the DfES Circular 0354/2004. Justice Walker held that the material which T said had not been taken into account concerned the proper approach to be taken by bodies when considering exclusion of a pupil who suffers from a disability. For the reasons given in relation to ground one, the Panel's approach to the question of T's disability was not an approach which could be upheld in law and in these circumstances there was held to be no need to investigate grounds 2 and 3.

Ground 4: that the statement in the decision letter that *'there was no evidence to support claims of discrimination, provocation or bullying'* was manifestly incorrect and failed to take into account material evidence. It was conceded by the Defendant that at the hearing before the Panel there was, in fact, evidence to support such claims. What is said in the detailed grounds is that T's mother *'did not adduce any sufficiently persuasive evidence'*. Thus the question on ground four was: can the Panel, having said in the Decision Letter that there was 'no evidence', be entitled now to assert that in fact its conclusion was that there was some evidence but not enough to enable it to reach the conclusion in question? Mr. Justice Walker answered this question in favour of T. The position taken in the decision letter was perfectly clear. The conclusion was that there was no evidence to support T's claim in the relevant respects. There is a world of difference between a case involving that conclusion and a case where the conclusion is that, while there was some evidence supporting the claims in question, that evidence has been assessed on its own merits and against evidence the other way and found to be

insufficient. The reasoning in the one case is clearly inconsistent with the reasoning in the other. It was common ground that later evidence may not be relied upon to support a clearly inconsistent assertion. In those circumstances T must succeed on ground 4.

Ground 5: that the reasoning of the decision letter was inadequate and it failed to comply with an 'enhanced duty' arising from the 2004 Circular. This stated that *'The decision letter should give the panel's reasons for its decision in as much detail as possible for the parties to understand why the decision was made'*.

For the reasons given on grounds 1 and 4 Justice Walker concluded that the Decision Letter was not adequately reasoned.

The Claimant raised additional grounds essentially stemming from the supplementary statement from the Panel Chairman – in particular, relating to the ground that the panel's conclusion was unrelated to his Asperger's Syndrome was completely at odds with the only medical evidence before the panel. Mr Justice Walker held that even if he had permitted reliance upon the Panel Chairman's statement, he would have concluded that the first of the claimant's additional grounds succeeded. The only medical evidence before the Panel was from Dr. H. She plainly regarded the incident as related to T's Asperger's Syndrome. The College, apparently in reliance on passages in letters from Dr. H. at the time T started his secondary education, asserted that a pre-meditated attack could not be related to T's Asperger's Syndrome. No consideration appears to have been given to the fact that Dr. H. plainly disagreed with the College's opinion as to whether a pre-meditated assault could relate to T's Asperger's Syndrome.

Remedy

On the question of remedy, the defendant resisted the quashing of the order on the basis of delay, which Mr. Justice Walker dismissed. The other ground of resistance was that T is now at another school. In relation to this second issue, Justice Walker held that a determination that he was rightly the subject of a decision that he be excluded permanently was a very serious matter. Without a fresh hearing before the Panel T would be unable to erase the blot on his record. Unless the court were to grant relief, the decision of the panel as a whole might be seen as reflecting adversely on T's character, and might impair his ability to access educational and other opportunities in the future. Relief was therefore granted.

Comment

This case demonstrates the importance of ensuring that any DDA claim is fully addressed whatever the venue in which the claim is determined. Whilst the court declined to expound the relevant principles regarding the adequacy of reasons and the circumstances in which they can be supplemented, it was nevertheless obvious from the Decision Letter that the panel had not addressed the DDA, which was something – lay panel or not – that they clearly had to do. In addition, the decision makes clear the gravity of a permanent exclusion upon a pupil, regardless of whether that pupil ever intends to return to the school from which he has been excluded, and thus the importance of an effective remedy.

Catherine Casserley
Disability Rights Commission

Briefing 451

Human rights and school uniform requirements

R (on the application of X by her Father and litigation friend) v Headteachers of Y School and Governors of Y School [2006] EWHC 298 (Admin) 21.2.07

Facts

X, a 12 year old Muslim girl, was a student at Y, an all girls grammar school. Upon reaching puberty in her second year at Y, X decided that she wanted to wear the niqab. Three of X's elder sisters had previously been students at the school; all had worn the niqab during their time there. Following meetings and correspondence between X, her family and the

headteacher, X was told in October 2006 that she would be excluded if she returned to school wearing the niqab. X has not returned since then. X has been offered a place at another grammar school, Q, at which she would be allowed to wear the niqab. The local authority has indicated that they would provide transport for the 25 minute journey. At the time of judgment X had not accepted the offer of schooling at Q school.

High Court of Justice

It was argued in front of Sibler J that:

1) the refusal to allow the niqab at school constituted a breach of article 9 ECHR,
2) X had a legitimate expectation she would be permitted to wear the niqab,
3) like cases should be treated alike: X's situation was indistinct from that of her sisters, they had been allowed to wear the niqab, thus so should she.

Article 9

Sibler J ruled that although article 9 was engaged, her article 9 rights had not been infringed. He drew on *R (Begum) v Governors of Denby High School* [2006] 2 WLR 719 and Strasbourg jurisprudence. Essentially, there was no infringement because X could, without excessive difficulty, transfer to Q school where she would be able to wear the niqab. His Lordship went on to find that even if there were an infringement of article 9, on the evidence (principally of the headteacher of Y), it was justified by:

- the importance of school uniform to cohesion and equality;
- security concerns (possibility of interlopers wearing the niqab to enter the school undetected); and
- pressure on other Muslim girls to wear the niqab.

Legitimate expectation

There was no regular practice which X could reasonably have expected to continue. It seems that only X's sisters had previously worn the niqab at Y school, the last of whom left in 2004 and had not been subject to any uniform requirements from 2002 onwards from which point she was in the 6th form which had no uniform regime. Since that time a new head teacher had been appointed and the uniform regime had been re-thought (though no reference to the niqab was made in the uniform policy).

Treat like cases alike

X's case was not the same as her sisters' cases. Time had passed and in any event staff who taught X's sisters gave evidence that the niqab had impeded their teaching of the sisters. There was a new head teacher and a new uniform policy which the school was entitled to introduce.

Comment

This case was not run under discrimination law, though it raises issues discrimination advisers may encounter.

Although the judgment is expressly confined to its facts it provides a good illustration of the prevailing approach to article 9 in religious dress cases and, in particular, to the difficulties individuals face in seeking to rely on article 9. Firstly, if an individual who has encountered an obstacle to the manifestation of their religion is able to manifest their religion by making a moderate adjustment to their behaviour (e.g. by going to a different school) it will be hard to establish an infringement of article 9. Secondly, even if an individual can establish that there has been an infringement of article 9 it will be relatively easy for the decision maker to justify the infringement. The court will afford the decision-maker a wide margin of appreciation. Thus, in the present case, the court was willing to accept *assertions*, albeit made by experienced members of the teaching profession, that allowing a student to wear the niqab would have wide-ranging and significant adverse educational and social implications within the school.

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Xxxxx

Baldwin v Brighton & Hove City Council [2007] IRLR 232

Implications for practitioners

This decision has two points of interest for practitioners. Firstly, the test as to whether there has been a breach of the implied term of trust and confidence is not as onerous as stated by the House of Lords in *Malik v BCCI* [1997] IRLR 462 in that the test can be determined objectively without needing to show what was in the mind of the employer. Secondly, a direct discrimination case cannot be brought by a claimant alleging that s/he 'would be' treated less favourably by a discriminator, as less favourable treatment must be actual not hypothetical.

Facts

Andy Baldwin (AB) was born a female and began to identify himself as a transsexual from April 2002, but not at work. He was diagnosed as a transsexual in November 2002 and in December he changed his name and gender in his passport. His employer did not become aware of AB's gender reassignment until 24 January 2003, the day upon which he resigned claiming constructive dismissal.

Prior to termination of his employment, AB had been appointed to a temporary post within the Council. The appointment was extended until January 2003 to allow AB to apply for a permanent post within the safety forum of the Council. In 2002, AB had assisted a third party in bringing a complaint to the Council against the Chair of the safety forum, Rev Miller, for being 'transphobic'.

The Council was unaware that AB had assisted in bringing this complaint when Rev Miller was appointed as part of the interview panel for the post within the safety forum. On 24 January 2003, before taking part in the interview, AB resigned claiming that the permanent post was inferior to his temporary post. AB subsequently lodged a claim for unfair dismissal and sex discrimination.

Employment Tribunal

The ET dismissed AB's claims on the basis that the Council had no knowledge of his gender re-assignment until he had resigned. Further, the ET also held that Rev Miller did not actually discriminate against AB at any point.

Employment Appeal Tribunal

AB appealed to the EAT. In relation to constructive dismissal, the EAT held that AB was not entitled to resign for breach of the implied duty of trust and confidence. The EAT considered the formulation of the test to establish whether an employee had been constructively dismissed. The EAT looked at the test formulated in *Woods v W M Carr Services (Peterborough) Ltd* [1981] IRLR 347 as approved by the House of Lords in *Malik v BCCI* [1997] IRLR 462 where Lord Steyn cited the test as follows:

> *It is expressed to impose an obligation that the employer shall not:*
>
> *'without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'*

The EAT compared the original wording of the Court of Appeal in *Woods v W M Carr Services (Peterborough) Ltd* and held that the correct formulation is as follows:

> *without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*

The EAT held that the use of the conjunctive 'and' should be regarded as a simple error in transcription. Accordingly, the test has two components and the employee is only required to show either that, without reasonable or proper cause, the employer conducted itself in a manner calculated to destroy or damage the relationship (the subjective test) or the employee must show that, without reasonable or proper cause, the employer conducted itself in a manner likely to destroy or damage the relationship (the objective test).

In relation to the second point, regarding unlawful discrimination, the EAT held that Rev Miller did not discriminate against AB merely by agreeing to be on the interview panel. The EAT referred to the wording

452 of s.2A SDA, i.e. a person (A) discriminates against another person (B) if he treats (B) less favourably than he treats or would treat a relevant comparator. It does not follow that unlawful discrimination can be established under s.2A where A would treat B less favourably; this wording is only relevant to a comparator.

Comment

Clarification of the test to determine whether or not there has been a breach of the implied term of trust and confidence is welcome. An objective test as to an employer's conduct is clearly a sensible approach. A subjective test requiring an employee to prove the mind of an employer combined with the objective test would be unduly onerous and would be inconsistent with establishing that an employer has acted 'without reasonable and proper cause'.

The second point on direct discrimination is not new but it nonetheless provides a useful reminder to employees not to jump too soon – if the discriminatory act has not yet occurred, an employee will not be able to establish direct discrimination.

Kiran Daurka
Russell Jones & Walker

453 # Briefing 453

Grievances must be sufficiently specified

City of Bradford Metropolitan District Council v Pratt [2007] IRLR 192

Implications for practitioners

A grievance brought under the modified procedure must contain sufficient detail to allow the employer to respond usefully without further information. If it contains insufficient information the tribunal will not have jurisdiction to hear the case.

Facts

Ms Pratt (P) was employed by Bradford City Council as a cleaner. In July 2005 she wrote a letter complaining that the Council paid her less than male employees doing work of equal value. The Council proposed that the modified, rather than standard, grievance procedure be followed. P agreed.

P's initial letter did not provide any detail about the male employees she compared herself to. In a later letter, responding to the Council's query, she said that she had referred to male colleagues cleaning in Alhambra House. The workers, she said, were on a higher grade of pay than the women they worked with.

This grievance was not satisfactorily resolved and P made an equal pay claim to the ET. This claim referred to litter pickers rather than employees at Alhambra House. The litter pickers were on the same pay grade as P and her claim was focused on the bonuses / overtime they received.

Employment Tribunal

The Council argued that P's claim did not relate to her earlier grievance and that, therefore, the tribunal did not have jurisdiction following s32 Employment Act 2002 (EA). The tribunal concluded that P's grievance had made it clear that her complaint related to the Equal Pay legislation and this was sufficient to give jurisdiction.

Employment Appeal Tribunal

The EAT set out guidance for tribunals when considering the effect of s32 EA.

Firstly, the ET must examine the claim and determine whether it is one that is subject to s32. Then the ET must consider whether there is a requirement to make a grievance. There are circumstances in which either the procedures will not apply or the parties will be deemed to have complied without needing to act. Finally, where one of the grievance procedures does apply the ET must determine whether the relevant procedure was complied with.

In P's case, the modified grievance procedure applied. Therefore she was required to set out the both the complaint and the basis for the complaint in her grievance. The EAT concluded that the need to set out the basis for the complaint meant that the grievance

needed to do more than identify the relevant jurisdiction.

The EAT placed particular emphasis on the fact that the modified grievance procedure involved the complaint being resolved without a further meeting. This meant that the grievance had to be sufficiently detailed to allow an employer to resolve it on paper. Although detailed evidence was not required it needed to identify the important aspects that the employer would need to investigate and consider.

P had not done this. Her initial letter contained no details and it was impossible for the Council to respond intelligibly, except by requesting more information. Her clarification did set out the basis for a grievance, to which the Council was able to respond. But it was not the grievance that she then pursued in the ET. The Council could not have dealt with the issues relevant to the claim during the grievance procedure because they were not raised.

Therefore P had not complied with the first step of the modified procedure and the tribunal did not have jurisdiction to consider her complaint.

Comments

This case is an example of the serious and invidious consequences that can result from the requirement to lodge a grievance in order to gain access to the tribunal.

It is vital that, from an early stage, litigants and their advisers address their minds to the necessary steps to ensure that a case can be heard. In many cases, it will be prudent to pursue the standard grievance procedure rather than the modified. The standard procedure requires only that a complaint, not the basis for it, be grieved. This is much less likely to lead to difficulties with tribunal jurisdiction.

It is ridiculous that such consideration may force cautious litigants into an inappropriate procedure, but many may regard it as a lesser evil than being barred from bringing their claim.

Michael Reed
Free Representation Unit

Briefing 454

Dress codes and the Religion or Belief Regulations

Azmi v Kirklees Metropolitan Borough Council [2007] IRLR 484

Implications for practitioners

The EAT upheld the ET's finding that refusing to permit a Muslim woman teaching assistant to wear a full veil did not amount to religious discrimination, direct or indirect.

Facts

Mrs Azmi (A) is a Muslim. She applied for a position as a teaching assistant at Headfield Church of England Junior School (HS). Her references were excellent, she performed well in interview and she was appointed.

At her interview A had worn a black tunic and headscarf; her face was not covered. She did not indicate that her religious beliefs required her to wear a veil. However, during the first week of term, she asked if she could wear her veil when teaching with male teachers.

The school took advice from the local authority. That advice was to the effect that obscuring the face and mouth reduced non-verbal communication and that a pupil needed to see the adult's face. There was some observation of A's performance in class, the conclusion of which was that the veil impeded A's 'diction' to a certain extent and prevented the pupils' receiving 'visual clues' from her. HS instructed her not to wear her veil when working with children in the classroom.

In October 2005 the school confirmed she could wear the veil when walking round the school but reiterated that she must not do so when working with children. A indicated she could not agree to this. The school's approach changed in November 2005 and A was required to be 'unveiled at school'. Again, A indicated that she could not obey this instruction. In February 2006 HS reverted to the position that A could continue to wear her veil in communal areas of the school.

After a period of sickness absence, A returned to work and continued to refuse to remove her veil whilst working with males. She was suspended.

A complained to the ET of discrimination on grounds of religion and belief (direct, indirect and

harassment) contrary to the *Employment Equality (Religion or Belief) Regulations 2003*. She also complained of victimisation.

Employment Tribunal

As to the claim of direct discrimination, the ET found that, in suspending A, HS had not treated her less favourably than it would have treated a person, not of the Muslim religion, who insisted on covering her face for whatever reason.

As for indirect discrimination, the ET concluded that HS did impose a provision criterion or practice (PCP) on A, which it would have applied equally to person not of the same religion or belief: the requirement was not to wear clothing which covers, or covers a considerable part of, the face or mouth or interferes unduly with the employer's ability to communicate appropriately with pupils. It was not in dispute that the PCP put persons of A's belief at a disadvantage. Thus, it was potentially a case of indirect discrimination.

The only issue was whether the treatment was justified. The ET found that it was. The objective of the PCP was legitimate: the need to raise the educational achievements of children in the school. It was also proportionate: A was free to wear the veil at all times other than when she working directly with children.

The ET also dismissed the harassment claim. It considered A's account to be exaggerated; that none of the remarks she complained about came within the category of comments or abuse at which, it considered, the Regulations are aimed; further, that the words she complained of could not reasonably be considered to have created an offensive environment.

A succeeded in her claim of victimisation, which related to R's failure to deal properly with the grievance that she had raised. A appealed to the EAT.

Employment Appeal Tribunal

The challenge to the finding on direct discrimination was that the ET had taken the wrong approach to the question of the comparator. A's Counsel argued that, in formulating the correct comparator, the focus should be specifically on the manifestation of the religious belief, rather than more generally on the religion. The belief in question, which the ET accepted as genuine and held by a sizeable minority of Muslim women, was:

> *…that they should only be in the presence of unrelated adult males when they are veiled. They regard this injunction as a requirement of their religion which requires them to dress modestly and decently.*

The comparison in this case should, therefore, have been with another Muslim woman who did not believe it necessary to wear the veil and covered her head but not her face. He relied on the statement of principle in *Showboat Entertainments Centre Ltd v Owens* [1984] IRLR 7 at paragraph 20 where the EAT said:

> *Although one has to compare like with like in judging whether there has been discrimination, you have to compare the treatment actually meted out with the treatment which would have been afforded to a man having all the same characteristics as the complainant except his race or his attitude to race. Only by excluding matters of race can you discover whether the differential treatment was on racial grounds. Thus the correct comparison in this case would be between Mr Owens and another manager who did not refuse to obey the unlawful racialist instructions.*

In rejecting this argument and concluding that the ET had identified the correct comparator, the EAT said that it would be *'unrealistic and would not comply with the requirements of the law'* to pose a comparator who does not cover her face and who would not, therefore, be instructed to uncover it, nor be at risk of suspension for refusing to do so.

As for indirect discrimination, it was argued that the conclusion that the imposition of the PCP was proportionate was wrong. The ET should have concluded that HS had failed to discharge the burden on it to show that the instruction to remove the veil when in class was reasonably necessary. The school had twice changed its position on what was or was not necessary. The ET, it was argued, had been insufficiently rigorous in its scrutiny of the justification relied on by HS and had failed to consider whether there were other, less discriminatory, means of achieving the same legitimate end. In particular, it was pointed out that simple strategies had been suggested by the person who had monitored A's teaching which might have overcome the difficulties identified (such as raising her voice) but HS had not given A an opportunity to try them out.

The EAT rejected these arguments and concluded that the ET had reached a conclusion which it was entitled to reach on the facts.

Comment

In some ways this is a frustrating judgment. It is not

always easy to see exactly how the legal arguments were framed, how they were responded to and why they were rejected. However, in a striking passage towards the end of the judgment, the EAT refers to *'those for whom this case raises issues beyond the terms and conditions of a particular person at a particular school' and endorses the ET's treatment of it strictly as 'an employment and education issue'*. Some commentators had taken the ET judgment as deciding once and for all the issue of whether an employer can lawfully prohibit the wearing of the veil in the workplace. It might be thought that the EAT, in this passage, is cautioning against regarding this judgment as providing general support for such a prohibition. Issues of the sort raised in this case, particularly issues of justification in indirect discrimination, are, of course, always highly fact-sensitive and dependent on their context.

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Briefing 455

Burden of proof in disability cases

Project Management Institute v Latif UKEAT, 10th May 2007, unreported

Implications for practitioners

The President of the EAT gives guidance on when the alleged reasonable adjustment must be identified and clarifies how the burden of proof applies in DDA reasonable adjustment cases.

Facts

Project Management Institute (PMI) confers qualifications in project management and is a qualifying body within the meaning of s.14 of the DDA. As such, it is subject to a duty to make reasonable adjustments in respect of disabled people (Ss14 and 18 DDA). This duty is analogous to the employment provisions. The same section dealing with the burden of proof (s.17A DDA) applies.

Ms Latif (L) is registered blind and is a disabled person within the meaning of the DDA. She applied to take the PMI examinations. She asked for a number of adjustments to be made to the exam arrangements. PMI agreed to some but not to others: specifically, it declined to allow her to bring her own computer into the exam.

She complained to the ET that PMI had failed to make reasonable adjustments.

Employment Tribunal

PMI contended that the steps they had taken, namely the provision of a reader / recorder and allowing double time to take the examination, were reasonable and sufficient. They submitted that this was supported by the fact that L passed the examination at her first attempt. They contended that the adjustments suggested by the claimant herself were unnecessary, unduly costly, posed a potential security risk, and gave rise to a real risk of cheating.

However, in the course of the hearing a new adjustment was identified by Counsel for L. This was that the exam could have been taken by L on a stand-alone computer onto which the relevant software she needed could have been loaded. It was put to witnesses for PMI and was the subject of submissions to the Tribunal by both counsel. It had never been suggested at any earlier stage that it might be a solution to her difficulties. The Tribunal concluded that this would have been a reasonable adjustment. The cost to PMI would have been relatively modest.

PMI appealed to the EAT, in part on the basis that the adjustment in question had been raised for the first time at the ET hearing.

Employment Appeal Tribunal

The EAT dismissed the appeal. In so doing, the President gave guidance on how Tribunals should approach reasonable adjustment claims where the adjustment relied on by the claimant was not raised by her at the time. He also considered how ETs should approach the question of the shift in the burden of proof. The following principles emerge:

1) There is no legal duty on the claimant to propose specific adjustments at the time (*Cosgrove v Caeser* and *Howie* [2001] IRLR 653) (para 38). The

proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, as here, not even until the tribunal hearing.

2) By the time the case is heard before a tribunal there must be some indication as to what adjustments it is alleged should have been made.
3) However, in certain circumstances it would be appropriate for the matter to be raised by the tribunal itself, particularly if the employee is not represented. For example, where the Code suggests an adjustment which on the face of it appears appropriate, that is something the tribunal should take into account. It would be perfectly proper for a tribunal to expect an employer to show why it would not have been reasonable to make that adjustment in the particular case, although of course the employer must have a proper opportunity of dealing with the matter.
4) It is for the claimant to show that the duty to make reasonable adjustments has arisen, i.e. that a criterion, provision or practice has been applied which places her at a disadvantage (para 54).
5) However, the claimant must go further and show that there is a potentially reasonable adjustment which could have been made to remove that disadvantage. The respondent must be able to understand the broad nature of the adjustment proposed and be given sufficient detail to enable it to engage with the question of whether it could be reasonable achieved or not.
6) Once the claimant has identified a potential reasonable adjustment, the burden shifts and it is for the respondent to show that the proposed adjustment was not reasonable in the circumstances.

The EAT accepted L's Counsel's submission that PMI's appeal was, essentially, a perversity appeal which failed to meet the high hurdle identified in *Yeboah v Crofton* [2002] IRLR 634 and the appeal was dismissed.

Comment

This case resolves some unfinished business from the CA cases on the burden of proof. Although the consolidated appeals in *Igen v Wong* [2005] IRLR 258 included a DDA case, no express consideration was given as to how the guidelines on the burden of proof (which were developed by reference to direct race and sex discrimination) should be adapted to deal with the differently-structured causes of action in the DDA.

The President's formulation is relatively forgiving to claimants. It would appear that it is not necessary for the specific adjustments to be set out in the pleadings – although there may be good tactical reasons for doing so. It would be unwise of a claimant not to set out all the adjustments contended for at the latest in further particulars or in a list of issues agreed in the course of case management. If an adjustment is identified for the first time at the hearing, the Tribunal retains a discretion not to deal with it, for example, if the respondent is prejudiced by its being raised late and/or ordering an adjournment to allow the respondent to deal properly with the new issue.

On the other hand if, as quite often happens, a common-sense adjustment occurs to the Tribunal – or to the claimant – in the course of the hearing, and it can be dealt with fairly there and then, then this Judgment encourages Tribunals to do so.

There still has not been a case in which the EAT considers how the burden applies to claims of disability-related discrimination. In the view of the present writer, the approach should be as follows:

1) It is for the claimant to prove facts from which the Tribunal could conclude that the respondent treated the claimant less favourably for a reason related to the claimant's disability, in circumstances where the treatment did not amount to direct discrimination.
2) If the claimant proves such facts, the burden shifts to the respondent to show that the reason for the treatment was in no sense whatsoever for a reason related to the claimant's disability. If the respondent fails to discharge that burden, the Tribunal must infer ('shall find' – s.17A(1C) DDA) that the reason for the treatment was related to the claimant's disability.
3) If the respondent fails to discharge that burden, the respondent may still seek to justify the less favourable treatment. The burden to prove justification remains on the respondent. However, because of s.3A(6) DDA, where the respondent has failed to make reasonable adjustments, and that failure could have made a difference to the disability-related less favourable treatment issue, the respondent will not succeed in showing justification.

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Stonewall Living Together survey

A major new survey, Living Together, about attitudes to gay people commissioned by Stonewall has found that the vast majority of Britons, 85%, support the new Sexual Orientation Regulations in relation to access to goods, facilities and services. The survey showed that similar numbers would be happy if a relative, their boss or a footballer in the team they support (92%) was gay. The vast majority believe that further steps should be taken to tackle homophobia by government, workplaces, schools and the media.

YouGov sampled 2,009 respondents from across Britain to gauge public opinion towards gay people. They found that:–

- 73% would not mind if their child's teacher was gay,
- 80% would not mind if a relative was gay,
- 88% would not mind if member of royal family was gay .

While a significant majority expressed high levels of tolerance, 73 per cent said that anti-gay prejudice needed addressing. Eighty-nine per cent support a new offence of incitement to hatred on the grounds of sexual orientation, to match existing protections against incitement to racial hatred.

Eighty-five per cent of adults also support the government's new Sexual Orientation Regulations, fiercely opposed by some religious leaders earlier this year, which make it unlawful to refuse gay people services such as healthcare or hotel rooms. But while religion is identified as a significant cause of anti-gay prejudice, the number of people of faith supporting gay equality is almost as high as the figure in the wider population.

The survey also found that:

- More than a third of adults have witnessed homophobic bullying in schools,
- Almost one in seven people has witnessed homophobic bullying in the workplace,
- 75 per cent of Sun readers think that prejudice against gay people in Britain should be tackled,
- Liberal Democrat voters are most likely to think that politicians are likely to conceal their sexual orientation.

Further details of the survey are available at www.stonewall.org.uk

Discrimination Law Review Green Paper

This was finally published on June 12th 2007. It is available at:
http://www.communities.gov.uk/index.asp?id=1511245
The DLA will be holding a consultation meeting for our members on **Tuesday July 10th at 6.00** at a central London venue to be notified. All members are welcome, this is your opportunity to feed in your comments and influence our response to the Green Paper.

The Government is also holding a series of four general awareness-raising events on the consultation. These events will be held in:

- **Cardiff** on the 3 July between 13.30 and 16.00 at St David's Hotel & Spa, Havannah Street, Cardiff, CF10 5SD;
- **Manchester** on the 4 July between 10.30 and 13.00 at The Midland Hotel, Peter Street, Manchester, M60 2DS; and
- **Edinburgh** on the 9 July between 10.30 and 13.00 at The George Hotel, 19-21 George Street, Edinburgh, EH2 2PB.

These events are open public consultation events so anyone can attend. However, they have requested that people register to attend these events by e-mailing Kate.Hepher@communities.gsi.gov.uk or by calling 0207 944 0629. There is limited space at all of these events so places will be available on a first come first served basis.

Please come.

Legal aid reforms: what price justice?

The government is planning to change the legal aid system. These changes pose a direct threat to thousands of vulnerable people, who may not be able to receive the legal help they need. Discrimination cases will be particularly badly affected.

The market-based legal aid procurement system that they propose relies on a fixed payment per case. This will disadvantage those users who are most vulnerable and who have the most complex problems, such as those with little command of English or who are disabled, who might require more attention and time from the legal aid agency dealing with their case. Effectively this introduces economic disincentives to helping the most needy as the relatively inflexible new fee schemes will reward providers for handling primarily simple cases. There is a real risk that providers will be forced to cherry pick the easier cases for those who are less vulnerable.

These proposed reforms were recently criticised by the Constitutional Affairs Select Committee who commented:

The Government's plan is to involve fewer but larger solicitors' firms in the Legal Aid system in order to achieve administrative savings. We doubt whether the potential savings resulting from such a move would justify the risks inherent in this change...The impact of the reforms on black and minority ethnic (BME) firms and their clients is one of our main areas of concern. Such firms will be disproportionately disadvantaged by these proposals...We are extremely concerned that the Department is trying to engage in such a far reaching change to the structure of Legal Aid on the basis of little or no evidence about which cost drivers have caused the problem or how its plans for a solution are likely to affect both suppliers and clients. We fear that if the reforms go ahead there is a serious risk to access to justice among the most vulnerable in society.

The Law Society has recently issued judicial review proceedings as have the Asian Lawyers and the Association of Black Lawyers.

Book review

Discrimination Law Handbook by Camilla Palmer, Barbara Cohen, Tess Gill, Karon Monaghan, Gay Moon and Mary Stacey, 2nd edition, 2006, Legal Action Group, 900 pages, £55.00

As the dust finally begins to settle from the frenzy of legislative activity triggered by the adoption of the Article 13 European Directives on equality and discrimination, the second edition of the Legal Action Group's Discrimination Law Handbook provides a timely guide through this ever more complex field. Written in a lucid, clear and accessible style, the Handbook navigates its reader through the law with confidence.

The opening three chapters provide the context for understanding the complexity of the current law. Chapter 1, on the current legal structure, sets out all the different sources of current discrimination law, and demonstrates the challenge the authors faced in writing this coherent and readable guide that acknowledges the similarities and differences between the different Acts and regulations operating in this field.

Chapter 2 takes us through the, sometimes neglected, potential of the provisions of the European Convention on Human Rights. It examines the recent developments in the Strasbourg case law on the Convention's discrimination provision, article 14, it also outlines the relevance of other Convention rights, (articles 2, 3, 6, 8, 9 and 10) to discrimination cases. The chapter provides an overview of EU law in this area, noting how and where arguments about

compatibility between EC Directives and domestic legislation implementing those Directives may be made. This is particularly useful, since, throughout the rest of the book, the authors constantly bring to the attention of the reader, areas where the current law may be challenged as failing to fully implement the requirements of EC Directives. Finally, chapter three examines the different grounds of discrimination. Here some more detail and discussion on the difficulties of tackling multiple or intersectional discrimination under the current framework would have been timely. As the number of grounds have increased, so the potential for, and difficulties in, addressing such discrimination has become more apparent.

The chapters are then organised, first around the common concepts, beginning with direct and indirect discrimination, before moving on to the more specific areas of disability and age discrimination. Individual chapters then address particular issues, including harassment, victimisation, positive action, equal pay, discrimination in occupational pensions, and maternity and parental rights. Later chapters examine discrimination in particular fields, employment and non-employment.

The handbook is written with the busy practitioner in mind. There is a useful summary of the key points at the beginning of each chapter. The authors glean practical points from cases that are relevant in running discrimination claims. Thus, for example, in relation to establishing direct discrimination, they identify factors which the case law show can be used to support an inference of discrimination. The information from case law is clearly presented in one paragraph bullet points identify the factors that the tribunal must consider, and in another paragraph the bullet points highlight what, according to case law, constitutes relevant information. Similarly, the section on indirect discrimination, takes us through the application of the old and new definition of indirect discrimination, with a useful table that identifies when and how each test applies. The chapter itself is also usefully organised around nine questions that can be posed in trying to establish indirect discrimination.

Where relevant, the handbook goes beyond the confines of 'anti-discrimination' law to identify other legal tools that practitioners can use in pursuing their client's case. For example, in relation to harassment, they consider the criminal law on harassment, and show how the Protection from Harassment Act, and other common law torts can and have been used to protect individuals.

Chapter 22 outlines the procedures that are relevant in pursuing a discrimination case, including an outline of the statutory dispute resolution procedures that must be followed before bringing a claim. Chapter 23 outlines the remedies that are available and includes example of recent awards for injury to feelings and for aggravated damages. Furthermore, the appendix contains samples of possible details of complaints and questionnaires for employment cases. There are also useful sample particulars of claim and questionnaires for non-employment cases.

Of course, a book, even of this length, to manage its broad scope, cannot be totally comprehensive. But, even here, the handbook indicates to the practitioner where information that is more detailed may be needed and suggests where this may be found. For example, in relation to the statutory dispute resolution procedures the handbook acknowledges that they only provide a brief summary and in the footnote they direct the reader to useful publications and websites. The appendix lists useful sources of further information, in the statutory and voluntary sectors as well as those that provide advice and research.

There can be no doubt that this second edition of the LAG Handbook will, like its predecessor, the first edition, become a central resources for those concerned with the practice of discrimination law. It will be a bridge on the way to a third edition that will hopefully follow the government's promised single Equality Act.

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Briefings

Notes and news

Abbreviations

AML	*Additional maternity leave*	*ECtHR*	*European Court of Human Rights*		*(Religion or Belief) Regulations 2003*
AR	*Employment Equality (Age) Regulations 2006*	*ECJ*	*European Court of Justice*	*RD*	*Race Directive*
		ED	*Employment Directive*	*RED*	*Race Equality Duty*
CA	*Court of Appeal*	*EOC*	*Equal Opportunities Commission*	*RRA*	*Race Relations Act 1976*
CEHR	*Commission for Equality & Human Rights*	*EPD*	*Equal Pay Directive*	*RRAA*	*Race Relations (Amendment) Act 2000*
CRE	*Commission for Racial Equality*	*EqPA*	*Equal Pay Act 1970*	*SDA*	*Sex Discrimination Act 1975*
CS	*Court of Session*	*ET*	*Employment Tribunal*	*SMP*	*Statutory maternity pay*
DDA	*Disability Discrimination Act 1995*	*ETD*	*Equal Treatment Directive*	*SOR*	*Employment Equality*
DED	*Disability Equality Duty*	*GED*	*Gender Equality Duty*		*(Sexual Orientation) Regulations 2003*
DRC	*Disability Rights Commission*	*GFS*	*Goods, Facilities and Services*	*TUPE*	*Transfer of Undertakings (Protection of Employment) Regulations 1981*
DsES	*Department for Education and Science*	*GOR*	*Genuine Occupational Requirement*		
DTI	*Department of Trade and Industry*	*HC*	*High Court*	*UN*	*United Nations*
EA	*Employment Act 2002*	*HL*	*House of Lords*		
EAT	*Employment Appeal Tribunal*	*HRA*	*Human Rights Act 1998*		
EC	*European Commission*	*OML*	*Ordinary maternity leave*		
ECHR	*European Convention on Human Rights*	*PCP*	*Provision, Criterion or Practice*		
		RBR	*Employment Equality*		