Discrimination Law Association

Briefings 468-480

Volume 33

February 2008

Editorial *A constitutional promise?*

In its response to the Discrimination Law Review (DLR), the Equality and Human Rights Commission (EHRC) stated,

"The real promotion of equality and the elimination of discrimination require a 'constitutional promise', not merely the creation of a detailed set of rules and processes. Without such a constitutional vision, the creation of a single equality act will fail…."

The 'constitutional promise' would be a "promise that the government and parliament make on their own behalf to us and, on our behalf, to everyone else." Through a set of fundamental principles it would set out the standards of treatment we should be entitled to expect.

A key element in the responses to the DLR by the DRC, CRE and EOC (before their absorption into the EHRC) and by the DLA, TUC and EDF was the need for a purpose clause in a Single Equality Act to ensure public understanding of the Act's aims and principles, and to provide guidance on its application and interpretation for employers, service providers, courts and tribunals.

The EHRC says its 'constitutional guarantee' goes further. What might it entail? Like the Human Rights Act (HRA) it could require the courts to interpret all other legislation in the light of the Equality Act and require ministers to certify whether proposed legislation is compatibile with equality principles.

The EHRC has not, or not publicly, explored how "constitutional" status for equality is to be achieved. If the set of fundamental principles forms a first chapter in a Single Equality Act, it would be vulnerable to amendment or repeal by a future parliament. This is, of course, also true of the HRA, as has been mentioned recently by politicians from different parties, but reading public reaction, it would seem that significant dilution or repeal of the HRA would be regarded as a very grave step. Such gravity may not attach to protecting equality principles.[1]

An alternative is that the constitutional guarantee of equality could form part of the government's proposed 'British Bill of Rights', although there is no certainty whether, in what form, or with what contents, such a Bill will ever be enacted.

Another route is for the UK to ratify Protocol 12 of the European Convention on Human Rights(ECHR).[2] This protocol provides a free-standing right not to be discriminated against on an open-ended list of grounds, not only by the state but also in any activity regulated by law, for example, employment or housing. If the UK were to ratify Protocol 12, it could be added as a Schedule to the HRA giving it the same status as other ECHR rights.

Is a formal "constitutional guarantee" important? Or necessary?

This is a very British debate, since a majority of countries of the world have a written constitution containing an entrenched right to equality (albeit not always upheld). There are persuasive arguments that a single equality law which replaces the present varied assortment of anti-discrimination statutes and regulations with generic equality rights that apply in relation to most functions of the state and our other formal relationships (with employers, landlords etc.) would inevitably have constitutional consequences, and all the more so if this law also imposes positive obligations on state institutions. No other UK legislation has such wide regulatory impact.

The fact that the detailed content of a Single Equality Bill would mainly be based on existing laws could be seen as implying that there is already a consensus in favour of equality protection on this scale and that the "constitutional" shift, making equality a basic right in Great Britain, has already occurred. If only this were the true! Regular decisions by public and private sector bodies undermining equality rights makes plain that we do not yet have a binding consensus.

Whether a Single Equality Bill – and the Act that is ultimately approved – will make a difference will depend on how far the government is prepared to go to promote a law that is effective in its protections and in the obligations it imposes, that removes hierarchies and creates clear, coherent enforceable rights. If the government is bold enough to do so, it will, in effect, be asking parliament and the public to recognise equality rights as indivisible. What is then needed is an unambiguous declaration by parliament that these rights are fundamental to our constitution – central to the 'bargain' between the state and the people – and cannot be ignored, eroded or avoided in our relations with the state and with each other.

BARBARA COHEN

1. This was recommended by the CRE in 1998 in its Third Review of the RRA

2. Article 1,Protocol 12:
1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

Briefings Published by the Discrimination Law Association. Sent to members three times a year. **Enquiries about membership to** Discrimination Law Association, PO Box 49064, London, N11 2UX **Telephone** *020 8365 8744* **E-mail** info@discriminationlaw.org.uk
Editorial team: Catherine Casserley; Tamara Lewis; Gay Moon; Michael Reed. Designed by Alison Beanland. Printed by The Russell Press.

What we need from a Single Equality Bill: Issues for Consideration

On 18 January 2008, I gave the keynote speech at the TUC Discrimination Law Conference in which I outlined the key principles necessary for reforming the current tangle of equality law in order to create a comprehensive, coherent and user-friendly law suitable for the challenges of the 21st century. This note provides a brief outline of those principles.[1]

Key principles

The three main underlying principles are:

- The Bill must contain clear, consistent standards, consolidating existing law so that it is more user-friendly and accessible.
- It must create an effective, efficient and equitable regulatory framework, aimed at encouraging voluntary and *easy* steps to promote equality.
- Victims should have accessible remedies. Individuals should be free to seek redress for the harm they have suffered as a result of unlawful discrimination, through procedures which are fair, inexpensive and expeditious, and the remedies should be effective in achieving widespread change.

Purpose

A Single Equality Bill should include a clause describing the purpose of the new legislation. In broad terms this should be:

- The protection of the dignity, autonomy and worth of every individual;
- The promotion of equality and the elimination of discrimination so that no person should be denied opportunities or benefits for reasons related to one of the prohibited grounds;
- The application of the principle of equality in a way which does not require a reduction in the level of protection already afforded to any person;
- The identification and removal of barriers against persons in designated groups;
- The encouragement of positive policies and practices and such reasonable adjustments as will ensure that persons in designated groups achieve fair participation in employment, fair access to education, training, goods facilities and services and a fair distribution of benefits;
- The promotion of good relations between persons of different racial or religious groups or belief, age, marital status or sexual orientation, between men and women generally, and between persons with a disability and persons without.

Interpretation Clause

The Bill should provide interpretative guidance in its introductory clauses. These are:

- No levelling down;
- Accommodation of difference: Promoting equality may require more than treating different individuals in the same way as each other and may also require the accommodation of difference in some contexts;
- Special Measures: The need to correct disadvantages that arise from discrimination may require the taking of nuanced measures which are necessary to remedy past discrimination and promote equality of opportunity. Such measures must be proportionate to their legitimate aim and enhance rather than diminish the principle of equal opportunities based on individual merit.

Measures to target particular behaviour or arrangements

- The intersection of discrimination based on more than one strand must be recognised.
- The Bill should identify clearly that unlawful conduct

1. The groundwork for a Single Equality Bill has already been done in the wide-ranging and ground-breaking report of the Independent Review and the Enforcement of UK Anti-Discrimination Legislation, *Equality: A New Framework*, published in 2000 ("the Hepple Report") which led to Lord Lester's Private Member's Single Equality Bill which was passed by the Lords in 2003. The principles outlined here are taken from this report and Bill.

involves discrimination, harassment or victimisation based on the prohibited grounds.
- Definitions of discrimination and indirect discrimination (especially the objective justification test) must be clarified, standardised across all the strands and harmonised in line with the definitions imposed by European law.

Scope

- The Bill should cover discrimination on the grounds of sex, race, disability, sexual orientation, age, gender reassignment and religion or belief. Family status, marital status, civil partnership status and pregnancy should be specified as grounds in their own right.'
- The definition of indirect discrimination should apply to disability discrimination.
- The prohibition against discrimination ought to apply to employment, education, the provision of goods, facilities and services, the performance of public functions and the disposal of premises. In particular, the prohibition against age discrimination should extend to goods, facilities and services.
- Prohibition against harassment should not extend to religion because of the free speech implications.

Exceptions

- Currently the law acknowledges genuine occupational requirements. This exception should relate also to genuine service requirements. This should be carefully worded so as to allow positive action measures but not to allow wide justification of direct discrimination in the provision of goods, facilities and services.
- In relation to insurance, there is a tension as to whether or not insurance providers can treat groups of people differently by imposing different premiums based on one's membership of a particular group. The EU Directive on gender equality allows insurance companies to impose differentiated premiums based on reliable actuarial evidence. This exception should be narrowly tailored.
- Exceptions relating to age should be removed as age is not a reasonable or justifiable basis for discrimination.

Equality duty

- Bodies exercising functions of a public nature must have due regard to the need to eliminate discrimination and to promote equality of opportunity.
- Auditing bodies should have a specific duty to consider compliance with the Bill.
- The equality duty should extend to all strands but each strand should be addressed in a way that best suits its needs.
- It should not be left to public bodies to prioritise one area of equality as this would be inconsistent with the general principle that there should be no hierarchy of rights.

Equality duty in the private sector

- It is important to ensure that employees in the private sector do not receive less protection than those in the public sector.
- Regulation in the private sector should not be intrusive and should operate primarily on voluntary incentive.
- Large employers should be required to carry out periodic reviews of the composition of their workforce and their employment policies and practices. If a review indicates that there may be failings in terms of equality opportunities or equal pay, employers should be required to draw up proposals with a view to bringing about change.

Equal pay

- Mandatory pay equity plans should place a positive duty on employers to provide pay equity, designed in a way which would remove the gender pay gap over a period of time. Employers with more than ten full-time employees should be obliged to conduct a periodic pay audit (once every three years), covering both full- and part-time employees, and to publish this in the company's report.
- If, following an audit, the employer finds a significant disparity between predominantly female and predominantly male job classes, it should be obliged to draw up a pay equity plan in negotiation with recognised trade unions with a view to reaching a collective agreement (or if no trade union is recognised to negotiate in respect of pay, the company should consult with employees or their representative to reach a workforce agreement). When bargaining on pay, the employer and recognised union should have due regard to the need to promote equal pay for work of equal value for men and women. If no agreement can be reached there should be a mechanism to go to arbitration and the arbitrator should have the power

to award a pay equity plan. Individual employees should be able to bring proceedings in an employment tribunal for breach of a collective agreement, workforce agreement or arbitration award.

- It is extremely important that this applies in both the public and private sectors. A distinction between the private and public sectors in this area would effectively discriminate against private sector employees, who would not have equal pay protection under a Single Equality Bill.
- It is necessary to extend the basis of comparison to include the use of a hypothetical comparator in the case of equal pay. It makes no sense to have a different standard for women than that which applies to race.
- It is necessary to improve the methods of assessing the relative value of jobs.
- There should be no distinction between contractual and non-contractual equal pay claims.
- New and improved tribunal procedures are necessary for the enforcement of individual equal pay claims, with mechanisms that extend decisions in individual cases to all people falling within the vulnerable group.

Positive action and reasonable adjustment

- Employers, service providers and providers of education ought to have positive duties to make reasonable adjustments to remove barriers created as a result of historical discrimination.
- It is necessary to extend the scope of permissible positive action to better tackle disadvantage linked to discrimination or to meet special needs.

Public procurement

- There should be a specific duty to ensure that public authorities are not able to contract out of their equality duties. This is an essential element of incentive-based regulation but under the current system it is weak and poorly enforced.

Enforcement and remedies

- There must be no levelling down of existing protection.
- Under current law, the focus is on eliminating discrimination by means of investigative and legal processes. New legislation should tackle discrimination more proactively and in a less adversarial way, without imposing unnecessary bureaucratic burdens.
- The focus should be on encouraging and incentivising voluntary compliance, with effectively deterrent sanctions when compliance is breached.
- Representative claims should be allowed. Where tribunals find cases of unlawful discrimination that apply more broadly than the individual claimant, its decision should have collective effect and provision should be made for collective implications.

Tribunals

- In order to make efficient use of resources, ensure appropriate expertise in discrimination cases and reduce procedural and cost barriers to bringing claims, employment-related discrimination cases should be commenced in employment tribunals, with the possibility for Judges to transfer matters to other courts if necessary. Employment matters which have particularly complex issues of discrimination may be referred to the High Court or an Employment Appeal Tribunal.
- Matters that do not concern employment, such as education or the provision of goods, facilities and services, should be referred to a special "equality tribunal" or body appointed under specific arrangements to hear such matters.
- Employment Tribunals should be able to recommend strategic changes to organisational policy following a finding of unlawful discrimination in order to maximise the impact of the individual discrimination cases and enable organisations to avoid future claims.
- Tribunals should be empowered to tackle persistent offenders through the imposition of increasingly severe sanctions, linked to the self-interest of organisations.

Lord Lester of Herne Hill QC is a barrister practicing at Blackstone Chambers and is a Liberal Democrat Life Peer. He is currently independent advisor to the Ministry of Justice on aspects of constitutional reform.

Race Relations Act and migrants labour

Can the Race Relations Act be used to combat the mistreatment of migrant workers?

For a number of years practitioners and our members across the country have reported increasing numbers of migrant workers seeking assistance and that these workers were disproportionately suffering employment difficulties and the severity of those difficulties.

According to the Audit Commission, foreign nationals made up 3.5 per cent of the workforce in 1996, but 6 per cent in 2006; in 2005/06, 662,000 new national insurance numbers were issued to foreign nationals, almost twice as many as in 2002/03.

This is a nationwide phenomenon. According to the Commission for Rural Communities' paper *A8 migrant workers in rural areas* [January 2007] "the scale of arriving migrant workers is similar in rural areas to that in urban areas and, as in urban areas, numbers of arrivals are continuing to rise." Often this means that practitioners and tribunals with less historical experience of migrant workers and their issues are on a steep learning curve. Practitioners in areas with historically higher numbers of migrants, are reporting higher than ever numbers.

In the background, is the political fallout. The UK's combination of high levels of incoming migrant workers, poorly enforced employment rights, low levels of union membership and a government which has given seemingly little thought to the issue has resulted, perhaps predictably, in migrant workers being blamed for eroding job security, pay and terms and conditions. There is still sadly too little sign of government or agencies recognising the inherent vulnerability of many migrants in the labour market and taking steps to combat this. Voices for better enforcement of employment law, such as that of John Denham (government skills secretary) on Radio 4's *The World at One*, are rare and seemingly unheard.

Our members and practitioners working with migrant labour report systematic problems with migrants accessing basic of employment rights – payslips, contracts, tax, National Minimum Wage, unauthorised deductions.

However, concentrating on obtaining basic employment rights for migrant labour, vital as it is, does not tackle the reasons behind the exploitation. We have to accept that what we are seeing is systematic less favourable treatment because people are migrants ie discrimination.

We are living through a large scale exploitation of a vulnerable group, related to their nationality and national origin. Yet the Race Relations Act is rarely used. How then, might this be remedied?

There are two possible claims - direct and indirect race discrimination.

Direct Discrimination

Under the Race Relations Act section 1:-

> *(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if –*
>
> *(a) on racial grounds he treats that other less favourably than he treats or would treat other persons.*

Further, under section 3.

> *(1) In this Act, ... –*
>
> *"racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins;*
>
> *"racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.*
>
> *(2)The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.*

A claim for direct discrimination on racial grounds may appeal, as a way of avoiding the sometimes byzantine complexity of indirect discrimination, but it can be difficult in practice.

There may be a direct race claim if there is evidence of discrimination because a worker is, say, Indian or Polish. Usually the ground of the discrimination will be

nationality and/or national origin.

Cases have been successfully run in the tribunal on the ground that no British worker would have been treated so badly, eg a group of discrete workers with very low pay, no tax and NI, forced to live in expensive employer- provided accommodation etc. In practice, the worse the treatment, the more likely this argument is to work. One case dealt with an employer of agricultural workers whose treatment of their migrant workers was such that the tribunal found that no British worker would have been treated in that way. This is a good reason for bringing all the "basic" employment claims such as failure to pay the worker, to provide payslips, national minimum wage (NMW), written contract etc in the same proceedings to concentrate the tribunal's mind on the level of mistreatment. An interesting example is *Mehmet t/a Rose Hotel Group v Aduma* (2007) 832 IDS Employment Law Brief 9, where the EAT upheld a decision by an ET that a Nigerian national suffered race discrimination when he was paid less than the national minimum wage and by being pressurised not to apply for a National Insurance number. The ET decided that a British or British-based comparator would not have been so underpaid.

Careful thought needs to be given to the identity of the comparator, ie someone who shares the same "relevant circumstances" as the claimant. The difficulty can be defining those relevant circumstances.

The basic starting point is the House of Lords' test in *James v Eastleigh Borough Council* [1990] IRLR 288 – "but for" the person's nationality/ national origin, they would have been treated differently. The immediate cause of the mistreatment of the migrant worker may have been either their inability to speak English or inability to transfer to another employer or ignorance of UK employment law etc; nevertheless, **but for** their being, for instance, Indian, they would have been treated differently, eg put "on the books", paid the NMW etc.

The identity of the comparator can be contentious in migrant cases but it is useful to keep in view the basic legal tests. Firstly, the racial (or nationality or national origin) grounds does not need to be sole reason for the treatment, only the major or substantive cause. Other causes may have operated. The importance of the nationality grounds is for the tribunal to assess on the facts.

The very clear line taken by the courts in maternity cases may be useful. Consider the case of *O'Neill v Governors of St Thomas More RCVA Upper School and others* [1996] IRLR 372 – a teacher whose job was to teach the doctrine of the Roman Catholic Church was dismissed not for falling pregnant outside of marriage, but for doing so by the school's Catholic priest. Although the reason for the dismissal was the "priest element", and other single pregnant women were not dismissed, the EAT still held the school liable for sex discrimination.

The second legal principle is that motive is irrelevant and the court should concentrate on effect.

It is difficult to recognise a consistent line in cases on the permissible comparator in race discrimination cases when the alleged discriminator discriminates against classes of nationalities eg non-UK nationals. This is particularly relevant where an employer exploits migrants from a number of countries. Section 3(2) is of prime importance here in stating that a racial group may comprise more than one distinct racial groups.

There is no space to go into the caselaw in detail but only to consider general themes. The most useful case is perhaps *Orphanos v Queen Mary's College* [1985] IRLR 349 (an indirect discrimination claim) where the House of Lords accepted that *all persons of non British origin* could form a racial group for the purposes of the Act. The court stated that an individual might belong to several racial groups under the Act, including non-UK and non-EU. The claimant was not required to rely on his personal national group (here, Greek Cypriot) but could choose to compare himself with UK citizens as a whole.

Not all cases are as helpful. The Court of Appeal in *Tejani v The Superintendent Registrar for the District of Peterborough* [1986] IRLR 502 held that a requirement for a foreign-born British citizen to show a UK passport which was not applied to UK-born British citizens was not racially discriminatory as all those from abroad were treated alike. (The court did not refer to section 3(2)).

Cases relating to immigration control tend to be particularly unhelpful; in both *Dhatt v MacDonalds* [1991] IRLR 130 CA and *Skeiky v Argos Distribution Ltd* 1129/95 EAT (which applied *Dhatt*) an employer misinterpreted an employee's right to work subject to immigration control to the employee's detriment; the courts found that no racial discrimination had

occurred. *Dhatt* is difficult to understand and much criticised; it shows the higher courts adapting the law at the least sign of conflict with immigration control policy.

In practice, *Dhatt* (and *Skeiky*) would have to be distinguished on their facts as turning on immigration control where the penalties on an employer are stringent if not draconian. It is also a useful reminder that any case where there is a suggestion of immigration control can produce unpredictable and unhappy results at tribunal. Any suggestion by a respondent that their practices are necessary for immigration control needs to be handled with the greatest of care.

It is almost always vital to consider if there are any actual comparators. If there is an actual comparable British person being treated differently from a non-British person, then this is usually good evidence. However, there may be "a fly in the ointment" – evidentially – of one or two British workers among the migrants who share the systemic mistreatment; ie the pattern is that the majority of workers are migrants, not all. It is important to use the questionnaire (as early as possible) to identify all possible comparators – whether actual comparators or *Shamoon* building blocks. Employers are required to have proof of all workers' rights to work in the UK since 1996, so the information on nationality, at least, should be easily accessible.

A further complicating factor is any "hierarchy" of migrant groups. For instance, Kalayaan – Justice for Migrant Domestic Workers – find that there is a pattern of one nationality of domestic workers receiving better treatment than another – sometimes in the same household. Colin Robertson of the CRE reported a practice of a factory employing one group of, for instance, Poles and then replacing all of them with, for instance, Ukrainians who are perceived as cheaper or more easily exploited.

It is important to remember a person can unlawfully discriminate against someone of their own racial group but in practice, this is usually harder to argue before an tribunal.

Indirect Discrimination – overview

Complex as it is, indirect discrimination may fit better with the mistreatment of migrant labour if it is not their nationality itself but the surrounding circumstances of their nationality which disadvantages them.

It is necessary to show that the employer has either a "requirement or condition" or a "provision criterion or practice"(PCP) which has a disproportionate effect on a protected group to which the claimant belongs.

For instance, it may be possible to show that an employer treats those with restricted immigration status (eg those on a migrant domestic worker visa or work permit and hence no or limited ability to change employer) worse than they treat or would treat those with unrestricted immigration status. It may be argued that this (supposedly) neutral requirement, condition or PCP has a disparate impact on, those of Romanian nationality or national origin. This again involves the contradictions in the caselaw in *Dhatt* and *Orphanos*.

It may be argued that the employer treats those who speak no English or limited English worse than English-speakers and this has a disproportionate adverse impact, for example, on those of Chinese nationality or national origin.

A more conventional example is an employer who requires only British qualifications. There can be prejudice about foreign qualifications extending to media stories about fake foreign qualifications. Research from the University of Liverpool shows that highly qualified migrants tend to work in low skill jobs as they find it hard to obtain employment consistent with their qualifications and skills. A requirement of a British qualification can have an adverse impact on those of Indian nationality or national origin.

Migrants are usually not of British nationality or British national origin and this can form the basis of the comparison.

An unusual characteristic of this type of indirect claim is that the employer will usually deny that they are applying the requirement, condition or PCP – for instance, they deny treating non-English speakers less favourably. Commonly in indirect discrimination cases, both parties agree that the requirement or PCP was applied (ie the employer only employed people with excellent written English) and the argument is mainly technical about whether the test for indirect discrimination is made out. Thus, indirect claims involving migrants tend to have the worst of both worlds; they combine the conflict of fact found in most direct claims (ie did it happen?) with the legal complexity of an indirect claim (is it a PCP, was there disparate impact etc).

Indirect discrimination – nationality

Under RRA s1(1)(b), a person discriminates indirectly if

> *he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but –*
> *(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and*
> *(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and*
> *(iii) which is to the detriment of that other because he cannot comply with it.*

Thus nationality requires the old test with all the old problems of statistics and the like. Looking at the different stages of the definition:

- Requirement or condition – this involves all the well-known problems of the case law in that failure to comply with the requirement or condition is an absolute bar. Is a practice to treat those with limited immigration status less favourably, a requirement or condition? Are there any exceptions? Is there a "pet" non-English speaker who receives better treatment?
- Proportion of the Claimant's racial group (nationality) which can comply is considerably smaller than the proportion of persons not of this nationality who can comply ie the number of Romanians with restricted immigration status in the UK is less then the proportion of all those not of Romanian nationality with restricted immigration status in the UK. As the number of non-Romanians in the UK includes all the British citizens in the UK, the statistics should work out right. However, obtaining statistics can be an insurmountable problem. The questionnaire cannot provide national statistics. See below for further comments on pools.
- Justification. If the employer denied treating non-English speakers worse, they will find it hard to win on justification. However, there may be some argument about market forces and competition. A Respondent may argue that they have no choice but to pay low wages (albeit above the NMW) in order to survive commercially; or that migrants are well paid compared to wages at home and are glad of the work; the claimant is risking putting their colleagues out of work. It is to be hoped that a tribunal would not accept arguments that it is acceptable to treat migrants worse than indigenous workers. Public policy arguments may be necessary here, ie if mistreatment of migrant workers is permitted, this would entail a race to the bottom in employment conditions which would have negative impact on community cohesion.
- The Claimants cannot comply – this is usually simple as they do not have the immigration status or cannot speak English.
- Detriment to the Claimant – this has to be proven ie failure to pay wages etc and that the reason for the mistreatment was the failure to speak English.

Indirect discrimination – national origin

If the limitations of the old test are insurmountable, a claimant can use the new law but must proceed on the grounds of national origin.

Under RRA s1(1A):-

> *A person also discriminates against another if, ...he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –*
> *(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,*
> *(b) which puts that other at that disadvantage, and*
> *(c) which he cannot show to be a proportionate means of achieving a legitimate aim.*

The difficulty with national origin is that it is poorly defined. Is it just a person's birth citizenship? ie only first generation immigrants? What of their children? The caselaw is of limited help.

In *Northern Joint Police Board v Power* IRLR 610, the EAT found that the English and Scottish have distinct national origins although the nations have not existed for 300 years. Thus an English person discriminating a Scot for being Scottish is committing unlawful discrimination on the grounds of national origin. (The case contains a comprehensive review of the concepts of nationality and national origin.)

In *McAuley v Auto Alloys Foundry Ltd and anor*, an Employment Tribunal found that an Irish employee was discriminated against on the grounds of their national origin, and it is irrelevant if they are Northern or Southern Irish – although these are now separate nations.

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It is to be hoped that a tribunal will agree that a migrant worker of Indian nationality is of Indian national origin. The question is how many non-Indian nationals in the UK (including the large number of UK citizens of Indian descent) will share that Indian national origin – first or second generation immigrants? This can further complicate establishing disparate impact.

Going through the stages of the definition:

- PCP – an employer's mistreatment of those with limited English is easier to define as a practice than fitting it in as a requirement or condition.
- Particular disadvantage when compared with other persons – the new test is less statistical but is vague and will require at least some evidence. Again see the comments on pools.
- Particular disadvantage to the Claimant – the same as under the old law.
- Legitimate aim – as with justification the respondent will have limited options on this point, except flexible market arguments. However, the influence of the EAT's difficult ruling on justification in *GMB v Mrs Allen & Ors* EAT [2007] IRLR 752 must be reckoned with and is as yet unclear.

Pools are many practitioners' least favourite part of discrimination law. According to *Home Office v Holmes* 1984 IRLR 299 EAT (and reinforced by Sedley J's comments in *Grundy v British Airways PLC* [2007] EWCA Civ 1020), the tribunal has a wide discretion on choice of pool in particular and how to approach disparate impact in general.

Practically, it must be considered whether this point is best dealt with at a pre-hearing review (which could save much unnecessary work if the tribunal disagrees with the claimant's pool) or left to the substantive hearing (hoping that the tribunal will accept the claimant's choice of pool as the course of least resistance). Much may depend on the sophistication of the respondent and their solicitors.

The case of *Orphanos* can be particularly useful to establish the pools for comparison but as the caselaw in this area is so complex, there can be no guarantee that the tribunal will not impose a different (and perhaps much less helpful) pool.

It is usually safest to proceed on the assumption that no one (including the tribunal) will have any familiarity with the arguments put.

Depending on the facts, claims under the RRA are usually technical and complex in practice. But if the RRA cannot be used to challenge this problem, we have to ask if it is capable of combating racial and nationality-related discrimination effectively. Whatever the difficulties, progress can only be made if cases are brought challenging the exploitation of migrant labour under the RRA.

If the courts and tribunals can be persuaded to interpret the Act as currently drafted to protect migrant labour, this will deliver immediate and measurable benefits.

Juliet Nash
North Kensington Law Centre

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Ends and means: two recent cases on justification in discrimination cases

This article examines two recent decisions relating to justification in discrimination cases. Although the cases are very different, they provide interesting examples of the current approach of tribunals and the EAT.

GMB v Allen

The case of *GMB v Allen* [2007] IRLR 752 in the Employment Appeal Tribunal is one of the more interesting cases arising from the current local government equal pay disputes. Rather than dealing with action against the Local Government employer, it arose from disagreement between female workers and their trade union.

In 1997, Local Government and the unions entered into an agreement known as the Green Book. The Green Book set out a structure for the pay and conditions for most local government employees, replacing the White, Purple and Red Books. Although the agreement was national it allowed for variations in

pay between local areas.

One aim of the agreement was to address gender pay disparities. To do this it required that, before local pay scales were set, there should be a job evaluation study in each local authority.

The Claimants were employed by Middlesbrough Metropolitan Borough Council. Having completed job evaluations the council brought in new rates of pay from 1st April 2004. This process was called the move to single status.

The single status process produced winners and losers among the council's employees. Some wages increased; others decreased. There were lengthy negotiations between GMB (the union) and the council. The union attempted to secure agreement for pay protection for those employees who faced a reduction in pay. The hope was that, by the time the pay protection period ended, annual salary increases would bring the wages back up to the old level. This would avoid members suffering an actual decrease in pay.

As expected the job evaluation process identified inequalities between men and women. In particular, certain roles had been rated as equivalent, but bonuses paid in the predominantly male jobs meant there had been differences in pay. There were also female employees outside the scope of the review who argued that their work was of equal value to that of better-paid men. There were many historic claims, which, taken as a whole, involved considerable sums of money. Some of the female employees affected were union members who looked to GMB to support them.

The union, then, was attempting to do two things at once. They wanted to secure protection for members who would otherwise see a reduction in pay in real terms. They also needed to pursue equality of pay on behalf of their female members. This included dealing with past inequalities, now identified, which might justify litigation.

To at least some extent these were conflicting aims. Money spent on pay protection could not be spent satisfying Equal Pay claims. Finances were tight and the union was seriously concerned that an aggressive approach to the equal pay issue might undermine the pay protection negotiations or even cause redundancies.

The union decided to give priority to the pay protection. Ultimately they reached a preliminary agreement with the council that, subject to the relevant members' agreement, would settle the claims at a small fraction of their probable value.

Many women took independent legal advice. One of the results of this was that the union was sued for sex discrimination. The claim included accusations of both direct and indirect discrimination.

The indirect discrimination claim was based on the allegation that the union had followed a practice, giving priority to the pay protection negotiations, which had a disproportionate effect on women, because they were the ones with alternative claims.

The tribunal upheld the indirect discrimination claim, concluding that there had been a practice of agreeing to low back pay settlement in order to free up funds for pay protection. This had a disadvantaged a group, predominantly women, who had other priorities that were sacrificed.

Furthermore, although the tribunal concluded that there had been no direct discrimination, the union was heavily criticised for failing to pursue their members' interests, for not advising their female members fully and for agreeing precipitately to an ill-advised deal over pay.

The union appealed to the EAT on a number of issues. The majority of their grounds were dismissed. But the union did succeed in convincing the EAT that their approach to the situation had been justified, and thereby overturning the tribunal's finding of indirect discrimination.

Indirect sex discrimination is governed by s1(2)(b) of the Sex Discrimination Act 1975, which at the relevant time read:

(2) In any circumstances relevant for the purposes of a provision of this Act to which this subsection applies a person discriminates against a woman if:

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –

which is such that it would be to the detriment of a considerably larger proportion of women than of men and

which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied

which is to her detriment.

The point of appeal related to the two-element test for justification. This has now been codified by an amendment to the Sex Discrimination Act which replaces s1(2)(b)(ii) with 'which he cannot show to be

a proportionate means of achieving a legitimate aim.'

The EAT concluded that this amendment would have had no significance to the case and that the law remained substantially the same. In order to justify a potentially discriminatory action the respondent must show that it is both in pursuit of a legitimate aim and using means proportionate to that aim.

In *GMB v Allen* a very strict distinction is drawn between these two stages. In the first stage, the legitimacy of the aim is considered, without any reference to the methods used to pursue it. In the second stage, the methods are considered, but only on the basis that they must be proportionate to the legitimate aim that has been identified.

This is a narrow approach. In relation to proportionality it is to ask whether there was an alternative method of pursuing the legitimate aim that would disadvantage the protected group less, without impairing the achievement of the aim.

The result of this approach in *GMB v Allen* was to render the criticisms made by the tribunal of the union's actions irrelevant. The legitimate aim came down to the setting of priorities between pay protection and equal pay claims. The various failures of the union did not affect that decision. The claimants were not suggesting that the union should have chosen a different method of achieving the same aim. They wanted the union to pursue a different aim, one that gave greater priority to their claims.

Since it had concluded that the priority given to pursuing the pay protection was a legitimate aim and that the tribunal's criticisms were not relevant to proportionality, the EAT concluded that the union's actions had been justified.

Bloxham v Freshfields

Coincidently, judgement in GMB v Allen was given at much the same time as the first instance decision of *Bloxham v Freshfields*, unreported. Bloxham is a tribunal decision that has not been appealed. It is therefore on a quite different level to *GMB v Allen*. However, a comparison between the two is interesting.

Mr Bloxham was a partner at Freshfields, the City law firm. After his retirement he brought an age discrimination case about changes to Freshfields' pensions scheme that had disadvantaged him and precipitated his retirement.

Partners in Freshfields, both active and retired, were remunerated under a lockstep system. Profits were shared between partners according to a points system, with points being acquired through long service. Retired partners retained a proportion of their points, the fraction depending on their age at retirement.

Since retired partners received a share of the partnerships current profits, their remuneration was generated by the next generation of partners. Unlike a conventional pension scheme there was no fund into which any individual paid in order store up money for their retirement.

This lead to tension between partners of differing ages. This was exacerbated by a provision within the scheme that no more than 10% of the firms profit could be paid to retired pensions. Younger partners were contributing more to the scheme than had previous been the case, but expected that, by the time they retired, their payments would be reduced by the 10% cap. They felt this was profoundly unfair.

Freshfields therefore resolved to alter the pension arrangements for partners in order to make the system more sustainable. Mr Bloxham's case arose from the transition between the old scheme and the new.

If he retired once the new scheme was fully in force, Mr Bloxham's pension arrangements would be much less favourable than they would have been under the old scheme. However, the old scheme allowed for a significant reduction in pension entitlement for early retirement. Any partner who retired at 54, rather than 55 or older, would lose forfeit 20% of his entitlement. Those retiring earlier than 54 suffered further reductions.

Mr Bloxham was caught between these two rules. If he continued to work until he reached 55 he would come under the new scheme. If he retired before the new scheme came into force he would suffer the 20% reduction.

Mr Bloxham chose to retire early to avoid coming under the new scheme. He then brought a case for age discrimination.

The tribunal rejected his claim. Their decision did not rest on the justification point, since the tribunal found against Mr Bloxham on other points irrelevant to this discussion. But they also concluded that, if discrimination had occurred, Freshfields' actions were justified.

In doing so the tribunal examined both the aim of pension changes and their proportionality. They

concluded that Freshfields had been pursing a legitimate aim, namely to reform their pension arrangements to place the scheme on a sustainable footing and avoid unfairness.

The tribunal went on to conclude that, given the importance of reforming the scheme and the difficulties in reaching consensus on the details of reform Freshfields' actions were justified. The tribunal were also influenced by the difficulties in accommodating Mr Bloxham without placing other partners at a disadvantage.

Conclusion

There are two important issues in these cases for practitioners. Firstly, *GMB v Allen* suggests is that the proportionality test is much weaker than many previously believed. No form of behaviour, however appalling, will guarantee a finding that the actions are disproportionate. Proportionality is restricted to considering whether less damaging methods could have been employed to the same result.

It is doubtful whether this approach is compatible with European law. The Equal treatment directive defines indirect sex discrimination as follows:

> *indirect discrimination: where an apparently neutral provision, criterion, or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

The wording used by the Directive is 'appropriate and necessary'. This wording would appear to allow for a fuller consideration of means, as well as ends, than allowed in *GMB v Allen.* It is difficult to see how unlawful or dishonest means could be described as appropriate.

Previous UK cases, in particular *Elias v Secretary of State* [2006] 1 WLR 3213, have stuck closer to the directive. What appears to have been lost, particularly in *GMB v Allen*, is the first stage of the test set out by Lord Justice Mummery in Elias at 3251:

> *'First, is the objective sufficiently important to justify limiting a fundamental right?'*

This question is not contained in the two-stage approach of considering whether there is a legitimate aim and then whether the means are proportionate to that aim. An aim may well be legitimate, without it justifying interfering with fundamental rights. The narrow approach, though, assumes that any means can be justified if they are necessary to achieve the legitimate aim.

This creates a problem where there is an unimportant, but legitimate aim, which can only be achieved with damaging methods. Only a wider approach, such as that suggested in *Elias*, can allow a tribunal to conclude "this aim is just not worth the negative impact". This is a conclusion that tribunals should have open to them. Despite *GMB v Allen*, both the directive and Elias suggest that it is.

Even, however, if future cases adopt this wider approach it will not produce a general reasonableness test. There will remain a close link between what the nature of the legitimate aim and what means of proportionate to achieving it.

This leads to the second lesson: the precise identification of the aim is vital. It goes far beyond simply determining whether the aim was legitimate. In both *GMB v Allen* and *Bloxham v Freshfields* it was likely that the respondents had, at least at some level, good reasons for their behaviour, and therefore a good chance of showing a legitimate aim. This is the position in many cases.

It was the identification of the precise aim in each case that was so important to the question of justification. In *GMB v Allen*, once the EAT had identified the aim as maximising the pay protection the union was able to secure, the members' case was lost. The criticisms made by the tribunal became irrelevant, because they didn't relate to the aim that had been identified. If, however, the aim had been identified more generally, along the lines of 'balancing the interests of members' proportionality arguments would have had greater relevance. Arguably, the means adopted – emphasising the pay protection so strongly – were not proportionate to that aim.

Similarly, once the tribunal in *Bloxham* had identified the aim as the reform of the pension scheme to place it on a sustainable basis and avoid the unfairness to younger partners, it was difficult for Mr Bloxham to win the proportionality argument. Had, as Mr Bloxham wished, the case been considered on the basis that the aim was to retain the 20% reduction on early retirement, Freshfields would have been much less likely to show that the aim was legitimate. Similarly, if the aim had been to eliminate unfairness between

470 partners of differing ages, Mr Bloxham might have been able to prevail.

Many justification cases then will rest on what aim is being pursued. Either the aim will be considered illegitimate, or the way in which the aim being pursued is formulated will determine the outcome of the proportionality question.

Michael Reed
Free Representation Unit

471 # Briefing 471

Indirect discrimination under the European Convention on Human Rights

D.H. and others v The Czech Republic Grand Chamber, European Court of Human Rights
13 November 2007

Background

(See *Briefings*, Vo. 32, Nov. 2007, p.31, Notes and News)

This case was brought by 18 Roma children who, between 1996 and 1999 were placed in special schools in the town of Ostrava, in the Czech Republic. Their placements were authorised by their head teachers, based on psychological tests to assess their intellectual capacity and parental consent, in accordance with the Schools Act 1984 (Law no. 29/1984).

In 1999 the applicants sent questionnaires to head teachers in special and ordinary schools; replies indicated that in Ostrava 1,360 pupils were placed in special schools of whom 762 (56%) were Roma, while Roma represented only 2.26% of the total of 33,372 primary school pupils. Only 1.8% of non-Roma pupils were placed in special schools, and 50.3% of Roma pupils were assigned to such schools, making it 27 times more likely that a Roma child in Ostrava would be placed in a special school than a non-Roma child.

Domestic remedies

Although they did not formally appeal. In 1999 fourteen of the applicants asked the Ostrava Education Authority to reconsider their placements on the basis that the testing was unreliable and their parents' consent was without full information of the consequences, but since the decisions complied with the law, the Authority found no reason to do so.

In 1999 twelve of the applicants lodged an appeal in the Czech Constitutional Court, complaining of *de facto* segregation in the special education system. They asked the Constitutional Court to quash the placement decisions on the grounds of inadequate education and an affront to their dignity. After considering submissions from special schools, the Education Authority and the Ministry of Education, the Constitutional Court ruled that there was no evidence that the statute had been interpreted or applied unconstitutionally.

European Court of Human Rights (ECtHR)

In April 2000, the applicants applied to the ECtHR alleging a breach of Article 14 of the European Convention on Human Rights (ECHR) (the right to non-discrimination) in conjunction with Article 2, Protocol no. 1 (the right to education). On 7 February 2006 a chamber of the Court ruled against the applicants by a majority of 6-1.

The applicants, represented by the European Roma Rights Centre, asked for their case to be referred to the Grand Chamber of the ECtHR. The case was heard on 17 January 2007, and on 13 November 2007, more than 8 years after the case began, the applicants' claim of racial discrimination in their right to education was upheld.

In its careful and thorough judgment the Court clarified important questions concerning the application of the ECHR to discrimination.

The Court reaffirmed that "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group;" it stated that such a situation may amount to

"indirect discrimination" as defined in the EC Race Directive 2000/43/EC and "does not necessarily require a discriminatory intent".

The key questions the Court sought to answer in the applicants' case were:

a) Whether a presumption of indirect discrimination arises, and
b) If, so, whether the Government can show objective and reasonable justification

In considering (a), the Court referred to recital 15 in the EC Race Directive 2000/43/EC permitting the use of statistical evidence to establish facts from which indirect discrimination may be presumed and ECJ case-law permitting reliance on statistical evidence. "The Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce."

While the Government queried the reliability of the applicants' statistics (see above), they did not dispute them or produce alternatives. The Court had reports[1] with statistical data for the whole of the Czech Republic consistent with those submitted by the applicants. "…[E]ven if the exact percentage of Roma children in special schools at the material time remains difficult to establish, their number was disproportionately high. Moreover, Roma pupils formed a majority in special schools. Despite being couched in neutral terms, the relevant statutory provision therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools." "Where it has been shown that legislation produces such a discriminatory effect... it is not necessary to prove any discriminatory intent on the part of the relevant authorities."

Turning to question (b) as the applicants' evidence could be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination, the burden of proof shifted to the Czech Government to show that the "difference in impact of the legislation was the result of objective factors unrelated to ethnic origin".

The Government submitted that the difference in treatment was based on the need to adjust the education system to the capacity of children with special needs. The applicants were placed in special schools on account of their " special educational needs as a result of their low intellectual capacity measured with the aid of psychological tests with the final decision by parents who had consented to the placement", and not on account of their ethnic origin.

The Court considered reports by international human rights and educational bodies that challenged whether the tests used as triggers for the placements of the applicants were capable of objective and fair evaluation of Roma children.

> *"The Court considers that, at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment."*

The Court also rejected the Government's reliance on parental consent as the decisive factor making the applicants' placements lawful. Since difference in treatment had been established "it follows that any such consent would constitute a waiver of the right not to be discriminated against". The Court was not satisfied that the parents of the Roma children, as members of a disadvantaged community and poorly educated themselves, were capable of weighing up all the aspects of the situation and consequences of their consent. They had been presented with a pre-completed form and had been given no information on available alternatives or on the consequences for their children's future. Further the only choice Roma parents had for their children was the risk of isolation and ostracism in ordinary schools or segregation in special schools. In view of the "fundamental importance of the prohibition of racial discrimination" the Grand Chamber ruled that, even if consent were informed and without constraint, "no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest".

While accepting that arrangements for education are matters for national legislation, the Court found that in this case there were not safeguards to ensure that, in

1. Including reports by the Advisory Committee on the Framework Convention for the Protection of National Minorities, ECRI and the European Monitoring Centre on Racism and Xenophobia

471 exercising its margin of appreciation, the Czech authorities took the special needs of Roma children into account, with the result that they received an education that compounded their difficulties as members of a disadvantaged group.

Further, since it had been established that in its application the relevant legislation had had a "disproportionately prejudicial effect on the Roma community" the Court accepted that, as members of that community, the applicants had all suffered the same discriminatory treatment, and it did not need to examine their individual cases.

The Grand Chamber ruled, by a majority of 13-4, that in the case of each applicant there was a breach of Art. 14 in conjunction with Art. 2 Protocol no. 1. Each applicant was awarded € 4000 as non-pecuniary damages and jointly € 10,000 for costs and expenses.

Implications

The European Roma Rights Centre (ERRC) and the Open Society Justice Initiative highlighted that in bringing together ECHR jurisprudence with that of the EU this decision laid down unified anti-discrimination principles for Europe. The ECtHR had adopted concepts more familiar in EU law, that "indirect discrimination" can constitute a breach of Article 14, that statistics may be used to establish facts from which discrimination may be presumed and that in most instances for indirect discrimination there is no need to show discriminatory intent. It confirmed that the ECHR addresses not only specific acts of discrimination but also systemic discriminatory practices.

The ERRC aptly described this judgment as "path breaking"; it opens the way for indirectly discriminatory practices of State institutions in their application of national laws to be challenged under Article 14, excluding any possible waiver of the right not to be subjected to racial discrimination.

Within the UK, while our judges are not bound by decisions of the ECtHR, they are required, under s.2, HRA in determining questions of a ECHR rights to take into account any relevant decision of the ECtHR. This decision will pave the way to HRA challenges of indirectly discriminatory policies and practices of bodies carrying out statutory functions. It could be particularly useful where anti-discrimination legislation does not apply, either because the grounds are not currently protected, for example, ex-offenders, or the treatment itself is outside the scope of anti-discrimination law, for example sentencing policy or practice.

Barbara Cohen
Discrimination Law Consultant

472 # Briefing 472

Political parties and race discrimination

Ahsan v Watt (formerly Carter) (sued on his own behalf and on behalf of other members of the Labour Party) [2008] IRLR 243, HL

Implications for practitioners

This important case concerns five key points

1. Section 12 of the Race Relations Act 1976 (RRA) which outlaws discrimination in relation to the granting of authorisations applies where there is some objective standard for the authorisation.
2. Cases of discrimination against political parties should be brought in the County Court under section 25 RRA.
3. Where an issue is resolved between parties to litigation in the ET, that issue cannot be re-litigated in the same or subsequent litigation ever again, absent quite exceptional circumstances (the principle of *estoppel* by *res judicatam*).
4. A 'good' motive for direct racial discrimination is not a defence.
5. It is uncommon to find a real comparator in exactly the same circumstances to the complainant, but this is not a problem, since a person put forward as a comparator will often be an evidential comparator.

Facts

The question whether or not complaints against political parties should be brought in the ET or in the County Court has been a vexed one. This case and McDonagh (on behalf of the *Labour Party v Ali and Sohal* (*McDonagh v Ali*) have both considered it. This case started out first and finished last.

Mr Ahsan (A) was a member of the Sparkhill ward of the Labour Party (LP) in Birmingham when it was suspended by the National Executive Committee (NEC) in 1997 for allegations in the national press that local Pakistani Councillors, or councillors with associations with the Pakistani community, were helping members of that community to jump the housing grants queue. Other reported allegations were that large numbers of Pakistanis, real or imaginary, had suddenly joined the LP. The implication was that A, known locally as aspiring to become a parliamentary candidate for the Sparkbrook constituency, of which Sparkhill was one of the wards, was recruiting or inventing countrymen to support his parliamentary ambitions.

The NEC therefore suspended four constituencies and their branches, including Sparkhill. These had a large ethnic minority, in particular Pakistani, community. In spite of an internal inquiry which found no impropriety on the part of A, or any other Pakistani councillors, the LP did not lift the suspension during the period when local parties were selecting candidates to stand for the 1997 general election.

The LP arranged for its NEC to select the local election candidates for the suspended constituencies. A was interviewed by the Regional Executive Committee, but was unsuccessful. Instead a White man from another branch, who did not qualify under the rules which required candidates to have been party members for 12 months, was selected.

A lodged a complaint in the ET alleging racial discrimination on the grounds he had been treated less favourably because of his ethnic origin during the selection process and that the LP was a qualifying body under s12 RRA.

Although A was an approved candidate he was then taken off the list of approved candidates on the grounds that he had brought a complaint of racial discrimination. He therefore lodged a second complaint of victimisation. He made a third complaint in May 2000 relating to the selection of candidates in that year and his candidature for the NEC.

Employment Tribunal and Employment Appeal Tribunal

The ET found against the LP on the preliminary point as to whether it was a qualifying body under s12. An appeal to the EAT on this point failed. The LP were given the right to appeal further, but declined to exercise it.

In a separate case, the Reading ET followed the Ahsan ET decision when deciding *McDonagh v Ali*, and rejected the LP's arguments on the s12 point. The LP appealed *McDonagh v Ali* to the EAT and lost because the EAT followed its earlier decision in *Ahsan*. However this time the LP appealed to the CA, and here it succeeded on the grounds that s12 was not intended to apply to membership bodies like the LP.

Meanwhile Mr. Ahsan's case had returned to the ET to be decided on its merits.

The judgment of the CA in *McDonagh v Ali* came out after the ET had heard evidence in Ahsan's case but before it gave its decision. The ET rejected further submissions from the LP that it was bound by the CA decision in the *Ali* case, holding that there was an estoppel, as the LP had not appealed the EAT's decision in Mr. Ahsan's favour. It considered that it was still bound by the unappealed EAT decision in *Sawyer v Ahsan* (2000). It therefore went on to consider A's complaints and found in his favour in all three. It found that A had been discriminated against when he was not selected as a candidate in 1997 and 2000; the latter occasion was also found to be an act of victimisation. A was also victimised when not included on the list of approved candidates in 1998. A lost his complaint that he was discriminated against in 2000 when the LP did not validate his nomination to the LP's NEC.

The EAT dismissed an appeal by the LP in respect of the first complaint, but allowed it in respect of the other two; the distinction being that the EAT in *Sawyer v Ahsan* had directed a hearing in relation to the merits of the first complaint but said nothing about the other two. Another division of the EAT rejected the appeal of the LP on the merits of the decision as to whether there had been discrimination.

Court of Appeal

The LP then appealed to the CA. The CA considered that it was bound by the decision of the CA in *McDonagh v Ali*, so there was no argument on that

point in front of it. However, by a majority, it held that there was no estoppel and that therefore the ET when hearing Mr. Ahsan's substantive complaints should have held that it was bound to find against him on the basis that the case should have been brought in the County Court and not in the ET. It further held that the LP had a good reason for discriminating against A and so it was not unlawful.

House of Lords

A appealed on the basis that the *Ali* case was wrongly decided and that in any case the interpretation given to s12 in *Sawyer v Ahsan* was *res judicata* between him and the LP for all three complaints after the first EAT judgment went against the LP and they did not appeal. It was argued that this was an estoppel.

On the point whether cases such as this should heard in the County Court or the ET, the HL agreed with the CA that the LP was not a qualifying body under s12. It considered that

> *The notion of an 'authorisation or qualification' suggests some objective standard which the qualifying body applies, as an even handed, not to say 'transparent' test which people may pass or fail.*

On the contrary

> *The main criterion for candidates is likely to be their popularity to the voters, which is unlikely to be based on the most objective criteria.*

The HL considered instead that the LP would be covered by s25 of the RRA relating to associations and discrimination against members or prospective members.

The HL pointed out that proceedings for breaches of s25 needed to be taken in the County Court. A had in fact lodged such proceedings at the time of his original ET claim and these had been stayed pending the outcome of this claim.

On the *estoppel* by *rem judicatam* point, the HL agreed that as A had been forced into funding an expensive hearing to consider the merits of all three applications, it would be unfair to expect him to start again in the County Court. The LP was therefore not permitted to challenge the s12 point in these cases. The decision had been made by a competent court (ie the ET) and it was therefore binding on the parties.

In considering the ET's decision on the merits, the HL took into account the fact that the ET found that the LP's reasons for the non-selection of the applicant were associated with the Pakistani community. Furthermore, that the ethnic origins of the applicant and the successful candidate *'were not irrelevant to the respondents considerations. Considerations relating to the applicant's ethnic origins were a significant cause of his non-selection by the respondent in December 2007'.*

The HL noted the ET's finding that

> *There clearly was a racial dimension to the decision to suspend those branches where Pakistani members were numerous and where it was suspected that some at least of those members were guilty of abuse of the membership system.*

However, the HL disagreed with the relevance of the CA's observations that the LP's wish not to have a candidate who would be seen to identify with the Pakistani community was a legitimate objective... provided that the perception that the problem was predominantly a Pakistani one was itself legitimate. The HL did not agree with the CA's distinction between 'legitimate' and 'illegitimate' discrimination; that even though a problem was identified as association with a particular community that a decision could be made uninfluenced by the racial make up of that community. Hence it was similar to the plea that you have nothing against employing a Black person, but the customers may not like it.

The ET was also not happy that the LP had failed to preserve vital documents, despite having been told within two days that there would be a challenge to the procedure. Furthermore, the RR65 replies were late without a satisfactory explanation and were evasive.

Finally the HL pointed out the relevance of comparators in an extremely useful passage which it will be helpful to cite in discrimination cases:

> *The discrimination which section 12 makes unlawful is defined by section 1(1)(a) as treating someone on racial grounds 'less favourably than he treats or would treat other persons'. The meaning of these apparently simple words was considered by the House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:*
>
> *(1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the 'statutory comparator') actual or hypothetical, who is not of the same sex or racial group,*

as the case may be.

(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant: section 3(4).

(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in Shamoon at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the 'evidential comparator') to those of the complainant and all the other evidence in the case.

It is probably uncommon to find a real person who qualifies under section 3(4) as a statutory comparator. Lord Rodger's example at paragraph 139 of Shamoon of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are 'materially different' is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.

Comment

The case has clarified the law in terms of how members of political parties are protected under the RRA 1976, although the issue of political candidates and equality of representation remains a concern.

Shortly after the HL decision Lord Ouseley asked a parliamentary question about whether the Government would be including in the Equality Bill a specific prohibition of discrimination in respect of political parties in all they do, and permit positive action measures. The Government replied that it would be considering these issues following the consultation it had carried out on the Bill. Harriet Harman has since indicated her support for All Black Shortlists to increase the representation of Black and ethnic minority MPs.

As part of the Discrimination Law Review the Government is considering whether to introduce All Black Shortlists to increase the representation of Black and ethnic minority MPs. While the low representation of BME MPs and councillors is a cause for concern, the answer lies not solely in shortlists. It is not clear that political parties have taken all necessary steps to remove barriers which Black and ethnic minority members face.

This case also raises the issue of the forum for discrimination cases – it is a case which would provide strong evidence for having one forum for discrimination cases; when there is a lack of clarity about the lawfulness of discrimination, then there is a strong case for one forum. On the other hand clarity of the law in this situation would not lead to forum being such an issue.

Brenda Parkes
Equality and Human Rights Commission

Robin Allen QC
Cloisters Chambers

Selecting the correct pool

Grundy v British Airways Plc [2008] IRLR 74, CA

Implications for practitioners

The CA rules that the correct pool is the one that suitably tests the particular discrimination in issue. There is no universal formula for ascertaining the correct pool and there is not necessarily a single correct pool for every case. There is no rule that says that the test of disparity must always look at the advantaged class, or that it must always look to the disadvantaged class. It is the ET's job to identify the pool that is appropriate to the alleged disadvantage.

Facts

Mrs Grundy (G) had worked for British Airways (BA) for many years. She had started work as a full time cabin crew, and in 1987 she became a support cabin crew. This entailed a new contract under which she nominated between 15 and 20 days on which she wanted to work in any 28 day period and she was paid at a daily rate. Until 1994 this was the only form of part time work available to cabin crew. After 1994 there was no further recruitment of support cabin crew and all new crew members were offered the option of fixed proportions of full time work – 33%. 50% or 75% of full time work. In 2002 BA abolished the support cabin crew posts and G opted instead to take up a 75% contract. Both full time and post 1994 part time employees were on an incremental pay scale with paid holidays and sick leave, whereas the support cabin crew received no pay increments. This meant that by the time the case came to be heard, G's pay was £13,589 pa compared to the £17,499 pa that Mr Wynne was earning. Mr Wynne was doing like work, also at 75% of full time. His higher pay was as a result of his receipt of annual increments which G had not been entitled to receive.

G brought a claim under the EqPA that she should receive equal pay compared to that received by Mr Wynne.

Employment Tribunal

The ET found in G's favour and ruled that her pay should be adjusted with retrospective effect so that she should receive 75% of the top of the cabin crew pay scale. The ET held that the differential pay scales amounted to a policy, criterion or practice of not paying increments to support cabin crew. They assessed detriment by looking at both the advantaged group and the disadvantaged group, but concluded that the focus should be on the disadvantaged group. This led them to conclude that the pay practice was to the detriment of a considerably larger proportion of women than men and it was not justified.

Employment Appeal Tribunal

The EAT decided that the ET had been wrong to focus on the smaller disadvantaged support cabin crew group rather than the larger advantaged group, the cabin crew. It was common ground that an examination of the advantaged group, the cabin crew, showed no disparate impact. So the EAT substitutued a ruling that no disparate impact was shown. They agreed with the ET that if there had been a disparate impact then it would not have been justified.

G appealed to the CA on the grounds that there was nothing legally wrong with the ET's conclusion that the relevant pool for testing the disparate impact comprised those who were disadvantaged by the practice.

Court of Appeal

The CA ruled that the EAT had interpreted the law incorrectly by focussing on the advantaged rather than the disadvantaged group. Sedley LJ ruled:

> *The correct principle, in my judgment, is that the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool for each case.*

Referring to *Armstrong v MOD* [2004] IRLR 672, he identified the fundamental question as being whether there is a causative link between G's sex and the fact that she is being paid less than the true value of her job as reflected in her comparator's wages. The tribunal should then be concerned to choose a pool which

illuminates what they identify as the potentially critical questions in diagnosing whether discrimination has occurred, or not. The pool should not be so narrow that no comparison can be made at all nor should it be so large that the comparison is no longer a comparison of like with like.

Sedley LJ recognises that there are considerable problems for tribunals in identifying the correct pool:

> *they can neither select a pool to give a desired result, nor be bound always to take the widest or narrowest available pool.*

The selection of the pool is a question of fact for the tribunal which must select a pool that is adequate to test the specificity of the alleged discrimination. Providing that the tribunal tests the allegation with a suitable pool their judgment cannot be overturned even though it can be shown that there was another possible pool that could have been used which would yield a different result. In this case the tribunal's choice of pool was not unreasonable and would be upheld. The appeal in relation to justification was adjourned for a further hearing.

Comment

This case adds to the long list of cases in which the courts have sought to find a single test for the identification of prima facie indirect discrimination. To conclude, as this court does, that the choice of pool is a question of fact and that there may be more than one pool, opens the door to a more wide ranging analysis by the ET. However, this is at the expense of legal certainty. It means that a simple calculator approach to statistics is not enough. It requires considering what the statistics mean and not merelywhat they are. This is probably in accordance with EC law. The text of the definitions of adverse impact in the race and employment directives is much less obviously specifically mathematical and more concerned with substantive effect. It will be interesting to see whether this case goes to the House of Lords.

Gay Moon
Special Legal Advisor, Equality and Diversity Forum

Briefing 474

Challenging a professional association's refusal to represent its members

British Medical Association v Chaudhary [2007] IRLR 800, CA

Implications for practitioners

The Court of Appeal rule that the BMA's less favourable treatment of the Claimant in order to protect itself from threatened litigation, did not amount to victimisation. Guidance is also provided in assessing damages for loss of a chance including the consideration of events post the tribunal's remedies hearing.

Facts

Mr Rajendra Chaudhary (C), of Asian origin, was a member of the British Medical Association (BMA) and a Fellow of the Royal College of Surgeons (FRCS). After qualifying as a doctor in India, he came to the United Kingdom in 1987 to work as a senior house officer. He became an FRCS, and in 1991 obtained a diploma in urology.

In 1991, he was offered the post of registrar in urology at North Manchester General Hospital. Between 1982 and 1994, the post was listed as being recognised by the RCS (the body responsible for the training of urologists) as providing acceptable training. C expected that after a period in the Manchester post, he would progress to a senior registrar post and eventually to consultant status.

In the mid-1990s, a new training regime came into existence. In April 1996, transition to the specialist registrar training grade began for trainee urologists. The transition period was to last until January 1997. C was now employed as a locum senior registrar in urology in Portsmouth. He had also been granted indefinite leave to remain in the United Kingdom. At Portsmouth he took steps to gain transition to the new specialist registrar grade. He believed he satisfied the minimum entry requirement and relevant conditions. His

application for transition was rejected on the ground that his Manchester post did not have the appropriate approval.

Following this rejection, C sought the support of the BMA in challenging the decision. He subsequently raised allegations of racial discrimination against regulatory medical bodies and persons responsible for affecting his progress (or lack of progress) through the reformed system. He commenced two sets of proceedings in the employment tribunal in which he alleged race discrimination. The BMA refused to support those proceedings.

C subsequently issued employment tribunal proceedings against the BMA alleging direct and indirect discrimination and victimisation. The tribunal dismissed the direct discrimination claim, but allowed the indirect discrimination and victimisation claims. The tribunal after considering remedies awarded £817,844 including interest, the largest award by a tribunal in a race discrimination claim. Those findings were upheld in the EAT.

Court of Aappeal

The BMA appealed to the CA contending that it had treated C in the same way that it treated, or would treat, its other members in the same or similar circumstances It investigated the merits of his discrimination claims against the regulatory medical bodies and persons and concluded that there was no real prospect of successfully challenging the lawfulness of the decisions that C alleged were racially discriminatory, informing him that it could take no action on his behalf. This was because the BMA did not support its members' claims unless they had a real prospect of success. C cross-appealed against the rejection of his direct discrimination claim.

The CA allowed the appeal and dismissed the cross-appeal. In reversing the findings of indirect race discrimination and victimisation the CA found that it was an unusual feature of the case that the employment tribunal was not prepared to hold that the BMA's refusal to support C had been based on racial grounds (no direct discrimination), but was prepared to infer indirect discrimination by the imposition of a requirement or condition that the BMA would not support race discrimination claims against certain regulatory medical bodies. The CA observed a paradoxical element between those two findings.

At the heart of the tribunal's reasoning was its rejection of the BMA's reasons for refusing to support C's claims. The CA found the tribunal never seized the issues and, significantly, never analysed the evidence to see whether the BMA's explanation for refusing support was valid and reasonable and should be accepted. The tribunal never asked or answered the crucial question, which was whether C had a case of race discrimination against any of the proposed respondents which was worthy of BMA support. Without this analysis the tribunal was not in a position to reject the BMA's explanation for its refusal, or to draw the inference that its collective mind was subconsciously closed to the possibility of bringing a race discrimination claim against the medical authorities.

The CA found that once the established facts were analysed, it was clear that the BMA had sound reasons for believing that C had been dealt with according to the rules and that there was no basis for suspecting that the decision had been tainted by either direct or indirect race discrimination. There was no evidence of any difference in treatment between C and another doctor. Some difference of treatment was required before any inference of racial discrimination could arise and before any burden passed to the BMA to show that its actions had not been on racial grounds.

It was right that if Dr Chaudhary, an Asian doctor, *appeared* to have been discriminated against, this might well give rise to a duty to investigate that possibility; but if enquiries revealed that he had been treated according to the rules that applied equally to everyone and which had been applied equally to everyone there would be no case on direct discrimination. When the evidence was analysed, the tribunal's essential findings of fact were held to be perverse and without foundation. As the findings were perverse, the inference that was drawn from them became untenable. The whole basis for the tribunal's holding that the BMA had indirectly discriminated against C also fell away.

Though it was not strictly necessary given the finding of perversity, the CA also expressed views on the tribunal's approach in finding that a significantly smaller number of Asian BMA members could comply with the requirement that a discrimination claim not be against the RCS. The CA observed that, in the light of the House of Lords' decision in *Rutherford v Secretary of State for Trade and Industry (No.2)* [2006] IRLR 551

HL the appropriate 'pool for comparison' should be defined by reference to the nature of the rule, condition or requirement in issue. The pool in this case comprised all BMA members who want that organisation's advice and support in respect of race discrimination claims against the RCS and other regulatory medical bodies. No member of that pool, continued the Court, could comply with the condition or requirement allegedly imposed by the BMA, meaning that there was no comparative disadvantage or advantage for any racial group and no indirect race discrimination against members of the racial group to which C belonged.

Regarding victimisation, the CA held that the EAT had erred in upholding the tribunal's decision that the BMA had victimised C by refusing to reconsider its decision not to support his claim against various regulatory medical bodies. Following the decision of the House of Lords in *St Helens Metropolitan Borough Council v Derbyshire* [2007] IRLR 540 HL, a person did not discriminate if he took the decision in question in order to protect himself in litigation. The CA concluded when analysing the matter further, that the BMA had not refused reconsideration because of the accusation but in order to protect its position. It followed that there had been no victimisation.

On the issue of remedy the CA commented on the tribunal having awarded damages for the loss (owing to BMA's failure to support him) of a 50 per cent chance of C 'putting his career right'. The CA took into account events that occurred after the tribunal's assessment of his loss. Following the remedies hearing C had proceeded with the support of the BMA, with his discrimination claims against the various medical regulatory authorities, and those claims had all failed in an employment tribunal. This failure demonstrated that C had suffered no loss as a result of the BMA's previous refusal to support him. The CA found 'he had no chance of putting his career right.' These subsequent events showed that the tribunal's necessarily speculative assessment of the loss of chance of success of C's claims had been wrong.

The CA found that regardless of what happened after the remedies hearing, the tribunal had erred in its task of assessing C's loss of a chance. Its job had been to identify the BMA's specific shortcomings, and to consider what probably would have happened had those shortcomings not occurred. There was no material before the tribunal to suggest that, had the BMA been prepared to allege race discrimination against medical regulatory bodies, C would have had an even chance of achieving his objective of progressing his career, either by litigation or by settlement. The CA found that if it had been required, it would have set aside the tribunal's assessment of loss in this regard.

Comment

This case acts as a salutary reminder of how difficult it can be in factually demanding cases to apply the principles of discrimination law. The CA's finding regarding victimisation was of note as were the comments made regarding the assessment of remedies involving a loss of chance and the detailed evidence and sound analysis required to succeed on these points.

Elaine Banton
7 Bedford Row, Chambers of Kate Thirlwall QC, London, WC1R 4BS
Tel: 020 7242 3555
ebanton@7br.co.uk

Briefing 475

Extension of time to claim disability discrimination

Department of Constitutional Affairs v Jones [2008] IRLR 128, CA

Facts

Mr Jones (J) had been employed by the North Wales Magistrates' Courts Committee ('the Committee') since 1977. He had been chief executive since 1995. He was suspended from work on 28th July 2004 on allegations of serious financial irregularities. In September 2004, his GP diagnosed him as suffering from anxiety and depression. An investigation interview was therefore rescheduled for a date in October. However, on 2nd October he broke his ankle

and did not attend the interview.

Disciplinary and grievance hearings were fixed for 22nd November 2004, but postponed until 14th January 2005 as he was unfit to attend due to his depressive illness and broken ankle. Both his own GP and a doctor consulted by the Committee agreed J was unfit for interview and/or discipline. On 8th January 2005, J was diagnosed with severe depression and severe anxiety. Nevertheless, the Committee refused his request to postpone the hearings again. He was found guilty of gross misconduct and dismissed.

J lodged an appeal. The first appeal date in January was adjourned, but the appeal proceeded in his absence on 28th February 2005 and was unsuccessful. The Committee ceased to exist on 31st March 2005 and was succeeded by the Department of Constitutional Affairs (DCA). The Committee had wanted to complete the disciplinary process before 1st April 2005, since afterwards it would be unable to pursue disciplinary proceedings against him and moreover, would have to pay out substantial notice pay. The Committee felt it would undermine public confidence if its chief officer received significant payments from the public purse at a time when serious allegations of gross misconduct were outstanding against him.

The Committee reported J to the Law Society. On 4th April 2005, the police raided his home. J lodged his first employment tribunal claim on 8th April 2005 for unfair dismissal and breach of contract. On 2nd June he made a further claim for unlawful deductions and a breach of the Working Time Regulations. Finally, on 5th July 2005, he made a claim for disability discrimination. The DCA submitted the latter claim was out of time. Both parties agreed that time began to run on 1st March 2005.

The employment tribunal found the disability discrimination complaint was out of time, but extended time using its just and equitable discretion under Sch 3 paragraph 3(2) DDA. The DCA appealed unsuccessfully to the EAT. It appealed again to the Court of Appeal regarding the tribunal's extension of time.

Employment Appeal Tribunal

The CA upheld the ET's decision to extend time. It cited the test in *Robertson v Bexley Community Centre* [2003] EWCA Civ 536, a race discrimination case. The Court of Appeal in *Robertson* noted that the exercise of the discretion to extend time is the exception rather than the rule – a tribunal cannot hear a late complaint unless the claimant convinces it that it is just and equitable to extend time. The higher courts must not interfere with a tribunal's exercise of its discretion unless the tribunal erred in principle or otherwise was plainly wrong.

The tribunal extended time because J had not previously been able to accept that he was disabled. The tribunal was well aware that J had been advised on several occasions prior to the tribunal deadline that he had a claim under the DDA. He had this advice from his trade union, his solicitors and his solicitor wife. Nevertheless, J gave written evidence to the tribunal that he did not want to accept disability status in the sense of it being long-term. His doctor had said continuing treatment would eventually get him back to good health. He had worked in a senior position in the local magistrates court for over 30 years and was well-known in the local community. He was reluctant to accept the label of disability, particularly on the basis of mental illness. Although the tribunal was uneasy that J' oral evidence was hard to reconcile with this written evidence, ultimately it accepted that J was genuinely reluctant to acknowledge the existence of a disability based on mental impairment.

The tribunal referred to the factors to be considered in section 33 of the Limitation Act 1980 as referred to by the EAT in *British Coal Corporation v Keeble* [1997] IRLR 336, ie a tribunal should have particular regard to (a) the length and reasons for the delay; (b) the extent to which the cogency of evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any request for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. Regarding (a), the delay was only 5 weeks. Regarding (b), the effect was negligible, because of the short time, because the possibility of disability was in the employer's mind at the time of the events themselves, and because there was in any event a timely unfair dismissal claim dealing with the same facts. The tribunal did not consider factors (d) and (e) were pertinent on the facts.

The DCA argued that the tribunal was wrong to have disregarded two of the section 33 factors.

However, the CA agreed with the tribunal's approach. The relevance of the *Keebles* factors depends on the facts of every case. Here, J admitted he had taken legal advice, but the relevant issue was his state of mind.

The CA emphasised that it was far from stating any general principle that a person with mental health problems is entitled to delay bringing a claim as a matter of course. But in this case, the tribunal was entitled to reach its decision based on four key considerations. First and most importantly, the definition of disability requires a substantial adverse effect lasting at least 12 months. The 12 month period did not expire for J until after the deadline for a claim. Although he could be expected to have regard to medical advice, this was a claimant of mature years with a very responsible job who did not want to admit to himself or anyone else that he was disabled. Second, the employers' conduct must be considered. They hurried the disciplinary process in their own interests and the result was that J had to make a decision as to whether he had a disability sooner than he would otherwise have had to do. Third, the DCA disputed that J was disabled, so it was harder for the DCA to complain J was unreasonable in not acknowledging his mental illness. Fourth, the tribunal was entitled to take account of the series of misfortunes which J suffered and operated on his mind, ie the police raid, the broken ankle and the knowledge that disciplinary proceedings were being conducted in his absence.

Comment:

As the tribunal said, it is neither uncommon nor surprising for people to be unwilling to accept that they have a mental illness amounting to a disability. In some instances, this will lead to delays in tribunal claims being issued. It would be dangerous to rely on this factor alone to persuade a tribunal to allow a late claim under its just and equitable discretion. What is useful is to look at the other considerations which the tribunal took into account. This case is also interesting for its comments regarding the relevance of the factors in section 33 of the Limitation Act 1980.

Tamara Lewis
Central London Law Centre

Briefing 476

The time for assessing whether an impairment will recur

McDougall v Richmond Adult Community College [2007] IRLR 771, EAT

Implications for practitioners

The Court of Appeal resolves the vexed issue of what evidence can be considered when determining whether or not an adverse effect is likely to recur and thus be long term, following the apparently contradictory decisions of the EAT in *Latchman v Reed Business Information Limited* [2002] ICR 1453 and *Greenwood v British Airways plc* [1999] ICR 969. The effect of an impairment must be considered at the point of the discriminatory act complained of, and evidence of subsequent recurrence should not be taken into account.

Facts

Ms McDougall (M) applied for a position as a database assistant at Richmond Adult Community College (R). In April 2005, she was offered and accepted the position, subject to satisfactory medical clearance and references. On 22nd April, having received a medical report, the appellants purported to withdraw the offer on the ground that medical clearances had not been obtained.

Between 1st November 2001 and 25th February 2002, M had been compulsorily admitted to hospital under the terms of the Mental Health Act. She was discharged into the care of a consultant psychiatrist. In August 2005, she had a relapse and in December 2005, she was again sectioned.

Employment Tribunal

M brought a claim of disability discrimination. She also brought a claim for breach of contract on the basis of withdrawal of the offer of employment. Whilst the tribunal found in her favour in respect of the breach of contract, they dismissed the claim of disability discrimination, on the basis that she was not disabled

within the meaning of the Disability Discrimination Act (DDA). The Employment Tribunal found that M suffered from a mental impairment; persistent delusional disorder, with a differential diagnosis of schizo-affective disorder. She had been admitted to hospital between November 2001 and February 2002. But in the tribunal's opinion, her mental impairment did not have a substantial adverse effect on her ability to carry out normal day-to-day activities within the meaning of Section 1 of the 1995 Act. They also found that any effect was not long term: M had had no recurrence of the schizo-affective disorder after her discharge from hospital in February 2002, the episode having lasted at most for eight months. M could not point to any evidence (medical or otherwise) to demonstrate that between February to June 2005 she was likely to suffer a recurrence. Whilst the persistent delusional disorder was said to be long standing and possibly life long by the medical experts, this was not the same as saying that it was likely to reoccur. There being no likelihood of a recurrence as at the date of the acts complained of, M had not shown that it was more probable than not that any mental impairment which produced a substantial adverse effect was likely to last for 12 months.

Employment Appeal Tribunal

M appealed to the EAT. The EAT upheld her appeal on both grounds. It held that there was a substantial adverse effect on her ability to carry out normal day to day activities and that, in determining whether or not a condition is likely to recur for the purposes of the assessment of disability under the DDA, it is relevant to consider not only those matters extant at the date the tort was committed, but those occurring up to the date of the hearing. On the issue of whether the M's mental impairment would be likely to recur at the date of her rejection for a job in April 2005, it was relevant to consider that it had in fact recurred when she was recommitted under the Mental Health Act. The EAT found that there had been a recurrence of her condition in August 2005 and she was admitted to hospital again under section 3 of the Mental Health Act in December 2005.

Court of Appeal

R appealed against the EAT's decision in relation to M's condition recurring. The Court of Appeal upheld the appeal. It was held that when determining whether an adverse effect on a person's ability to carry out normal day-to-day activities was "likely to recur", within the meaning of para 2(2) of Sch 1 to the Disability Discrimination Act 1995, an employment tribunal should make its determination on the basis of evidence available at the time of the allegedly discriminatory act.

The CA said that DDA s 1(1) contemplated that, for a disability within the meaning of the Act to exist, a physical or mental impairment having a "long-term adverse effect" on the person's ability to carry out his normal day-to-day activities must be established. DDA para 2(2) of Sch 1 provided that where the effect of the impairment had ceased, it might still be treated as having a long-term effect if the effect was "likely to recur". R had contended that the likelihood of recurrence had to be considered on the basis of circumstances existing at the date of the alleged discriminatory act on which the claim was based, ie April 2005. M had submitted that the true construction of para 2(2) was for the employment tribunal to consider all relevant evidence about the impairment which emerged up to the date of the hearing before them and to assess what was likely to occur in the light of what had occurred. If there had been a recurrence, that must be taken into account.

The CA said that if employers were to avoid the sanctions which might result from disability discrimination, they must first decide whether the employee was disabled within the meaning of the DDA. They would do that by applying a series of tests which, in an appropriate case, included that in para 2(2) of Sch 1. That involved a prediction on the available evidence. The employer's decision was inevitably taken on the basis of the evidence available at the time of the alleged discriminatory action. Therefore it was on the basis of evidence as to circumstances prevailing at the time of that decision that the employment tribunal should make its judgment as to whether unlawful discrimination by the employer had been established. Whether a wrong had been committed must be judged on the basis of the evidence available at the time of the act alleged to constitute the wrong.

Comment

This decision accords with the revised Guidance on

definition of disability, and does at last provide some certainty on this matter, given the previous contradictory decisions of the EAT. It does, however, serve to emphasise the difficulties that disabled people face – particularly those with mental health issues – in bringing a discrimination claim and having to meet the somewhat tortuous definition set out in section 1 of the DDA. Those with mental health issues face considerable stigma in the workplace and more generally, and yet there will be no protection under the DDA – regardless of any subsequent hospital admissions – if they cannot demonstrate that, at the time of the discriminatory action, the effects of the impairment were likely to recur. It is to be hoped that this is an issue which the forthcoming single equality bill will address as the definition of disability is long overdue for amendment.

Catherine Casserley
Cloisters
cc@cloisters.com

Briefing 477

The definition of disability: normal day–to–day activities

Paterson v The Commissioner of Police of the Metropolis [2007] IRLR 763, EAT

Under section 1(1) of the Disability Discrimination Act 1995 (DDA), a person has a disability 'if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'. The following case concerns what amounts to a substantial adverse effect on day-to-day activities.

Facts

Mr Paterson (P), a police officer, discovered in 2004 at the age of 42 that he suffers from dyslexia. Although he had always been aware that he had certain difficulties, he had not previously realised this was dyslexia. He had a successful career and was able to achieve the senior post of chief inspector. He claimed disability-related discrimination and failure to make reasonable adjustments in respect of his applications for promotion to superintendent. Although some adjustments were made to the selection process, he claimed these were insufficient.

Employment Tribunal

The employment tribunal rejected P's claim on grounds that he was not disabled within the meaning of the DDA. In particular, his dyslexia did not have a substantial adverse effect on his ability to carry out normal day-to-day activities. The tribunal considered two expert reports, generally preferring that of Dr Biddulph, an educational psychologist. Dr Biddulph had examined P two years previously and placed him in the category of mild dyslexia, with problems in speed of reading, short term auditory working memory, speed of information processing, and organisation. He recommended P be allowed an additional time of 25% at each stage of the selection process, which was done.

The tribunal accepted the experts' evidence that the degree of P's dyslexic difficulties would become more marked at his very senior position. The positions for which he had been competing were high powered roles with very difficult tests and assessments. However, P had given no specific examples of the extent to which day-to-day activities were affected. The tribunal concluded that any adverse effects on day-to-day activities were minor. The only substantial disadvantage was in carrying out the promotion exam, but that was by no means a normal day-to-day activity. Moreover, although P was disadvantaged when compared to his non-dyslexic colleagues, he was not disadvantaged with reference to the 'ordinary average norm of the population as a whole'. P appealed.

Employment Appeal Tribunal

The EAT upheld P's appeal. It said the tribunal was wrong to measure the adverse effect against the population at large. There are clearly differences between people in such things as ability to lift objects or concentrate. But to be substantial, the effect must fall outside the normal range of effects which one might expect from a cross-section of the population. When assessing the effect, the comparison is between

what the individual can do and what s/he would be able to do without the impairment.

The tribunal was also wrong to say that taking high pressure promotion exams was not a 'normal' activity. The test for what is normal is not whether the majority of people do it. The EAT accepted P's submission based on obiter comments in *Ekpe v Metropolitan Police Commissioner* [2001] ICR 1084 that what is 'normal' is anything which is not abnormal or unusual or particular to the individual claimant. Therefore, as it was undisputed that P suffered a substantial disadvantage because of the effects of his disability in the promotion selection procedures, the only proper inference was that there was a substantial effect on his ability to undertake normal day-to-day activities. To say otherwise would fundamentally undermine the protection which the DDA is designed to provide. In any event, P had a deficit in his reading and comprehension skills, which is itself a day-to-day activity.

Although the EAT reached this conclusion based on domestic law alone, it said that EC law reinforced its conclusions. The definition of disability in the DDA must be read in a way which gives effect to EC law. The relevant law is set out in the General Framework Directive (2000/78) as interpreted by the ECJ in *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706. In *Chacón*, the ECJ said disability is to be understood as 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. Since P's disability may adversely affect his promotion prospects, it must be said to hinder his participation in professional life. 'Day-to-day activities' in DDA, s1 could easily be read to must encompass the activities which are relevant to participation in professional life.

This case is also interesting for its discussion as to whether the EAT was bound by EC law, given that the discrimination took place prior to the deadline for implementing the relevant Directive (2000/78), but after the UK had in fact passed Regulations to amend the DDA for this purpose. The EAT said it would make no sense if the amended DDA was not interpreted in the light of the EC law it was intending to transpose until the deadline for transposition. It confirmed the narrow interpretation of the effect of *Mangold v Helm* [2006] IRLR 143, ECJ given by *Adelener v ELOG* Case C-212/04.

Comment

This case is particularly interesting as the first higher-level authority referring to the European definition of disability. In addition, it refers to the effect of an impairment on participation in professional life – thus potentially extending the reach of the definition of disability, and in particular, what is a normal day to day activity, further. It also illustrates once again the hoops which a claimant needs to go through to prove s/he has a disability. While finding there was no 'disability' within the meaning of the DDA, the employment tribunal said P had a 'degree of dyslexia which plainly at a high level is something which in good industrial practice should be taken into account by the Respondent'. But what ensures good practice if there is no legal underpinning for those with an impairment which falls short of a 'disability'?

The Disability Rights Commission recommended in 2006 that the definition of disability be amended so that a person who is discriminated against due to any impairment is covered. This is something that the DLA supports. By removing the requirement to prove substantial adverse effect over 12 months or more, many people unjustly excluded on technicalities would be brought within the protection. The emphasis would move to whether the employer's behaviour was reasonable and justifiable. It remains to be seen whether the government takes up this recommendation when the Single Equality Bill is finally published.

Tamara Lewis
Central London Law Centre

The right to return after maternity leave and 'but for' test

Blundell v Governing Body of St Andrew's Catholic Primary School
[2007] IRLR 652, EAT

In this article Camilla Palmer looks at the EAT decision on the right to return after maternity leave and analyses the 'but for' and 'reason why' tests for discrimination cases.

Summary

This is one of the few appellate decisions to consider the job to which an employee is entitled to return after her maternity leave.

The EAT also comment on the 'but for' and 'reason why' tests. This article looks at how the 'reason why' test often wrongly involves both a comparison with a male worker and inappropriate reliance on motive and intention. It argues that the 'but for' test is the most appropriate test, but always bearing in mind the fact that pregnancy or maternity leave must be a 'substantial' or 'effective' reason for the treatment and not merely incidental.

The facts

B was a teacher in St Andrew's Primary School. In 2002/2003 she was teacher of yellow reception class. The head teacher's practice was to try and keep a teacher in a particular role for two years and to consult teachers about their preference of class, though the decision was up to the head teacher.

In June 2003 B told the head teacher, Mrs Assid (the second respondent) that she was pregnant. Mrs Assid asked B if she would do 'floating' duties the following year rather than take a particular class. B initially agreed but then changed her mind and was given yellow reception class again. She claimed that the pressure put on her to accept the floating duties, and Mrs Assid's frosty and distant treatment of her following her refusal, were discrimination.

In December 2003 B told Mrs Assid that she needed to take sick leave because of pregnancy related illness. She alleged that Mrs Assid was angry with her because of the disruption this would cause to the reception class and this was discrimination on grounds of her pregnancy.

The following year, on her return from maternity leave, B was offered a floating position or Year 2 and accepted the latter. She argued that the failure to consult her about her preference, because she was on maternity leave, was discrimination and the refusal to give her back the yellow reception class was a breach of her right to return to the same job.

The tribunal found that there was no discrimination and no breach of the right to return as B could be required to teach any class.

The Law

The relevant law against pregnancy discrimination at the time of the facts in *Blundell* was section 1 of the Sex Discrimination Act 1975 (SDA), as interpreted by many EC cases. This established that less favourable treatment of a woman on the ground of her pregnancy or maternity leave is automatically unlawful direct sex discrimination without the need to compare her treatment with that of a man. This protection lasts from the beginning of pregnancy until the end of maternity leave. Pregnancy and/or maternity leave does not have to be the only reason for the treatment, but it must be a substantial or effective reason.

The present s3A SDA, which came into force on 1st October 2005, was intended to codify these principles, but s3A must still be interpreted in accordance with the pre-existing law. Unfortunately, the wording of s3A narrows the position in that it requires a comparison to be made between the treatment of a pregnant woman and the hypothetical treatment of the same woman who is not pregnant. Such a comparison is not always appropriate and was successfully challenged by the EOC in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327 (see DLA *Briefing* 449).

Discrimination: The 'But For' versus 'Reason Why' test

The tribunal found that Mrs Assid was angry in December because of the disruption to the reception class, which was caused by B's pregnancy related

absence. The tribunal found this disruption to be a 'proper concern' and that Mrs Assid would have reacted in the same way to being told that any class was being disrupted by a change of teacher. Thus, the reason for her anger was the disruption to the class, rather than the reason why the particular teacher was absent. The tribunal therefore decided Mrs Assid's anger (which amounted to a detriment) was not pregnancy-discrimination.

The EAT upheld the tribunal's decision, stating the ET had made a clear finding as to the reason for the less favourable treatment. This misses the point that the disruption to the class was caused by B's impending absence due to her pregnancy; there was no other reason. The EAT's approach highlights the problem with adopting the 'reason why' test rather than the 'but for' test.

At paragraph 2 of the judgment, the EAT acknowledges that absences from work in consequence of pregnancy cannot be compared to absences faced by men or women for other reasons; 'no like to like comparison can properly be made'. If pregnancy is the reason for detrimental treatment, the woman will succeed in her discrimination claim as her employer can point to no man who has been equally badly treated.

Despite this, the EAT goes on to decide that although the background and context to the December conversation was that the claimant was shortly to be absent on maternity leave, 'this does not disable an employment tribunal from asking whether in relation to matters occurring in such a conversation a hypothetical male comparator would have been treated in the same way as this might help to elucidate what was the reason for the treatment, which might be pregnancy, but which might not be.' The EAT relies on the Court of Appeal decision in *Madarassy v Nomura International plc* [2007] IRLR 246 where the Court of Appeal said that it is not in itself an error of law to compare the treatment of the claimant with a male comparator.

A comparison may be useful, as in *Madarassy*, where the treatment is not inherently related to pregnancy or maternity leave, for example, where there is a delay in giving a pregnant woman her objectives, but there is a similar delay in giving objectives to other non-pregnant employees. I would argue, however, that where the context or background to the treatment is clearly the claimant's pregnancy or maternity leave, as in B's case, it is wrong to look at how a man in a similar situation would have been treated.

The EAT said that although the 'but for' test was often helpful in identifying whether treatment is on the ground of sex, and in some circumstances (such as *James v Eastleigh Borough Council*) may be determinative, the focus should be on the 'reason why' (following Shamoon).

In criticising the 'but for' test, Mr Justice Langstaff says that one could say that 'but for' his leaving home in the country to travel to London he would not have been knocked down by a car in Fleet Street, which would entitle the philosopher to muse that his doing so was the cause of his injuries. Such musing, his says, is unhelpful in determining the cause of the accident and who should be financially responsible for the damage to man and car. Of course such musing is unhelpful because a crucial part of the test in discrimination cases has been omitted from his example, ie the question whether the 'substantial' 'real and efficient' 'effective' or 'predominant' reason for the injury was the leaving of his home or the car in Fleet Street. Clearly, the effective reason is not leaving home but the car, in the same way that it was B's pregnancy that caused her absence and thus the head teacher's anger disruption to the class.

The problem with 'the reason why' test is that it often wrongly involves consideration of motive, intention and the comparative test. It is not the motive that is relevant but whether the effective cause of the treatment was the claimant's pregnancy or maternity leave absence. In pregnancy cases the reason for the treatment is rarely pregnancy per se but the inconvenience of pregnancy and maternity leave to the employer. That is why the 'reason why' test is inappropriate. In *Blundell*, 'the reason why' test lead the tribunal and EAT to find that it was disruption of the class, not the claimant's pregnancy related absence, that lead to the head teacher's annoyance. However, the two are inseparable, the one led to the other, the pregnancy being the real cause.

The 'reason why' test also suggests that any other employee would have been treated the same way if they had been absent so there is no discrimination.

The ECJ said in *Brown v Rentokil* [1998] IRLR 445 para 24 that 'dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the

occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and so constitutes direct discrimination on grounds of sex.' It is no defence for the employer to say the reason for the less favourable treatment was the absence from work, and resulting disruption, irrespective of its cause.

As Michael Rubenstein points out, the EAT reasoning 'flies in the face of binding case law of the highest authority on pregnancy discrimination. If the head teacher treated the claimant detrimentally by expressing anger at the prospective disruption caused by the claimant's pregnancy, it is no answer to say that she would have reacted in the same way regardless of the cause of the disruption, any more that it was a defence for *EMO Air Cargo* in the *Webb* case to say it was simply trying to provide temporary cover for someone on maternity leave and it would have dismissed anyone who was unable to provide that cover regardless of the reason for their unavailability. … The EAT's judgment shows the risks of over-emphasising the *Shamoon* mantra of ascertaining "the reason why".

Applying the 'but for her pregnancy' test, the answer would be that if B had not been absent because of her pregnancy, there would have been no disruption. Her absence was the effective reason for disruption which led to the head teacher's annoyance. As Mr Justice Langstaff noted, an employee's absence on maternity leave is likely to cause logistic problems but as the HL said in *Brown v Stockton on Tees Borough Council* [1988] IRLR 163, this is 'a price which has to be paid as part of the social and legal recognition of the equal status of women in the workplace'.

The advantage of the 'but for' test, when properly applied, is that it is simple to understand. If you ask an employee 'what would have happened if you had not been on maternity leave' (ie the 'but for' test) this will usually elicit a clear reply with reasons. If you ask 'What was the reason why' you were treated in this way, the answer is more likely to be that there could be any number of reasons, including the wish to keep clients happy, to avoid extra costs, the inconvenience and disruption etc. None of these would be a defence if the treatment would not have happened 'but for' the pregnancy or maternity leave absence. The 'reason why' is more concerned with the conscious 'motive' or 'intention' of the employer which are not necessary ingredients of discrimination. Indeed it is widely accepted that much discrimination is subconscious and relies on matters of inference rather than direct proof.

However, although technically the head teacher's anger and frustration at the Claimant's absence was less favourable treatment because of her pregnancy, arguably the detriment was not serious and it is unlikely that much compensation would have flowed from it.

Having dismissed the other complaints of discrimination the EAT found that the failure to ask B about her preferences was discrimination. She had lost something which she might reasonably have thought to be of value, ie the chance of putting forward her choice.

The statutory right to return

Section 71 of the Employment Rights Act 1996 (ERA) provides that an employee is entitled to return from leave to a job of a prescribed kind. Regulation 2 defines job as meaning

> *'the nature of the work which she is employed to do in accordance with her contract and the capacity and place in which she is so employed'.*

The Maternity and Parental Leave etc Regulations 1999 (MPLR), reg 18(1) provides that an employee who returns to work after a period of ordinary maternity leave (OML) (ie first 26 weeks) 'is entitled to return to the job in which she was employed before her absence'. Reg 18(2) provides that an employee who returns after additional maternity leave (AML) (ie the second 26 weeks) 'is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.' **Note** that even after AML the right to return is first to the same job and only if this is not reasonably practicable, can the employer consider a suitable alternative.

If the reason it is not practicable to allow the employee to return to the same job is related to her absence on maternity leave, this will be unlawful under s3A SDA. Any such less favourable treatment relating to pregnancy or maternity leave is discrimination. It may also be a breach of s99 ERA and MPLR, regs 19 and 20 whereby it is unlawful if

the reason or principal reason for dismissal (or detriment) is 'connected with' pregnancy, giving birth or taking maternity leave'. The EAT did not address these questions in *Blundell*.

Right to return to the same job

In *Blundell* The EAT analysed the meaning of 'job' as defined by MPLR reg 2, holding that the phrase 'in accordance with her contract' qualifies only the 'nature' of the work, nothing else. The contractual nature of the work encompasses the job description and other relevant terms and conditions.

On the other hand, the reference to 'capacity' is not defined by the contract. It covers the employee's status and also describes the function which she serves in doing work of the nature she does. The 'place in which she is employed' is not contractual either. Even if there is a mobility clause in the employee's contract, this does not mean that she may be relocated on her return from maternity leave.

Thus, hold the EAT, the Regulations aim to provide that a returnee comes back to work in a situation as near as possible to that which she left.

The EAT says that the level of specificity of 'nature', 'capacity' and 'place' is crucial but that this is for the tribunal to decide. The EAT makes the important point that the legislation seeks to ensure that there is as little dislocation as is reasonably possible so as to avoid adding to the burdens which will inevitably exist in the employee's family life. Thus, an employer should not be able to avoid its obligations by defining the 'job' as covering a broad spectrum of work in order to ensure an appropriate balance between the employer and employee. 'Job' can be quite specifically defined. Latitude is provided by an employer being able to provide a job which is not the same job, but nonetheless suitable.

In relation to B's case the EAT upheld the tribunal decision that there was a real requirement under the contract that she could be required to teach any class as asked by the head. The nature of her work was as a teacher. Her capacity was as a class teacher rather than a teacher of yellow reception. She would have to move after each 2-year period and her pupils would change. The place of work was the school not yellow reception. Thus, there had been no breach of B's right to return to the same job.

The findings of fact will be of limited value in other cases as each case will depend on the particular circumstances. In this case, it was clear that B could be required to teach other classes and her job was to teach any class. If she had been allocated a difficult or a floating class, ie less attractive classes, because she had been on maternity leave this would have been discrimination.

Jobs evolve and there are often some changes to the job during the employee's maternity leave which would have occurred whether or not the employee had taken leave. It will nevertheless still be the same job as jobs are not preserved in aspic. On the other hand, if the employee's responsibilities have been permanently reallocated to another employee, her job is more likely to have been changed in breach of the regulations.

In order to show that the job is not the same, a claimant will need to provide detailed information to the tribunal about the job she was doing prior to maternity leave and how it changed on her return. This should include the actual work done, responsibilities, reporting lines, etc.

Camilla Palmer, Palmer Wade solicitors
cpalmer@palmerwade.com
020 7014 1440

Judges cannot decline to sit on cases in order to avoid compromising their religious views

McClintock v Department of Constitutional Affairs [2008] IRLR 29, EAT

Facts

Mr McClintock (M) was a magistrate who sat as a member of the family panel. The Civil Partnership Act 2004 allowed civil partners and those in same sex relationships to adopt. This meant that M would have to make orders placing children with such couples. A devout Christian, M was concerned that children being brought up by same-sex couples was untested and might be harmful. He asked that he not be asked to sit on cases where he might have to make such an order. The DCA refused to allow this. M resigned from the panel and brought an employment tribunal case for religious discrimination.

Employment Tribunal

M's claim was for both direct and indirect discrimination. The direct discrimination claim was based on the allegation that he had been treated less favourably because of his religious faith. The indirect discrimination claim was based on the argument that the failure to allow magistrates to avoid hearing certain types of cases had an adverse impact on those who had a religious objection to placing children with same sex couples.

The ET dismissed both claims. It concluded that M had never put his objections in religious terms. Instead he framed them on the basis of the children's welfare. The ET therefore dismissed the direct discrimination claim.

In relation to indirect discrimination, the ET found that the relevant practice was requiring magistrates to honour the judicial oath in which they promised to hear cases according to the law, regardless of their personal feelings. It concluded that this practice would have applied to any group and so dismissed the appeal.

Employment Appeal Tribunal

The appeal was directed at the finding that there had been no indirect discrimination. The EAT agreed that the ET's approach was flawed. The very nature of indirect discrimination is that the provision is applied equally to all groups.

However, the EAT found that M did not come within the group of people protected from indirect discrimination. His views on same sex adoption were not based on his religious beliefs, but on his views about the welfare of children. The same conclusion might have been reached by somebody else on the basis of religious convictions about homosexuality. But this was not M's position. This took him outside the scope of people put at a disadvantage by religious views.

Finally, the EAT concluded that, even if indirect discrimination had occurred, it would have been justified. The importance of the judges applying their judicial oath was overwhelming.

Comment

The real interest in this case is not the finding that any indirect discrimination would be justified, but in the court's approach to the disadvantage point.

Many claimants will feel that their views on a wide range of subjects are rooted in their religion. What *McClintock* indicates, is that these must be traced back to a specific belief within the religious belief, for an indirect discrimination claim to succeed.

Michael Reed
Free Representation Unit

Does a requirement for 'tidy hair' discriminate against Rastafarians

Harris v NKL Automotive Consultancy and Another UKEAT/0134/07/DM

Facts

Mr Harris (H) worked as a driver for NKL Automotive Ltd (NKL). He was supplied to NKL by an agency, Matrix Consultancy UK Ltd (the agency). In accordance with his Rastafarian beliefs, he wore his hair in dreadlocks. Typically the hairstyle is achieved by allowing the hair to mat together as it grows. Once hair is 'dreaded' in this way it cannot be 'undone'.

Between October 2005 and February 2006 H worked for NKL on a regular basis. During this period, NKL expressed concern to the agency that H's hair was untidy and that they did not feel that he represented NKL well. In February 2006 H also raised concerns with the agency. He complained that he was not being allocated as much work as other drivers nor was he offered a permanent position unlike other agency drivers.

NKL said H had failed to meet other criteria that would have justified him being offered full time employment. They asserted that he was sometimes abrasive, flouted dress rules (apart from his hair) and had made himself unavailable for work for a period of time.

H claimed was that he was being discriminated against because of his hair. He was subsequently signed off work for a month due to sickness. The agency issued him with a P45. His employment with the agency and NKL was treated as "at an end" and terminated. He raised a grievance with the agency asserting that he had been discriminated against on the grounds of his Rastafarian beliefs, in particular because he wore his hair in dreadlocks.

NKL said that they were not aware that H had his hair in dreadlocks. They believed that he had long curly hair which he tied back in a ponytail. However, NKL accepted that H's hair had reached a stage where it had become untidy and did not comply with their dress code. The dress code stated that drivers should have "a smart professional haircut and ensure that hair is tidy…"

H issued proceedings in the employment tribunal; his claims included direct and/or indirect discrimination and/or victimisation contrary to the Employment Equality (Religion or Belief) Regulations 2003 (the Regulations).

Employment Tribunal

It was common ground before the tribunal that Rastafarianism constituted a 'philosophical belief similar to a religious belief' within the meaning of the Regulations. Since the facts of this case, the Equality Act 2006 amended the Regulations so that a philosophical belief no longer needs to be similar to a religious belief. Protection now covers any form of philosophical belief, including atheism. It should be noted that Rastafarians are not protected under the race discrimination legislation as they do not qualify as an ethnic group.

The ET accepted that NKL had not been aware that H was Rastafarian until receipt of his grievance letter. The ET also found that NKL did not know that H had dreadlocks. As such, the ET rejected H's direct discrimination claim.

In considering the question of indirect discrimination, the ET considered whether a criterion or practice was applied which could have disadvantaged H when compared with others. It decided that there was no such criterion in respect of long hair, as NKL employed another driver with long hair, and in fact H had been taken on with long hair. In relation to dreadlocks, the ET decided that there was no such criterion or practice, as H had worn dreadlocks from April 2004 – February 2006.

According to the ET, NKL did not apply any criterion that long hair or dreadlocks were unacceptable as long as they were kept in a tidy manner. Moreover, the requirement to have "tidy hair" was a proportionate means of achieving a legitimate aim. The legitimate aim upon these facts was to impose an acceptable standard of appearance. The ET further

stated that there was no criterion or practice that was applied that could disadvantage H when compared to a hypothetical person wearing dreadlocks but not of Rastafarian belief.

This case note does not examine the ET's decision in respect of H's victimisation claims.

Employment Appeal Tribunal

H appealed the ET's finding that there was no indirect discrimination or victimisation. He did not challenge the finding that there was no direct discrimination.

One of the questions that the EAT had to consider was whether the ET had erred in its analysis of indirect discrimination. The EAT concluded that the ET had failed adequately to analyse the issue of justification when it stated that even if NKL had objected to dreadlocks, this would have been justified because of the desire to ensure a conventional appearance. Mr Justice Elias commented that the ET should have undertaken a careful assessment of whether this was a proportionate response. For example, wearing a hat may have been a solution.

The EAT also raised concerns about the ET's decision that there was no indirect discrimination because NKL would treat those with dreadlocks, who were not Rastafarians, in the same way as Rastafarians. Under the wording of the Regulations this is not relevant. The question that the ET should have asked is whether, although applied to everyone, the practice or criterion adversely affects Rastafarians.

Despite the errors made by the ET, the EAT did not consider this to have an impact on the finding, and determined that there was no indirect discrimination on the basis that NKL had not applied a criterion of the kind relied upon by the Claimant.

H's appeal on indirect discrimination failed. The only point the EAT referred back to the ET was whether in treating his grievance dismissively, the employer had been guilty of victimising the employee on the grounds of his belief. This matter will be heard by the ET in March 2008.

Comment

It is clear that Rastafarianism is a philosophical belief protected by the Regulations. Advisers need to be alert to the possible areas in which Rastafarian clients may have been discriminated against, such as the wearing of dreadlocks and days off for religious festivals. Appendix 2 of the ACAS Guide on Religion or Belief in the Workplace provides useful information that will assist employees and their advisers.

In cases involving indirect discrimination, it is important that an employee and his/her adviser identify the specific provision, criterion or practice that the employer is applying and acquire evidence showing disadvantage on unlawful grounds. An employer's explanation for applying such a criterion or practice must then be examined to consider whether it can be objectively justified

In this case the ET considered that, for H to have been potentially disadvantaged contrary to Regulation 3(1)(h), the "criterion or practice" must have been disallowing long hair or dreadlocks. The ET decision does not seem to examine properly whether the criterion or practice of requiring 'tidy hair' potentially disadvantaged Rastafarians and H in particular.

The EAT decided that NKL did not object to H's dreadlocks but took action on the grounds that his hair had become untidy. It is suggested that the ET ought firstly to have examined whether the apparently neutral requirement of 'tidy hair' put Rastafarians at a particular disadvantage. Had the ET examined this question fully, the answer to it ought to have been affirmative given the various references in the ET decision to H's hair becoming more matted and therefore untidy. Hair needs to become matted for natural dreadlocks to form and these are required by Rastafarianism.

The EAT held that a requirement to have tidy hair is not prejudicial to Rastafarians because dreadlocks can be kept tidy. However it did not look at the ET's failure to examine whether the criterion or practice of requiring tidy hair put Rastafarians and in particular H at a disadvantage.

Shah Qureshi and Homa Wilson
Webster Dixon LLP

Employment Bill

The much-reviled statutory dispute resolution system is to be dumped. The Employment Bill, currently working its way through the House of Lords, repeals the relevant parts of the Employment Act 2002. It replaces them with discretion for tribunals to adjust awards if either party has failed to comply with a relevant code of practice. ACAS is expected to release a draft Code of Conduct on disciplinary and grievance processes for consultation shortly. The detail of this code will determine how the new system works in practice. It is not yet certain when these changes will come into force, but April 2009 is the most likely date.

Amending the Sex Discrimination Act

The government has yet to legislate to address the outcome of the successful judicial review brought by the Equal Opportunities Commission (EOC), against the Government in relation to some of the provisions of the Employment Equality (Sex Discrimination) Regulations 2005 which amended the Sex Discrimination Act 1975 to implement the Equal Treatment (Amendment) Directive – in particular, relating to the definition of harassment (*Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327, HC). Despite the judgment of the Court being handed down on 12 March and the requirement as a result of it us to make some amendments to provisions in these Regulations on pregnancy and maternity leave discrimination and harassment, it has said merely that it is continuing to develop the necessary Regulations and "will provide an update on when they will be laid and come into effect at the earliest possible opportunity". The Government Equalities Office has indicated this may be imminent. Watch for updates on its website, www.equalities.gov.uk

Harassment related to sexual orientation

Following the above-mentioned projected changes, one would have hoped that the definition of harassment would be redrafted across all the discrimination strands, where a similar principle applies. This seems unlikely to happen, as the government continues to drag its heels. In *English v Thomas Sanderson Blinds Ltd* UKEAT/0556/07/LA, the EAT reluctantly rejected a claim of harassment under reg 5 of the Employment Equality (Sexual Orientation) Regulations 2003 because the claimant was not gay and accepted that his colleagues knew he was not gay. He had been subjected to homophobic 'banter' once they found out he lived in Brighton and had been to Boarding School. Because reg 5 refers to harassment 'on grounds of' sexual orientation, the EAT felt it did not cover a situation where the claimant was neither gay nor wrongly perceived to be gay. The EAT thought the position might be different under the wider wording of the General Framework Directive which – as with the Equal Treatment Directive – prohibits unwanted conduct 'related to' sexual orientation. Leave to appeal was granted.

Tackling Multiple Discrimination

The European Commission concluded a year of work on Multiple Discrimination in Decemer 2007 with a Report – *Tackling Discrimination: Practices, policies and laws* – and a conference in Denmark. The work was undertaken by the Danish Institute for Human Rights and the report includes a literature review, the results of roundtable discussions undertaken in ten European Member States, case studies, reviews of the legal treatment of multiple discrimination both within the EU and in Australia, Canada and the United States and it concludes with a series of recommendations for the future. (It is available free from the EU Bookshop).

It recommends that, in relation to multiple discrimination, more research needs to be done into effective protection mechanisms and legal frameworks to handle cases; that the scope of existing legislation should be extended to facilitate a remedy for multiple discrimination on all grounds both within and outside the employment field; that there be greater awareness raising within EU Member States; that social partners and national equality bodies encourage innovation and promote good practice; that there should be more extensive data collection; that there should be more training and education both for and by national equality bodies and that more multiple ground non-governmental organisations (such as the DLA?) should be encouraged.

Advocate General's opinion on Coleman v Attridge Law

On January 31st 2008 Advocate General Poiares Maduro of the European Court of Justice gave his opinion on *Coleman v Attridge Law*. This important case concerns the vexed question of whether protection against disability discrimination extends to those who are discriminated against because of their association with a person with a disability, rather than because they are disabled themselves. Currently the UK law, which implemented the EC directive no 2000/78/EC (the Employment Directive) is not thought to cover disability discrimination by association. This case challenges whether the UK government has correctly implemented the directive.

The Advocate General has written an Opinion for the judges of the European Court of Justice that recommends that the Judges should rule that the directive requires that at least direct disability discrimination or harassment should include discrimination by association. He suggestes that the ECJ rules that:

> *Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation protects people who, although not themselves disabled, suffer direct discrimination and/or harassment in the field of employment and occupation because they are associated with a disabled person.*

This Opinion does not mean that the Judges will necessary follow his recommendations but it is clearly influential and is often followed by the Judges.

The Advocate General's Opinion does present an interesting analysis of the law and deserves reading for this alone. He bases his opinion on a purposive interpretation of the directive which he identifies as 'to lay down a general framework for combating discrimination...*with a view to putting into effect in the Member States the principle of equal treatment*' (his emphasis). He identifies equality as 'not merely a political ideal and aspiration but one of the fundamental principles of Community law... in order to determine what equality requires in any case it is useful to recall the values underlying equality. These are human dignity and personal autonomy'. The Opinion can be found at: http://www.bailii.org/eu/cases/EUECJ/2008/C30 306_O.html

A disaster that was waiting to happen

In 2003, the RRA was amended by the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626) in order to implement the EC Race Directive (2000/43/EC). The key changes related to the definitions of indirect discrimination and harassment and the new burden of proof under RRA s54A. Unfortunately, the government decided to implement the EC Directive by statutory instrument under the European Communities Act 1972 rather than primary legislation. This meant the amendments could go no further than required by the Directive being implemented. Following the literal wording of the Race Directive, the changes only applied to 'race or national or ethnic origins' and not to colour or nationality. This has long been a disaster waiting to happen. In *Okonu v G4S Security Services (UK) Ltd* UKEAT/ 0035/07/JOJ, the claimant – a black African – alleged direct discrimination on grounds of national and/or ethnic origin and/or colour. The tribunal decided that the only possible evidence related to colour and that s54A therefore did not apply. The EAT agreed, noting that the claimant could not make a claim directly based on interpretation of the Directive because his employer was not an emanation of the state. The EAT did not explore whether the Directive intended to incorporate colour within the word 'race', nor whether the claimant could have successfully described his discrimination as on grounds of 'race' as a sub-section within section 3(1) of the RRA.

Gay adoption rights

In *E.B. v France*, the ECtHR upheld the right of a lesbian teacher not to be rejected as an adoptive parent because of her sexual orientation. One of the French Authorities' main grounds for refusal – 'the lack of a paternal referent in the applicant's household' – was not necessarily problematic in itself. But this ground may have been a pretext, since the application was made by a single person, which was permitted in France. As France had chosen to allow single people to adopt, the facts of the case fell within the concept of private and family life under Article 8 of the Convention. The refusal amounted to a violation of Article 14 (prohibition of discrimination) taken together with Article 8. The Court's media release and summary is at: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=827939&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Book review

Equality Law, Karon Monaghan
Oxford University Publishing, 2007
768pp, £88.95

This book, by a former Chair of the Discrimination Law Association, aims to consider the full scope of protection against discrimination in UK and European law and provide an analytical critique of the current legal framework, its underlying concepts and the history of protection against discrimination. It reflects Karon's 18 years in practice at the forefront of UK discrimination law.

It is an ambitious book aiming to provide a learned overview of current equality law. It has chapters covering the history and context of protection against discrimination in UK law, interpreting anti-discrimination law, EU law and fundamental rights, the protected classes for discrimination, the key discrimination concepts, the areas covered by discrimination laws from employment to goods, facilities, services and public authorities and it concludes with a section on strategic action, statutory duties and Commissions.

Karon Monaghan admits that the production of this book was harder than she thought and took a year longer to prepare than had been planned, with the inevitable result that the law changed in the meantime, a perennial problem that many lawyers will recognise. However, this extra time has facilitated a consideration of the historical and political roots of the relevant legislation, both domestic and European, which explain many of the anomalies and inconsistencies of our current legal provisions. As she puts it:

> *Each of the main anti-discrimination enactments has very different and idiosyncratic histories. Understanding the history of the enactments is important in making sense of their contents.*

Karon Monaghan is rightly critical of the current symmetrical approach to discrimination law in relation to gender, race, religion or belief, sexual orientation and age and the difficulties to which this gives rise when it comes to considering any form of positive action to alleviate years of deeply embedded structural disadvantage experienced by many minority groups. Consequently the structural causes of discrimination need to be acknowledged and measures put in place to counter these. In grasping this criticism she considers the alternative models developed in a number of other jurisdictions including Canada and South Africa and the importance of a constitutional equality guarantee. The importance given to positive action in the Equalities Review, or as it is termed in the Review 'balancing measures', may lead to further examination of ways to achieve real social change for minority people. However, she suggests that it is not only the law that needs to be adapted; the application of the law also needs to reflect an awareness of the nature of the inequalities in our society:

> … *hope for a radicalisation of equality law depends in large part on a commitment to fundamentally changing the constitution of the judiciary.*

This book is a thorough and detailed exposition of equality law that will repay many return visits. The fluid nature of the law in this area means that it is always hard to pin down and difficult to know when to stop. It is up to date to October 2006. For equality law practitioners and academics alike it will provide a significant source of information and ideas that will be a welcome addition to any equality library.

Gay Moon
Special Legal Advisor, Equality and Diversity Forum

Employment Law an Adviser's handbook, Tamara Lewis
Legal Action Group, 2007
7th edn, 772pp, £30

It is likely that many readers will either own or have used an earlier edition of this book at some stage. It is perhaps the best-known and most relied-upon general claimant-orientated handbook in employment law.

For those who are not familiar with it, this book covers the great majority of employment law which claimant advisers in a Not for Profit or High Street setting will come across. It runs the gamut from failure to provide written particulars under section 1 Employment Rights Act to indirect sex discrimination in all its complexity.

It is therefore inevitable that discrimination law forms only a part (by pages about a third to one half). There is therefore a limit to the level of detail appropriate to discrimination law in such a wide-ranging publication. However, there is nevertheless a considerable amount of information and useful guides to running a discrimination case.

Crucially for the advisor, however, a discrimination law issue very rarely appears in isolation – as a neatly packaged intriguing point of law in a case report. It comes attached to a human being(s) and is usually one of a number of many issues that they have. Particularly in the NFP/High Street, those seeking help tend to have a long list of issues – or at least they do if they are well-advised:- unauthorised deductions from wages, failure to provide payslips or written terms and conditions, holiday pay, notice pay and often much more. Whether an advisor considers themselves a "discrimination advisor" or an advisor who does discrimination, they need to have a broad range of employment knowledge and to be able to apply it to real situations. The uniqueness of this book is that it is written by a practitioner who knows how advisers have to think and takes a solidly practical approach.

It is little short of miraculous that this book is still so useful, (although sadly now far heavier). Employment law just keeps growing but this book keeps up. It is a very good first place to look – and often the only place that is needed. Even if the advisor is sure on a point, it is always tempting to check what the book has to say. There is a chapter on the morass that is the Statutory Dispute Resolution Procedures which valiantly attempts to make sense of the senseless and provide a firm spot on which to stand.

As usual with LAG publications, there is the invaluable list of statutes, statutory instruments, cases and European legislation. What is most helpful about this book may sound the least exciting but is in practice often the most useful – full references. A principle of law is not merely stated as a bare fact but backed up with a reference which permits an advisor to consult and check. These references are copious and considerably more reliable than usual in legal handbooks. In effect, the buyer gets more for their money than the book itself, they get a guide to where to look next.

The value for money is excellent especially compared to other publications. It can be strongly recommended to both the generalist who needs a reliable guide to employment law or to the specialist who needs an efficient and thought-provoking time saver.

As specialist advice is cut back by funding cuts, books like this become more important. If a claimant has no choice but to take on the employment tribunal system without expert assistance, this book is a good companion and is perhaps the best to recommend to an unrepresented claimant who wants a thorough guide to the law and tribunals. It is also enormously useful for students as they make the step from theoretical employment law to the world of the client and tribunal.

If you have the previous edition, is it worth buying this new edition? If the budget can possibly stretch, yes. Employment law changes very fast – that is what keeps it fascinating and keeps us hooked.

Juliet Nash
North Kensington Law Centre

Briefings

Abbreviations

AML	*Additional Maternity Leave*	*ECtHR*	*European Court of Human Rights*	*MPLR*	*Maternity and Parental Leave etc Regulations 1999*
CA	*Court of Appeal*	*ECJ*	*European Court of Justice*	*NMW*	*National Minimum Wage*
CRE	*Commission for Racial Equality*	*EDF*	*Equality and Diversity Forum*	*OML*	*Ordinary Maternity Leave*
DDA	*Disability Discrimination Act 1995*	*EHRC*	*Equalities and Human Rights Commission*	*PCP*	*Provision, Criterion or Practice*
DLR	*Discrimination Law Review*	*EOC*	*Equal Opportunities Commission*	*RRA*	*Race Relations Act 1976*
DRC	*Disability Rights Commission*	*EqPA*	*Equal Pay Act 1970*	*SDA*	*Sex Discrimination Act 1975*
EA	*Employment Act 2002*	*ERA*	*Employment Rights Act 1996*		
EAT	*Employment Appeal Tribunal*	*ET*	*Employment Tribunal*		
EC	*European Commission*	*HC*	*High Court*		
ECA	*European Communities Act 1972*	*HL*	*House of Lords*		
ECHR	*European Convention on Human Rights*	*HRA*	*Human Rights Act 1998*		