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Editorial *New equality legislation – uncertainty, challenges and opportunities*

We could be entering one of the most significant periods in the development of equality law in Great Britain. To secure clear and coherent legislation which raises levels of protection against discrimination and meets the highest EU and international standards will require vigilance and determination by all those concerned about equality and human rights.

The government's draft legislative programme published in May 2008 includes an Equality Bill to *'bring together and simplify existing legislation on all forms of discrimination… [the Bill] would go much further than that, shifting from an approach reliant on individuals seeking remedies when they are discriminated against.'* This Bill will have a huge impact on our rights and responsibilities and shape the nature of the equitable society in which we all aspire to live. Some positive developments are anticipated such as provisions to improve transparency among public bodies to expose the gender pay gap, improved tribunal enforcement powers, and the extension of positive action to allow public bodies to deliver services more effectively to disadvantaged groups.

Most of the proposed detailed measures may well impact on the public sector, with the public sector duty being extended to cover religion or belief, sexual orientation and age. A proposed development of equality procurement by public bodies would have a positive impact in both the public and private sector. The concept of 'buying social justice' analysed in a book by Professor McCrudden, is reviewed in this edition of *Briefings*.

A simple coherent framework for equality law founded on the highest existing standards of domestic and EU law applied equally across all grounds providing improved protection and access to justice for victims of discrimination is what the DLA has called for – but will this happen?

At the time of writing the detail in the bill is unknown. While new legislation brings an opportunity to improve current deficiencies and give full effect to the relevant EC Directives, there are concerns that this opportunity will be lost. Many questions exist: will the new single equality duty retain the existing requirement to carry out equality impact assessments; will the definition of harassment finally be brought into line with European requirements; will the prohibition of age discrimination be extended to goods, facilities and services? Will the new legislation assist courts and tribunals deal with complaints of multiple discrimination or adjudicate fairly between conflicting rights?

While the simplification of our complex set of disparate acts and regulations developed piecemeal over 40 years is necessary, this must not be done at the cost of watering down existing rights and duties. Now that it appears that a new EU directive prohibiting discrimination in non-employment on grounds of age, sexual orientation, religion and belief will be proposed, it is imperative that the drafters of the Equality Bill seize the opportunity to anticipate and deal with the consequences of age discrimination. The need for such protection in relation to age discrimination and the huge impact it could have on issues relating to intergenerational fairness and an increasingly older population is discussed in *Briefings*. It is imperative that the new legislation seizes the opportunity to anticipate and deal with the consequences of age discrimination.

There are concerns that the business lobby which has consistently opposed better regulation in other fields, will pressure government not only to adopt a 'light touch' in relation to the private sector, but also to avoid any upward harmonisation of existing rights. We need to persuade the business community that anti-discrimination legislation is not a barrier to flexibility nor a costly burden, but that good practice and the promotion of diversity is an asset, strengthening competitiveness and protecting against expensive discrimination complaints. Likewise, public authorities who argue for a weaker public sector duty can learn from Northern Ireland where the duty to consult, assess and act to avoid adverse impact and promote equality of opportunity can become second nature and a real tool to implement strategic objectives in improving public services.

The draft Queen's Speech included other worrying measures such as a citizenship, immigration and borders bill which aims to implement a system of 'earned citizenship' which will, in the DLA's submission, institutionalise inequality and impose a range of burdens and restricted rights over an increased number of years which could alienate rather than integrate migrant workers; the new employment bill will replace the unworkable statutory dispute resolution procedures with a non-regulatory system emphasising alternative dispute resolution which could favour the powerful; fewer rights for agency workers, often recruited from vulnerable economic groups, may be agreed at domestic level in order to allow the government to undermine a new EU directive on agency workers, as suggested by Kiran Daurka in this edition.

Faced with a reluctant government and an often hostile media, it is essential that the struggle for equality has the widest possible base. Barack Obama, speaking about addressing the legacy of discrimination in the US said, *'It requires all Americans to realise that your dreams do not have to come at the expense of my dreams; that investing in the health, welfare, and education of black and brown and white children will ultimately help all of America prosper.'* To address our own legacy of discrimination we need to make the case that strong and effective equality legislation is not a minority issue but one that will benefit and enhance society as a whole. **Geraldine Scullion, Editor**

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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Age discrimination and goods, facilities and services

Is protection necessary, is it feasible?

Article 13 EC empowered the European Union to legislate to prevent discrimination on grounds of race, sex, disability, sexual orientation, religion and belief, and of course, age. But it is well known that it has only been used to provide a patchwork of protection from discrimination which less than covers all areas. There is protection from discrimination in the provision of goods, facilities and services in relation to race[1] and ethnicity and also sex[2] but not in relation to anything else.

It is understandable that the first comprehensive measures introduced under Article 13, which came into effect in 1999 with the adoption of the Treaty of Amsterdam, were concerned with race and ethnic discrimination as this was where the European project was perhaps most at risk. It is understandable also that the next extension should relate to gender discrimination given the great importance that the EC Treaty places on equal treatment between the sexes in everything that is done under or by reference to that Treaty.[3] But it is very surprising that equivalent cover has not yet been made in relation to age.[4] After all, the issues of an aging population and the problems of inter-generational fairness are probably even more acute than those associated with fairness between ethnic and racial groups. And there are very large numbers of older people.

In the United Kingdom alone in 2005, according to estimates based on the 2001 Census of Population, there were more than 11 million people of state pension age and over.[5] This number is increasing so that the number of people over pensionable age, taking account of the increase in the women's state pension age, is projected to increase from nearly 11.4 million in 2006 to 12.2 million in 2011, and will rise to over 13.9 million by 2026, reaching over 15.3 million in 2031.[6] This is also increasing as a proportion of the population as a whole.

Moreover ageing affects every person, and every gender, and the changes in the age profile of Europe and its consequences are arguably the single most important social issue we face. The European Commission Green Paper on aging 'Confronting demographic change: a new solidarity between the generations'[7] has pointed out that across Europe from 2009 onwards there will be more people in the 55-65 cohort than in the 16-25 age group. The difference will continue to grow for the foreseeable future. So the issue of age discrimination is going to be one which does not just affect employment and occupation but also the allocation of resources and social goods of all kinds. Society has a choice therefore. It can wait for the inevitable tensions this will bring to arise and deal with them when they become intolerable at the macro level or it can seek to anticipate them now.

1. See Council Directive of 29th July 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC) ('the Race Directive').

2. See Council Directive of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (2004/113/EC) ('the Gender GFS Directive').

3. See Articles 2 and 3 of the EC Treaty.

4. A proposal for such legislation has been adopted by many of the Age organisations across Europe. Age Concern England, UK. AGE – European Older People's Platform, CDU Senioren, Germany, DaneAge, Denmark, Expertisecentrum LEEFtijd, Netherlands, 50 plus Hellas, Greece, Forum 50+Poland, Poland, Help the Aged, UK, Kuratorium Deutsche Altershilfe, Germany, MZU, Slovenian, Swedish Speaking Pensioners in Finland, Finland, and Sveriges Pensionärsförbund SPF, Sweden, among others back the proposal: see http://www.ageconcern.org.uk/Age Concern/age_discrimination_europe.asp

5. Population Trends, (PT 126) 126, Winter 2006, National Statistics © Crown Copyright 2006, table 1.4 (Population: age and sex). www.statistics.gov.uk/downloads/theme_population/PopTrends126.pdf

6. National population projections 2004-based, National Statistics © Crown Copyright 2006, table 3.2 (Actual and projected population by age United Kingdom 2004-2031). www.statistics.gov.uk/downloads/theme_population/PP2_No25.|pdf

7. 16.3.2005 COM(2005) 94 final; http://ec.europa.eu/employment_social/news/2005/mar/comm2005-94_en.pdf

The current proposals for a single Equality Bill set out in the Government's announcement for its legislative programme surely provide the opportunity for this work to start now.[8]

What is necessary? The answer is simple: to correspond with the European protection for race and gender, there needs to be legislation for protection across a very wide area going beyond employment to social protection, education, housing and other facilities and services, and this needs to be given effect domestically.

The arguments for such a measure seemed to have been advanced at the end of 2007 which was the European Year of Equal Opportunity for All. At the end of the year the European Commission's work programme for 2008 included a proposal to bring forward a proposal for a directive to combat discrimination in relation to such goods, facilities and services on all the grounds in Article 13 EC which are not yet protected.[9]

However since then there has been much political debate about this. First it seemed as though the German government was most reluctant to see any new legislation from Europe in this field. Aware of the political difficulties they suffered in getting to a point where the first two Article 13 EC directives were transposed into German law, the German government was most reluctant to spend more time arguing about new legislation. Secondly there is something of a political problem within the College of Commissioners as the post of President of the European Commission is coming up for reconsideration. Thirdly there was a move by the European Disability Forum to argue for a separate disability-only directive addressing the issue of discrimination in relation to goods, facilities and services. The European Disability Forum launched a large campaign for a million signatures[10] across Europe in support of a draft disability directive being brought forward.[11]

However these moves have given rise to an understandable counter-reaction. In particular, Liz Lynne MEP has argued for a comprehensive directive preventing discrimination on all the Article 13 EC grounds. She launched a campaign for a million signatures in support of comprehensive legislation at the European level in relation to age, disability, religion and belief and sexual orientation.[12] Her report[13] to the European Parliament arguing for this comprehensive approach was accepted on 20 May 2008.[14]

The UK is to some extent ahead of the game in providing protection in relation to discrimination on grounds of goods, facilities and services. However age remains the Cinderella amongst the Article 13 EC grounds in not having any domestic protection in this area. While it is known that the government is currently considering whether to legislate to outlaw discrimination on grounds of age in access to goods, facilities and services in the forthcoming Equality Bill, rumours abound that there is some reluctance to extend this age protection. Help the Aged and Age Concern have lobbied very hard in relation to this. A powerful article[15] by Jackie Ashley in the Guardian on the 2 June 2008 elicited strong support from those and other commentators.[16] So why is this becoming such an issue and what can be done?

The very simple point is that legislation to protect people from age discrimination in access to goods, facilities and services has a vital role to play in establishing a fair and equal society and it would give rise to real change. Substantial evidence exists of the inequalities experienced by older people – whether as patients in receipt of health care or social services, as volunteers or in respect of insurance and other financial services. Age Concern[17] highlights the evidence, for

8. See *Preparing Britain for the Future*, the Government's Draft Legislative Programme 2008/09, Cm. 7372.

9. See http://ec.europa.eu/atwork/programmes/docs/clwp2008_en.pdf

10. The significance of a million signatures lies not only in the sheer size of support which it enumerates but also because of Article 11(4) of the EC Treaty as amended by the Lisbon Treaty provides that: *'Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.'*

11. http://www.1million4disability.eu/campaign.asp?langue=EN

12. http://www.signtostopdiscrimination.org/

13. See http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/699/699739/699739en.pdf

14. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P6-TA-2008-0212%200%20DOC%20XML%20V0//EN&language=EN

15. See *Ageism is no more tolerable than any other prejudice*; http://www.guardian.co.uk/commentisfree/2008/jun/02/gordonbrown.labour

16. http://www.guardian.co.uk/money/2008/jun/04/workandcareers?gusrc=rss&feed=news

17. The Age Agenda 2007, Public Policy and Older People, p27.

example, that:

- 29 per cent of adults report experiencing age discrimination, more than any other form of prejudice.[18]
- People of 75 years or over are nearly ten times more likely to be refused a quote for motor or travel insurance than people aged 30 to 49.[19]
- In a recent survey more than 40% of GPs, cardiologists and old age specialists treated patients aged over 65 years differently to those below 65 years. Patients over 65 were less likely to be referred to a cardiologist, given an angiogram or given a heart stress test.[20]
- National minimum standards for care homes for older people in relation to involvement in the community and in running the home are lower than those for younger adults. In 2004 the cost of residential care for older people averaged £377, whilst for other adult groups it varied between £447 and £734.[21]

There is also important evidence of discrimination experienced by younger people. For example, a recent UK government report found the most common form of unfair treatment reported by children and young people was based on age (43%).[22]

Help the Aged has published a very powerful summary of different kinds of ageism in '*Worth Fighting For: ten stories of ageism*'[23] which sets out in very human terms how ageism is affecting people across a very wide spectrum in the health service, social care system and financial sector; their campaigning document *'Just Equal Treatment'*[24] sets out the government's stance so far and what can be done.

The government is said to be considering introducing new guidance on age discrimination in health care and social services as an alternative to extending the law. On the basis of recent experience this seems to be an inadequate response. In 1999, hoping to avoid age discrimination legislation, the government issued a Code of Practice to promote good practice on age discrimination in employment, supported by the Age Positive campaign. A survey undertaken by the Employers Forum on Age in 2001[25] revealed that the Code was having very little impact on the way in which employers were running their businesses. The government's own research confirmed that only one in four employers had adopted its guidelines.[26] So what use is guidance by itself in the face of this kind of problem?

Legislation prohibiting discrimination on grounds of age in relation to goods, facilities and services including housing and education would, of course, need to be carefully structured. However there are models which deal with some of the problems that can arise. The Republic of Ireland has such legislation and while it is not universally liked, some lessons can be learnt from the way in which it has worked. There is extensive provision of special benefits to the elderly and to younger persons across the UK, for example in relation to travel, which would need to be considered. A general decision would be necessary as to whether they should be maintained as a permissible form of positive action. Equally, some provision in relation to education will of course continue to be offered on a discriminatory basis. Yet while this is obviously appropriate for primary and secondary education why should it be so for tertiary education? In a knowledge based society, it is very important that there are possibilities for revisiting tertiary education and even for a fresh start with tertiary education. It will also be necessary to consider whether for reasons of legal certainty some kinds of age related rules should be maintained.

All these issues have been considered in great depth by the European Age organisations and the proposal which has been put forward at the European level contains many clear statements of where exclusions should be permitted.

The advantages of such legislation are perhaps obvious but may be summaries. Legislation at the

18. Office for National Statistics, www.statistics.gov.uk. Life expectancy statistics. (19.12.06)

19. Office for National Statistics, Health Expectancies in the UK 2002. *Health Statistics Quarterly 29* (Spring 2006).

20. *British Medical Journal*, vol 333, John Young.

21. Department of Health, Health Survey for England 2004, 2005.

22. Consolidated 3rd and 4th Periodic Report to UN Committee on the Rights of the Child, 2007, p34-35.

23. http://www.helptheaged.org.uk/NR/rdonlyres/5207A130-6DC3-43A9-82E1-2B72D81868C4/0/WorthFightingFor.pdf

24. http://www.helptheaged.org.uk/NR/rdonlyres/2E117A03-77B6-48BF-B429-BDBB35475F7B/0/JET_govt_plans_230707.pdf

25. Employing Older Workers, *IRS Management Review*, issue 21, April 2001.

26. House of Commons Select Committee on Education and Employment, 7th report, 2000-2001 session: *'Age Diversity: Summary of Research Findings'* March 2001.

domestic level would send a clear signal to society that age discrimination in any context is unacceptable, prompt the gradual elimination of age discriminatory practices and ageist cultures, and provide people of all ages with the tools to challenge ageism and age related discriminatory treatment.

Jackie Ashley ended her article in the Guardian by saying that

> *If Brown has only two more years in office, helping to transform attitudes to the millions of elderly citizens in this country wouldn't be a bad legacy – not a bad legacy at all.*[27]

Maybe it would not be a legacy; maybe it would be the making of him.

But even more significant for Mr Brown is the fact that according to estimates, 75% of those aged 65 and over voted at the 2005 General Election compared to 37% of those aged 18-24.[28] They could really make a difference!

Surely the time for real and imaginative action on this last frontier has come.

Robin Allen QC
Cloisters

27. *Guardian*, 2.6.08.

28. *The growing importance of older voters: an electoral demographical model for analysis of the changing age structure of the electorate*, by Scott Davidson. Loughborough University, 2006. www.20millionvotes.org.uk/reports/electoral_demography_report.pdf

Briefing 482

Amendments to pregnancy/maternity and harassment sections of the Sex Discrimination Act 1975

Following the High Court decision in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327 the Sex Discrimination Act 1975 (SDA) has been amended to comply with European law. The changes came into effect on 6 April 2008.

Pregnancy and Maternity Leave changes

No need for comparator in pregnancy/maternity cases

S3A SDA has been amended to remove the need for a pregnant woman to show that she had been treated less favourably than she would have been had she not been pregnant or had not exercised or sought to exercise her right to maternity leave.

As has always been the case under European law, unfavourable treatment of a woman for a reason related to her pregnancy, pregnancy related absence or maternity leave is automatically discrimination. Examples of discrimination include:

- Treating a woman unfavourably because she is absent from work because of pregnancy related sickness, such as disciplining her or denying her promotion or a pay rise; however, she is not entitled to full pay unless all employees in her situation would be so entitled;
- Failure to consult an employee about redundancy, carry out an appraisal or consider a woman for promotion because she is on maternity leave;
- Refusal to allow a woman to return to the same job after maternity leave if the reason is related to her absence on maternity leave.

Rights during maternity leave

Apart from remuneration, an employee is entitled to all contractual rights during the first 26 weeks (ordinary maternity leave or OML). Where her expected week of childbirth is on or after 6 October 2008, she will be entitled to the same rights during the second 26 weeks (additional maternity leave or AML). This will include, for example, contractual annual leave, company car, mobile telephone, gym membership. Thus, there will be no difference between OML and AML.

Harassment

S4A SDA has been amended so that harassment may be '*related to*' (instead of '*on the ground of*') the claimant's sex or related to '*that of another person*'.

The amended SDA prohibits 3 types of harassment:

a. Unwanted conduct **that is related to her sex or that of another person** and has the purpose or effect of violating her dignity or creating an intimidating,

hostile, degrading, humiliating or offensive environment (SDA 4(1)(a));

b. Unwanted verbal, non-verbal or physical conduct of a **sexual** nature which has the purpose or effect of violating her dignity etc (as above); or

c. On the grounds of her rejection of or submission to **unwanted** conduct (as above) she is treated less favourably than she would have been had she not rejected or submitted to the conduct.

Thus:

- Unwanted conduct need only be *related* to the sex of the complainant, not necessarily *motivated* by her sex; it is enough if there is a connection or association with sex and there is no need to look at how a man was or would have been treated;
- It may be harassment if the claimant witnesses another person being harassed, i.e. where there is unwanted conduct which has the purpose or effect of creating an intimidating etc environment; thus the treatment of a woman in the office could create an offensive environment for a female or male colleague.

The SDA has also been amended to make an employer liable for third party harassment where the employer is aware that there has been harassment by a third party on two previous occasions and the employer fails to take reasonable steps to prevent it on the third occasion. A third party could be a client, customer or entertainer. The harassment does not have to be by the same third party on each occasion (SDA s2B, 2C and 2D inserted after s6(2A)(b)).

The other discrimination statutes have not been amended to comply with the High Court decision but it is arguable that they should have been. An employee working for a government body (an emanation of the State) can rely on the Directive to enforce their EC rights.

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Briefing 483

Agency & Temporary Workers – will new legislative measures protect against or permit abuse?

Since I started to write this piece during May 2008, I have had to update it no less than three times to keep up with the flurry of changes that are currently being pushed through parliament under a private members' bill. Clearly this is an important and pressing issue, but why the urgency now?

According to the TUC, *'many agency workers are drawn from groups of workers that are vulnerable to exploitation in the labour market. Temporary agency workers tend to be young, likely to be from an ethnic minority background, and tend to be less qualified than the workforce overall'*. The agency labour market is dominated by migrants. These are the most vulnerable workers, and are often falsely referred to as 'self-employed'. They often work on zero-hours contracts, with no guaranteed employment, and may have other costs deducted from their pay (such as housing or transport costs).

At present, however, the law is failing these workers by not giving them any employment rights despite the fact they undertake key roles similar to their directly employed counterparts. Agency workers often do not receive enhanced sick pay or holiday pay and are likely to be on lower overtime rates. Agency workers are vulnerable and easy to take advantage of as they are unlikely to be entitled to the same statutory protection afforded to permanent employees, including the right to the national minimum wage and a 48 hour maximum working week.

Each year, a number of complaints are raised by agency and temporary workers in relation to the less favourable treatment suffered by them. Even within the Civil Service, for example, casual workers can be recruited without the need to go through the Civil Service's fair and open competition procedures. Often agency workers carry out roles that have a permanent or long-term requirement. Once the agency worker's services are dispensed with, another fixed term or agency worker is likely to be brought in to continue with the same role alongside permanent employees. A real disadvantage is suffered when that role is then advertised internally only as a permanent appointment – this prevents any worker who has not been through 'fair and

open competition' from applying for that post. Agency workers are, therefore, prevented from applying for roles that they have been carrying out, which in some cases is a job that they have been doing for many years.

The government is aware of these issues and concerns, but in the past has been swayed by arguments from businesses that legislative protection for agency and temporary workers will entail increased business costs. However, in January this year, 147 MPs supported a private members' bill to give greater rights to agency workers. The bill, known as the Temporary and Agency Workers (Equal Treatment) Bill 2007-08, aims to provide for the protection of temporary and agency workers; to require the principle of equal treatment to be applied to temporary and agency workers; to make provision about the enforcement of rights of temporary and agency workers; and for connected purposes. At present, the bill is still at the Committee stage of the Commons.

In early discussions at the Committee stage, the Minister for Employment Relations and Postal Affairs initially stated that the government did not support the bill as it considered that there were better ways to achieve the aims therein. Its position was apparently based on the fact that a European Directive on Temporary and Agency Workers is still in draft awaiting agreement by member states. If the bill becomes law, it might need to be amended in line with the final Directive, if it is implemented. In light of these discussions, it was looking increasingly likely that the Committee stage would be deferred until there was resolution in respect of the draft Directive. Given that the Directive has been in draft for four years, it seemed (in early May) uncertain as to when there would be any movement on it.

Despite what the Committee was told, on 14 May, 2008 the Guardian reported that Gordon Brown would now back legislation to support agency and temporary workers. This was clear and unashamed back-pedalling, but should still be welcomed and encouraged given that Mr Brown's earlier calls for 'British jobs for British workers' failed to recognise the poor circumstances under which migrants are made to work under 'agency' arrangements. And the even more up-to-date news is that the government has come to an agreement with the TUC and CBI to ensure that legislation is passed this year to treat agency and temporary workers equally with other types of workers within 12 weeks of starting work for an employer.

Interested parties have not been consulted so far on the bill currently before Parliament. One of my concerns relates to the problematic notion of 'objective justification' of less favourable treatment of an agency/temporary worker in comparison to a worker who is directly engaged. The notion of objective justification mirrors the provisions of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ('Fixed Term Regulations') which allows for less favourable treatment of fixed term workers where there is objective justification. The decisions appear to be interpreting the concept narrowly, but there may be less cause to do this in agency worker cases given the main resistance to this legislation relates to cost and flexibility of labour market. Tribunals may be more persuaded to interpret the concept widely in these types of cases unless the legislation sets down clear parameters as to when this defence can be properly invoked. Further, it is still unclear if statutory sick pay and pension contributions will be excluded from the rights to be given to agency and temporary workers. If these rights are excluded, there is likely to be a wider range of types of less favourable treatment capable of justification.

Despite five years of lobbying by the TUC to get this legislation drafted, the private members' bill is now likely to be expressed through. Whilst this appears to be good news for agency and temporary workers, only time will tell whether the legislation really will protect those in the most vulnerable positions, or whether the government should have taken the time to consult interested parties to ensure that the legislation covers the necessary issues. I cannot help feeling cynical about this sudden urge to protect agency and temporary workers given that trade unions have been pushing for this legislation for some time. The more likely explanation is that the draft Directive is soon to become a reality and this would give agency and temporary workers equal rights after only 6 weeks of employment. Businesses will have argued that the EU provisions would be too onerous for them, and that this current position would be an acceptable compromise. The British government, when meeting the EU heads of government later this month, is hoping to persuade the EU to adopt its less onerous approach as part of the EU Directive. If the EU sanctions this new agreement, it is likely that legislation will be introduced here in Autumn 2008.

Kiran Daurka
Russell Jones & Walker

Court shifts burden of proof to government in racist violence case

Stoica v Romania, European Court of Human Rights
(Application no. 42722/02) 4 March 2008

Background

In *Stoica v Romania* the European Court of Human Rights (the Court) held that Romania had violated Article 14 of the European Convention on Human Rights (the Convention) prohibiting discrimination, in conjunction with Article 3 prohibiting inhuman or degrading treatment. The application to the Court by Constantin Stoica, a Roma boy, followed his family's failed attempt to invoke criminal proceedings after he was beaten by the police. This case is important firstly for the Court's finding of a substantive violation of Article 14 and secondly for its treatment of evidence and the burden of proof in Article 14 cases.

Facts

The incidents giving rise to this case occurred in Gulia, a village with an 80% Roma population in the commune of Dolhasca, Suceava County, Romania. On 3 April, 2001, the Dolhasca deputy mayor with four police officers and six public guards entered a bar in Gulia. A conflict arose between the authorities and 20-30 Roma who had gathered in front of the bar. Several witnesses heard the deputy mayor call on the police and guards to teach the Roma 'a lesson'.

At the time of this incident the applicant was aged 14 and had undergone surgery on his head 18 months earlier. The applicant's case was that as he was coming out of a shop he saw the crowd and the police and began to run home but, as he was running, he was tripped by D.T. a police sergeant, who began to beat and kick him. The applicant told D.T. about his recent head surgery but D.T. continued to beat him until he lost consciousness. The applicant was carried home and his parents took him to hospital where his injuries were recorded. Nine days later he was assessed as having a first-degree disability which required permanent supervision and a personal assistant.

Domestic Remedies

The applicant's father, assisted by the Roma Centre for Social Intervention and Studies (Romani CRISS), complained of the racially motivated ill treatment of his son and sought an official investigation and the instigation of criminal proceedings against the officer D.T. After considering the evidence the Suceava police declined to press charges and referred the matter to the Bacau Military Prosecutor. The Suceava police also informed the Military Prosecutor that the Dolhasca police had not initiated a criminal investigation against the Roma for insulting behaviour because *'the way in which some of the Roma acted is pure Gypsy behaviour and does not constitute the crime of insulting behaviour.'*

The Bacau Military Prosecutor also heard evidence; he chose to disregard certain eyewitness statements supporting the applicant's case because they were 'unreliable' and 'inconsistent' with other evidence. He decided not to prosecute because *'the evidence gathered showed that the applicant was not injured, insulted or threatened by the police officers'*. The decision not to prosecute was confirmed by the Military Prosecutor's Office attached to the Supreme Court of Justice.

Judgment of the European Court of Human Rights

Represented by his parents, and by Romani CRISS and the European Roma Rights Centre, the applicant complained to the Court of violations of Articles 3, 6, and 13, and Article 14 in conjunction with Articles 3 and the Court first considered the complaint under Article 3:

1. In determining whether the State should be responsible for the applicant's injuries, which it found to be sufficiently serious to amount to ill treatment within Article 3, the Court was cautious about taking on the role of a first-instance tribunal. Nonetheless, the Court said:

   where allegations are made under Article 3 ….the Court must apply a particularly thorough scrutiny

even if certain domestic proceedings and investigations have already taken place.

Having reviewed the evidence submitted by the parties, the Court concluded that the Government had failed to establish that the applicant's injuries were caused otherwise than by the actions of the police.

2. Article 3, when read with the general duty of the State (Article 1) to secure to everyone within their jurisdiction the rights and freedoms of the Convention, requires that there should be an effective official investigation into allegations of ill-treatment. The Court concluded that in this case the investigation was not effective as:
   i. the investigation relied on the evidence of the police officers and guards and disregarded as unreliable the evidence of villagers which supported the applicant's version of events
   ii. the investigators had limited themselves to exonerating the police officers and failed to identify who otherwise was responsible for the applicants' injuries

Thus the Court found a violation of both the substantive and procedural aspects of Article 3.

The Court accepted as admissible but did not uphold the applicant's complaints under Article 6(1), right to a hearing to determine his civil rights, and Article 13, right to a remedy before a national authority for violation of Convention rights, both having been considered to some extent under the procedural head of Article 3.

The Court then considered whether the ill treatment of the applicant and the failure properly to investigate his ill treatment had been predominantly due to the applicant's Roma ethnicity, that is whether there was a violation of Article 14 with Article 3. It looked first into the allegation of racial motives behind the conduct of the flawed investigations:

In this context, it [the Court] reiterates that when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.[1]

The Court acknowledged that proving racial motivation will often be *'extremely difficult in practice'*. In reviewing the evidence the Court concluded that the authorities failed to do 'everything in their power' to investigate the possible racist motives behind the conflict, and hence were in breach of Article 14 in relation to the procedural obligations under Article 3.

The Court went on to consider whether there was a substantive violation of Article 14 in the ill treatment of the applicant. The Court stated that:

…it has not excluded the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. …the Court acknowledges that where it is alleged – as here – that a violent act was motivated by racial prejudice, shifting the burden of proof to the respondent Government might amount to requiring the latter to prove the absence of particular subjective attitude on the part of the person concerned.[2]

The Court reviewed the facts which were not in dispute:

- The conflict took place between Roma villagers and the police;
- The applicant is of Roma origins;
- The dispute as described was not racially neutral;
- The bar owner's dispute with the deputy mayor involved racist elements.

Further, the remarks about aggressive conduct being *'pure Gypsy'* were stereotypical proving that the police were not *'race neutral'*. Thus the Court could find no reason to consider the aggression by the police towards the applicant as *'removed from this racist context'*.

The Court ruled that in these circumstances the burden of proof shifted to the Government. The Court was satisfied that there was clear evidence of racial motives behind the police officers' action, and found that neither the prosecutor nor the Government could offer any other explanation or put forward any argument showing that the incidents were racially neutral. The Court therefore found that in the ill treatment of the applicant there had been a violation of Article 14 in conjunction with Article 3.

The Court awarded the applicant €15,000 non-pecuniary damage.

Comment

This decision represents a significant step forward in ECtHR jurisprudence in relation to Article 14. In *Nachova and Others v Bulgaria*[3] in 2005, the Grand Chamber of the ECtHR found a violation of Article 14 in the state's failure to properly investigate possible racist motives for the killing of two Roma army deserters but, refusing to shift the burden of proof, found insufficient evidence to uphold a substantive violation of Article 14 in respect of the two deaths.

In *Stoica* the Court was prepared, where there was evidence of discrimination which the Government did not dispute, to place the burden of proof on the Government to prove that the ill treatment of the applicant was racially neutral.

It is hoped that in future cases under Article 14, the ECtHR will recognise when it is appropriate to apply the shift of the burden of proof, not only for race discrimination but for discrimination on other grounds and not only in conjunction with Articles 2 or 3, but also when there is evidence of discrimination by the State in relation to other Convention rights.

On a different note, for many *Briefings* readers, the approach of the ECtHR to possible racial motives in the investigation of alleged racist violence will be reminiscent of the Stephen Lawrence Inquiry and its ultimate finding that institutional racism infected the failed investigation into Stephen's racist murder. Now, nearly 10 years later, perhaps this decision could also be a useful reminder to bodies within the UK charged with investigation of violence – by members of the public or agents of the state – of the need to recognise and treat differently cases where the violence may be induced by hatred or prejudice.

Barbara Cohen
Discrimination Law Consultant

1. Paragraph 119
2. Paragraphs 126 and 127
3. ECtHR [Grand Chamber] 6 July 2005

Briefing 485

ECJ judgment on survivors' pension rights for same sex partners

Maruko v Versorgungsanstalt Der Deutschen Bühnen [2008] IRLR 450

Facts

Mr. Maruko (M) was the registered civil partner of a deceased German theatre costume designer. M's partner had been a member of a compulsory pension scheme which was administered but not funded by a state institution. The scheme afforded a widower's pension for *'spouses'* but made no similar provision for *'life partners'*. M's application for a widower's pension was therefore refused and he sought to challenge the relevant pension regulations on the basis that they were directly discriminatory on grounds of sexual orientation.

The matter was referred to the ECJ by the Bavarian Administrative Court for rulings on the following matters:

1. Whether the relevant pension scheme was outside the scope of the Framework Directive (the Directive) by virtue of being a payment under a social security scheme, such schemes being excluded from the Directive's scope by Article 3(3);
2. Whether benefits paid to survivors under such a scheme amounted to pay within the meaning of Article 3(1)(c) of the Directive;
3. Whether Article 1 read together with Article 2(2)(a) of the Directive precluded regulations which disentitle life partners to the same benefits as spouses even though, like spouses, they were registered partners living together in a union of mutual support and assistance entered into for life;
4. Whether recital 22 of the Directive, which states that the Directive applies '*without prejudice to national laws on marital status and the benefits dependent thereon*', permitted sexual orientation discrimination;
5. Whether, if the discriminatory effect was precluded by the Directive, such benefits should be restricted

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to 17 May 1990 in line with *Barber* [1990] IRLR 240.

European Court of Justice

In an instructive reiteration of the principle of non-discrimination inherent in community law obligations, the ECJ concluded that survivors' benefits under the scheme did fall within the definition of *'pay'* for the purposes of Article 141 of the EC Treaty. The ECJ reached this conclusion by reliance on the principle[1] that retirement pensions paid to an individual by reason of the employment relationship are properly described as pay. In answer to the fourth question about the effect of recital 22, the Court held, as did the Advocate General, that this preamble could not have the effect of permitting member states to discriminate on grounds of sexual orientation even if it permitted them to determine whether and what benefits flowed from civil partnership and marital status: compliance with community law required adherence to the principle of non-discrimination even in areas deemed to be within the competence of member states. Since the benefits were *'pay'* and recital 22 did not permit sexual orientation discrimination, the ECJ held that the scheme fell squarely within the scope of the Directive.

As regards the third question, the ECJ concluded that the absence of provision for life partners in the scheme did amount to direct discrimination on grounds of sexual orientation. In its view Articles 1 and 2 of the Directive precluded legislation of the kind under scrutiny. On the issue of retrospective effect, the Court concluded that there were no sufficient financial or other reasons to limit the temporal effect of its judgment.

Comment

The judgment in *Maruko* is a welcome, clear reiteration by the ECJ of the paramountcy of the equality principle to community law obligations. It puts paid to the noises that have been being made for some time about the impact of recital 22 of the Directive and marks a further step on the road to ensuring that the equality principle becomes embedded in the way the state chooses to regulate the lives of its citizens.

Ulele Burnham
Doughty Street Chambers

1. A principle associated with the cases of *Beune [1995] IRLR 103; Evrenopoulos [1997] ECR 1-2057; Griesmar* [2001] ECR I-9383, paragraph 28; case C-351/00 *Niemi* [2002] ECR I-7007, C-4/02 and C-5/02 *Schönheit and Becker* [2004] IRLR 983

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Briefing 486

Protection against discrimination for women who undergo IVF or other fertility treatments

Mayr v Bäckerai und Konditorei Gerhard Flöckner OHG

European Court of Justice (Grand Chamber), 26 February 2008 [2008] IRLR 387

Implications for practitioners

This is an interesting case which clarifies the status of protection for women who undergo IVF or other fertility treatments.

Facts

Ms Mayr (M) was employed by the respondent as a waitress in Austria. M was undergoing IVF treatment and, following hormone treatment, she had two ova extracted from her ovaries which had been fertilised but not transferred to her uterus. M was off sick during this process from March 8-13. The respondent gave her notice of dismissal on 10 March 2008 with a termination date of 26 March 2008. On 13 March 2008, whilst employed but under notice, the fertilised ova were transferred to her uterus.

M claimed pregnancy discrimination. A preliminary issue arose as to whether she was pregnant at the time that she was given notice of dismissal for the purposes of the EC Pregnant Workers Directive 92/85. The question was passed to the ECJ for a preliminary ruling.

European Court of Justice

The ECJ held that pregnancy means once the fertilised ovum is in the uterus. The ECJ recognising that fertilised ova can be held for indefinite periods, held that *'applying the protection against dismissal …..before the transfer of the fertilised ova could have the effect of granting the benefit of that protection even where that transfer has been postponed, for whatever reason, for a number of years.'* The purpose of the EC Directive is to avoid harm to a pregnant woman's mental and physical state.

Comment

This case does not mean, however, that women treated less favourably by reason of fertility treatment are without legislative protection. The ECJ stated that the Equal Treatment Directive (implemented within our Sex Discrimination Act 1975) is capable of protecting workers against less favourable treatment, and a dismissal on the basis of fertility treatment (or because she is likely to get pregnant) would amount to direct sex discrimination.

Kiran Daurka
Russell Jones & Walker

Briefing 487

Impact of disability discrimination on housing rights

S v Jacqueline Floyd and The Equality and Human Rights Commission
[2008] EWCA Civ 201 Case No B5/2006/2480

Implications for practitioners

Housing has become an area of increasing litigation under the Disability Discrimination Act 1995 (DDA). In April 2008, the House of Lords heard the case of *London Borough of Lewisham v Malcolm (Disability Rights Commission intervening)*. This case is expected to settle many of the outstanding questions regarding the interpretation of the DDA in premises cases – in particular, the effect of the DDA on possession proceedings, the interpretation of disability related less favourable treatment in a premises context, and the question of knowledge and disability discrimination. In the interim, some interesting views were expressed on these issues by the CA in the case of *S v Floyd*.

Facts

S had been an assured tenant of Ms Jacqueline Floyd's (F) premises since May 1996. S has what was described by a cognitive behavioural psychotherapist as obsessive compulsive personality disorder. S took a decision to hold back rent and, as a result, fell into arrears. F gave notice to S that she intended to apply to the court for a possession order on grounds 8, 10 and 11 in Schedule 2 to the Housing Act 1988 (the 1988 Act).

Grounds 10 and 11 provide the court with a discretionary power to make a possession order in certain circumstances where it considers it *'reasonable'* to do so (s.7(4) of the 1988 Act). Ground 8 is a mandatory ground under which the court must make an order (s.7(3)) if at least eight weeks rent lawfully due is unpaid both at the date of service of the notice under section 8 and at the date of the hearing.

Housing benefit would have been available to meet much of the arrears.

In his defence, which S drafted himself, he wrote, amongst other things, that he would suffer exceptional hardship if ordered to leave the property immediately because of issues of *'ill health, disability and old age'*.

S was represented at the hearing of the possession proceedings by Mr Leaver, a housing adviser from Brighton House Trust. Mr Leaver thought that S might lack capacity and raised this with the District Judge (DJ); the DJ refused to adjourn and made a possession order. S appealed unsuccessfully to the Circuit Judge on essentially the same grounds as went before the CA.

Court of Appeal

S appealed on three grounds:

1. The DJ was unreasonable in concluding that an adjournment to investigate S's mental capacity was not warranted
2. The DJ erred in law in concluding that there were no

exceptional circumstances to adjourn the possession claim following *North British Housing Association v Matthews* [2004] EWCA Civ 1736

3. The DJ erred in law in concluding that there was no ability to resist the possession proceedings on the basis of disability discrimination which warranted an adjournment.

The CA dismissed the appeal.

On ground (1) the CA agreed with the Circuit Judge that there was insufficient material before the DJ to make a serious submission that she was wrong in exercising her discretion not to grant an adjournment on that ground. All that she had was a concern raised by Mr Leaver but no evidence, not even circumstantial evidence, that S lacked capacity such as would require him to be made a patient. The test of capacity is issue specific – see *Masterman-Lister v Brutton & Co* (No 1) [2002] EWCA Civ 1889.

On ground (2) the CA stated that non-receipt of housing benefit cannot of itself amount to an exceptional circumstance, as *Matthews* makes clear; and more importantly, no application for an adjournment was made to the DJ. It was admitted on S's behalf that there were arrears and that he had no defence to the claim under ground 8. Moreover, the only basis suggested for any adjournment was in relation to the question of S's capacity. No adjournment was sought with a view to S being able to pay off the arrears. In addition, there was nothing to suggest that his decision to hold back the rent was in any way related to his disabilities.

On ground (3), the Court stated that this ground presented several difficulties. The first was on the facts: S mentioned disability in his defence but the DJ was not invited to adjourn the proceedings on the grounds that they constituted or involved unlawful disability discrimination which might provide S with a defence to the claim.

The second difficulty was on the law: Mummery LJ, giving the lead judgment, said that it is not immediately obvious

1. how the 1995 Act could provide a basis for resisting a claim for possession on a statutory mandatory ground, or
2. how a landlord would be unlawfully discriminating against a disabled tenant by taking steps to enforce his statutory right to a possession order for admitted non-payment of rent for 132 weeks.

> *The 1995 Act was enacted to provide remedies for disabled people at the receiving end of unlawful discrimination. It was not aimed at protecting them from lawful litigation or at supplying them with a defence to a breach of a civil law obligation…*

The CA went on to say that the definition of discrimination does not refer to the effects that the disability has on a disabled person's ability to do things such as discharge his legal obligations as a tenant. It refers to 'a reason' for treatment which, in this context, would normally require the existence of something in, and consciously or subconsciously affecting the mind of, the discriminator – see for example *Taylor v OCS Group Ltd.* [2006] EWCA Civ 702.

The CA held that it was not arguable in the circumstances of the case that the 1995 Act provided a defence to a claim for possession. There was no error in the DJ's refusal to adjourn. The case of *London Borough of Lewisham v Malcolm (Disability Rights Commission intervening)* [2007] EWCA Civ 763 – which was relied upon by the appellant – was distinguished as follows:

1. the mandatory ground for possession did not apply in *Malcolm*
2. the court found that the subletting by the tenant in *Malcolm* – which led to the loss of security and the reason for possession – related to Mr Malcolm's disability. A finding that the reason for the possession proceedings related to the disability was impossible in this case

The Court commented that *'at the forthcoming hearing of Malcolm, the House of Lords will see from the procedural history of this case and the arguments deployed the urgent need for a clarification of the scope of application of the 1995 Act in possession proceedings which come before the county courts throughout the country every day'*.

Comment

The approach in this case to the impact of the DDA on possession proceedings is the opposite of that in *Malcolm* – far from 'trumping' housing legislation, if Mummery LJ's conclusion is correct then the DDA will have no impact on such proceedings at all – merely providing the person who has been evicted with a claim once any unlawful discrimination takes place. This affects not just claims under the DDA but also premises claims under any of the anti-discrimination provisions.

The difficulties in a DDA context arise because of the limited nature of justification grounds available for disability related less favourable treatment (for example if a failure to pay rent were disability related and eviction ensued, the only justification grounds available would be health and safety or incapacity to contract – neither of which is likely to apply and so such an eviction could never be lawful under the DDA).

In its consultation on single equality legislation, the government announced an intention to replace these grounds with an all encompassing objective justification – which would give more scope to landlords to defend potentially unlawful possession proceedings for, for example, disability related rent arrears. This is some way in the future though. In the meantime, it is to be hoped that the Lords' decision in *Malcolm* will bring at least some clarity to this area of the law.

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Briefing 488

Article 9 did not prevent a Pastor being an employee

New Testament Church of God v Stewart [2008] IRLR 134 EWCA

Facts

Mr Stewart was an ordained Minister and pastor of the New Testament Church of God in Harrow. He was removed from his position of pastor after being found guilty of unbecoming contact and misappropriating church funds. He then brought a claim against the Church for unfair dismissal.

Employment Tribunal

The ET considered whether there was an employment relationship between the Church and Mr Stewart, and concluded that there was. The ET separated Mr Stewart's status as an ordained minister from his position as pastor. After considering his role and responsibility as pastor, the ET concluded that there was sufficient mutuality of obligation and control to meet the classic employment definition.

Court of Appeal

The CA upheld the ET's decision. They noted that Article 9 of the European Convention on Human Rights required that tribunals take account of the religious doctrine of any particular church. This doctrine might be incompatible with its clergy being employees of the church. In such a case, this would indicate that there had been no intention between the parties to enter into binding legal obligations. This was not the situation with the New Testament Church.

Comment

This case continues the trend of treating individuals holding church posts as employees for the purposes of that post. It makes clear that there is no longer a presumption that clergy are not also employees. Indeed, it is likely that most, at least most holding paid posts, are employees.

Michael Reed
Free Representation Unit

Briefing 489

Solicitors acting for an employer had not aided acts of victimisation

Bird v Sylvester [2008] IRLR 232 EWCA

Facts

Ms Bird brought a complaint of victimisation on the grounds of race against her employer. Having received advice from their solicitors, her employers commenced disciplinary proceedings against her. She brought a second victimisation claim based on the disciplinary action. This included a claim against the solicitors advising her employer, on the basis that they had 'aided' the further victimisation.

Employment Tribunal

The ET struck out the claim against the solicitors. The tribunal found that it would be against public policy to allow solicitors acting for employers to be liable for action that they had taken on their client's behalf. The ET concluded that, while a solicitor may advise her client, the client makes any decisions. In carrying out those decisions, the solicitor is merely a conduit.

The ET went on to say that, even if a solicitor had actively pursued a discriminatory course, it would be impossible for a tribunal to consider it without examining privileged communications. Since this evidence was inadmissible the tribunal could not consider it.

Court of Appeal

The CA concluded that, on the facts, the solicitor's conduct could not amount to victimisation.

They also considered the general approach to be taken in such cases. They concluded that advising someone to take some course of action did not aid them to do that act. In so far as the solicitor had taken action, they had done so on their client's instructions. The CA upheld the ET's conclusion that in doing so the solicitor was only a conduit and the act had been done by the employer.

The CA, however, refused to set out a general rule that a solicitor acting within the scope of her agreement with her client could never be liable under the aiding provision. They considered that there might be extreme situations where a finding of aiding would be appropriate, while emphasising that these would be extremely rare.

Comment

Solicitors will welcome the CA's conclusions and there is a powerful public interest in protecting them in these situations.

There are, however, worrying elements to the decision. Solicitors do advise their clients, but so do many other people and organisations. Should all such advice be outside the scope of 'aiding'?

Similarly, many people carry out the instructions of others. Surely, in many cases, they aid those who give them instructions.

Indeed, if neither advising nor carrying out instructions is to be considered aiding, the scope of such liability is narrow indeed.

Michael Reed
Free Representation Unit

The burden of proof in section 54A of the Race Relations Act 1976 does not apply to direct discrimination on grounds of colour

Okonu v G45 Security Services (UK) Ltd UKEAT/0035/07/JOJ

Implications for practitioners

Section 54A of the Race Relations Act 1976 (RRA) transfers the burden of proof to the respondent where the claimant proves facts from which, in the absence of an adequate explanation from the respondent, the tribunal could conclude unlawful discrimination has occurred. The following case confirms that this partial transfer of the burden of proof does not apply to cases of direct discrimination on the grounds of nationality or colour. In such cases, the burden of proof remains on the worker throughout and follows the guidelines set out in *King v Great Britain – China Centre* [1991] IRLR 513, CA and *Anya v University of Oxford* [2001] IRLR 377, CA.

Employment Tribunal

Mr Okonu (O) claimed direct discrimination under the RRA on grounds of his black African ethnic origin and/or his Nigerian origin and/or his colour. The ET found there was no evidence to suggest his treatment had anything to do with his ethnic or national origin. It noted that in his grievance letters and during meetings, he had been clear that he believed his shabby treatment was because of his colour. The ET went on to consider whether he was discriminated against on grounds of colour and rejected each of his allegations. In doing this, the ET failed to apply RRA s54A which shifts the burden of proof for certain discrimination claims. O appealed.

Employment Appeal Tribunal

The EAT dismissed the appeal. RRA s3(1) defines *'racial grounds'* as meaning *'any of the following grounds, namely colour, race, nationality or ethnic or national origins'*. O argued that a claimant should not have to specify on which of those grounds he was less favourably treated. The EAT disagreed. It pointed out that a claimant can potentially be discriminated against on any one of the grounds. For example, a Sikh worker could be discriminated against on grounds of colour, nationality (Indian or Pakistani), ethnic origin or religion. An ET must be able to identify the issues which it has to hear. This is often done at a case management discussion or at the start of the substantive hearing. The category into which a claimant falls informs the definition of the comparator, and employers are entitled to know what case they have to meet. If the claimant is unaware of any particular ground upon which s/he has been discriminated against, then s/he can plead all or most of the alternatives and the matter will become clear as the evidence progresses.

RRA s54A, which partially shifts the burden of proof in certain discrimination cases, applies where the complaint is that the respondent has committed an act of discrimination *'on grounds of race or ethnic or national origins'*. The section was introduced to implement Council Directive 2000/43/EC (the Directive). O argued that the Directive requires the shifted burden to apply to discrimination on grounds of colour. He said there is no distinction in EU jurisprudence between the concepts of racial and ethnic origin on the one hand and colour on the other. The EAT rejected this argument.

The EAT noted that parliament decided to implement the Directive by statutory instrument (the Race Relations Act 1976 (Amendment) Regulations 2003 SI No. 1626), rather than by primary legislation. Unlike primary legislation, a statutory instrument made under the European Communities Act 1972 can go no further than the EU legislation which it is intended to implement. Therefore the 2003 Regulations could not and do not cover race discrimination complaints brought on grounds of colour or nationality. In any event, the Directive had no direct effect in this case because the respondent was not an emanation of the state. It could not assist O as an interpretative aid because the language of s54A is

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crystal clear and omits the words 'colour' and 'nationality'.

Comment

It is surprising this issue has not come up before. When the government took a shortcut to implementing the Directive, it made a number of amendments to the RRA which explicitly refer to discrimination *'on grounds of race or ethnic or national origins'* and omitted the other two categories within the RRA of colour and nationality. This means that for indirect discrimination and harassment, as well as in regard to the burden of proof, there are lesser rights where the discrimination relates to colour or nationality. This is a shocking state of affairs in a country where the prevalent form of race discrimination is based on colour and where the public sector race equality duty was introduced as a result of the Macpherson report following the murder of Stephen Lawrence, a black British teenager.

It is strongly arguable that the 2003 Regulations do not properly implement the Directive. The Directive prohibits *'discrimination based on racial or ethnic origin'*. It explicitly excludes *'difference of treatment based on nationality'*, but it does not use the word *'colour'* at all. This is surely because the Directive envisaged that *'colour'* was incorporated within the concept of *'racial origin'*.

The wording of RRA s54A is not as crystal clear as the EAT suggests, as it too refers to discrimination based on *'race'*. The concept of *'race'* does not appear to have been explored in any UK cases, but it is hard to see how discrimination based on colour is not at the same time based on race. Pending any amendment of the law in a long awaited Single Equality Act, claimants alleging discrimination based on colour may be wise to plead in the alternative that it is based on race. This suggestion is made with some trepidation because it may lead to some undesirable arguments about what the word *'race'* means – there is after all only one human race.

Tamara Lewis
Central London Law Centre

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Briefing 491

Narrow definition precludes harassment claim under the Sexual Orientation Regulations

English v Thomas Sanderson Blinds Ltd [2008] IRLR 342, EAT

Implications for practitioners

The definition of harassment in the Employment Equality (Sexual Orientation) Regulations 2003 (SOR) does not properly implement the Framework Directive. As a result of the narrower definition in the domestic legislation, a worker, whom everyone knows is not gay, cannot bring a claim of harassment despite being subjected to homophobic remarks.

Facts

Mr English (E) worked for Thomas Sanderson Blinds Ltd (TSB) under an agency agreement from 1996 to August 2005. In November 2005, he brought a tribunal claim of harassment contrary to reg 5 of the SOR. He claimed that his colleagues had subjected him to homophobic innuendo for many years, even though they knew he was not gay. The comments stemmed from the fact that he possessed characteristics which could be associated with stereotypes about gay men, i.e. he lived in Brighton and had attended a boarding school.

Employment Tribunal

Reg 5 states that:

> *a person ('A') subjects another person ('B') to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of*
> *(a) violating B's dignity; or*
> *(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

The ET dismissed E's claim because it did not fall within the scope of this regulation. Having considered

cases interpreting the analogous definition of direct discrimination under the Race Relations Act 1976, the ET decided that *'on grounds of sexual orientation'* only covers harassment of three categories of person: (1) someone who is homosexual; (2) someone who is perceived by the harassers to be homosexual; (3) someone who has failed to follow instructions to discriminate against another on grounds of sexual orientation. In this case, E accepted his colleagues knew he was not homosexual. E appealed.

Employment Appeal Tribunal

The EAT upheld the ET's decision. The difficulty for E was the wording of reg 5. This covered harassment based on perception, association or instructions, but none of these applied here. The homophobic 'banter', unacceptable as it was, was simply a vehicle for teasing E. It was not based on the harassers' perception or incorrect assumption that he was gay.

Without deciding the matter, the EAT commented that the decision may have been different under the wording of the Framework Directive 2000/78/EC (the Directive), which the SOR were passed to implement. The Directive defines harassment as unwanted conduct *'related to'* sexual orientation, as opposed to '*on grounds of'* sexual orientation, as appears in the SOR. The key part of Art 2(3) of the Directive states:

> *Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*

The grounds referred to in Article 1 include sexual orientation.

The EAT considered the case of *Equal Opportunities Commission v Secretary of State for Trade & Industry* [2007] IRLR 327, HC where the High Court made a declaration that the harassment provision then in s4A(i)(a) of the Sex Discrimination Act 1975 (SDA) did not properly implement the Equal Treatment Directive (2002/73/EC). The EAT noted that the wording of s4A(i)(a) and the Equal Treatment Directive reflected that of reg 5 of the Sexual Orientation Regulations and the Framework Directive. The only real difference, that s4A(i)(a) spoke of conduct *'on the ground of* ***her*** *sex'*, as opposed to *'on the grounds of sexual orientation'* in reg 5, was not material. Therefore, reg 5 does not properly implement the Directive and E's protection was narrower than provided for under the Directive. This was an unsatisfactory state of affairs.

As the employer was in the private sector, E could not rely on the Directive and his appeal failed. The EAT gave leave to appeal to the Court of Appeal.

Comment

Unwanted conduct *'related to'* sexual orientation covers a wider range of conduct than that which is simply *'on grounds of'* sexual orientation. This is because *'on grounds of'* raises the question – 'why did the harasser act as s/he did?' In this case, the ET decided that the reason why E was subjected to the 'banter' was not because he was gay or perceived to be gay. It was simply a vehicle for teasing him.

The EAT does not discuss in detail every situation covered by the reg 5 definition, but it does seem to accept that it has wider application than the three scenarios itemised by the ET. It states that the definition extends to harassment based on *'perception, association or instructions'*. It would therefore presumably be unlawful to make homophobic comments to a worker because s/he has gay friends.

What of the situation where a worker finds it offensive to listen to homophobic comments made in his/her hearing, but not directed at him/her, for example, comments based on the sexual orientation of someone else with whom the worker is not associated? The EAT does not address this scenario. In *Gravell v Bexley LBC* UKEAT/0587/06, the EAT said a (white) worker could claim racial harassment under the equivalent provision in the Race Relations Act 1976, on the basis that a council's policy not to challenge racist remarks by customers created an offensive environment for that worker.

Following the High Court's order in the *Equal Opportunities Commission* case to recast the definition of harassment in the SDA, the government eventually issued the Sex Discrimination Act 1975 (Amendment) Regulations 2008. From April 6, 2008, the material part of s4A(1)(a) refers to unwanted conduct *'related to'* sex (see s3). It is a pity the government did not take the opportunity to make similar changes to the definitions in the other discrimination strands since the same issue so obviously arises. Unfortunately, dragging its heels on

491 such changes is all too typical of a government which has ignored endless warnings about errors in proposed legislation. Indeed, the DLA has drawn attention in several pre-legislation consultations to incorrect implementation of the EU Directives on the definition of harassment. Much expensive litigation and many unjust decisions could have been avoided.

Pending any redrafting of the definition in the non-sex discrimination strands, claims against public sector employers can be made under the Framework Directive.

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Awards for injury to feelings in multiple discrimination cases

Al Jumard v Clywd Leisure Ltd [2008] IRLR 345, EAT

Implications for practitioners

Where there are numerous acts of discrimination, it is impossible to attribute the level of injury to feelings attributable to each act. However, the approach should not be too broad brush, and an ET should separately take account of the impact of significantly different acts or types of discrimination.

Facts

Mr Al Jumard (AJ), a British national of Iraqi birth, worked as duty manager at a leisure centre operated by Clywd Leisure Ltd (CL). He had a hip problem for most of his working life and was disabled. He claimed that from 2002 onwards he was subjected to various acts of race and disability discrimination.

Employment Tribunal

The ET found that AJ had been unfairly dismissed and subjected to various acts of discrimination. In May 2002 he had been given a written warning for setting off the alarm at the leisure centre because he did not leave quickly enough after setting it. This was as a result of his disability. The ET said the warning was direct discrimination under the Disability Discrimination Act 1995 (DDA) and the Race Relations Act 1976 (RRA). Others were not disciplined for similar security lapses. In addition, CL had failed to make reasonable adjustments under the DDA because nothing had been done to extend the period between setting the alarm and getting off the premises.

In early 2004, AJ raised a grievance that his manager had treated him less favourably than white colleagues in a number of incidents. His grievance was not upheld but, as a result, the chief executive gave him a severe dressing down and told him his own conduct would be monitored. Later in 2004, AJ was given a final written warning with no expiry date for an incident where he taped a conversation with another member of management and was allegedly aggressive. The ET found AJ's treatment in these incidents to be further acts of race discrimination.

AJ was transferred to another centre, which opened only during the summer, and then transferred again in the autumn to the Bowl Centre, where he was given menial tasks. Some of the work involved standing all the time and his disability became worse. The ET found CL had failed to make reasonable adjustments under the DDA when moving him to the different centres.

In 2005, AJ lodged a tribunal claim for race and sex discrimination. Following this, he was put under surveillance by a private detective to check whether he was really disabled. Despite receiving a consultant's report that the activities noted by the detective were appropriate, CL considered AJ was making false claims for sick pay and dismissed him for gross misconduct. The ET decided that subjecting AJ to surveillance was victimisation under the RRA and the DDA.

With regard to injury to feelings, the ET found that AJ was distressed, frightened and under threat from December 2003 until his dismissal in November

2005. The injury to feelings and stress had escalated as the situation developed through a series of incidents. He was on anti-depressants for 18 months, but was now recovered. The ET concluded that *'for the injury to feelings and stress suffered for the racial and disability discrimination, which occurred over a period of some 20 months, we award £13,000*'. The ET also awarded £5000 for personal injury and £1500 for aggravated damages, as well as substantial awards for loss of earnings and pension loss.

AJ appealed on various aspects of the compensatory award. In particular, he appealed against the award of £13,000 for injury to feelings, stating that the ET was wrong to treat injury to feelings in a composite way, as this led to a smaller award. The ET should have distinguished between acts of race and disability discrimination separately and should have allocated compensation for injury to feelings to each individual incident.

Employment Appeal Tribunal

The EAT upheld the appeal regarding the calculation of injury to feelings and remitted the matter to the ET to reconsider. The EAT said that although no scientific calculation of injury to feelings arising from each incident is possible, the tribunal was a little too broad brush and a more nuanced approach was necessary. The losses flowing from race and disability discrimination should have been separately considered, at least where they did not arise from the same facts. Each is a separate wrong and indeed, it helps focus a tribunal's mind on the compensatory nature of the award. For example, the offence, humiliation or upset resulting from a deliberate act of race discrimination may quite understandably cause greater injury to feelings than a thoughtless failure to make reasonable adjustments under the DDA. In this case, it was not necessary to look separately at injury to feelings caused by direct discrimination under the DDA and failure to make reasonable adjustments, but it would not necessarily be wrong for a tribunal to do so in an appropriate case. The ET should have also considered whether any separate loss could be identified in respect of the victimisation. Having considered these elements separately, an ET must still stand back and look at the global figure, ensuring there is no double counting and that the overall award is not disproportionate.

Comment

Although tribunals must consider whether their total award for injury to feelings is proportionate, it usually helps achieve a higher award if they can be persuaded to consider several headings separately. It is advisable to make separate claims, where applicable, under the heads of injury to feelings, injury to health (personal injury) and aggravated damages.

This case suggests that a tribunal should also be invited to consider the level of injury caused by different grounds of discrimination or even significantly different discriminatory actions. To maximise compensation for injury to feelings, it is necessary to obtain detailed evidence from the claimant, often backed up by medical evidence, of the impact of the discrimination. If the tribunal is to be asked to consider certain matters separately, the evidence will need to be even more precise. In some cases it is obvious which actions have upset the claimant most. In others, it simply won't be practical to make even the rudimentary distinctions suggested by the EAT.

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Treatment of retirement cases until ECJ decision on *Heyday*

Johns v Solent [2008] IRLR 88 UKEAT

Background

When implementing EC Council Directive 2000/78, (the Directive) prohibiting discrimination on the grounds of age, the UK government took the view that it was both permitted and desirable to allow employers to forcibly retire staff. Thus regulation 30 of the Employment Equality (Age) Regulations 2006 (the Age Regulations) effectively permits enforced retirement at the age of 65.

This decision was controversial and much criticised. Heyday, backed by Age Concern, is challenging the UK's government's implementation of the Directive in the case *Age Concern v Secretary of State*. This was referred to the ECJ in 2007 and judgment is expected late 2008 or early 2009.

The question arises as to what should happen to age cases challenging forcible retirement – where there is currently no valid claim in UK law – whilst we wait for the ECJ decision.

Employment Tribunal

Ms Johns (J) brought a claim for unfair dismissal and unlawful age discrimination. The ET struck out the claim on the (agreed) grounds that, under current UK law, the claims were bound to fail because of s98ZG Employment Rights Act and regulation 30 of the Age Regulations.

The ET (which only had the advantage of the Advocate General's decision, as opposed to the ECJ judgment, in the similar – but far from identical – case of *Palacios de la Villa v Cortefiel Servicios* SA ECJ, C-411/05) in effect held that *Heyday* had very little chance of success.

Employment Appeal Tribunal

J appealed to the EAT. The EAT – with the advantage of the ECJ decision in *Palacios* – decided that there were considerable differences between *Palacios* and *Heyday*. The EAT held that it was not for the ET to prejudge the decision in *Heyday* and ordered that J's case be stayed until *Heyday* is decided. This approach has been confirmed by the CA.

Consequences

The Employment Tribunal Offices for England and Wales have issued a direction that all claims which are raised under regulation 30 of the Age Regulations should be accepted by the Tribunal, and thereafter put on hold until such times as the ECJ has made its determination with regards to the legality of the provision.

Time limits

When advising an employee who is forcibly retired, practitioners should advise that any claim for unfair dismissal and/or age discrimination should be brought within the normal time limits and then stayed by the ET. If an employee who is dismissed now, waits until the decision in *Heyday* to present their claim, they run the risk of being out of time.

Juliette Nash
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How detailed must a grievance in an Equal Pay Claim be to allow proceedings to be issued?

Highland Council v TGWU & Others [2008] IRLR 272

Key issues

In this case, the EAT in Scotland considered whether the claimants in a multiple equal pay case had complied with section 32 (2) of the Employment Act 2002 (the 2002 Act) which states that employees cannot issue proceedings without putting their grievances in writing to their employer as required by schedule 2 of the 2002 Act. The key question before the EAT was whether the claimants had set out their grievances in writing to their employer in sufficient detail before issuing proceedings under the Equal Pay Act 1970 (EqPA).

Facts

The claimants in this case lodged a number of written grievances with their employer alleging breaches of the EqPA on the grounds that they were paid less than male comparators for undertaking work of equal value or work rated as equivalent to those male employees. They specified a number of male comparators in their grievances. Unlike other types of unlawful discrimination, a claimant must rely on an actual comparator in respect of a claim brought under the EqPA.

The claimants subsequently issued proceedings and submitted their ET1 tribunal application forms. They referred to a number of comparators that had not been referred to in their original written grievances.

The ET held that the claimants had satisfied the requirements of section 32 (2) and paragraph 6, schedule 2 of the 2002 Act on the basis that they had identified their claims in a grievance letter, although the specific comparators identified in the ET1 claim forms were different to those identified in the original grievances.

Employment Appeal Tribunal

Highland Council (HC) appealed against the ET's findings on the grounds that in order to comply with section 32 (2) of the 2002 Act, the comparators set out in the original grievance must have been the same as those set out in the ET1s. It argued that if this was not the case then, under section 32 (2), an employee could not present a claim to the tribunal because paragraph 6 of schedule 2 of the 2002 Act had not been complied with. HC argued that as an actual comparator had to be specified under the EqPA, this information had to be set out in a grievance and not be materially different in any subsequent claim.

The EAT allowed the appeal. It stated that as the EqPA required the identification of a comparator, at the very least, the grievance must identify the comparator by reference to a specific job or job title and that this could not be materially different to the comparators identified in the subsequent claim.

In giving judgment, Lady Smith stated that some degree of identification was required or otherwise '*the employer cannot be expected to appreciate that a relevant complaint is being made without saying more*'.

Comment

The EAT's decision will necessitate employment tribunals carrying out assessments to see if there have been changes between comparators in the original grievance and the ET1.

It is submitted that the EAT's strict approach may have a negative effect in respect of the purpose of the EqPA – namely achieving equality in pay between women and men. In practical terms claimants are often aware that they are paid less than their male counterparts but do not know the specific details of comparators at the grievance stage.

Whilst the EAT is correct to state that employees need to know the basis of the claims being brought, the need to specify comparators in the manner envisaged does not seem to strike the correct balance. Paragraph 6 of schedule 2 of the 2002 Act merely requires that a claimant *'set out the grievance in writing and send the statement or a copy of it to the employer'* and the statutory grievance procedure does not require the

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claimant to do more than identify the nature of her claim. The Scottish Court of Session is currently considering an appeal by the claimants in this case and a judgment is imminent at the time of writing this article. The EAT's decision seems to 'go against the grain' given its more liberal interpretation of what constitutes a grievance for the purposes of section 32 of the 2002 Act in respect of other forms of unlawful discrimination.

Implications for practitioners

The EAT's judgment creates a number of practical difficulties particularly where a claimant discovers new comparators after submitting her original grievance to the employer. If proceedings have not been issued, the best course of action is for the claimant to lodge a further grievance letter specifying the new comparator. It may be possible for the parties to agree a single grievance process in respect of both grievances.

If tribunal proceedings are already under way, the claimant should also apply to amend her claim form as well as submit a further grievance.

Shah Qureshi
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Justification arguments considered in age discrimination case

Hampton v The Lord Chancellor and The Ministry of Justice (2008) London South Employment Tribunal, case no 2300835/2007

Background

As the commencement of the Employment Equality (Age) Regulations 2006 (the Age Regulations) approached, it became apparent that the UK Government intended to retain a mandatory retirement age above which employees could not maintain claims of unfair dismissal if their employers had complied with the new retirement procedure, now set out in Schedule 6 of the Regulations.

When the Age Regulations came into force, advisers confirmed this to be the correct interpretation, although much of the public at large had the impression that retirement was no longer mandatory. The ACAS booklet 'Age and the Workplace' summed up the position when it stated in relation to the new schedule 6 procedure:

> *As long as employers follow this procedure correctly they may rely on their normal retirement age (if they have one) or the default retirement age without the dismissal being regarded as unfair or age discriminatory*'[1]

As is now well known, Age Concern (or Heyday) was quick to launch a challenge to the new retirement age[2], stating that regulation 30, which renders lawful the dismissal of employees over the age of 65, was contrary to the provisions of Article 6 of Council Directive 2000/78, upon which the new Regulations were based. Article 6 'Justification of differences of treatment on grounds of age' reads:

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

The prospects for *Heyday* did not look too good when the judgment in *Palacios de la Villa v Cortefiel Servicios* SA, ECJ [2007] IRLR 989[3] came out. In this case the Court heard the Spanish government's arguments on its mandatory retirement age and concluded that the government did have a legitimate aim i.e. a national employment policy promoting full employment by facilitating access to the labour market, and that its means of achieving the aim were appropriate and necessary. There was no breach of Article 6. The

concept of a national mandatory retirement age had been endorsed.

In the case of *Johns v Solent SD Limited* (2007) UKEAT/0449/07, a case involving a straightforward application of regulation 30, Mr Justice Nelson (sitting along) declined to hear the case with the judgment in *Heyday* still being outstanding, and instead stayed the case pending the ECJ's judgment. This lead to a Direction being issued on 8 November 2007 by the President of the Employment Tribunals to the effect that any case dealing with regulation 30 should be stayed pending the outcome of *Heyday*, or alternatively, on the Court of Appeal reviewing *Johns v Solent*.

Office holders

Despite covering effectively the same ground, this Direction does not have any effect on claims involving office holders claiming direct discrimination rather than employees. So the arguments on whether a mandatory retirement age is lawful did get a hearing, despite Heyday, in the case of *Hampton v The Lord Chancellor and The Ministry of Justice*.

Facts

Mr Hampton, who was a fee-paid part time Recorder, had been retired from his post against his wishes on 31 March 2007 as he had attained the age of 65. As an office holder, his claim fell to be determined in accordance with regulation 12 (office holders) and regulation 3(i) (direct discrimination).

Employment Tribunal

The ET Chair, Mr Zuke, examined the provisions of regulation 3, which state that a person shall not treat another less favourably on the grounds of age if *'that person can not show the treatment … to be a proportionate means of achieving a legitimate aim'* and compared this with the wording of Article 6 of Directive 2004/78/EC set out above.

In attempting to reconcile these two apparently different provisions, Mr Zuke referred to the case of *Hardys and Hansons plc Lax* [2005] IRLR 726 which dealt with a similar conflict between Article 2 of the Equal Treatment Directive 2002/73/EC and the Sex Discrimination Act 1975, as amended in October 2005. He noted the Court of Appeal's judgment in that case stated that the employer has to show that its proposal is justifiable:

> *It must be objectively justifiable and I accept that the word 'necessary' … is to be qualified by the word 'reasonably'. … The presence of the word 'reasonably' reflects the applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal … is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business.*

Using this as a guide as to how to interpret regulation 3(1), Mr Zuke went on to consider the justification that the Ministry of Justice had put forward in this case for retaining a lower retirement age. A number of reasons were presented including:

1) the imposition of a retirement age is necessary to maintain judicial independence i.e. the inclusion of retirement date means that the end of a judge's tenure is not within the hands of the executive;
2) setting the age at 65 rather than 70 is necessary to ensure a reasonable flow of new appointments (given the limit of 1000 available posts the average length of service means a lower 'flow through' of post holders which in turn would mean a smaller pool from which applicants for the Circuit or High Court Bench could be appointed); and
3) the need to balance individuals' experience with the need for 'new blood'.

The Ministry of Justice argued that the above aims were legitimate and proportionate.

Mr Zuke agreed that the second of these reasons did constitute a legitimate aim. But he then went on to consider an analysis, provided by one of the Ministry of Justice's witnesses, of whether the pool of Recorders available for promotion to the Circuit and High Court benches really was significantly reduced as a result of the lower retirement age. On the analysis, Mr Zuke was able to reach the conclusion that if the retirement age were increased to 70, the impact upon the available pool of Recorders for promotion was not sufficiently adverse to mean that the legitimate aim could not be achieved. The use of a lower age was therefore not a proportionate – or reasonably necessary – means of achieving that legitimate aim. The other justifications put forward by the Ministry of Justice were rejected.

Comment

Whilst providing an interesting analysis of the Ministry of Justice's decision to reduce the retirement age for Recorders to 65, it is clear from the judgment that this is a decision which rests firmly on its own facts. Detailed evidence was heard as to the decision making process employed by the ministers and their senior advisers. Even within different branches of the judiciary, one can imagine that the reasons put forward by the Ministry of Justice for justifying retirement ages would differ widely.

For all those involved in cases stayed pending *Heyday*, *Hampton* offers little comfort. Although it grabbed the legal headlines and provided judges approaching the age 65 some indication that they might not have to retire shortly, it is unlikely to open the floodgates to other challenges to mandatory retirement ages.

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1. ACAS Age and the Workplace, page 27
2. R (on the application of the Incorporated Trustees of the *National Council on Ageing (Age Concern England) v Secretary of State for Business Enterprise and Regulatory Reform* co/5485/2006
3. See *Briefings* 459

New offence of incitement to hatred and abolition of blasphemy

The Criminal Justice and Immigration Act 2008 received Royal Assent on 8 May 2008. This Act has two important effects – it will introduce a new criminal offence of incitement to hatred on the grounds of sexual orientation and abolish the common law offences of blasphemy and blasphemous libel.

Guidance on public procurement

Public procurement offers a significant opportunity for more consistent and effective progress towards equality. Central and local government spend over a hundred billion pounds per annum on goods and services and this makes them vital customers for many large firms as well as small and medium enterprises. Experience in the UK and abroad has shown that state purchasing power can be an effective tool in influencing the private sector. This theme has been reflected in both the books reviewed in this issue of *Briefings*.

The Office of Government Commerce has just published the first in a series of pamphlets on procurement aimed at encouraging wider strategic use of public procurement. It is called *'Buy and make a difference. How to address Social Issues in Public Procurement'*. It is a practical guide that draws on real-life examples to show public procurers how they can help address social concerns when purchasing.

In addition, the Equality Commission for Northern Ireland and the Central Procurement Directorate of the Department of Finance and Personnel have just published new guidance to advise the public sector regarding the purchasing of all goods and services. The guide *Equality of Opportunity and Sustainable Development in Public Sector Procurement* will support public authorities as they embed equality of opportunity and sustainable development in their planning and delivery of services with the aim of advancing equality of opportunity and eradicating the inequalities which continue to exist in Northern Ireland.

Employment Bill [HL] 2007-08

The Employment Bill got its third reading in Parliament on 2 June 2008. The bill contains proposals to reform existing law covering industrial relations and employment protection.

Key areas

The bill will repeal the Employment Act 2002 (Dispute Resolution) Regulations 2004 which were intended to reduce employment litigation, but had unintended consequences in practice. The statutory dispute resolution procedures will be replaced by a new non-regulatory system; it will include a package of measures to encourage early/informal resolution of employment disputes possibly with increased support for the involvement of ACAS.

The bill aims to clarify and strengthen the enforcement framework for the national minimum wage; it will clarify and strengthen employment agency standards to address some of the concerns about vulnerable workers. The bill amends the relevant labour law to ensure compliance with the European Court of Human Right's judgment in *Aslef v UK*. This requires clearer rights for trade unions to determine their membership, after domestic courts held that trade unions could not lawfully expel British National Party activists.

Committee report on 'Domestic Violence, Forced Marriage and 'Honour'-Based Violence'

The House of Commons Home Affairs Committee published its report on 'Domestic Violence, Forced Marriage and 'Honour'-Based Violence' on 13 June 2008.

The report states that *'a lack of standardised data, and what is judged to be significant under-reporting, make it difficult to make an accurate assessment of the numbers of individuals experiencing domestic violence'*, while *'understanding of the scale of so-called 'honour'-based violence and forced marriage is even patchier'*.

Finally, a new non-employment equality directive?

As we reported in *Briefings* volume 32, the European Commission announced that their work plan for 2008 included the proposal for a generic anti-discrimination directive (the combined directive) to provide protection against discrimination on the grounds of disability, sexual orientation, religion or belief and age in the non-employment field to the same degree as race is covered in the race directive. Their reasons for this proposal were given as follows:

- Although some member states may go beyond the current Directives and provide for the same level of protection for all the grounds of discrimination, it is necessary to ensure certain coherence throughout Europe in this field. Only a European Directive can provide such a coherent framework.
- Lack of uniform protection can affect people's choices on whether to work or study in another member state, or whether to travel there and access services.
- The European Business Test Panel consultation shows that many businesses (63%) believe it matters if there are different levels of protection against discrimination in the EU member states in relation to access to goods, services and housing on grounds of age, disability, religion and sexual orientation, and 26% believe that a difference in the level of protection would affect their ability to do business in another member state.

The advantages of a single directive to cover all 4 grounds are:

- it avoids the difficulties of a perceived hierarchy between grounds;
- it enables problems of multiple discrimination to be tackled;
- it deals with the blurring of definitions between ethnic and racial origin and religion and belief;
- it is consistent with the current Employment Directive.

In March it transpired that the idea of a combined directive to cover access to goods, facilities and services on the grounds of disability, sexual orientation, religion or belief and age was likely to be dropped in favour of a single disability-only directive.

The announcement that this was under consideration provoked considerable concern amongst a number of European and UK NGOs and equality bodies as well as among some MEPs. The DLA wrote to President Barroso, Commissioner Spidla and Commissioner Mandelson expressing our view that a combined directive would be a preferable option.

It appears that all this activity has had a considerable impact. At a meeting of the European Social Platform on 12 June President Barroso indicated that the European Commission would propose a single directive on all four grounds, as it had originally intended. And this was confirmed by Commissioner Jacques Barrot in Strasbourg on 16 June.

'All discrimination is serious, and deserves to be fought with the same determination,' Mr Barrot told MEPs, adding that the EU executive had asked Commissioner Spidla to *'draw up a proposal for a cross-cutting directive.'*

The new bill, set to be unveiled on 2 July, will *'aim at combating all the forms of discrimination referred to in Article 13 of the Treaty'*, i.e. on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation'.

There is still a long way to go. A new directive on equality requires unanimous approval by all member states so the political battle is still to be won. The German government had indicated that it was wholly opposed to any new equality directive; recent elections in Italy may affect its position. The views of the UK government are not known. So in the next few months it will be essential for those who consider that the new directive would be beneficial to make sure that their views are known not only to the European Commission and UK MEPs but also to UK politicians and the Minister for Europe, Jim Murphy.

Equality Bill

On 14 May 2008, the Government published its draft legislative programme for 2008-2009, including plans for a new Equality bill.

'Preparing Britain for the future', by the Office of the Leader of the House of Commons, states: *'[a]n Equality bill would meet the Government's commitment to bring together and simplify existing legislation on all forms of discrimination. But it would go much further than that, shifting from an approach reliant on individuals seeking remedies when they are discriminated against. There is still much work to be done to reduce inequalities and the bill would provide a number of ways to make progress, for example making public bodies more transparent'* (p17).

Pages 43-44 of the publication outline the main elements of the bill, which are:

- Making Britain fairer through a single equality duty which will require public bodies to consider the diverse needs and requirements of their workforce, and the communities they serve, when developing employment policies and planning services;
- Making public bodies more transparent.

DLA meeting with Lord Hunt, Minister for Legal Aid and Crispin Passmore, Head of the Community Legal Service

Issues for practitioners

On 22 April 2008, the Chair of the Discrimination Law Association (DLA) Catherine Casserley, together with practitioners who work under Legal Services Commission contracts (from both the not-for profit sector and private practice), met with the Minister to discuss the DLA's concerns about the future of publicly funded discrimination cases.

The DLA explained that the fixed fee in employment cases (equivalent to just under 4.5 hours work) was manifestly inadequate for anything other than brief advice on discrimination law.

The Minister and the Head of the CLS were both adamant that they did not want practitioners to stop doing discrimination work; this was not what they intended from the funding changes.

The Head of the CLS emphasised that the 4.5 hour fixed fee was calculated on an average of the shorter employment law cases only; the longer cases (i.e. most discrimination cases) had not been included when reaching this 4.5 hour figure.

The DLA explained that practitioners wishing to do exceptional cases (i.e. most discrimination cases) were reporting pressure from their organisations to minimise or avoid exceptional cases – organisations were concerned at 'betting the farm' on a small number of exceptional cases rather than undertaking a large number of very small cases with a fixed fee.

The Minister expressed concern at this and said that he would look at taking steps to reassure organisations that exceptional cases should be done under the contract.

However, there was no explanation of how an organisation might avoid the cash flow problems caused by exceptional cases. This is particularly acute in smaller and not-for profit organisations.

The most useful point for practitioners which emerged from the meeting was the assurance that practitioners are *expected* to do exceptional cases in discrimination. It remains to be seen if this is being passed on to contract managers.

It is to be hoped that the Minister will ensure that his intention that discrimination law cases continue to be carried out under the contract is turned into a reality and does not remain a pious hope. This will depend on the interpretation of the contract on the ground.

For the future, the DLA is planning a Practitioners' Group Meeting on members' experiences with the LSC contract. It will be of great help if members could inform the DLA of their organisations' practice and procedure in respect of discrimination and exceptional cases, their experiences of billing exceptional cases and the reaction of contract managers.

If members' experiences show that using 'exceptional cases' is not enabling them to take on discrimination cases, we will need to continue to raise these issues with the Minister and the LSC and ask them to consider an alternative solution. The Minister invited the DLA to meet again if necessary and we will be taking up this invitation once we have gathered further views from members.

If inequality remains hidden, it can't be measured and progress cannot be made;

- Improving enforcement;
- Allowing political parties to use all-women election shortlists until 2030;
- Making the law more accessible and easier to understand, by bringing together nine major pieces of legislation and around 100 other laws in a single Bill.

The main benefits of the Bill and related secondary legislation are stated to be:

> *To promote fairness and equality of opportunity; tackle disadvantage and discrimination; and to modernise and strengthen the law to make it fit for the challenges that our society faces today and in the future.*

At Prime Minister's Questions on 4 June the Prime Minister avoided saying whether the bill would improve legislation on age discrimination. Publication of a consultation paper is expected at the end of June and it is anticipated that the bill will be included in the Queen's Speech in autumn 2008.

BUYING SOCIAL JUSTICE

Equality, Government Procurement & Legal Change, Christopher McCrudden
Oxford University Press, 2007 680 pages, Paperback £39.95 Hardcover £100.00

The use by governments of their purchasing power to produce social justice outcomes has been controversial for more than a century and continues to be so. In this excellent and timely book, Professor McCrudden explores the various economic, political and legal arguments that have influenced decisions on what he calls *'linkage'*, i.e. the use of public purchasing power to advance concepts of social justice, particularly equality and non-discrimination.

The book is carefully organised and well structured, making its rich contents accessible even to readers contemplating *'buying social justice'* for the first time. The first of 5 chapters leads one irresistibly into the rest of the book. Each subsequent chapter begins with a summary of what it contains; the concluding part begins with a reminder of *'Where have we got to'*, reviewing the contents of the earlier parts and providing the foundation for McCrudden's conclusions.

In Part I, Preliminaries, McCrudden introduces his readers to how, from the late 19th century, procurement was used to achieve socio-economic and political goals, including protecting national industries, creating work for the unemployed, giving preference to suppliers employing disabled workers and securing fair wages.

McCrudden discusses four different functional models of equal status law and policy, all of which he later demonstrates can be facilitated through linkage:

a) Individual justice model
b) Group justice model
c) Mainstreaming, and
d) Extra-territoriality (for example, using a trade boycott to improve equality rights in another country)

He explores the ways in which procurement has been regulated to prevent discrimination between suppliers under the General Agreement on Tariffs and Trade (GATT) and in Europe and how approaches have changed during the 70's, 80's and 90's. McCrudden ends his preliminaries on a theoretical note setting out the arguments for and against procurement linkages.

In Part II, he describes in fascinating detail the development of contract compliance and set-asides to favour particular disadvantaged groups in the US, Canada, Malaysia and South Africa, illustrating the political and economic conflicts that shaped the legal debates.

In Part III the focus shifts to the EC and the different responses of European institutions, including the ECJ, to procurement linkage over some four decades.

He provides more detailed descriptions of the developments in GB and NI, including the Thatcher government's strict regulation of compulsory competitive tendering, and New Labour's move to *'best value'* and partnerships with the private sector on the back of concerns about the environment and the growth of corporate social responsibility. He provides a thorough review of public procurement in Northern Ireland recommending ways in which it should be used to achieve social, economic and environmental goals.

Part IV includes an interpretation of the government procurement agreement under GATT and an analysis of EC procurement law and equality linkages. Referring to the growing recognition of the central role of social and equality rights in building the EC's economic strength, McCrudden argues that the only correct legal interpretation of the procurement directives, consistent with the approach of the ECJ, is to view EC law *'as one harmonious whole, giving appropriate weight to all of EC law, without assuming any particular priority or hierarchy'*. He suggests that the perceived conflict between using procurement linkages to advance equality and the obligation to promote competitive procurement markets can be resolved by recognising that both derive from the principle of equal treatment and by applying the principle of proportionality.

McCrudden looks at the procurement process as a whole and distinguishes how, and at which stages, equal status linkages may be affected by the current procurement directives. He distinguishes the roles of government as customer and regulator:

- *as a customer:* buying social justice/making status equality part of the subject of the contract, included in the technical specification, used to identify suitable tenderers and included in award criteria.
- *as a regulator:* equality obligations as conditions of contract, rejecting contractors with proven history of unlawful discrimination, requiring compliance with domestic employment law, requiring set-asides.

He highlights the lack of empirical research which could measure the effectiveness of the linkages described in this

book and stresses the need for such research to test the validity of the arguments for and against linkage.

In his final chapter, McCrudden reminds readers that his purpose was to use procurement linkages as a bridge between the normally separate worlds of equality and procurement. He concludes with a challenge to equality specialists to overcome their reluctance to engage with procurement professionals and to use procurement as a tool in the fight for equality. After reading this well-researched and well-written book, few equality specialists – or government policy makers – would choose to remain aloof from procurement as a means of advancing equality and non-discrimination.

Barbara Cohen
Discrimination Law Consultant

Promoting Equality and Diversity: a Practitioner's Guide, Henrietta Hill and Richard Kenyon, OUP, 2007

490 pages, £39.95

This book, as its title suggests, aims to provide a guide to promoting equality and diversity in the workplace. It sets out to arm those working in the field with the essential information to enable them to introduce good equality and diversity practices into the workplace. It is practical in its approach and takes account of all recent legislative developments and the law up to 1 October 2007. The two authors are both past contributors to the DLA Briefings and Henrietta Hill is a former member of the Executive Committee.

The chapters cover the following topics: the legal framework; the public duty to promote equality; audits, monitoring and impact assessments; procurement and outsourcing; positive action and occupational requirements; recruitment and promotion; family-friendly and flexible working; attendance management; religious practice, dress codes and freedom of expression in the workplace; harassment; handling requests for information and grievances; ending employment; managing litigation and the EHRC and the new single Equality Act. Each chapter concludes with a brief summary and there are a number of useful sample documents and case studies to help the busy practitioner.

Chapter 2 describes the context and sets out the legal framework covering the main equality acts and regulations as well as relevant parts of the Human Rights Act 1998 and the ECHR. The chapter on the public duties deals with the three existing duties on race, gender, and disability and looks ahead to the possibility of a single duty covering all of the prohibited grounds. In doing so it makes suggestions about how a single equality duty might be framed. The chapters on procurement, recruitment and religious practice are rich with practical examples and suggestions of good practice which will help build a workplace where employees are respected and treated well. The difficult areas of attendance management, harassment and ending employment are also examined and constructive suggestions made for good practice.

The book's approach is informed by the authors' years in practice as barrister and solicitor respectively and is full of practical examples and advice. Most chapters contain appendices with relevant practical material such as checklists, sample monitoring forms, codes and questionnaires which will be useful both to legal practitioners and to human resource professionals. Overall, this book provides a useful basic text bringing together much information on how to move from simply defending discrimination cases as they arise, to actively managing the workplace so that anticipatory action is taken to ensure that the workplace welcomes and embraces equality and good diversity practice.

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Abbreviations

ACAS	Advisory Conciliation and Arbitration Service	DRC	Disability Rights Commission	EHRC	Equalities and Human Rights Commission	HRA	Human Rights Act 1998
AML	Additional Maternity Leave	EA	Employment Act 2002	EOC	Equal Opportunities Commission	IVF	In vitro fertilization
CA	Court of Appeal	EAT	Employment Appeal Tribunal	EqPA	Equal Pay Act 1970	LSC	Legal Services Commission
CLS	Community Legal Service	EC	European Commission	ERA	Employment Rights Act 1996	MEP	Member of the European Parliament
CRE	Commission for Racial Equality	ECA	European Communities Act 1972	ET	Employment Tribunal	OML	Ordinary Maternity Leave
DDA	Disability Discrimination Act 1995	ECHR	European Convention on Human Rights	EU	European Union	PCP	Provision, Criterion or Practice
DJ	District Judge	ECtHR	European Court of Human Rights	GATT	General Agreement on Tariffs and Trade	RRA	Race Relations Act 1976
DLA	Discrimination Law Association	ECJ	European Court of Justice	HC	High Court	SDA	Sex Discrimination Act 1975
DLR	Discrimination Law Review	EDF	Equality and Diversity Forum	HL	House of Lords	SOR	Employment Equality (Sexual Orientation) Regulations 2003