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Editorial *Inspiring change*

The euphoria of hope and expectation surrounding the choice of Barack Obama as president elect of the USA resonates in all of us with the overwhelming desire for change leading to the full realisation of social justice, equality and the end to discrimination in our society. The sight of people queuing patiently for hours in order to vote inspires in us a fresh hope that disaffected and marginalised people can engage in our political systems and make a difference. Where President-elect Obama will take America and the world – and how he will live up to the huge expectations placed upon him – is unknown but the enormity of his achievement in being elected and his power to inspire others cannot be overestimated. Measures to encourage the participation of more women and ethnic minorities in political life in the UK to mirror this achievement here, are strongly supported by the DLA which has urged that appropriate positive measures to accelerate real equality be incorporated in the Equality Bill. We therefore welcome the news that the Rt Hon. Harriet Harman is convening a Speaker's Conference to consider and make recommendations on how to improve representation of women, disabled and ethnic minority people in the House of Commons.

Positive and encouraging developments in relation to the willingness of the courts to 'develop and rigorously' enforce existing equality duties are covered in this edition of *Briefings*. It can be seen in John Halford's overview and in the case reports on *Kaur* and *Shah* and *Sarika Angel Watkins-Singh* that these the duties are having real and significant impact on public authority decision making. Public authorities need to demonstrate in a transparent way that they have complied with their duty to have due regard to equality before reaching decisions where equality outcomes are important. This is not an exercise in ticking boxes but a critical component of lawful decision-making.

Also encouraging is the guidance given in these cases on the importance of positive action to address the limits and barriers that stop people achieving their potential. As expressed by Moses, LJ *'equality for those who are the victims of indirect discrimination may require their special needs to be met… There is no dichotomy between the promotion of equality and cohesion and the provision of specialist services to an ethnic minority. Barriers cannot be broken down unless the victims themselves recognise that the source of help is coming from the same community and background as they do.'*

The damning report of the Inquiry in the NHS in relation to institutionalised discrimination in the treatment of people with learning disabilities reminds us how much still needs to be done, especially for the most vulnerable. That people with learning disabilities receive less effective treatment from the NHS is an outrage; rigorous application of the positive duties under the DDA might be one avenue to address this. It is critical that the Equality Bill does not, in extending the equality duties to gender reassignment, age, sexual orientation and religion or belief, weaken the existing duties. Instead, opportunities to strengthen the duty by, for example, providing statutory guidance on what constitutes a proper equality assessment, guidance on the remedies which flow from a failure to properly implement an equality assessment, or by extending it to decisions regarding public sector employment capable of being tested in the tribunal, should all be explored.

The development of the debate on the UK Equality Bill is paralleled by the debate at European level on the new directive providing protection from discrimination in the non-employment sphere. Readers are encouraged to contribute to this debate and lobby their politicians to ensure that it operates to widen protection against discrimination in the wider social sphere and, along with our new domestic single equality legislation, permit the emergence of new leaders to inspire and challenge us.

Geraldine Scullion
Editor

PLEASE SEE BACK COVER FOR LIST OF ABBREVIATIONS

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Paying attention to inequality: the significance of the positive equality duties in public and private law

Over the last seven years Parliament has imposed a series of positive equality duties on public authorities. All aim to put anti-discrimination and equality of opportunity in the forefront of policy makers' minds and plans are afoot to consolidate the existing duties and extend their scope to belief and sexuality in the Equality Bill. However, these duties have only been actively enforced since 2005 and the Courts have yet to lay down comprehensive guidance on compliance. In this article, **John Halford**, the solicitor who acted in the first race and disability claims based on the duties, reviews the current state of the law.

Introduction

Criticisms may be levelled at the present government, but it cannot be said that it has been unwilling to think creatively the reach and breadth of equality law. Besides extending individual rights in employment, services and education, it has also sought to 'constitutionalize' anti-discriminatory practice.[1] For example, subject to exemptions (some of which are very significant) 'public functions' must now be discharged to avoid not only human rights breaches but also the forms of individual discrimination prohibited by the Race Relations Act 1976 (RRA), Disability Discrimination Act 1995 (DDA) and Sex Discrimination Act 1975 (SDA). The Equality Bill holds out the tantalising prospect of major procedural advances such as representative actions and workplace-wide recommendations.

To date though, perhaps the most unexpected development in this trend has been the willingness of the Courts to develop and rigorously enforce the three 'positive equality' duties brought into force between April 2001 and 2007. Both discrimination and administrative lawyers were initially sceptical about the duties' potential to make a difference for their clients, but the Courts have taken a principled and purposive approach in many of the cases decided so far. Notably all of them have been brought by individuals or non-governmental organisations rather than the Equality and Human Rights Commission or its predecessors. These developments are discussed below. First, it is helpful to give a sense of what the duties require, their origins and which public authority activities are caught.

Form and origin of the duties

The duties concern race, disability and gender equality. Each takes a broadly similar form: an overarching requirement to have 'due regard' to a series of identified needs (referred to below as statutory imperatives) coupled with a regulation making power to secure its better performance.

The earliest to come into force, s71(1) of RRA as amended provides:

> *Every body or other person specified* [in the Schedules to the Amendment Act], *shall in carrying out its functions, have due regard to the need –*
> *a) to eliminate unlawful racial discrimination; and*
> *b) to promote equality of opportunity and good relations between persons of different racial groups.*

S49A(1) of the DDA says this about disability equality:

> *Every public authority shall in carrying out its functions have due regard to –*
> *a) the need to eliminate discrimination that is unlawful under this Act;*
> *b) the need to eliminate harassment of disabled persons that is related to their disabilities;*
> *c) the need to promote equality of opportunity between disabled persons and other persons;*
> *d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;*
> *e) the need to promote positive attitudes towards disabled persons; and*
> *f) the need to encourage participation by disabled persons in public life.'*

The most recent of the duties, s76A(1)of the SDA provides:

> *A public authority shall in carrying out its functions have due regard to the need –*
> *a) to eliminate unlawful discrimination and harassment, and*
> *b)to promote equality of opportunity between men and women.*

Duties of this kind do not require policy or decision makers to bring about a particular substantive outcome.

1. See *'Equality: The Neglected Virtue'* Rabinder Singh QC [2004] EHRLR 141.

They are also primarily concerned with processes, rather than the legality of particular acts of discrimination which impact on individual 'victims'. Nothing explicit is said about remedies or enforcement (though decisions made by reference to them or failures to discharge them can be challenged in judicial review proceedings). Importantly all concern more than the simple avoidance of discrimination which would be unlawful under the RRA, DDA or SDA. As Munby J recently observed in *R (E) v Jews Free School* [2008] EWHC 1535/1536 (Admin) at [213]:

> *Proper compliance with section 71 requires that appropriate consideration has been given to the need to achieve statutory goals whose achievement will almost inevitably, given the use of the words 'eliminate' and 'promote', involve the taking of active steps.*

Parliament's aim in extending anti-discrimination law in this way is the elimination of institutional discrimination. S71 was the legislative response to a recommendation of Sir William Macpherson's Inquiry into the ineffectual police investigation of the racist murder of Stephen Lawrence. In paragraph 46.27 of the report, the Inquiry stated:

> *We all agree that institutional racism affects the Metropolitan Police Service, and Police Services elsewhere. Furthermore our conclusions as to Police Services should not lead to complacency in other institutions and organisations. Collective failure is apparent in many of them, including the Criminal Justice system. It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.*

Explaining the government's thinking in imposing a statutory duty to counter such complacency, the sponsoring Minister, Mike O'Brien said:

> *The Government sees this new duty as a way of trying to eliminate discrimination in public services, not only in the internal organisational structure of public authorities but in the delivery of services to ethnic minorities… In considering any new element of Government policy, a Minister must consider the implications for ethnic minorities and race equality generally... The public services must recognise that it is no good simply paying lip-service to race equality: they must ensure that race equality is at the heart of their organisation's considerations when providing services – it should be part of the mainstream of policy consideration.*[2]

The clearest and most principled statement of the legislative intent comes from the first case in which s71 was litigated, *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, [2006] IRLR 934. This was the second challenge to the eligibility criteria of *ex gratia* government compensation arrangements intended to discharge the 'debt of honour' owed to British civilians imprisoned in the Far East by Japanese forces during World War II. That debt was said to be owed because of the horrendous suffering endured at the hands of the Japanese by both military prisoners of war and civilian internees. Yet eligibility was limited to British civilians who had either a grandparent or parent who were born in the UK, or were born here themselves. Tellingly, this restriction was called the 'bloodlink'. Deliberately excluded from the compensation arrangements were those British subjects who were imprisoned by the Japanese on account of their British nationality, but who lacked a connection by birth or ancestry to this country. Between 1700 and 2500 people were refused on this basis in June 2001, just a few months after s71 had come into force. One was Diana Elias, an 81 year old pensioner. She realised long before seeking legal advice that the bloodlink criterion was, in the words of a letter she wrote to the Prime Minister 'prejudicial and biased'. In her eyes it artificially created 'two classes of British subjects' yet the Japanese had drawn no such distinction.

The CA held that the criteria were indirectly discriminatory on grounds of national origins and that this could not be justified. They also commented extensively on the undisturbed first instance ruling that there had been a breach of s71. This was highly significant to issues of justification, as discussed below. But the opportunity was also taken to highlight the significance of the duty for both policy makers and the Courts. As Arden LJ explained]:

> *Anti-discrimination legislation has implications for the administration of justice.., judges have a role to play in the process of transforming society from one in which inappropriate distinctions have in some cases been drawn between individuals based purely on their race, gender or other grounds to a society in which, through the integration of laws prohibiting discrimination in specified ways, each individual is valued and treated equally…*
>
> *But legal proceedings are not the only way of policing anti-discrimination legislation. Monitoring and self-assessment by public bodies in their decision making can also further the aims of such legislation, and this is the role of section 71 of the 1976 Act…*

2. See Speech of Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department, HC Standing Committee D, 2 May 2000.

It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them…

How can s71 and its sister duties in the DDA and SDA achieve these aims? Firstly, through the specific 'better performance' duties imposed; secondly, by requiring 'due regard' to be had to the statutory imperatives conscientiously, at critical times and in a transparent way; and lastly by being a duty that can be enforced with real and meaningful consequences as against the public authorities to which they apply. Before discussing each of these practical issues in detail, it is worth identifying the kind of decisions to which the duties apply.

Scope of the duties

Public authorities and functions

A subtly different approach is taken depending on which equality duty is engaged.

For s71, there are set lists scheduled to the RRA and implementing regulations identifying which public bodies are caught by the overarching duty and subsets of them to which the 'better performance' regulations apply. Almost all obvious public bodies are caught: government departments, local authorities, the police and health services. There are some interesting and significant others: schools are subject to the overarching duty and some of the better performance duties, including, for example, a specific obligation to produce an equal opportunities policy. The overarching duty applies to all the functions of the Arts Council, the Tate Gallery and the British Museum. A number of the Royal Colleges of medicine are subject to it, though only in respect of their public functions.

Sections 49A of the DDA and 76A(1) of the SDA take a wholly different approach echoing that of the Human Rights Act 1998. They provide that the overarching duties apply to *'any person certain of whose functions are functions of a public nature'* but not where such bodies are specifically excluded by regulation. Controversially, regulations were made to absolve the Post Office of its s49A duties shortly before implementation of a closure programme.

S49A also provides *'In relation to a particular act, a person is not a public authority by virtue only of subsection (1)(a) if the nature of the act is private.'* Thus for DDA purposes, there will be 'pure' public authorities to whose actions the overarching equality duty will always apply and 'hybrid' ones which will be immune when acting in an insufficiently 'public' way. S76A(1) SDA carries a further similar caveat: the 'functions' to which it applies must be 'functions of a public nature'.

All of this begs the first of a series of important questions the Courts have yet to grapple with: do public functions for s49A and s76A(1) purposes embrace employment decisions and if so, which ones? The instinctive administrative lawyer's response is to say that employment decisions, for example, to dismiss or amend contractual terms, are made outside the reach of public law altogether. Similarly, a hybrid authority cannot be challenged under the Human Right Act 1998 for the way it makes employment decisions.

This distinction may not be so clear cut when it comes to the positive equality duties. For one thing, if s76A(1) was not intended to apply to employment practices or policies, there would be no obligation to have due regard to the need to avoid some of the most prevalent forms of unlawful discrimination against women. It might also be said that, while individual employment decisions remain sufficiently private in nature to fall outside its reach, the same cannot be said when it comes to policy making, especially in organisations such as the NHS.

No 'contracting out'

The Courts have made it clear that, when an institution is seized of one of the duties, it and it alone will be responsible for having due regard. *R (Eisai) v National Institute for Clinical Excellence & Others* [2007] EWHC (Admin) 1941 concerned the terms of NHS guidance on identifying the class of patients who would most benefit from (and so normally receive) Alzheimer's disease inhibitor drugs. In the guidance as framed, these would be identified exclusively by means of a Mini Mental State Examination (MMSE), a language and cognition test which the defendant, NICE, accepted had discriminatory effects on persons of non-UK national origins and those with certain disabilities. The argument that doctors could use their 'common sense' to mitigate the effects of the guidance being applied strictly was held to be misconceived by Dobbs J.

Staged decision making

Turning to the structural question, the Courts have also indicated that discharging the duty falls to the decision maker primarily responsible for the function on which it bites. A local authority committee, for example, cannot simply be told that an officer has carried out an impact assessment as happened in *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin). Wilkie J commented:

There is no evidence that this legal duty and its

implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes. It was not enough to refer obliquely in the attached summary to 'potential conflict with the DDA' – this would not give a busy councillor any idea of the serious duties imposed upon the Council by the Act…

In some situations those who frame policies will be different from the decision makers who implement them. A positive equality duty may well apply to both. For example, in *R (Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWCA 1865 (Admin) Silber J criticised not only the failure of the school to frame its equal opportunities policy by reference to s71, but also the failure of its head and appeal panel to have regard to the section when considering a Sikh girl's application for an exemption from the uniform policy so that she could wear her Kara. (See Briefing 504) In *R (Baker and others) v Secretary of State for Local Government and others* [2008] EWCA Civ 141 the duty was held to apply to an inspector's decision on an individual planning application and in *O'Brien and others v South Cambridgeshire District Council* [2008] EWCA Civ 1159 when a planning authority is considering whether to seek an injunction to restrain a breach of planning control.

The specific better performance duties

The first way in which a relevant due regard duty must be discharged is when particular steps are prescribed for its better performance under the associated regulations. Not all public bodies are subject to these additional duties and there is some variation as to what is required. For example, Article 2 of the Race Relations Act 1976 (Statutory Duties) Order 2001 (SI 2001/3458) requires certain public authorities to periodically publish, assess and monitor a Race Equality Scheme which identifies those of its functions an authority considers caught by the overarching duty. An equality scheme is not determinative of those functions; the compensation arrangements at issue in *Elias* had never been thought to have race equality implications so the Ministry of Defence's Scheme was silent about them. Similarly in *Eisai* it emerged that the original equality scheme operated by NICE had conspicuously failed to identify the equality implications of its primary function. Notwithstanding this, any equality scheme will always be worth looking at when contemplating litigation to enforce an overarching positive equality duty.

The absence of a scheme, or of a lawful one, can now only be challenged by the EHRC. However, when a scheme is in place, and the decision making process it proscribes is not followed (including any impact assessment) the failure to do so without good reason will be a free standing legal error: see *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC (Admin) 2026 at [27]. (See Briefing 505) This is particularly significant in the disability context because, where disability equality schemes are required, disabled people must be involved in their development: see regulation 2 of the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (SI 2005/2966). Again, the implications of this requirement have yet to be clarified.

What is meant by 'due regard'?

Although the legacy equality commissions each produced helpful Codes and guidance, the responsibility of developing the concept of 'due regard' has been left to the Courts. Five principles have emerged from *Elias* and the subsequent cases.

How much regard is called for will vary depending on the context

There will be some (though probably not many) decisions made by public authorities which do not have equality implications. In these circumstances the amount of regard needed will inevitably be negligible. To hold that any decision impacting upon one of the groups with which the duties are concerned can only be made after a proper assessment would, in the view of the CA, 'promote form over substance': see *Baker*. That said, the threshold for one or more of the duties to be triggered is a low one. In *Elias* at first instance it was said to have been crossed because there was 'an issue to be addressed'.

Once the threshold is crossed, the amount of regard called for (that is, 'due') will be that 'appropriate in all the circumstances' including the extent of the inequality experienced by the protected group.

Timing

Due regard must be exercised proactively whenever a function is caught by one of the duties, whether that be policy making or making decisions based on a policy. In *Elias* at first instance, in response to an submission that s71 could be discharged by ventilating concerns about discrimination in the course of litigation Mr Justice Elias responded:

[T]he purpose of this section is to ensure that the body subject to the duty pays due regard at the time the policy

is being considered – that is, when the relevant function is being exercised – and not when it has become the subject of challenge. Moreover… there will be in many cases a tendency... to make the assessment whether discrimination might arise with an eye on the outcome of the litigation. That will not produce the same unbiased analysis as might occur if consideration is given to the section 71 factors at the proper time.

Arden LJ reiterated this conclusion on appeal:

It is the clear purpose of section 71 to require public bodies … to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them…

Compliance should therefore never be treated as a 'rearguard action following a concluded decision' but exists as an 'essential preliminary' to any such decision, inattention to which 'is both unlawful and bad government': see *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 per Sedley LJ. This point was echoed by Moses LJ in *Kaur*. The significance of late compliance in terms of remedies is discussed below.

Structured due regard

Due regard involves more than a tick box exercise. As the CA stressed in *Baker*, mere recitation of a mantra will not by itself show a positive equality duty has been discharged, but the 'substance and reasoning' of the decision must be examined. On the other hand, failure to make explicit reference to the relevant positive equality duty will not, of itself, be fatal to a decision.

In circumstances where there is a significant equality issue, that reasoning will need to be clear and structured. In *Eisai* the Alzheimer's Society argued that due regard for s71 and s49A would normally involve completion of a formal 'equality impact assessment' (analogous to the obligation to complete an Environmental Impact Assessment before certain planning decisions are made). Dobbs J's attention was drawn to the Statutory Codes and guidance about this issued by the CRE and DRC. She did not make a specific finding on this submission, but set out the minimum standards for due regard in the context of NICE's decision making:

There was a series of simple questions the Panel could have asked … such as: i) has the Appraisal Committee taken into account any anti-discrimination legislation in coming to its decision? ii) in the light of NICE's anti-discrimination duties, given that it is accepted that the use of the MMSE test as the benchmark for [Alzheimer's disease] severity discriminates against certain groups, and given the purpose of the Guidance, were/are the Appraisal Committee/Appeal Panel satisfied that the Guidance properly and clearly ensures, without the need for interpretation, that those atypical groups are put in the same position as those scoring 10-20 on the MMSE test for whom treatment was recommended? Rather than relying on what clinicians could do to eliminate the risk, and having regard to the need to eliminate discrimination, what could NICE itself do to reduce or eliminate any risk of disadvantage?

Tackling questions of justification

Sometimes the exercise of posing and addressing such questions or undertaking a formal assessment will show that there is a discriminatory effect which would amount to unlawful discrimination for DDA purposes, were there no justification (or indirect and thus potentially unlawful discrimination under the RRA or SDA). Faced with this very situation in *Eisai*, Dodds J commented at [93]:

With regard to the question of justification, the Appeal Panel needed to give close scrutiny to the reasons given for lack of specific provision in relation to the atypical groups and properly test whether they were proportionate and pursued a legitimate aim. Whilst purporting to deal with proportionality in its decision, the Panel never in fact tested the main reason put forward for not including those with language difficulties and those with English as a second language as exceptions. This was an important omission, particularly in the light of the acceptance by NICE of the potentially discriminatory impact of the approach, and in the light of the concerns expressed by a number of parties.

To summarise Dobbs J's analysis, due regard involves all of the following:

a. (at a general level) ensuring account is taken of equality legislation when a decision is made
b. where there is a risk of discrimination, asking and addressing the question of what could be done to eliminate that risk
c. where there are actual discriminatory effects, ensuring that thought has been given to the steps necessary to put those who would be adversely affected in the same position as those who would not (in other words, eliminate the discrimination)
d. where identified discriminatory effects are indirect, and the public body nevertheless considers they may be justified and incapable of being eliminated entirely, it must properly test whether they pursue a legitimate aim and are proportionate.

This was echoed by Moses LJ in *Kaur* who also considered there to be an unlawful breach of the

Statutory Code issued by the CRE (to which the courts must give regard) because the failure to follow it was unexplained.

Transparency and documentation

These issues were considered in *R (BAPIO Action Ltd & Yousaf) v Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC 199 (QB). The Home Office asserted that it had turned its mind to s71 before drafting changes to immigration policy on foreign doctors but accepted that there was no formal record. Stanley Burnton J directed that any note or memorandum that existed to evidence this 'informal assessment' having taken place should be put in evidence. Nothing was produced, provoking this comment:

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

He went on to declare that section 71 had been breached in these circumstances. Similarly, Moses LJ commented in *Kaur*:

> *The process of assessments should be recorded … Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage. They further tend to have the beneficial effect of disciplining the policy maker to undertake the conscientious assessment of the future impact of his proposed policy, which section 71 requires. But a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes. The impact assessment must be undertaken as a matter of substance and with rigor.*

Enforcing the duties

Remedies in judicial review are always a matter of discretion and, up until very recently, there was some concern that, although the Courts were willing to declare that positive equality duties had been breached, the consequences were insufficient to encourage future compliance. In *Elias* this made little difference to the outcome given the unlawful indirect discrimination finding. In *Eisai*, however, the defendant was encouraged by Dobbs J to resolve the discrimination inherent in the challenged guidelines before the final judgement was handed down. Special interest groups which might well have been consulted as part of a proper assessment process were deprived of an opportunity to comment. How did this approach to remedies sit with the obligation to have due regard at the time decisions were made? Public bodies might well take comfort in the fact that, however serious their failure to have due regard at the right time, it could always be remedied during the course of proceedings, as in *BAPIO*, or once they were concluded.

The Courts now appear willing to take a harder line on remedies than before. The normal course will be to quash a decision (including one to make a policy) or action which fails to have due regard when this is required unless having it would (as was the case in *Jews Free School*) almost certainly make no real difference). Quashing orders were made in *Watkins-Singh* and *Kaur* (effectively reversing the funding cut under challenge). In *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882 the CA explained their significance in this context. *C* concerned the legality of changes to the rules concerning forceful restraint of children in secure training centres. These had not been preceded by a race equality impact assessment because it was considered that they were not significant enough in policy terms to warrant one. The Divisional Court ruled that this was unlawful but went on to find that the defect was cured by a late review of the changes of the kind that occurred in *BAPIO*.

Buxton LJ held that this was not good enough:

> *[A]s a matter of principle it cannot be right that a survey that should have been produced to inform the mind of government before it took the decision to introduce the Amendment Rules was only produced in order to attempt to validate the decision that had already been taken.*

He held that the failure to produce an assessment at the proper time *'is a defect .. that is of very great substantial, and not merely technical, importance'*. The rule of law itself required that the Rules be quashed.

The future

What does the future hold for the positive equality duties?

Legislative changes

The most immediate answers will be found in the Equality Bill. The government currently proposes a single 'streamlined' equality duty to replace the current free standing ones. Its scope will be extended to cover gender reassignment, age, sexual orientation and religion or belief. This, it is said, will help public authorities to *'focus their efforts on outcomes, rather than*

3. See *Framework for a Fairer Future* – The Equality Bill Cmmd 7331

on producing plans and documents'.[3] Earlier proposals limiting the right to challenge failure to discharge the positive equality duties to the EHRC have been abandoned.

Further litigation

So far only twelve equality duty cases have been decided by the Courts. How might the law be developed further?

Besides the issue about whether the duties under the DDA and SDA extend to employment decisions of public authorities (see above), the Courts have yet to decide precisely what amounts to an adequate impact assessment particularly in the DDA context. The ongoing case of *R (Lunt and another) v Liverpool MBC* may provide some answers, however. This involves a challenge to a taxi licensing policy which allows only 'London-style' black cabs to operate as hackney carriages in Liverpool, despite the fact that larger wheelchairs cannot be turned and secured within them. An impact assessment of sorts was undertaken but it failed to consider how the apparently discriminatory effects of the policy could be mitigated, or balance them against the other aims the authority was seeking to achieve. The case will be heard early in 2009.

The precise nature of the relationship between failure to discharge an equality duty and prima facie discriminatory decisions which call for justification also needs to be further explored. In principle, the failure to discharge a positive equality duty at the proper time will make subsequent acts of individual discrimination which might otherwise be justifiable far harder to defend as in *Elias*.

This is also a live issue in *Jews Free School*, currently pending in the CA. To the writer's knowledge, no private law claims against public bodies, whether in the employment or service provision contexts, have so far relied on a clear and relevant failure to discharge a positive equality duty. This might be explained by the fact that an ET or County Court lacks the jurisdiction to hold that there has been such a failure. Sometimes though, the lack of an impact assessment will be readily accepted either in pre-action correspondence or the response to a questionnaire. This might well have a bearing on the justification offered for a sickness related dismissal or a redundancy when the public authority employer's decision was made by reference to a policy which had never undergone an equality impact assessment.

Lastly, it should be kept in mind that the substantive individual anti-discrimination rights which the RRA, SDA and DDA create can potentially be enforced in the Administrative Court in litigation which also raises questions of positive equality duty compliance: *Elias, Eisai, Watkins-Singh* and *Jews Free School* are all good examples. The Court cannot deal with damages, but parallel proceedings can be issued in the County Court or ET and stayed, if necessary. The cases discussed above suggest that the Administrative Court and CA are more engaged with issues of policy and context than the County Court might be.

As Arden LJ stressed in *Elias*, these duties are intended to remind the state that its policies and decisions can help shape a future society in which human potential is not frustrated and all are treated and valued equally. The Courts have an important role in ensuring they are honoured. But it is also important that lawyers are ready to use the full range of tools parliament and the Courts have supplied. Certainly there is certainly no shortage of courageous individuals like the Lawrence family, Mrs Elias or the claimants in *Kaur* (service users of Southall Black Sisters which faced a fatal funding cut) who are capable of identifying institutional discrimination and its impact on their lives.

John Halford
Bindmans LLP
j.halford@bindmans.com

London Borough of Lewisham v Malcolm [2008] UKHL 43

The long-awaited decision by the House of Lords in the Malcolm case was handed down on 25th June 2008. Although a case involving premises, its implications have been felt throughout the provisions of the Disability Discrimination Act. In this article Catherine Casserley, one of the junior counsel for the Disability Rights Commission and the Equality and Human Rights Commission which intervened in the case, looks at the case, the DDA, its potential impact, and the prospects for the future.

Background

The Disability Discrimination Act 1995 (DDA) is different from the other anti-discrimination statutes. Whilst UK (and indeed European) anti-discrimination legislation proceeds on the basis of treating everyone equally (direct discrimination), or treating differently situated people differently in some circumstances to achieve equality (indirect discrimination), the DDA contained no such concepts when first enacted.

Whilst direct discrimination against disabled people is not uncommon, on the whole the second aspect of equality is of greater importance in relation to disability compared to other grounds. This is because the disadvantage of a disabled person often arises from the interaction of their impairment with the environment and the way in which employment, services, etc are organised. For example, a wheelchair user's problem in accessing a service arises because level access is not provided to that service.

Many barriers can be highly individualised because of the wide range of impairments interacting with very specific environments. The extent to which disadvantage arising from disability is often so individualised also marks disability out from the other grounds.

The concept of disability-related less favourable treatment (DRD) was designed to address these very specific, individualised barriers to equality of opportunity. It addresses not only the disability itself, but also what may be the consequences of the disability.

Whilst the duty to make reasonable adjustments also operates to address such barriers – and is an extremely important tool for disabled people – it is based on what is in some situations a more artificial concept; it asks, is there a provision, criterion or practice which puts the disabled person at a substantial disadvantage, rather than directly addressing the reason for their treatment.

In *Clark v Novacold* [1999] ICR 391 *(Novacold)*, the CA recognised the unique approach contained in the provisions of DRD. The broad reach of these provisions was tempered in the employment field by the ability to justify treatment on the basis that the reason for it was both 'material and substantial'. The same justification ground applied in relation to education; whilst goods and services have a list of grounds which are nevertheless relatively broad in their reach. It is only in the case of premises – the very area with which *Malcolm* was concerned – where the justification provisions are so narrow as to make the provisions in many ways unworkable.

The premises provisions were added to the Disability Discrimination Bill as it was passing through parliament. They contained no duty to make adjustments; and the ability to justify DRD was severely curtailed, as a prescriptive list of conditions were set out to be met if a landlord were to succeed in justifying such treatment, s24 (2) and (3). The way in which these operated meant that, if *Novacold* were followed in the premises context, a landlord attempting to evict a disabled person in rent arrears whose arrears had arisen for a disability related reason, could only evict if it was necessary in the interests of health or safety or if the disabled person was incapable of entering into a contract – neither of which are in reality likely to be the case.

It was these justification provisions which proved to be the insurmountable difficulty in *Malcolm*.

Facts in Malcolm

Courtney Malcolm (M) was diagnosed with schizophrenia in 1985. In the space of 5 years following his diagnosis, he had ten admissions to hospital, two of them compulsory under the Mental Health Act. His condition then stabilised on medication. In January 2002 he took on a secure tenancy with Lewisham (L). One of the fundamental features of the tenancy was that he could not sublet it without the consent of the local authority – if he were to do this, he would lose his security of tenure (s.93 of the Housing Act 1985 provides that when a secure tenant sublets the whole of the dwelling, the tenancy ceases to be a secure tenancy and cannot subsequently become one).

M exercised his right to buy the flat in March 2002 but completion was delayed. On 22nd June 2004, he sublet his flat – a letting to which L had not consented. M's tenancy therefore ceased to be a secure tenancy in accordance with s93 of the Housing Act 1985.

In October 2003, M's behaviour changed; evidence to this effect was given by his mother, sister and brothers. In April 2004, those treating M discovered that he had not been taking his oral medication, probably from the latter part of 2003. In May 2004 M lost his job. On 6th July 2004 L discovered that M had sublet his flat; as he had not completed the purchase, L gave him notice to vacate on 9th August 2004. On 2 December 2004, L issued proceedings for possession, relying on the notice to quit. M defended the proceedings on the basis that they were unlawful under the DDA.

At the hearing of the possession proceedings, Her Honour Judge Hallon identified 4 issues which formed the basis of the subsequent appeal.

Firstly, the judge held that the DDA did not provide a defence to a non-discretionary ground for possession. Secondly, she held that M was not a disabled person within the meaning of s.1 of the DDA and thirdly, that in any event his actions were not caused by his illness. The judge also expressed the view that there would be no discrimination by L against M unless L had knowledge of his disability, although she did not reach a final decision on this.

M appealed against the decision. The Disability Rights Commission intervened in the appeal at the CA.

Court of Appeal

The CA upheld the appeal in every respect. The lead judgment was given by Lady Justice Arden with both Longmore LJ and Toulson LJ giving separate judgments. The appeal dealt essentially with the 4 issues identified above.

L obtained permission to appeal. Prior to the appeal being heard by the Lords, another DDA premises case came before the CA. *S v Floyd* [2008] EWCA Civ 201 (see Briefing 487) was a case involving a mandatory ground for possession under Ground 8, Schedule 2 of the Housing Act 1988. Mummery LJ (who gave the leading judgment in *Novacold*) suggested, obiter, that it was difficult to see how the DDA could provide a defence to a claim for possession under a mandatory ground. The CA noted the need for the House of Lords to clarify the law. Mummery LJ questioned whether it had been appropriate for the *Novacold* formulation to be applied to Part 3 of the Act. It was noted that in *Romano* [2005] 1 WLR 2775 there had been little discussion of what exactly were the acts of unlawful discrimination. The CA noted the following:

> *The definition of discrimination does not, we note, refer to the effects that the disability has on a disabled person's ability to do things, such as to 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 'A.' See, for example, Taylor v. OCS Group Ltd [2006] EWCA Civ 702, [2006] IRLR 613.'*

Mummery LJ sought to distinguish *Floyd* from *Malcolm*, on the basis that *Floyd* involved a mandatory ground for possession based on statute.

House of Lords

Malcolm was appealed to the HL; the appeal was heard on 28th and 29th April 2008 and the decision was handed down on 25th June. The Equality and Human Rights Commission intervened at the HL.

In summary, L's appeal was allowed. All the Lords, bar Baroness Hale, agreed that in the context of premises *Novacold* was incorrectly decided; 'that reason' bore the meaning advocated by the unsuccessful employer in *Novacold* and thus the comparator is someone who is not disabled but who is in essence in the same position as the disabled person i.e. in the case of M, the person unlawfully sub-letting.

The Lords also unanimously held that in order for there to be disability related discrimination, the defendant must know of the disability – although the degree of knowledge required and whether, for example, such knowledge could be presumed, was not determined.

The reasoning on each of the issues dealt with is set out below:

Definition of disability

All the Lords, bar Baroness Hale, held that the reasoning of the CA was persuasive and that M had a disability for the purposes of the DDA.

Baroness Hale did not agree on this issue: she was *'not convinced that the judge applied the wrong test or that no judge who applied the right test could have reached the conclusion she did.'*

What was the treatment complained of?

The possession proceedings as a whole were held to have been the treatment complained of.

The reason for the treatment

There were differences of opinion on this issue. Lord

Bingham held that the reason for the treatment is to be judged objectively. The reason for the treatment of M was because L was not prepared to allow tenancies to continue where the tenant was not living in the demised premises. This was the real reason for M's treatment.

Baroness Hale and Lord Neuberger did not agree with this approach; they held that the reason for the treatment was the sub-letting and relinquishing of possession of the flat.

The comparator

The key issue in the case was that of the comparator i.e. whether or not *Novacold* had been correctly decided. All the Lords, bar Baroness Hale, were unanimous in holding that the 'others' to whom the treatment of M is to be compared are persons without a mental disability who have sublet one of L's flats and gone to live elsewhere.

Lord Scott gave a lengthy opinion on this issue. He said that the common sense answer in the present case would be that the comparators are tenants of L who have sub-let but whose sub-letting had no connection with schizophrenia or perhaps with any mental condition causally responsible for the sub-letting. Parliament must have intended the comparison directed by s5(1)(a) (employment), or by s24(1)(a) (premises) or s20(1)(a) (goods and services) where the directed comparison is in identical terms, to be a meaningful comparison in order to distinguish between treatment which was discriminatory and treatment that was not. *Novacold* was wrongly decided.

Referring to the example of the guide dog and the restaurant refusal used in *Novacold*, Lord Scott said that the problem in that example was the dog – the dog was the reason for the refusal of entry. That reason was causally related to the disability but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog.

Lord Brown held that all three provisions of the DDA relating to premises, goods and services, and employment are in materially identical terms. In considering the judgment of Mummery LJ in *Floyd*, he asked what difference is there between on the one hand a 'civil law obligation' to pay rent or otherwise vacate the premises, and on the other hand to do one's job or otherwise vacate the job? If, as Mummery LJ said in *Floyd*, *'the legislation is not about disability per se: it is about…unjustified less favourable treatment for a reason which relates to the disabled person's disability'* then it cannot be right to construe s24(1)(a) (or ss5(1)(a) or 20(1)(a)) in such a way that the requirement to show less favourable treatment will always be satisfied.

Lord Neuberger concluded, 'not without considerable misgivings' that L's argument in favour of the narrower construction is to be preferred 'at least in relation to s24(1)(a)'. Although either reading of the section can be said to accord with the words used, it appears that the narrower construction is the more natural. If 'the reason' the landlord is seeking possession is non-payment of rent due to the tenant's disability, to take as a comparator a non-disabled tenant who is similarly in arrears with his rent appears sensible whereas, at first sight, it seems somewhat odd to use as a comparator a tenant who has not failed to pay rent at all. The wider construction would mean at least on the basis of the present state of the authorities, and as per Toulson LJ *'that the complainant is logically bound to be able to satisfy the requirement of showing that his treatment is less favourable than would be accorded others to whom the reason for his treatment did not apply'* because *'without the reason there would not be the treatment'*. Whilst the narrower construction results in s24 having a very limited reach, the wider construction would, by contrast, produce a remarkably extensive and, from a landowner's point of view, potentially highly invasive result.

Whilst accepting that as a matter of general policy, there are positive benefits in the courts interpreting the law to assist the intended beneficiaries of anti-discrimination legislation, Lord Neuberger went on to say that the legitimate interests of those whose common law rights are affected by the legislation must also be borne in mind. If the wider construction would involve private rights being taken away without compensation, potentially in circumstances which could reasonably be regarded as extraordinary and positively penal, the policy arguments appear to be to point in favour of the narrower construction.

Lord Neuberger went on to say that *'It would on the face of it be very surprising if section 24(1)(a) had a different meaning from the effectively identically worded section 5(1)(a) but it would not be an impossible conclusion'*. The combination of the contrast between s5(3) and s24(3) and the fact that the wider construction of s5(1)(a) has been assumed to be right for some years – perhaps together with other factors, such as subsequent implied parliamentary approval – could conceivably justify the decision in *Novacold* being correct as to the effect of s5(1)(a), despite the conclusion Lord Neuberger reached as to the meaning of s24(1)(a).

Baroness Hale, dissenting, held that the decision in *Novacold* makes sense. The DDA intended that a disabled person should be treated in the same way as a

non-disabled person whose circumstances were alike in every other material respect. The DDA undoubtedly also aimed to cover indirect discrimination. Parliament deliberately chose a different formulation during the passage of the bill; the words *'who does not have that disability'* – a direct discrimination formula – were substituted with *'to whom that reason does not or would not apply'* and it was clear from Lord Henley's speech in Hansard that a change of substance, and not just words, was intended. There was nothing to suggest that the provisions should have different meanings. Direct discrimination can no longer be justified (under the new employment provisions). It is difficult to see why parliament introduced s3A(5) – it could simply have repealed the justification provision in s5(1)(b).

Knowledge

All the Lords were agreed that knowledge of disability was required in order for there to have been discrimination under the DDA, though differed as to the extent and whether this could be imputed or not.

Meaning of 'which relates to his disability'

Lord Bingham held that 'relates to' denotes some connection, not necessarily close, between the reason and the disability. Whilst he accepted that, but for his mental illness, M would probably not have behaved so irresponsibly as to sub-let his flat and move elsewhere, L's reason for sub-letting was a pure housing management decision which had nothing to do with his mental disability. 'With some hesitation' he resolved this issue in favour of L.

Baroness Hale held that the connection between the disability and the reason must not be too remote. *'It is not easy to lay down a simple test by which to judge remoteness, but the number of links in the chain may be the pointer. Another pointer is whether or not the landlord knew or ought to have known of the disability and of its connection with the reason for the landlord's decision.'* The judge was in a much better position than anyone else to form a view of M's thinking and motivation at the time and Baroness Hale could not say that her conclusion on this point was one to which she was not entitled to come. Lords Brown and Scott agreed with Baroness Hale's conclusion on this point.

Lord Neuberger held that there is less room for uncertainly or injustice in determining the reason for the treatment and its link with disability when one uses the narrower comparison outlined above. The link between the treatment and the disability would always, or at least almost always, be causal but not in the limited sense in which that term is used in other fields e.g. in tort. A broad and flexible effect should be given to the words 'relating to'.

Effect of the DDA on a possession claim

Bingham, Hale and Neuberger were clear in holding that the courts cannot be required to give legal effect to acts proscribed as unlawful and thus a claim for possession to which there is no defence under housing legislation will be defeated where the claim is shown to be discriminatory. Scott and Brown did not address the issue directly.

Implications for practitioners

Whilst this case has dealt a serious blow to disability-related discrimination, its impact should be considerably lessened by the extensive duty to make reasonable adjustments in the employment, education and goods and services provisions (and the limited adjustment provisions in relation to premises). In the employment context, recourse can be had to the European Employment Framework Directive 2000/78, the case law of the ECJ and its effect on direct discrimination (which may carry a broader meaning in light of *Malcolm*). Of greater concern, perhaps, is the undermining of the concept of disability equality and the narrow approach given to it in some of the opinions.

With regard specifically to premises provisions, it is clear from the judgment that claims relating to the premises provisions can no longer be brought on the basis of *Novacold*. This means that more emphasis will need to be placed upon (a) the duty to make reasonable adjustments which is now available to disabled people (though very specific conditions must be met in order for the duty to apply) and (b) the duty to promote disability equality (particularly in light of the decision in *R (on the application of Susan Weaver) and London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin) that housing associations can be public authorities for the purposes of the HRA).

The draft European directive (Implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation) contains obligations in relation to both indirect discrimination and a duty to make reasonable adjustments in the premises context and, if this were to be finalised in its present form, is likely to require changes to the premises provisions in the UK, particularly in relation to the reasonable adjustment provisions.

On the question of knowledge, in a housing context it is highly likely that in possession proceedings, certainly at the point of an individual defending such

proceedings, a landlord will have knowledge of the disability, and so it is unlikely to be an issue at this point. Otherwise, questions are likely to arise as to the degree of knowledge required, the circumstances in which imputed knowledge is sufficient, etc. Knowledge is, in any event, in effect required in relation to the duty to make adjustments.

Goods and services provisions

Whilst the goods and services provisions were not in issue here, clearly the comments of their Lordships may have an impact. Baroness Hale favoured the *Novacold* approach in any event (although she did indicate that she could see no basis for there being a different interpretation in the different parts of the DDA). Lord Bingham confined his narrower approach to the premises provisions. Whilst Lord Neuberger initially confined his approach to premises, he went on to cast doubt on a different meaning in different sections. However, it is still arguable that a different approach applies in the context of goods and services. For example, whilst the approach to justification is similar to that in relation to premises i.e. specific grounds must be met, they are broader than those relating to premises and in effect give service providers more scope for justifying their treatment of disabled people. In any event, many of the claims currently run as DRD are also run as, and often better suited to, the duty to make reasonable adjustments.

The knowledge comments are likely to impact on certain claims of discrimination, but the majority of claims under the goods and services provisions relate to the duty to make adjustments – and the judgment of Sedley LJ in *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 makes clear that the duty to make adjustments in a services context is an anticipatory one which does not rely upon knowledge of the disabled person's disability.

Employment

It is in employment that perhaps the greatest impact of *Malcolm* may be felt, given that it is in the employment field that there are the most claims under the DDA. There are a number of ways in which these can be tackled in the employment arena:

- As indicated above, the Lords were far from unanimous that the narrow approach to the comparator applied outside the premises field. It may be feasible to pursue a case to the HL in the employment context arguing that *Novacold* does apply in this arena – not least because otherwise the provisions of s3A (5) and (6) are meaningless.
- *'Direct discrimination'* in the DDA context may also take on a broader meaning (and it may be possible to rely on Case C-13/05 *Chacón Navas*[1] [2006] ECR I-6467 in this respect). The case concerned the definition of disability under the European Employment Framework Directive. The ECJ examined the interaction between direct disability discrimination and the duty to provide reasonable accommodation and stated in effect that an employee could not be dismissed on the basis of capability when reasonable accommodation could be made.
- In addition, it is arguable that without the interpretation in *Novacold* i.e. with no concept of disability-related discrimination, the government is in breach of its obligations to implement the Employment Framework Directive; in particular, that the duty to make reasonable adjustments alone does not fully meet the requirements of indirect discrimination if *Novacold* no longer applies in the employment context.
- It is also important that the breadth of the harassment provisions is considered when pleading employment cases.
- In practice, virtually every DRD case involves a breach of the duty to make reasonable adjustments. Practitioners will need to be imaginative with the duty and to plead this in addition to DRD.
- A key issue of contention is likely to be that of damages; it will be important to demonstrate, where appropriate, that loss flows from a failure to make reasonable adjustments as opposed to what would otherwise have been a discriminatory dismissal (and see LJ Mummery's positive comments on this issue in particular in *Novacold* at paragraph H p.996)
- On the issue of knowledge, very few cases in reality turn on knowledge, particular as knowledge – or imputed knowledge – is required in order for the duty to make reasonable adjustments to apply. However, those advising disabled individuals will no longer be able to say that the DRD provisions can apply even if they do not disclose disability.

Education

The education provisions are different depending on whether pre-16 or post-16 provision is being dealt with, although both sets of provisions contain the concept of disability-related discrimination. The majority of the post-16 provisions were amended by the 2006 regulations (The Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations SI 2006/1721) to introduce a concept of direct discrimination and to remove the possibility of

justifying a failure to make reasonable adjustments, and are thus very similar to the employment provisions. They received no mention in the *Malcolm* judgment. Given this fact, and that the amendment regulations were introduced so recently, it may be possible to run the same arguments on the applicability of *Malcolm* as mentioned above – and it may stand a greater chance of success. Reasonable adjustments are a broad concept and, along with direct discrimination and harassment, should be used to their full effect.

The pre-16 provisions contain no direct discrimination provisions and are reliant upon disability related discrimination and the reasonable adjustment duties (which are subject to justification). Reasonable adjustments will be key to these cases, as well as the possibility of arguing that *Malcolm* does not apply (although there is far less ammunition – and far less prospect of success – here than in relation to post-16).

The Future

The effects of *Malcolm* may be countered by provisions in the forthcoming Single Equality Bill. There are it seems two options: replace DRD with an easier to understand concept – perhaps one based on pregnancy discrimination, i.e. less favourable treatment for a reason connected to disability. There would be no comparator, and justification would provide the control mechanism. This would ensure that employers and others had to justify treatment which impacts adversely on disabled people. The alternative would be indirect discrimination. This may be problematic however – in particular, it may not be suited to what is sometimes a very individualised disability/effect of disability; and it may run the risk of being interpreted in a similar way to the interpretation afforded in *Malcolm*. In addition, it is a far more complex approach which does not place the onus on employers and others to directly address their treatment of disabled people.

Whatever the solution, it will be important to ensure that the impact of *Malcolm* is addressed as soon as possible.

Catherine Casserley[2]
Cloisters

1. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0013:EN:HTML

2. Thanks are due to Robert Latham, also junior counsel for the Commission in Malcolm and with whom the author wrote an article for LAG which formed the basis for this article

Briefing 498

Learning Disability Discrimination in the NHS – Independent Inquiry

The results of an Independent Inquiry into access to healthcare for people with learning disabilities were published in July this year and they highlight some damning findings. Sir Jonathan Michael conducted the Inquiry at the government's invitation. A copy of the report can be downloaded at www.iahpld.org.uk. The key findings in this Inquiry are addressed in this article by Kiran Daurka.

The government ordered the Inquiry in 2007 following a Mencap publication *Death by Indifference* which reported the death of six learning disabled people following poor healthcare. The Inquiry found that there was, despite the legal framework set out in the Disability Discrimination Act 1995 (DDA) and the Mental Capacity Act 2005, *'convincing evidence that people with learning disabilities have higher levels of unmet need and receive less effective treatment'*. The results of a separate inquiry into the death of those six people are likely to be published later this year.

The Inquiry defined learning disabled people as those with *'a significantly reduced ability to understand new or complex information…impaired intelligence…impaired social functioning'*.

Reasonable adjustments

One of the main problems evidenced was that reasonable adjustments are not being made. This partly arises because there is a lack of awareness and knowledge about learning disabilities and what is considered to be good practice. More worryingly, the Inquiry also found that the NHS has a poor understanding of the concept of reasonable adjustments; despite the fact that all public healthcare organisations were required to publish their Disability Equality Schemes, around 20% had failed to do so.

The Inquiry recommended that the Department of Health should amend the core documentation, including the Core Standards for Better Health, to make explicit reference to the duty to make reasonable

adjustments in providing services to vulnerable groups – this would include the learning disabled, as well as the elderly and people with mental health conditions. The Inquiry also encouraged communication and knowledge-sharing to understand good practice in order to promote a dialogue about the ineffectiveness of current practices in healthcare.

The Inquiry also made clear that carers' understanding of learning disabled patient needs and their insight into their treatment is vital and a carer's involvement would be a clear reasonable adjustment. The concept of 'diagnostic overshadowing', i.e. *'the tendency to attribute symptoms and behaviour associated with illness to the learning disability and for the illness to be overlooked'* was also raised.

The Inquiry highlighted a situation where a parent could clearly see that her daughter with a learning disability was in severe pain, but pain relief was withheld as the symptoms of severe pain were misunderstood as part of her disability. Diagnostic overshadowing can also lead to the belief that a life with a learning disability is a less valued life and, therefore, healthcare is less of a priority.

Stereotyping

Diagnostic overshadowing demonstrates the importance of training staff to ensure that stereotypes are broken down, and the carers/patients are actually listened to without those prejudices getting in the way of diagnosis and treatment.

Another difficult issue to be resolved is that mental ill health is more prevalent amongst persons with learning disabilities. Mental health carries its own stigma and so there are often two difficult disabilities which require sensitive and knowledgeable handling by healthcare providers.

Tracking

The Inquiry also suggested that people with learning disabilities should be monitored and their healthcare 'tracked'. Whilst this might be useful in order to establish weaknesses in the NHS, there are concerns that this type of monitoring is invasive and unnecessary; if good practice is established and incorporated, then this should not be required. Would 'tracking' be limited to the learning disabled, or all vulnerable groups – and what actions (and when) would be taken? This aspect of the Inquiry's findings requires further analysis; an equality impact assessment would be essential before any tracking is seriously considered.

Carers

One in eight people in England are carers, two-fifths of whom care for a disabled person. One key finding was that carers and parents of those with learning disabilities are not consulted or heard in relation to treatment of the patient.

Carers told the Inquiry that when they are required to stay in hospital with someone with a learning disability, there are no facilities available for them at all – i.e. no mattress, washing or toilet facility or refreshments. Carers reported a lack of attention to their input; the attitudes of staff were said to be poor. One report included a hospital's failure to communicate to the family its decision not to provide pain relief or to resuscitate a child with a learning disability. It would be unimaginable for a hospital not to provide communication regarding relief or resuscitation in the case of a non-disabled child.

Another important issue that arose was the care that carers themselves receive; the Inquiry encouraged individual social and health care budgets to be extended to the families of those with learning disabilities to allow them to find support as required.

Conclusion

Some of the accounts in the Inquiry were upsetting and surprising given the importance placed on equality and human rights in today's society. To learn that one of the most significant public bodies in Britain displays such hostile attitudes is disconcerting and requires a responsive remedy by the Department of Health.

The Inquiry raised some very worrying observations about the lack of knowledge about the legal frameworks, including the Disability Equality Duty and Disability Equality Schemes. It reported concerns that the Single Equality Bill would cause significant difficulties within the NHS and other public authorities which were only just starting to grasp the relevance and importance of the statutory duties. The Bill is likely to include a single equality scheme, with the aim of tackling discrimination occurring across more than one strand of discrimination; for example, as the Inquiry itself found, those with a learning disability from an ethnic minority were likely to suffer poorer care. However, given the NHS inability to provide appropriate care for the learning disabled, it is a real concern that a single duty would have the result of diluting responsibility and understanding.

The Inquiry supported a more robust approach from the Equality and Human Rights Commission in

intervening in cases where the Disability Equality Duty is not being complied with and suggested that the EHRC should be inspecting services as part of an on-going assessment of compliance with the DDA. This approach would be welcomed.

Kiran Daurka
Russell Jones & Walker

Briefing 499

Discrimination by Association

Coleman v Attridge Law [2008] ECJ Case C-303/06; [2008] IRLR 722

Facts

Ms Coleman (C) was a legal secretary employed by Attridge Law (AL). Though she is not disabled, she claimed disability discrimination arising from her association with her disabled son. C alleged that because of her son's disability and her role as his principal carer, she was treated less favourably at work; for example, she alleged that she was denied flexible working when requests from other employees with child care commitments, but no disabled child, were allowed. C complained of direct discrimination and harassment and relied on ss3A, 3B and 4 of the Disability Discrimination Act 1995 (DDA).

Issues of law under the DDA

The Framework Directive 2000/78/EC (the Directive) was adopted in November 2000 to combat workplace discrimination 'on grounds of' religion or belief, disability, age or sexual orientation. The DDA was amended in 2004 to implement the disability strand of the Directive. Ss3A and 3B of DDA provide:

> ***3A Meaning of 'discrimination'***
> *(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.*
> ***3B Meaning of 'harassment'***
> *… a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –*
> *a) violating the disabled person's dignity, or*
> *b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.*

On its face, then, those provisions of the DDA (and the similarly worded s4) only protect 'the disabled person', and do not provide protection from associative discrimination.

Employment Tribunal

C argued that the Directive's prohibition against discrimination 'on grounds of' disability etc. was intended to outlaw associative discrimination. (Because she was privately employed, Ms Coleman could not simply rely on the direct effect of the Directive.) Thus, words should be interpolated into the DDA to make it accord with the Directive.

This is because *'when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a Directive… national law is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the Directive …'. Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2005] 1 CMLR 1123 ECJ.

An interpolative approach has been taken in the context of other domestic legislation. See, for example, *Ghaidan v Godin-Mendoza* [2004] AC 557 HL which concerned provisions in the Rent Act 1977, and the circumstances in which a person living *'as … wife or husband'* with a protected tenant could succeed to the tenancy. The HL upheld the decision of the CA that the latter words should be read as though the words *'if they were'* were inserted after *'as'*.

At a pre-hearing review (PHR) in 2006, the ET made a preliminary reference to the ECJ. It asked the ECJ to determine if a person who is directly discriminated against or harassed on grounds of their association with a disabled person is protected by the Directive.

AL appealed the making of the reference. It agued that the reference was unnecessary because, even if (which it disputed) the Directive was intended to prohibit associative discrimination, the DDA manifestly did not share that purpose.

Employment Appeal Tribunal

Judge Peter Clark disagreed ([2007] ICR 654, EAT). He held that, assuming C's interpretation of the Directive was right, the DDA:

> *…is capable of interpretation, consistent with an interpretation of the Directive favourable to the Claimant, so as to include associative discrimination without distorting the words of the statute and consistent with the domestic Court's responsibility to arrive at a conclusion which ensures that the Directive is fully effective, as Parliament presumably intended when passing the 2003 regulations…*

European Court of Justice

In answer to the questions put to it by the ET, the ECJ affirmed that the Directive prohibits associative discrimination, in the context of all four of its strands.

Coleman therefore gives new rights to employed carers of the disabled (of which there are 2.6 million in the UK). Those in the public sector will be able to immediately rely on the ECJ's decision. For those in the private sector, one way or another, things will have to change.

Next steps

Following the ECJ's decision, on 30th September 2008 the ET held a PHR to determine whether or not necessary words can be interpolated into the DDA. The ET's decision is awaited at the time of writing this case report.

Implications for practitioners

The decision has implications in the context of both disability and age. Domestic law putting the Directive into effect already prohibits associative discrimination in the context of sexual orientation and religion and belief. Logically, associative discrimination should also be outlawed in the context of disability and age.

In the short term, the ET may determine that the necessary words can be interpolated into the DDA. (If so, the case will provide a useful example of how far a Court can go in 'reading down' domestic legislation.)

In the longer term, the government has promised an Equality Bill in the next Queen's speech. The government's response in July 2008 to the consultation on the Equality Bill already sets out the need for 'careful consideration' of the judgment in *Coleman*. The government has also indicated that once it has addressed the implications of the judgment in the context of how to define harassment in the Equality Bill, it will also consider whether there is a case for extending freestanding statutory protection against harassment on grounds of disability outside the workplace.

As for age, the ECJ's judgment in *Coleman* means that the 2006 Age Regulations are non-compliant with the Directive. Associative discrimination appears outlawed in the context of harassment 'on grounds of' age, but not direct discrimination, which applies to less favourable treatment of B by A 'on grounds of B's age'. This, too, must change.

Conclusion

The decision in *Coleman*:

- confirms that the Directive is intended to prohibit associative discrimination in the context of direct discrimination/harassment, in respect of all four of its strands
- means the DDA and the Age Regulations will have to be 'read down' or revised to ensure compliance
- will advance the developing national agenda of finding a balance between home and work obligations
- may have an impact on the government's implementation in domestic law of the Directive's harassment provisions
- may prove of use to those who are discriminated against by reason of *perceived* disability.

Paul Michell
Cloisters

Discriminatory Advertisements

Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] ECJ Case C-54/07

Facts

The Centre for Equal Opportunities and Opposition to Racism (C) is an independent public body established by the Belgian parliament and designated, pursuant to Article 13 of Directive 2000/43, to promote equal opportunities and fight discrimination. C applied to the Belgian labour courts for a finding that Feryn (F) operated a discriminatory recruitment policy. C acted on the basis of public statements by F that the company, which was recruiting door fitters, were unable to employ 'immigrants' because its customers were reluctant to give them access to their homes to carry out the work.

Labour Court

The President of the Labour Court in Brussels dismissed C's application, stating, in particular, that there was no proof, nor could it be presumed, that a person had applied for a job and had not been employed as a result of his ethnic origin.

Reference to the ECJ

C appealed and the Labour Court referred a number of questions to the ECJ for a preliminary ruling. Broadly, these requested:

- An interpretation of the provisions of the Employment Framework Directive 2000/43 (the Directive) to assess the scope of direct discrimination in the light of the public statements made by an employer in the course of a recruitment exercise
- Guidance on the conditions for the application of the reversal of the burden of proof, and the
- Appropriate penalties in such a case

European Court of Justice

The ECJ ruled that discriminatory job advertisements can amount to direct discrimination. The Court held that the fact that an employer publicly declares that it will not recruit employees of a certain ethnic or racial origin, *'something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim.'*

The Court ruled that where an employer makes public statements about the discriminatory nature of its recruitment policy, this is sufficient for a presumption of the existence of direct discrimination and the reversal of the burden of proof. It is then for the employer to prove that there was in fact no breach of the principle of equal treatment.

In relation to the final question, the ECJ held that Article 15 of Directive requires that, even where there is no identifiable victim, the rules on sanctions must be effective, proportionate and dissuasive. Such sanctions could, if appropriate, include a finding of discrimination *'with an adequate level of publicity, the cost of which is to be borne by the defendant'*, as well as injunctions and fines.

Comment

Up to now, it has been the role of the EHRC or the Equality Commission for Northern Ireland to take action where an advertisement is published which indicates an intention to unlawfully discriminate on grounds of sex, race or disability. Case law in the UK has held that discriminatory job advertisements can not be the subject of complaints by individuals as they indicate *'an intention to do an act of discrimination'* but are not themselves acts of discrimination within the meaning of the legislation, *Cardiff Women's Aid v Hartup* [1992] UKEAT 761/93/0802.

The ECJ's ruling has overturned this position and opens the way for an individual to bring a complaint about a discriminatory advertisement on any of the grounds covered by the Directive.

Geraldine Scullion
Editor

Back to ends and means: GMB v Allen and Redcar v Bainbridge in the Court of Appeal

GMB v Allen [2008] IRLR 690, *Redcar & Cleveland Borough Council v Bainbridge*, and *Surtees v Middlesbrough Borough Council* [2008] EWCA Civ 885

The litigation arising from local government equal pay disputes continues to highlight difficult areas of equality law. This article will consider recent cases dealing with the vexed issue of the justification defence. *GMB v Allen* and *Redcar v Bainbridge* were both controversial EAT decisions which have now reached the Court of Appeal.

GMB v Allen

GMB v Allen is unusual in employment litigation since it was brought against a trade union rather than an employer.

Facts

In 1997 unions and local government negotiated 'the Green Book': a national collective agreement which replaced the White and Purple books. The aim was to consolidate previous agreements while addressing gender inequalities. In order to identify and resolve these inequalities, job evaluations were carried out before local agreements were reached. This was described as the 'single status' agreement.

This process created winners and losers among employees. Some found that their jobs were assessed as more valuable than previously and their wages increased. In addition, where pay was upgraded, it provided strong evidence to support equal pay claims from women in female dominated jobs, who had been paid less than men in male dominated jobs now assessed as equivalent. At the same time some roles were downgraded and members faced reductions in pay.

Unions were involved in negotiations on both these issues. Where members had equal pay claims they sought to negotiate settlements. Where members faced reductions in wages they sought pay protection which would freeze their salaries. The hope being that, by the end of the protected period, annual increases in local government pay would mean that no actual reduction need occur.

These aims were not entirely compatible. Local government employers had limited funds. Money spent on pay protection could not be spent on settling equal pay claims. There were serious concerns within unions that an aggressive approach to the equal pay issue could undermine pay negotiations or cause redundancies.

GMB, 'the Union', decided to give priority to pay protection. They reached a preliminary agreement with Middlesbrough Metropolitan Council which, subject to their members' agreement, would have settled the equal pay claims for a fraction of their value.

A number of female union members then brought claims against the Union for sex discrimination. They argued that the Union's approach to negotiations was discriminatory, alleging direct and indirect discrimination.

The indirect discrimination was based on the allegation that the Union, in making pay protection a priority, had followed a practice which had a disproportionate impact on women.

Employment Tribunal

At first instance the ET rejected the direct discrimination claim, but upheld the indirect claim. They concluded that there had been a practice of agreeing to low equal pay settlements in order to leave funds for pay protection. This disadvantaged women, who were the workers affected by the equal pay settlements.

The ET heavily criticised the Union's approach concluding that it had failed to lodge tribunal cases to establish their member's claims or to support litigation. The ET felt that the Union had rushed into the pay protection deal. Most importantly, it had also failed to fully advise members about their equal pay claims and had mislead them about their likely value.

Employment Appeal Tribunal

The Union appealed. The EAT upheld the appeal, finding that the ET had misdirected itself in relation to the justification test.

Indirect discrimination is unlawful only if the respondent fails to show that a practice is 'a proportionate means of achieving a legitimate aim'. President Elias drew a sharp distinction between the two parts of this test. He concluded that prioritising pay protection was a legitimate aim. Once this was established, any methods reasonably necessary to achieve that aim would be proportionate. In effect the EAT's

approach was that, once an end had been established as legitimate, any means reasonably necessary to achieve it were proportionate. This was the case even if, as in this case, the means included misleading the Union's members about the value of their claims.

Court of Appeal

The members then appealed to the CA, who reversed the EAT's decision. The CA found that the EAT had failed to properly characterise the manipulation of the Union's members as a means of achieving an objective. Since it was a means, it had to withstand the proportionality test. The ET had correctly concluded that it had not.

The CA's judgment makes clear that a legitimate objective, which can only be achieved by unreasonable means, will not be justified. Where there are many legitimate objectives, some of which can only be achieved by disproportionate means, those objectives will not be justifiable.

The CA also criticised the EAT for relying on a conclusion that the outcome of negotiations would not have been different if a different approach had been taken. This, they said, was a quantum issue rather than something affecting liability.

Redcar & Cleveland Borough Council v Bainbridge, and *Surtees v Middlesbrough Borough Council*

Facts

This was a conjoined hearing of three separate equal pay appeals, with the Equality and Human Rights Commission intervening. The facts are complex and can only be summarised here. It also deals with a number of important legal issues aside from justification, in particular the distinction between direct and indirect discrimination in relation to pay, *res judicata*, the retrospective effect of job evaluation schemes and uplifts under the statutory dispute resolution procedures. These issues will not be covered here and the facts relevant to them are not dealt with.

The joined cases arose from the same move to single status as *GMB v Allen*. Equal pay claims were brought against two local authorities: Redcar and Cleveland Borough Council (R) and Middlesbrough Borough Council (M).

The claims against R were mainly brought by care workers and catering workers in Manual Grade 2 who compared themselves with male gardeners, refuse collectors and street cleaners. Gardeners and refuse collectors were Manual Grade 2, while street cleaners were Manual Grade 1. Although all employees on Manual Grade 2 were paid the same basic salary and those on Manual Grade 1 were paid a lower salary, these male workers were paid more overall than the female claimants. This was as a result of bonuses and allowances paid on top of basic salary.

At the time these claims were brought, both Councils were in the process of reforming their pay schemes as a result of the move to single status. However, the pay protection schemes agreed with the unions meant that the bonuses and allowances were still being paid. The claimants' case was that, but for the earlier discrimination, they would have been paid the allowances and bonus prior to the reassessment. They would then have benefited from the pay protection scheme. The disparity in pay therefore stemmed from R's earlier discrimination.

Although it conceded some earlier claims, after 27th January 2004 R defended these cases on the basis that the bonuses and allowances could be justified. They said the bonuses were genuinely and justifiably based on increasing productivity and the allowances were justified by economic and working conditions. R also sought to justify the pay protection. Protection was necessary in order to secure Union support for the move to single status, and therefore to achieve, in a wider sense, pay equality. It was therefore a genuine material

reason for the difference in pay.

The M claimants were primarily carers who compared themselves to equally rated employees, such as gardeners and street sweepers. There were also claims from administrative employees who claimed to be doing work of equal value to male manual workers.

Employment Tribunal

The ET upheld the majority of the claims against R concluding that the bonuses and allowances, while initially justified, had by 2000, become automatic payments to the men. They concluded that what was being protected was a discriminatory pay situation. This was a form of indirect discrimination, since the determining factor was the type of job done by the employee.

The ET considered whether, in the circumstances of the case, this approach could be justified, but concluded that it could not. It decided that R had failed to show that the need to address wider inequalities of pay required continued pay protection in male dominated roles, without similar protection in female dominated jobs.

This decision was appealed to the EAT, which supported the ET's decision.

The claims against M were also successful in the ET. As in the R cases, the ET concluded that what had once been a potentially justifiable system of bonuses and allowances, had ossified into an automatic pay uplift for those in male dominated roles.

Employment Appeal Tribunal

Both R and M appealed to the EAT.

R's appeal was based on the argument that the historical discrimination was irrelevant to the transitional provisions under consideration. There was no discrimination in the operation of the pay protection scheme, which simply protected those workers whose salaries would otherwise be reduced. Alternatively, if there was discrimination, it could be objectively justified. Pay protection was necessary to get Union support for the pay changes. The fact that women did not have pay protection was justified because they were not facing pay reductions.

The EAT dismissed this appeal. They concluded that the pay protection was tainted by sex discrimination. The reason that the women did not benefit from the pay protection scheme was that their original pay had been lower than the men. Had there been pay equality they would have also benefited from the scheme. It was not a defence to say that the Council's failure to implement equal pay at an earlier stage was a justification for maintaining the inequality through pay protection.

M's appeal was brought on similar grounds to R's, but it succeeded in the EAT. The EAT accepted that the issue of justification was finely balanced, but concluded that the ET had got it wrong.

The EAT found that the ET had failed to grasp the intrinsic difficulty of identifying those employees with potential equal pay claims and quantifying them in order to extend the pay protection to them. It also concluded that the ET did not pay sufficient attention to the fact that the pay protection was intended to cushion employees from a reduction in real pay, which the women were not going to suffer.

Court of Appeal

Both cases were appealed to the CA.

There was significant debate over the precise characterisation of the discrimination. R argued that the ET had wrongly characterised the case as one of direct discrimination, which could not be justified. This argument was dismissed, the CA concluding firmly that the ET had dealt with the case as one of indirect discrimination

R also challenged the decision on the basis that the ET was wrong to conclude that the pay protection was tainted by sex discrimination. This argument was also dismissed. The underlying reason for men benefiting from the pay protection was the unjustified inequality in pay prior to the move to single status.

R's most important point of appeal, however, was objective discrimination. R argued that the ET had erred by relying on the historic discrimination to defeat the justification argument. The ET ought, they said, to have recognised that given the situation that R found itself in, the pay protection was an acceptable transitional measure.

It was common ground that, where there is direct discrimination in pay, there is no room for transitional arrangements. The inequality in pay must be corrected immediately. Anything in the nature of a temporary, partial fix will only perpetuate the inequality.

The CA, however, found that the position in relation to indirect discrimination was different. Indirect discrimination could be justified, and so, in principle, transitional provisions could be lawful, provided they could be justified.

In practice, however, the CA thought it would be difficult to justify transitional arrangements where unjustified indirect discrimination had been identified. Employers must, they said, do their best to eliminate both direct and indirect discrimination in pay. Where

an employer knew of unjustified indirect discrimination, it would be difficult to do anything but move immediately to correct it fully.

In the case of R, the Council had known that the original pay structures amounted to unjustified indirect discrimination. The ET was entitled to conclude that pay protection, which perpetuated this inequality, was unjustified.

In terms of knowledge, M's position was different to R's. While R had conceded many of the claims against it, M had fought them all. R was forced to accept that, if they had corrected the pay inequality as soon as they became aware of it, the women would have benefited from pay protection. M made no such concession.

The CA recognised that an employer's level of knowledge was significant in relation to justification in this context. It was R's actual knowledge of pay inequality which defeated its justification argument.

The CA, however, did not make knowledge determinative of the justification defence. Indeed, it highlighted the difficulty of doing so. If it were possible to defend an indirect discrimination claim on the basis of ignorance of the problem, it would put a premium on lack of knowledge. A rational employer might deliberately avoid monitoring pay arrangements and fail to investigate allegations of pay inequality.

This, the CA said, was not acceptable. Employers had been under a duty since 1975 to ensure pay equality. They could not simply wait until successful claims were brought against them and then bring in transitional arrangements which extended inequality for several years.

The CA therefore concluded that the EAT had failed to identify an error of law in the ET's judgment. In order to overturn the first instance decision an appeal court would need to identify an error in approach or meet the high perversity standard. A finding on justification was largely an error of fact, which relied on the evidence heard by the ET. It could only be overturned if it was plainly wrong.

Comment

In both cases the CA took a more progressive approach than the EAT and this is bound to be welcomed by those seeking equality in pay.

In contrast to the EAT, the CA was willing to examine means as well as ends. Particularly in *GMB v Allen* the EAT had focussed almost exclusively on identifying a legitimate aim. Once an acceptable aim had been identified, the EAT appeared reluctant to accept that methods to achieve it were unacceptable. This could be seen clearly in *GMB*, where even unlawful deception of the Union's members was found to be justified, and in *Middlesbrough* where the EAT endorsed transitional arrangements which maintained pay equality for several years after it had been identified.

The CA in both cases took a more robust approach to considering what methods could be proportionate. It is clear, following *GMB v Allen* and *Redcar*, that a legitimate aim which can only be achieved using unreasonable methods will not be justified.

The most significant element of the cases, however, is the CA's emphasis in *Redcar* that justification is primarily an ET issue which should not be interfered with on appeal, unless the decision can be shown to be perverse. Given the stakes involved in local government pay, this is unlikely to discourage appeals, but it will make them much harder to win and mean that tribunal decisions will be more secure.

Of course, it is likely that one, or both cases will reach the House of Lords. So further developments in this area seem inevitable.

Michael Reed
Free Representation Unit

Briefing 502

'Remarkable facts' in race discrimination case

Aziz v Crown Prosecution Service [2006] EWCA Civ 1136; ET case reference: 1808500/2001

Background

In October 2001 Ms Aziz (A), a solicitor for the Crown Prosecution Service (CPS), appearing at Bradford Magistrates Court as she had done on many occasions in the past, was stopped by a security guard and told that she was a security risk. She responded saying sarcastically *'yeah, I'm a friend of Osama bin Laden'*, before adding that she totally and fundamentally disagreed with the 9/11 attacks.

Some days later the CPS was informed that A had incited a riot between Asians and white youths at Bradford Magistrates Court because, it was said, of her

outspoken comments in the Court waiting area in support of the 9/11 attacks and against the Americans and Jews – *'it's all the fault of the Jews…'*.

On receipt of these allegations the CPS moved to suspend A; she was marched out of the office by security in full view of her colleagues.

Employment Tribunal

A issued race discrimination proceedings in 2001, alleging that the decision to suspend her and, when the suspension was lifted, not to allow her to return to her place of work but instead to transfer her to another office, was on grounds of her Pakistani origin.

The CPS's subsequent investigation found that there was no truth in the allegations made against A. By this time however, some months later, A was suffering from severe ill health caused by her suspension and the allegations hanging over her.

The CPS's disciplinary code states that the CPS shall:

> *make every reasonable attempt in the circumstances to establish the facts of the alleged misconduct before any disciplinary action is taken…*

And in cases of apparent gross misconduct

> *the line manager will usually make preliminary enquiries … to establish whether misconduct has taken place and whether a formal investigation should be instigated. These enquiries would not normally involve interviewing any individuals suspected of involvement.*

In its evidence the CPS argued that preliminary enquiries were, in fact, against policy as it would lead to two investigations occurring concurrently. The ET described this contention as *'utter nonsense'*.

The ET accepted that the CPS discriminated against A in suspending her from work without first making any preliminary enquiries to establish whether there was any evidence that she had made such remarks. The ET was struck by the remarkable, but intermittent, memory loss of CPS managers, and concluded that A's race was a critical deciding factor in the action taken saying that the CPS approached the matter with *'a closed mind'*.

Employment Appeal Tribunal

The CPS appealed, arguing that it had followed its disciplinary process in suspending her without investigation, and that the decision to suspend was not on grounds of race. The EAT agreed, accepting that the ET had misinterpreted the CPS' disciplinary process. A appealed to the CA.

Court of Appeal

At the CA Ms Aziz successfully restored the ET's decision. Smith LJ, in her leading judgment accepted that to initiate disciplinary action on grounds that an employer:

> *suspects the employee of serious or gross misconduct... that suspicion must be based on reasonable grounds. That must be so, not only as a matter of common sense… in most cases, some preliminary enquiries will be necessary in order to provide the reasonable grounds for the suspicion upon which the decision to initiate action will be based.*

The CA also accepted that a detriment occurs on suspension, even if disciplinary action is thereafter not initiated.

> *In my view, it is important (both under the code and as a requirement of fairness and good employment practice) that disciplinary proceedings should not be initiated unless the suspicion of misconduct is based on reasonable grounds… I share the view of the ET that such an allegation cried out for preliminary enquiries to be made. They were required as a matter of fairness and reasonableness, good employment practice and also by the CPS disciplinary code.*
>
> *The ET regarded the breaches of the [disciplinary] code as flagrant. The breaches were, in my view, serious and obvious…. the ET was entitled to conclude, as it did, that the CPS knew that it was not complying with its own code.*

Outcome

On 1st September 2008, the ET published its decision on compensation. In a far-reaching judgment, the ET awarded A approximately £400,000, to cover past and future loss of earnings, injury to feelings, aggravated damages, pension and other losses. The pecuniary loss awards are calculated net, and the CPS will be paying tax on these figures. In addition there is provision in the judgment for an application for costs.

Between the CA decision and the remedies hearing, the CPS conducted an internal enquiry into the decision to suspend A. In its report, the author Peter Lewis, Chief Executive of the CPS, concluded that no-one had made any error, as in fact the CPS were not complying with the written disciplinary code, but another Code which was unpublished but known to all involved in the decision to suspend.

In making an award of aggravated damages to A, the ET noted that this hidden or secret Code was not mentioned in evidence at the ET, the EAT or the CA. The ET held that Mr Lewis therefore failed to provide vital relevant information to these courts. The Courts were therefore:

> *invited to adjudicate on false premises… persons of a senior level in the CPS… allowed Leading Counsel to*

advance arguments in the EAT and at the Court of Appeal… [which] they knew was not the true position…The Claimant had to endure some 6 years litigation with this deceit at the heart of the proceedings.'

The ET concluded:

it appears highly probable that the [CPS] withheld from the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal material evidence of a policy in practice the [CPS] had followed over a considerable period of time which evidence was of significant relevance to the issues to be determined at each of the Tribunal and the Court Hearings.

Implications for practitioners

There are remarkable facts in this case, not least of which is the finding of 'deceit' in withholding evidence at senior levels of the CPS. Leaving aside these facts, the importance of this decision is that an employer must have regard to both its own disciplinary process and to wider notions of fairness and reasonableness before deciding to initiate disciplinary action, including suspension. The important issue is to ensure, whether or not the disciplinary policy calls for it, that a decision to suspend is based on reasonable grounds, and this would usually involve an employer undertaking preliminary enquiries to ensure that its decision to suspend is a reasonable step to take.

Mark Emery
Bindmans LLP

Briefing 503

Same information required in equal pay grievance letter and claim?

Cannop and Others v Highland Council and Others [2008] CSIH 38

Key issues

In this case, the Court of Session considered whether the claimants in a multiple equal pay case had complied with s32(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 main question for the CS was whether the Scottish EAT had correctly decided that the claimants needed to at least identify the comparator by job title or specific job in their grievance and that these comparators could not be materially different from those in the subsequent claim. See Briefing 494 for a report on the EAT decision in this case.

Facts

The claimants lodged a number of written grievances with their employer alleging breaches of the Equal Pay Act 1970 (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 comparators in their grievances. Difficulties arose when the subsequent claims referred to comparators who had not been included in the original grievances. These new comparators had been included following the disclosure of further evidence in the questionnaire process.

ET and EAT decisions

The ET held that the claimants had satisfied the requirements of s32(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.

The EAT overturned that decision stating that the identification of the comparator was key because otherwise the employer would have no way of being able to investigate the grievance properly. It found that, at the very least, it 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.

Court of Session

Unfortunately the CS decided that much of the earlier decision had in fact been obiter and should be taken as comment only. They felt that there had been a concession by the employer at an earlier stage of the proceedings that Step1 of the grievance had been complied with in respect of some of the claimants but that this was not properly addressed by either the ET or the EAT.

The CS discounted much of the discussion and the requests from the parties for 'guidance' as to what was

503

expected in a grievance. Instead they remitted the case back to the ET amending the referral basis to:

> *whether, in the case of each of these claimants …. the grievance underlying the form ET1 submitted to the tribunal was essentially the same as the grievance earlier communicated.*

They therefore changed the decision to be made by tribunals from whether the grievance and the grounds of claim were materially different to whether the grievance and the grounds of claim were essentially the same.

Comment

It is a shame that no decision was actually made on the facts of this case so that those bringing equal pay claims in the future can be sure whether they need to identify their comparators despite often having very little information with which to assess who their comparators should be.

Given the lack of clarity, it appears that to be on the safe side, complainants should raise as many categories of potential comparators as possible in their grievance. This will no doubt lead to large levels of unnecessary documentation and consideration.

It presumably also reinforces the importance and scope of the questionnaire process and suggests that questionnaires should be submitted as soon as possible in the hope that the information provided will ensure a more accurate basis for any grievances and subsequent claims.

Shah Qureshi and Emma Webster
Bindmans LLP

504

Briefing 504

Wearing religious jewellery in school – the Sikh Bangle Case

R on the application of Sarika Angel Watkins-Singh v The Governing Body of Aberdare Girls' High School [2008] EWHC 1865 (Admin)

This case was widely reported in the media as the 'Sikh Bangle case'. The Sikh bangle refers to the Kara bangle worn by Sikhs as one of the 'five Ks'. The five Ks are items worn by Sikhs to demonstrate their Sikh identity and faith; the other four Ks are the Kangha (a type of comb), Kaccha (an undergarment), Kesh (uncut hair) and Kirpan (a ceremonial sword – usually only a symbol of the Kirpan is worn on a necklace).

Facts

The case involved a pupil (S) of Punjabi-Welsh heritage at Aberdare Girls' High School (A) in Wales. A's uniform policy prevented S from wearing her Kara at school. S was a good pupil and was made prefect in May 2007. At around the same time, a teacher noticed S wearing her Kara and asked her to remove it in accordance with A's uniform policy which permitted only a pair of studs and a wrist watch to be worn.

S refused to remove her Kara and her mother provided A with information about the significance of the Kara to Sikhs. The governors did not allow an exemption to the policy and S was permitted to attend school wearing her Kara but only on the condition that she was taught in isolation. S said that she was prepared to wear a sweatband over her Kara (which was only 50mm in width) as a compromise to any health and safety issue. She appealed unsuccessfully to the Appeals Committee. In making their decision, the Appeals Committee referred to the Human Rights Act 1998, but did not consider the Race Relations Act 1976 (RRA) or the Employment Equality (Religion or Belief) Regulations 2003 (the Regulations). From September to mid-October 2007, S was again taught in isolation, and was then excluded from school for five days in the autumn term. The head teacher stated that S was not excluded from school as she could attend if she did not wear her Kara.

From February 2008, S attended another school which allowed her to wear her Kara. S wished to return to A for her education.

Claims

S brought claims in the Administrative Court for:

- Indirect race and religious discrimination;
- Failure by A to have due regard to the need to eliminate unlawful race discrimination and promote equality of opportunity and good relations contrary to s71 RRA;
- Contravention of Article 8 of the European Convention of Human Rights (ECHR) in imposing disciplinary sanctions, segregation and isolation;
- The exclusions were procedurally unfair; and
- Failure by A to take into account the Guidance on Exclusions from Schools and Pupil Referral Units 2004.

Indirect race and religious discrimination

The judgment refers to the significance of the Kara to Sikhs in some detail. It found that the *'5 Ks are important as they intended to distinguish Sikhs from both their Muslim and Hindu contemporaries... are demonstrating both loyalty to the Gurus' teaching... In practice, it is the initiated or amritdhari Sikhs, who observe all 5 Ks and there are of course different levels of devoutness and observance amongst Sikhs'*. The Court also considered that *'although the claimant is not obliged by her religion to wear a Kara, it is clearly in her case an extremely important indication of her faith and this is a view shared for good reason by many other Sikhs'*.

It was agreed by both A and S that Sikhs were a racial group for the purposes of the RRA and a religion for the purposes of the Regulations.

Provision, criteria or practice

The Court then considered what would be the appropriate provision, criteria or practice (PCP) in this case. Both S and A agreed that the relevant PCP was the uniform policy. A contended that the appropriate comparator would be all pupils at the school who wished to wear jewellery. The Court disagreed and held that the appropriate comparators would be, in accordance with *BMA v Chaudhary* [2007] IRLR 800, those who have no interest in the particular disadvantage or actually want the benefit in question (i.e. to wear a Kara or other religious jewellery because of its great importance to them).

Disparate disadvantage or detriment

The Court then went on to consider what disparate disadvantage or detriment S suffered as a result of the PCP. A argued that S did not suffer an appropriate degree of disadvantage because wearing the Kara was not a compulsory requirement of Sikhism. The Court rejected this argument for various reasons; these included: the ordinary dictionary meaning of detriment does not have a high threshold requiring an *inability* to comply with a requirement of a religion or race for a detriment to occur; there ought to be recognition of the special needs of minorities and an obligation to protect their identity to preserve cultural diversity; and there is no legal authority to require proof of a religious or racial requirement. Accordingly, S did suffer a detriment as a result of the PCP because S demonstrated that the wearing of the Kara was a matter of exceptional importance. The Court was satisfied that S was not wearing the Kara merely to challenge A's authority.

Proportionality and justification

Finally, the Court considered the issue of proportionality and justification. The Court considered that it was the failure by A to grant an exemption from the uniform policy which required justification, not the policy itself. A relied on the previous decisions in *Begum* (Muslim pupil wearing the jilbab robe), *X v Y School* (teaching assistant wearing the niqab face veil) and *Playfoot* (pupil wearing a chastity ring). The Court distinguished these cases on the basis that: the niqab and jilbab stand out far more than a Kara; unlike the ring in *Playfoot*, the Kara is small and inexpensive; arguments that a uniform fosters community spirit do not apply to the discreet Kara; and the 'floodgate' argument cannot be accepted because the Kara was of exceptional importance to S. Finally, the health and safety element was not upheld as S had agreed to cover her Kara with a sweatband where health and safety would be an issue.

The claims for indirect race and religious discrimination were upheld.

Section 71 RRA

The Court also upheld that A had failed in its duties to have an appropriate racial equality policy in accordance with s71 RRA which requires specific public authorities to *'have due regard to the need –*

a) to eliminate unlawful racial discrimination; and

b) to promote equality of opportunity and good relations between persons of different racial groups.'

A was covered by the requirements of s71. Further, in accordance with the Race Relations Act 1976 (Statutory Duties) Order 2001, A was also required to maintain a race equality policy, assess the impact of its policies and monitor the operation of such policies.

Following *Secretary State for Defence v Elias* [2006] ECWA Civ 1293, the Court decided that it was necessary to give advance consideration to issues of race before making any policy decision. A did not have due regard to the impact on S's ability to wear a Kara when devising its uniform policy. Further, in line with *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin) 199, there was no written record of any consideration of race issues when implementing the uniform policy.

A had failed in its duty under s71 RRA.

Article 8 ECHR

S argued that her internal isolation and segregation caused significant problems for her and A was in violation of her right to private life including the right to establish and develop relationships with others. A

504

argued that S always seemed content and happy.

Faced with conflicting evidence, the Court felt bound to follow A on the basis of existing case law (*R v Camden LBC, ex party Cran* [1995] 94 LGR8) and S's Article 8 claim failed.

Other claims

S also succeeded in her claim that she had been excluded for disciplinary reasons and should have been allowed to invoke the appeal procedures.

Comments

This case is fact-sensitive and does not mean that all pupils will automatically be allowed to wear a Kara or other religious/racial jewellery. The Court made clear that the wearing of the item must be a matter of exceptional importance to such pupils, but need not be a requirement of religion/race. The wearing of the item as an assertion of belief should be made in good faith, and there should be some consideration of the source material to consider the matter more objectively and to ensure a belief is genuinely held.

The case highlights the importance of s71 RRA. The case also gives very clear reasoning in deciding the various elements of the indirect discrimination claims.

Kiran Daurka
Russell Jones & Walker

505

Briefing 505

Using the statutory duties and equality impact assessments to eliminate unlawful discrimination

R (Kaur and Shah) v London Borough of Ealing (intervention by the EHRC) [2008] EWHC 2062 (Admin)

Southall Black Sisters (SBS) is a very well respected organisation which provides specialist services to Asian and Afro-Caribbean women mainly in relation to domestic violence. Since the mid-1980s, SBS received funding from Ealing Council (E) as well as from voluntary contributions.

Facts

SBS received £102,000 from E for 2007 and 2008. In 2007, E decided that it would encourage open competition by commissioning services according to published criteria. SBS were informed that its funding from E would end in March 2008.

E's original specification for an award of up to £100,000 required that the service provider would have to provide its service to *'all individuals irrespective of gender, sexual orientation, race, faith, age, disability, resident within the Borough of Ealing experiencing domestic violence'*.

SBS complained that this criteria would have a disproportionate impact on black and minority ethnic women, and that there had been no racial equality impact assessment carried out in accordance with its statutory duties. In September 2007, E agreed to withdraw the criteria pending the conclusion of an equality impact assessment. SBS also expressed concerns about the impact on specialist services if funding was only available for service providers providing for a wider group.

In February 2008, E maintained its proposal to fund wider service providers, but agreed to set aside £50,000 if it could be shown that funds were needed in relation to the provision of specialist services. It was this decision that was challenged by SBS on the basis that the decision making process contravened s71 Race Relations Act 1976 (RRA) and that E failed to follow its own equality impact assessment policy. Further, the proposed criteria were said to be a misapplication of s35 RRA which does not preclude specialist services for racial groups.

On the second day of the hearing, E conceded that it could not stand by its decision of February 2008. It agreed to fund SBS until a further decision is made about the funding of services for domestic violence victims. The Court made an agreed Order and in its judgment set out some principles which emerged in relation to the CRE Code of Practice on the duty to promote Race Equality 2002 (the Code) and guidance on local authority funding of the services in question.

The Law

S71 RRA requires E to '*have due regard to the need –*

to eliminate unlawful racial discrimination; and

to promote equality of opportunity and good relations between persons of different racial groups.'

This duty was imposed following the Stephen Lawrence

Inquiry Report with the aim of challenging institutional racism. The Code should assist local authorities in complying with its statutory duties.

The Code identifies four principles to enable the duties to be fulfilled:

a) the promotion of race equality is obligatory for all public authorities listed in Schedule 1A of the RRA;
b) public authorities must meet the duty to promote race equality in all relevant functions;
c) the weight to be given to race equality should be proportionate to its relevance;
d) the elements of the duty are complementary which means they are all necessary to the meet the whole duty.

The judgment stated that an authority is only entitled to depart from the statutory code where the reasons are clear and cogent *(R (Munjaz) v Mersey Plan NHS Trust* [2006] 2 AC 148). Further, it was agreed that it was highly important to consider the impact of a proposed policy before the policy was adopted. An impact assessment must not be a 'rearguard action following a concluded decision' *(R (BAPIO and another) v Secretary of State for the Home Department and Secretary of State for Health [2007]* EWCA Civ 1139); in other words, the impact assessment should not be used after the event to justify the adoption of a policy. The *BAPIO* case also called for written records of assessment in order to demonstrate that a genuine assessment had been carried out. The purpose of such risk assessments is to eliminate the risk of adverse impact.

E had failed to assess the impact its policy would have on ethnic minority women. To formulate a policy in this manner was unlawful. When it did carry out an assessment, it found that the largest proportion of domestic violence in the borough was towards white European women. However, this statistic did not stand up when compared with the fact that 58% of the female population in Ealing was white, yet 28% of all domestic violence was suffered by Asian women who made up only 8.7% of the female population in Ealing.

The judgment emphasised comments made in a 2008 sector agreement about relations between government and the voluntary and community sectors which considers that cohesion is achieved by overcoming barriers which may require the needs of ethnic minorities to be met in a specialised way.

The Court ordered E's decision to be quashed.

Comment

Like the Sikh Bangle case (see Briefing 504), this case emphasises the purpose of the statutory duties and demonstrates how equality impact assessments should be utilised to eliminate discriminatory impact. The case is a clear warning to local authorities (and other public bodies) to understand their statutory duties and the equality impact assessment process.

Kiran Daurka
Russell Jones & Walker

Briefing 506

Discrimination on grounds of colour re-visited

Abbey National v Chagger [2008] UKEAT/0606/07/RN, 0037/08/RN & 0041/08/RN

Implications for practitioners

This case involved a number of points. This case report focuses on the issue of the burden of proof when the discrimination is alleged to have been caused by 'colour' rather than 'race' or 'ethnic or national origins'. It concludes, in contrast to *Okonu v G4S Security Services (UK) Ltd* (see Briefing 490), that discrimination caused by 'colour' was inseparable from discrimination on grounds of 'race' or 'ethnic or national origins'.

Background

The ET held that Mr Chagger's dismissal was unfair and on racial grounds. Although the decision was announced informally at the hearing there was an eight month delay in setting out the formal judgment and reasons. Compensation was subsequently awarded in the sum of £2.8m.

Facts

Mr Chagger (C), a man of Indian origin aged 40, was employed by the Abbey National Plc (AN), from 26th November 2001 until his dismissal for redundancy with effect from 18th April 2006. He was a chartered accountant who had been working in the field of risk control and when he joined AN his job title was Trading Risk Controller. He was part of a trading risk team which consisted of two controllers and two associates reporting to Mr Hopkins (H), the head of Risk Control

and Reporting, who in turn reported to Mr Oon who was the director of Market Risk. C and H did not get on well together.

In August 2005 Mr Oon was told that each mature business unit, including the Risk Management division, must achieve a 5% saving. He therefore told H that these savings must be found and redundancies were a possible option. H suggested to him that it would be possible to lose one of the two Trading Risk Controllers, H or Ms Mastronikola (M). As neither H nor M wished to take voluntary redundancy a process was initiated whereby each was assessed on a number of 'competencies' the range of scores being 0, 1 or 2 for each. M received the maximum score of 18 while C was marked down for two competencies and his score was 16. The process also took account of their interim rating on their annual appraisals where C was rated 5 out of 7 on the 'do' scale, and 4 out of 7 on the 'be' scale. It was not clear from the ET judgment how M scored but she appears to have done better, or at least no worse.

C was then told that he was at risk of redundancy and the rest of the team were told that they were not at risk. Prior to this AN had consulted the recognised trade union, but it had not taken the first step required by the statutory dismissal procedures i.e. written statement of circumstances leading them to contemplate dismissal and an invitation to a meeting. C then issued a formal grievance over his redundancy selection and on January 26th he was formally made redundant. A consequent review, and then an appeal, confirmed the redundancy.

Additionally, on February 9th, C was notified that his bonus payment for 2005 would be £45,000 which was £10,000 less than he had received in the previous financial year. On March 9th he raised a formal grievance about this.

On June 14th C raised a formal grievance complaining of race discrimination and on July 18th this grievance was dismissed.

Employment Tribunal

On 14th July 2006 C presented a claim complaining of (i) unfair dismissal (including 'automatic' unfair dismissal pursuant to s. 98A (1) of the Employment Rights Act 1996); (ii) race discrimination; and (iii) breach of contract.

In his unfair dismissal claim C alleged that H had used the possibility of redundancies as a pretext to dismiss him and that his selection for redundancy was predetermined. His race discrimination claim alleged that H was prejudiced against him on grounds of his race and that this prejudice affected the decision to dismiss him, the assessment of his bonus and the handling of his grievance. The ET concluded that:

- he had been unfairly dismissed,
- AN and H had discriminated against C on grounds of race in respect of his dismissal,
- AN had discriminated against him on grounds of race in respect of the dismissal of his grievance and the bonus award, and
- AN was in breach of contract in respect of his bonus.

At the remedies hearing the ET awarded compensation of £2.8m on the basis that C would suffer a career-long loss.

AN appealed against both the liability and remedy decisions, and C cross-appealed on the quantum of uplift.

Employment Appeal Tribunal

The EAT dismissed the appeal on liability but allowed the remedy appeal.

During the appeal AN had sought to argue that C's case before the ET was one of discrimination on the basis of his colour alone, to the exclusion of any other types of 'racial grounds' identified in s3 RRA. This meant that, following *Okonu v G4S Security Services (UK) Ltd*, the easier burden of proof provided for by s54A RRA should not apply to this case.

In considering this argument the EAT pointed out that the claim had been framed and argued as discrimination based on C's race, colour **and** his ethnic or national origins. Although C in his witness statement referred mainly to his colour, he did also refer to his race when defining himself as *'born in India to Asian parents and I am therefore Asian in both origin and appearance'*. The EAT stated that the starting point must be the pleadings and the list of issues, rather than his witness statement.

Mr Justice Underhill went on to discuss whether s54A applied to claims of discrimination on grounds of colour more generally. He pointed out that:

> *...in the real world the different kinds of discrimination referred to in s.3(1) overlap to a very considerable extent; and in many, perhaps most, cases they will be practically indistinguishable...it is very hard to conceive of a case of discrimination on the ground of colour which cannot also be properly characterised as discrimination on the ground of race and/or ethnic origin. It could indeed be said that colour is significant primarily as an outward and visible manifestation of race or ethnic origin.*

This led him to conclude that:

> *In our view it is inconceivable that the Directive is not intended to apply to discrimination which is expressed as being on the ground of colour: for the reasons already*

given, such discrimination is in practice necessarily an aspect or manifestation of discrimination based on 'racial or ethnic origin'. We have no doubt that the European Court of Justice would not give even the time of day to a submission that a claim of 'colour discrimination' did not attract the operation of the Directive. That being the position in EU law, s.54A must of course be construed so far as possible to give effect to that position.

Comment

In essence this case clearly concerns discrimination on grounds of race, ethnic or national origins as well as colour so the EAT's conclusions in relation to colour must be treated as obiter. Whereas in *Okonu v G4S Security Services (UK) Ltd* the ET had, possibly idiosyncratically, found as a fact that Mr Okonu was discriminated against on grounds of his colour alone. However, Mr Justice Underhill's comments in this case do strike a note of common sense, as our Briefing 490 comments *'it is hard to see how discrimination based on colour is not at the same time based on race'*. This is one on the many anomalies which we expect the new Equality Bill to clarify.

Gay Moon
Equality and Diversity Forum

Briefing 507

Drawing inferences of discrimination from an unanswered questionnaire

D'Silva v NATFHE and others [2008] IRLR 412 EAT

Implications for practitioners

The value of the questionnaire procedure is undermined by the next President of the EAT in this case. He suggests that an inference can be drawn from an unanswered reply only if there is some evidential connection between the failure to answer and the act of discrimination complained of.

Facts

Dr D'Silva (D), of Indian origin, was employed as a lecturer at Manchester Metropolitan University since 1993. He joined the trade union NATFHE in 1994. Under its rules, the union has an absolute discretion to offer legal advice and assistance. Factors taken into account are chances of success, whether the case has wider significance for the membership and funding available in its legal budget. At the material time, Michael Scott (S) (the second Respondent) headed the in-house legal department.

In 2002, D brought employment tribunal proceedings against the university alleging race discrimination. He was offered assistance by the union but, after some delays, S gave pessimistic advice as to the merits of the claim and reduced the level of assistance offered. D instructed his own solicitors and counsel who conducted the case for him until it was settled. The union refused to make a contribution towards his private legal costs. At around the same period, he received some unfavourable advice from solicitors instructed through the union as to a possible stress-related personal injury claim. All this left him dissatisfied with the union.

In November 2003, D requested further assistance from the union in relation to a proposed new claim against the university. Part of the proposed new claim concerned alleged victimisation in a reference. There was prolonged correspondence between D and S as to which counsel should be instructed to advise. D wanted someone from Littleton Chambers to be instructed, but S could not find anyone available there for an acceptable price. Eventually, D agreed to the instruction of Nicholas Toms at Doughty Street. At a conference in February 2005, Mr Toms gave pessimistic advice, though he regarded some parts of the claim as less weak than others. D subsequently wrote to S complaining that he had not received value from the union over his 10 years' membership 'as have other ethnic minorities'. He said S had tried to influence Mr Toms and he threatened to report S 'to the Bar'. He demanded a second opinion from a senior counsel from Littleton Chambers or at least a written opinion from Mr Toms, so that he could then approach a barrister of his own. There was further correspondence, in which D accused S of direct discrimination or of victimisation because he had given evidence for a fellow NATFHE member in a race discrimination complaint against the union.

The union supplied Mr Toms' written advice in March 2005. It advised that no part of D's claim had reasonable prospects of success and, that if he ran all the currently pleaded allegations, there was a costs risk. However, if he withdrew claims concerning other issues, he would have some prospects of success in relation to the reference. NATFHE would represent him, with S instructing Mr Toms, if D amended his claim to focus on the reference issue. On 19th March, D responded that he would withdraw the weaker claims, but in view of

> *the lack of trust and confidence between us … you should consider offering me a solicitor and barrister of my own choice or at least a barrister of my choice.*

S took this to be a rejection of the union's offer and wrote back saying he would close his file. D wrote to the union's general secretary asking for review of the decision not to offer further assistance. This was carried out and the original decision was confirmed to be correct.

Meanwhile, D's tribunal claim against the university was listed to start on 18th April 2005. The ET refused D's request for an adjournment, whereupon D made it clear he would take no part in the proceedings. The ET went ahead and conducted a 14-day hearing in his absence, followed by four days deliberation in chambers. Before the ET issued its judgment, D appealed against the refusal of the adjournment. The EAT allowed his appeal but awarded costs for his 6 week delay in lodging the appeal, which had led to the entire costs of the hearing being wasted.

By coincidence, on the same day, the ET gave its judgment. D was held to have succeeded in some parts of his claim. D applied to the union for further legal assistance in relation to the EAT's costs order. An independent member of the National Executive Committee considered the matter and assistance was refused. Unfortunately D never received that letter and his chaser letters were ignored, due to the NEC member's stress from involvement in an industrial dispute.

Employment Tribunal

D lodged proceedings against the union and various individual respondents for direct race discrimination and/or victimisation in the original decision to curtail legal assistance, the outcome of the review and the refusal to give him assistance regarding the EAT's costs order. An ET rejected all his claims. It said that D had not established primary facts from which race discrimination or victimisation could be inferred and the burden of proof transferred. Even if he had done so, the union would have discharged such burden. The union's explanations were reasonable, credible and not discriminatory. It was not unreasonable for the union to believe that D, in his letter of 19th March 2005, had effectively rejected the offer of limited support offered to him on the basis of Mr Toms' advice. In the light of D's response, expressing a loss of trust and confidence and requesting alternative advisers, the union was entitled to have regard to the cost factor. No relevant more favourable treatment was shown in respect of the two white comparators D had put forward. D appealed.

Employment Appeal Tribunal

D put forward 9 pleaded grounds of appeal, all of which were rejected by the EAT under its soon to be new President, Mr Justice Underhill. The final two grounds were that the ET failed to draw discriminatory inferences from the union's failure to keep ethnic monitoring information concerning acceptances or refusals under the legal assistance scheme, and/or failed to draw inferences from the manner in which the union had answered the RRA questionnaire.

D said the ET had simply accepted the union's explanation that its computer systems did not permit this information to be recorded routinely and collating such information by hand would have been disproportionately burdensome. D argued this was inconsistent with the guidance in *Dattani v Chief Constable of West Mercia Police* [2005] IRLR 327. He said that when large organisations fail to keep such data, it really begs the question as to why systems have not been put in place to carry out this task, either electronically or manually.

The EAT noted that this argument was confined to the union's failure to maintain the data in the first place, rather than the failure to attempt to obtain it subsequently. It was therefore not a matter of an evasive answer to a questionnaire of the kind considered in *Dattani*. Moreover, there was no evidence before the ET which could have linked decisions leading to the design of the computer system with decisions about the provision of legal assistance to D. Failures of the kind complained of are only relevant to the extent they potentially shed light on the alleged discrimination, i.e. the mental processes of the decision-maker. Even if S had been involved in decisions about the computer system, which was unlikely, the most that might conceivably have been established was that he did not pay sufficient attention to the risk of discrimination in the provision of legal assistance. That would not help decide whether he had racially discriminated in this case.

The EAT said it had noticed a tendency in discrimination cases for respondents' failure in answering a questionnaire or otherwise provide information or documents, to be relied on by claimants – and sometimes tribunals – as automatically raising a presumption of discrimination. That is not the correct approach. The '*Barton* guidelines' endorsed in *Igen Ltd v Wong* [2005] IRLR 258, CA, require inferences to be drawn only 'in appropriate cases'. Drawing inferences is not a tick-box exercise. It is necessary in each case to consider whether in the particular circumstances of the case the failure in question is capable of constituting evidence supporting the inference of discrimination. There will be many cases where a failure of this kind, however reprehensible, can have no bearing on why the respondents did the act complained of.

Comment

It is generally accepted, even in judicial circles, that race discrimination – while statistically widespread – is difficult to prove in individual cases. For this reason, the law of evidence and certain tribunal procedures have been constructed in a way which attempts to address this injustice. The shifting burden of proof once a claimant has proved a prima facie case was introduced by a European Directive in recognition of these evidential difficulties. The questionnaire procedure is even more crucial. It is notable that parliament chose to give claimants (not respondents) access to this unique procedure. While employers and other respondents have access to all the documents and information surrounding the incidents complained of, questionnaires are often the only way claimants can find out what has happened. If respondents can avoid answering with impunity, discrimination will remain hidden and claimants will be unable to access information to prove their case.

The EAT suggests an inference should be drawn from failure to answer only where the failure is *'capable of constituting evidence supporting the inference that the respondent acted discriminatorily in the manner alleged'*. This undermines the procedure by focusing on the respondent's reason for not answering rather than on the value of the lost answer. It also raises a question. How can one be really sure that the failure to answer is not significant without knowing the content of the unprovided answers?

There are other reasons why the idea that, in order to draw an inference, the failure to answer the questionnaire must bear directly on the motives of the original decision-maker cannot be correct. In many cases, the decision whether to answer a questionnaire is made by a managing director, chief executive or head of human resources, who may have had no involvement in the allegedly discriminatory decision. What if employers fail to answer questionnaires simply because they are incompetent or because they take a policy decision never to use up time and resources on questionnaires? Would the EAT view this as a reason which 'however reprehensible' had no bearing on whether they discriminated and therefore from which no inference could be drawn? Or could one argue that such a policy or practice would be significant in that it revealed a refusal by the employer to engage constructively with equality matters?

D's representative is surely correct when he says, if a large respondent fails to monitor, it begs the question why not. The concept of monitoring has been with us for a long time and is recommended in the CRE Code of Practice as well as part of the public sector race duty. As the voluntary and public sectors would testify, ethnic monitoring on computerised systems is not at all difficult to set up. If S did not pay sufficient attention to the risk of discrimination in the provision of legal services, might that not (in theory) be indicative of a general lack of understanding within the union which could have led to discriminatory decisions?

Future tribunals should be persuaded to distinguish *D'Silva* on its facts. Read closely, the ratio of the decision may simply be that a tribunal's decision not to draw an inference from an unanswered questionnaire cannot be overturned on appeal unless such decision was perverse, or unless an inference must always be drawn in such circumstances. Neither of those points appears to have been argued on appeal. The ground of appeal seems to have been simply that the ET ought to have drawn an inference on the balance of the evidence. The EAT's general comments were probably obiter.

Moreover, the issue arose as a final point at the end of a long and hopeless appeal. To the EAT, the facts of D's case might well have seemed unsympathetic and there was no real evidence of discrimination. It seems that the union's only failure in answering the questionnaire was its inability to supply an ethnic breakdown of applicants for legal assistance since it had never collected such information on the computer in the first place. As the EAT accepts, it is not a case where the respondent had information which it withheld. Arguably the EAT's more general comments go further than the facts of this case and should not be binding. In any event, this was certainly not a case where the respondents failed to answer altogether.

The questionnaire procedure is of course available for all kinds of discrimination, not just race. When

507 encouraging tribunals to draw an adverse inference from a respondent's failure to answer the questionnaire, it is best to go back to first principles, reminding them of the wording of the relevant statute and the Court of Appeal's guidance in *Igen Ltd v Wong*. S65 of the Race Relations Act 1976 says the purpose of the procedure is *'with a view to helping a person who considers he may have been discriminated against … to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner'*. Under s 65(2)(b) the ET may draw an inference from failure to reply if it considers it *'just and equitable'* to do so. There is no further qualification to the tribunal's discretion. There is nothing which says the failure to answer must in itself be indicative of discrimination.

Similarly in *Igen Ltd*, where the CA sets out the revised Barton guidelines. After reminding tribunals that it is important to bear in mind that it is unusual to find direct evidence of (sex) discrimination, the CA says that whether a claimant has proved a prima facie case depends on the inferences the ET draws from the primary facts: *'These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire … Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.'* The burden of proof then shifts to the respondent. The CA concludes firmly, underlining the importance of the questionnaire: *'Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'* There is no mention in these very explicit guidelines that an inference from failure to answer can be drawn only if it in itself reflects on the discriminator's state of mind.

Mr Justice Underhill in *D'Silva* warns against wasting time and money, running arguments that an inference should be drawn from an unanswered questionnaire, where it is clear from the start that failure to answer can have no bearing on the reason why the employer did the act complained of. This reveals a lack of understanding as to the delicate balance of evidence in most discrimination cases, where the inferences to be drawn from the facts, especially having regard to the transferring burden of proof, only gradually emerges. In any event, the amount of time arguing that failure to answer a questionnaire should be taken into account would be minimal.

In conclusion, there are various ways of dealing with the *D'Silva* decision: (1) dispute that it is legally correct, having regard to the wording of the statutes and the CA's guidance in *Igen Ltd*; (2) try to limit its application by distinguishing it on the facts or reading what it says narrowly; (3) convince the tribunal that in your particular case, the failure to answer is indeed potentially probative of the alleged discrimination.

Tamara Lewis
Central London Law Centre

508 # Briefing 508

Harassment on the grounds on another person's religion

Saini v All Saints Haque Centre (1), Mr. D Bungay (2) and Mr S Paul (3)
[2008] UKEAT/0227/08

Facts

The claimant (S) and a fellow employee, Mr. Chandel (C), worked at the All Saints Haque Centre, an advice centre located in the All Saints district of Wolverhampton. C was employed as its projects manager until his dismissal on 3rd July 2006, whilst S was employed as a senior advice worker from 11th August 2003 until his resignation on 11th July 2006. Both S and C are Hindu. The second and third respondents (B and P) were Ravidassis – a distinct faith group with religious beliefs that distinguish them from both the Sikh and Hindu communities. They worked as projects manager and a volunteer worker respectively until 2005, and from then on they gained control of the board of directors of the centre along with other Ravidassis.

Both B and P resented the fact that they had lost their posts and that non-Ravidassis had, as they saw it, been retained in post by the Hindu manager, C. They wanted to get rid of C because he was a Hindu.

The respondents took certain action in relation to S including: interviews regarding apparent complaints, the demanding of certain files at short notice; and suspension. S felt that he was being pressured by the respondents to provide them with ammunition to justify their taking action against C instead of conducting any proper investigation of any complaints against him. S was called to a disciplinary hearing, which he attended 'under duress' only for it to be adjourned. He subsequently resigned.

Employment Tribunal

S brought a claim of unfair constructive dismissal and wrongful dismissal as well as religious discrimination. The Employment Equality (Religion or Belief) Regulations 2003 (the Regulations) provide at 5(1) that a person subjects another person to harassment where 'on grounds of' religion or belief it engages in unwanted conduct which has the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

S succeeded in everything bar the claim based on the Regulations. The ET found that although the behaviour of the respondents may have had a purpose or effect which fell within regulation 5(1(b) – that of harassment – it was not on the grounds of the claimant's religion but on the account of the respondents' desire to target C and the targeting of C was clearly on the grounds of C's religion (although this was a finding of fact not anticipated by the parties and submissions were neither sought not provided on this). The ET held that the respondents did not act as they did on the grounds of the S's religion or belief, and thus that this claim was not made out.

Employment Appeal Tribunal

The EAT upheld S's appeal. Lady Justice Smith giving judgment considered the cases of *Weathersfield Ltd v Sargent* [1999] ICR 425 and *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7, as well as *Redfearn v Serco* [2006] ICR 1367. She held that regulation 5(1)(b) – the harassment provisions – will be breached not only where an employee is harassed on the grounds that he holds certain religious or other relevant beliefs but also where he is harassed because someone else holds certain religious or other beliefs.

> *To use an employee in any manner in the implementation of a discriminatory policy is caught if the effect on the employee falls within any of the descriptions set out in paragraph 5(1)(b). Such an interpretation is consistent with the aims and intention of the Framework Directive and of the plain import of the legislation. To adopt the language of the Advocate General at paragraph 17 in Coleman v Attridge Law: 'As soon as we have ascertained that the basis for the employer's conduct is one of the prohibited grounds then we enter the realm of unlawful discrimination'.*

The EAT held that the ET had erred in not holding, on the facts found by them, that the respondents had subjected S to discriminatory harassment in breach of regulation 5. It was plain from the decision that the respondents mistreated S, not simply because they wanted to get rid of C, but because of their desire to get rid of C because he was a Hindu. The desire to get rid of C cannot be separated from its impetus namely the respondents' anti-Hindu policy. That policy was a discriminatory one and the only conclusion that could follow was that the respondents' treatment of S was harassment on grounds of religion contrary to regulation 5.

On the matter of the ET reaching a factual conclusion which was not anticipated by either party and in respect of which they had not accordingly heard submissions, the EAT highlighted the need for tribunals to be vigilant and to consider whether there is a possibility that issues of law also arise in respect of which submissions have not been made.

The EAT substituted ET's decision for a finding that the respondents discriminated unlawfully against S by harassing him on grounds of religion contrary to paragraph 5 of the Regulations.

Comment

This case has seen the EAT accept the broad scope of the anti-discrimination provisions, and in particular the concept of harassment because of association with a particular ground in the context of religion and belief. It builds on *Coleman v Attridge* (see Briefing 499) and makes it clear that the other anti-discrimination provisions are to be interpreted in accordance with that decision.

Catherine Casserley
Cloisters

'Youthful enthusiasm' raises inference of age discrimination

McCoy v James McGregor & Sons Ltd (1) Mr Dixon (2) Mr Shane Aiken (3)
[2007] NI Industrial Tribunal 237/07

Background

This is the first decision of the Northern Ireland Industrial Tribunal (IT) on a claim of unlawful age discrimination under the Employment Equality (Age) Regulations (Northern Ireland) 2006. The IT found that the respondents had treated the claimant less favourably in the arrangements made for the purpose of determining to whom they should offer employment and by refusing to offer employment to Mr McCoy (McC).

Facts

James McGregor & Sons Ltd (McGs) was a commercial timber trading company and Mr Dixon (D) was a Director. The company was a subsidiary of R & D Aiken Limited of which Mr Aiken (A) was a Director. McGs employed ten staff. In December 2006 they conducted a recruitment exercise to appoint two sales representatives. The job advertisement stated that candidates needed to have:

> *At least five years experience* [and] *youthful enthusiasm.*

McC was 58 years old at the time of the recruitment exercise. He telephoned D and outlined his thirty years of experience in the timber industry. D asked McC his age and commented that he was around the same age as himself and queried whether he still had the drive and motivation to be successful in the trade. McC reassured D that he was very enthusiastic. He was not asked to complete an application form; job descriptions or personnel specifications were not used.

McC attended for interview with D and was again asked, in the context of his age, to convince D that he still had the drive and motivation to be successful and whether he was hungry enough to succeed.

McC was asked to attend a further interview with D and A. He was told that there were three candidates shortlisted for the two positions. D made several references to the McC's age and again asked him to convince them that he had the drive, motivation and was hungry to succeed. The IT found that A had remained passive and disinterested during McC's interview. McC believed that he had been forthright, enthusiastic and demonstrative during the interview and he had *'sold'* his experience and expertise well.

McC later received a letter advising him that he was unsuccessful. In response to his request for feedback, D advised that the two successful candidates had met the specifications with regard to motivation and drive more closely than he had.

The two successful candidates were aged 43 and 42 years old. One candidate had provided his age on his CV and D had written the other candidate's date of birth on his CV. D could not provide any rational explanation as to why he had taken a note of the candidate's date of birth.

D completed rating forms for both of McC's interviews. On the first interview form, D had recorded McC's age, noted that his health was good but there was a question of motivation. His notes on the second interview form included the comments *'motivation??'* and '*Shane's comment. That lad would put me to sleep.'*

Industrial Tribunal

The IT drew an inference of discrimination from the use of the phrase *'youthful enthusiasm'* in the job advertisement when set alongside other evidence in the case. McGs had attempted to argue that the expression was intended to be a term of mere popular usage. The IT found that there was a clear linkage in D's mind between the concepts of age and *'energy'*, *'enthusiasm'* and *'motivation'*, hence the usage of 'youthful enthusiasm' in the advertisement and the questions which he asked McC at various stages of the selection process.

The IT described the process of marking and scoring of the interviewees as *'at best opaque'*. The marking in the scoring process was inconsistent and difficult to comprehend, appearing to be completed on an entirely ad hoc basis and was characterised by obscurity and a lack of transparency. The IT could not find any reason why McC had failed to be selected when he had very considerable experience in the timber industry. The IT had no reason to doubt his own subjective assessment of his interview performance. The comments made on the interview forms clearly displayed an express linkage between McC's age and the notion of energy, motivation and enthusiasm. McC was questioned about his drive and

motivation whilst the two younger successful candidates were not asked such questions. Both D and A had made the assumption and approached the selection process with the notion that McC would be potentially less of an asset to McGs than would be his younger co-interviewees. The IT found that, but for his age, McC would more probably than not have been selected for one of the two posts.

McGs had stressed the empathy between D and McC, as the two were both of a relatively similar age. The IT found that motivation is not a necessary component of proving age discrimination and was therefore of no consequence in reaching a determination of discrimination. The IT's finding of discrimination was against all three respondents. D and A had knowingly aided McGs in doing unlawful acts and therefore were treated as doing the unlawful acts themselves.

Remedy

The IT was to reconvene to determine the remedy. However, prior to the reconvened hearing, the parties reached agreement on the remedy. McGs agreed to pay McC £70,000. In addition, they agreed to liaise with the Equality Commission for Northern Ireland, who had supported McC, to review their practices and procedure to ensure compliance with the legislation.

Comment

The case demonstrates the importance of all employers being aware of the age discrimination legislation and ensuring that their practices and procedures comply with the legislation. In particular, the case highlights the dangers of using such phrases as *'youthful enthusiasm'*, *'drive'* and *'motivation'* in the context of recruitment exercises. The twenty three page decision offers a very practical case study of poor recruitment and selection practices and processes, highlighting the dangers which can arise if employers fail to adopt systematic and equality proofed selection methods.

Mary Kitson
Senior Legal Officer
Equality Commission for Northern Ireland

Equal Rights Trust's Declaration of Principles on Equality

On 21 October 2008, the Equal Rights Trust published a Declaration of Principles on Equality – a document drafted, agreed and signed by a group of 128 human rights and equality experts and advocates. The Principles are based on legal concepts that have evolved in international, regional and national human rights or equality jurisprudence. Although many of the terms employed in the Declaration are sufficiently well established, the resulting conception of equality in its entirety opens a new space for standard development in the international human rights system.

The Equal Rights Trust is an independent human rights organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Achieving consensus among the contributors was not an easy task, given the gaps and discrepancies between the frameworks of equality law and international human rights law; the differences in the meanings of key legal terms across jurisdictions; and the fragmentation of the global equality movements, broken down into narrower co-existing agendas.

The Declaration expresses an integrated view of substantive equality, deriving the right to equality from the universal recognition of equality as a value in itself, as well as a necessary aspect of a fair society. The Declaration shares the basic assumptions of human rights philosophy: for example, that as a human right, equality is an entitlement and not a benefit, and must be legally enforceable, like every other human right. The Declaration follows a similar logic to that found in numerous pre-existing human rights instruments setting out the content of the right, the definitions of key terms, the scope of the right's application, right-holders, duty-bearers, obligations to give effect to the right, etc.

In the Declaration, the concept of equality, as well as its equivalent, 'full and effective equality', understood as 'larger' than that of 'non-discrimination', is given a meaning which is richer than the notions of equality before the law and equality of opportunity.

An essential element of the right to equality is participation on an equal basis with others in any area of economic, social, political, cultural or civil life. But the Declaration defines the areas of application of the right to equality without drawing the distinctions between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, which have for so long bedeviled international human rights law. At the same time, the Declaration goes beyond the understanding of discrimination and equality as necessarily related to an existing legal right (or to 'any right set out by law', as Protocol 12 to the European Convention on Human Rights puts it). This non-subsidiary approach to the definition of equality was preferred in the Declaration to the approach taken by international human rights law, the law of the European Convention on Human Rights and other legal systems which understand discrimination as discrimination in the exercise and enjoyment of a legal right. The understanding of 'equal treatment' in the Declaration abandons the framework of formal equality: as the right to equality requires ensuring participation in certain areas of life 'on an equal basis with others', non-identical treatment is justifiable and indeed necessary in order to achieve such participation. Positive action measures are not defined as an exception to the principle of equal treatment but as part of its implementation.[1]

The Declaration of Principles on Equality is open for further endorsements from both individuals and institutions. Everyone who wishes to support the Declaration is invited to send a message to info@equalrightstrust.org, or visit the website www.equalrightstrust.org and sign up to the Declaration online.[2] The Equal Rights Trust is committed to initiating and coordinating efforts to ensure universal recognition of the Declaration.

Dr Dimitrina Petrova
Executive Director
The Equal Rights Trust

1. For the full text of the Declaration, a list of the original signatories and my commentary on the Declaration's legal strengths, see www.equalrightstrust.org

2. Both individual and organisational endorsements are welcome. Individual signatories are requested to provide their preferred institutional affiliation, which will be mentioned in publications for identification purposes only.

News on the proposed non-employment equality directive

As anticipated in our last issue of *Briefings*, Volume 34, the European Commission has proposed a new directive to cover the areas outside employment in the fields of disability, sexual orientation, religion or belief and age. Broadly the directive proposes protection from direct and indirect discrimination, victimisation and harassment in both the public and private sectors in:

- Social protection, including social security and health care
- Social advantages
- Education
- Access to and supply of goods and services which are available to the public, including housing

Inter-governmental discussions are taking place at EU level through working group meetings and the details of the directive are now being discussed within the standing committees. The two key standing committees are the LIBE (Committee on Civil Liberties, Justice and Home Affairs) and the EMPL (Employment and Social Affairs). Each of these committees has appointed a rapporteur and will produce a report to the European Parliament which will undoubtedly be influential. The Dutch Green MEP Kathalijne Buitenweg is the rapporteur for the LIBE committee and Liz Lynne is the rapporteur for the EMPL committee. These committees can propose amendments to the existing draft directive which will then be put to the European Parliament and, if agreed, these will be passed on to the Council of Ministers.

The draft timetable for the directive in the EMPL and LIBE committees is:

- Discussion of amendments: 2 December 2008
- Adoption in EMPL: 21 January 2009
- Adoption in LIBE: February 2009
- Plenary: March 2009

The European Parliament only has to be consulted on the proposed directive; it does not have the power to approve or reject it. The EU legislative procedure comes under the European Communities Treaty Article 13 paragraph 1. This procedure requires the vote for the directive in the Council of Ministers to be unanimous amongst all 27 Member States. At the moment there are a small number of Member States who are, if not opposing the directive, *'expressing strong reservations'*. These are led by Germany with Ireland, Malta and the Czech Republic following close behind. The UK appears to be the main opponent to including education within the scope of the directive. In next few months it will be essential for those who consider that such a 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, the Rt Honourable Caroline Flint MP.

The DLA will hold its AGM and a social event at 6pm on December 9th at Doughty Street Chambers, 54 Doughty Street, London. Dr Richard Light, OBE, will be the guest speaker and will speak on the UN Convention on the Rights of Persons with Disabilities. 2 CPD hours have been accredited for this meeting. Wine, soft drinks and nibbles will be provided. All members welcome.

Default retirement age is not unlawful, says AG

On 23rd September Advocate General Mazak provided the ECJ with an opinion in the Heyday challenge to the provisions of the Employment Equality (Age) Regulations which give employers the right to retire people at 65. In his opinion, a rule which permits employers to dismiss employees aged 65 or over if the reason for dismissal is retirement, can in principle be justified under Article 6(1) of Directive 2000/78 if that rule is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market and the means put in place to achieve that aim are appropriate and necessary. The ECJ hearing took place in July 2008 and a judgment is likely before the end of the year.

Concerns over Higher Courts and hard-won principles of discrimination law

Speaking at a recent DLA Practitioner's Group meeting, Karon Monaghan QC asked the question: are the higher courts undermining the hard-won principles of discrimination law? Karon thought they were not, although she is less sure about the Employment Appeal Tribunal. She pointed out that many of the recent cases outside the employment context show a sophisticated and nuanced understanding of equality issues. At the same time, the EAT has been tending towards a narrower view, which many equality practitioners find worrying. A full copy of her talk is available to members on the DLA website.

Criminal Justice and Immigration Bill

The Criminal Justice and Immigration Bill received Royal Assent on 8 May, bringing into force important new legal protections against incitement to hatred on grounds of sexual orientation. Schedule 16(a) amends Part 3A of the Public Order Act 1986 to include hatred against a group of people defined by reference to sexual orientation.

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Amendment Regulations 2008

From 27th October 2008 agency workers with contracts of less then three months gain equal access to Statutory Sick Pay with other workers. This corrects the previous lacuna in the law, which left such workers unprotected.

Briefings

Notes and news 38

Abbreviations

CA	Court of Appeal		Related Less Favourable Treatment)		and Social Affairs		Examination
CPS	Crown Prosecution Service	EA	Employment Act 2002	EOC	Equal Opportunities Commission	NICE	National Institute for Clinical Excellence
CRE	Commission for Racial Equality	EAT	Employment Appeal Tribunal	EqPA	Equal Pay Act 1970	PCP	Provision, Criterion or Practice
CS	Scottish Court of Session	ECHR	European Convention on Human Rights	ERA	Employment Rights Act 1996	PHR	Pre-hearing Review
DDA	Disability Discrimination Act 1995	ECtHR	European Court of Human Rights	ET	Employment Tribunal	RRA	Race Relations Act 1976
DJ	District Judge	ECJ	European Court of Justice	HC	High Court	SDA	Sex Discrimination Act 1975
DLA	Discrimination Law Association	EDF	Equality and Diversity Forum	HL	House of Lords	SOR	Employment Equality (Sexual Orientation) Regulations 2003
DLR	Discrimination Law Review	EHRC	Equalities and Human Rights Commission	HRA	Human Rights Act 1998		
DRC	Disability Rights Commission	EMPL	Committe on Employment	IT	Industrial Tribunal		
DRD	Disability Related Discrimination (Disability			LIBE	Committee on Civil Liberties, Justice and Home Affairs		
				MMSE	Mini Mental State		