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Editorial *Putting human rights standards at the heart of equality*

It is significant to reflect on how human rights principles are increasingly to the fore in our discussions about promoting equality and tackling discrimination in society. In her article in this edition of *Briefings* on dealing with competing equality claims, Maleiha Malik argues that human rights principles must be the minimum standard upon which interpretations of conflicting equality rights are based and resolved.

The Runnymede Trust's report on social justice and financial inclusion raises timely issues. Reporting on the financial exclusion of Black and minority ethnic people denied access to financial goods and services such as bank accounts, credit or insurance, the Trust argues that this can deny individuals the opportunity to participate as equals in societies based on the market economy. The Trust's report raises for discussion whether access to credit should be seen as a social or economic right.

New models for tackling financial exclusion based on principles of social justice are proposed as alternatives and this issue chimes with the current discussion on the government's proposals to establish a new statutory duty on public bodies to tackle socio-economic exclusion.

The theme of the development of human rights is repeated in the report on the UK's progress towards ratifying the UN Convention on the Rights of Persons with Disabilities.

This broad discussion creates a dynamic and powerful environment at a time when equality and human rights are, potentially, under threat from a number of different sources – witness the rising tide of anti-Roma racism in Europe where scapegoating Roma for economic problems and increasing crime has brought attacks on Roma communities in Hungary resulting in the death of at least 5 people, including a 5 year old child.

The protectionist reaction of construction workers, rightly concerned about growing unemployment across Britain, has led to demands to exclude foreign workers threatening the application of the principle that all European Union citizens have the same right to work anywhere in the EU and threatening to encourage a similar rise in racism and xenophobia here. We need to take action to ensure that responses to the economic crisis do not act as a cover for dismantling equality and human rights in the UK.

Looking back 25 years to the miners' strike when (in Great Britain) legal protection against discrimination in employment existed only on grounds of sex and race, 1984 seems like a far distant place. That struggle was against a fundamental denial of the rights of organised workers and was ultimately unsuccessful. What we have gained since in terms of workers' rights has come about mainly because of the UK's membership of the European Union. It is thanks to the EU that the UK now has anti-discrimination law on age (see Briefing 515 on the outcome of the Heyday challenge) and other grounds on which the UK might otherwise have been reluctant to legislate. We must remain alert to threats to equality and human rights which could result from a severe financial recession and constantly reiterate the argument that the principles of equality and human rights are the fundamental building blocks of a stable society which benefits all of us, employers and employees alike.

The government plans to introduce its new Equality Bill in the next few months and this provides the opportunity to address and avoid conflicts between competing equality rights. Regrettably, the government is not proposing to include a purpose clause or preamble to the Bill. The DLA and other organisations have argued that a purpose clause which refers to human rights and equality standards and principles should provide the framework for interpretation and implementation of this new law and would serve as the backbone for the new single equality duty. The new Bill could provide mechanisms to tackle structural and historical disadvantage, including financial and socio-economic exclusion, suffered by particular groups, but there are strong pressures to adopt a 'light touch' in relation to both the public and private sectors.

As we wait to see the content of the new Equality Bill there must be continuing serious public debate about what is needed in terms of law and action to tap into the enormous potential which would flourish if we take positive steps to eliminate, at every level, discrimination in its single and multiple forms and ensure that 'self belief' exists equally in all members of our society.

When the fundamental principles of the market economy have been shaken to their roots, a new climate emerges which provides us with an opportunity to create new and imaginative approaches to achieving substantive equality underpinned by human rights principles as the true minimum standard.

Geraldine Scullion
Editor

Please see back cover for list of abbreviations

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A path to greater equality? The government's proposals for an Equality Bill

In this article Shah Qureshi discusses the government's proposals for the new Equality Bill which is due to be introduced in parliament in the coming months. He summarises the key themes in the proposed Bill and highlights areas where current equality law can, and should, be strengthened.

In its general election manifesto of 2005 New Labour made a commitment to consolidate and update the UK's Equality Laws in a single Equality Act. This led to a lengthy consultation process by way of the Discrimination Law Review and the Equalities Review resulting in the publication of *Framework for a Fairer Future – The Equality Bill* in 2008 (the proposals) which sets out the government's intended measures and changes.

The aims of the Equality Bill are to simplify the nine major pieces of discrimination legislation currently in existence and to strengthen the impact of equality law, particularly in new areas.

The proposals point out that although anti-discrimination legislation has helped achieve much change, many inequalities still exist. Examples of such inequality include:

- women's pay is on average 12.6% less than that of men;
- if you are disabled you are 2.5 times more likely to be out of work than a non disabled person;
- if you are from an ethnic minority you are 15.5% less likely to be able to find work;
- 62% of over 50s believe they have been turned down for a job because of their age compared to 5% of the population in their 30s;
- 6 out of 10 lesbian and gay schoolchildren experience homophobic bullying;
- 85% of Muslim employees reported that they had suffered discrimination on the grounds of religion.

A new equality duty on public bodies

There are currently three public sector equality duties which require public authorities to combat discrimination and promote equality in respect of race, disability and gender. The government proposes a new equality duty which would cover the existing duties and would extend to gender reassignment, age, sexual orientation and religion or belief.

The principle of a single equality duty is a good one in that it can be an effective tool to tackle structural and disadvantage suffered by particular groups.

The proposals state that the existing equality duties on public bodies, on race, disability and gender, operate to ensure the whole of the public sector is *'engaged in actively tackling discrimination and disadvantage'*. The government states that these duties have led to public bodies *'considering more broadly the needs of women, disabled people and local ethnic minority communities who use their services and are employed by them'*.

Public bodies such as local authorities, health authorities, schools, colleges, universities and government departments are required to consider such things as their spending decisions, practices and service delivery in light of these duties.

The fact that the new equality duty will cover all strands including race, disability, gender, gender reassignment, age, sexual orientation and religion or belief is a step forward and is to be welcomed. Nevertheless the detail needs careful examination and it is suggested that the following issues need to be considered and addressed:

- the general duty ought to apply to all public authorities. The size and resources of any relevant public authority can be taken into account by having regard to the principle of proportionality.
- the current race equality duty is too weak in that it requires public authorities to have 'due regard' to the need to promote equality. Any new equality duty ought to require that public authorities 'promote' equality. This would encourage public authorities to be more positive and proactive in respect of their duties.
- there needs to be a clear statement of purpose in relation to the public sector duties. This ought to be tied to a purpose clause or preamble to the Equality Bill which could refer to the need to tackle structural and historical disadvantage suffered by particular groups.
- the specific duties currently in existence need to be strengthened and extended to all the equality

strands. There are weaknesses in the current specific race equality duties as they are insufficiently focused. Specific statutory rules on compliance with a general equality duty are needed to provide guidance to public authorities. Such statutory rules need to be bolstered by requiring measurable outcomes which can be monitored by the Equalities and Human Rights Commission (EHRC). By measuring specific outcomes the government, public authorities and other stakeholders can assess progress on achieving equality.

Age Discrimination

It is currently unlawful to discriminate against workers on grounds of their age unless such discrimination can be justified. The government proposes to extend the law by making it unlawful to discriminate against someone on the grounds of their age when providing goods, facilities and services or carrying out public functions. It is proposed that the new law will only cover over 18 year olds.[1] The Equality Bill will provide powers for regulations at a later date to prohibit age discrimination - making it more difficult for debate or amendment of government proposals. There are compelling reasons why such protection is needed; examples include doctors failing to investigate health matters raised by older persons or the failure to provide the same quality of treatment for a person on the grounds of their age. Differential provision of goods and services on the grounds of age can be justified. This could include, for example, the targeting of flu vaccinations for particular age groups and, possibly, differential treatment on the grounds of age in certain financial services. Much will depend on the case law that will inevitably arise in relation to the justification test in the same way that has occurred in respect of the current Employment Equality (Age) Regulations 2006 (AR).

The inclusion of age in the new public sector equality duty will provide further protection. It is envisaged that the EHRC will assist service providers to prepare for the introduction of the new law. The government will need to recognise that there may be additional resources required if this aim is to be achieved.

There is probably a case for adopting some specific exceptions relating to age such as compulsory school age, age criteria for the purchase of such things as cigarettes and alcohol, and access to particular social security benefits. However, there does not seem to be a rationale as to why there should be a blanket exclusion of those aged under 18 from age discrimination laws. The general principle ought to be that age discrimination should be lawful only if it is justifiable.

Transparency

The proposals highlight the fact that greater need for transparency is required to drive change and monitor progress on equality outcomes. In summary the proposals set out the following changes:

- an onus on public sector employers to publish information about their progress on equality issues;
- greater transparency in the private sector through the use of public sector purchasing or procurement;
- banning secrecy clauses which prevent people discussing their pay;
- working with the EHRC and businesses to improve equality practice.

Transparency in the public sector

The proposals state that the new expanded public sector equality duty will make public bodies more transparent without putting an undue administrative burden on them. In respect of the current equality duties on race, disability and gender there is no clear mechanism for monitoring progress. Hence public authorities cannot properly be held to account for their performance on addressing discrimination and promoting equality.

The proposals suggest that public bodies should report on three particular equality areas; namely, gender pay, ethnic minority employment and disability employment. This will enable the government and the public at large to assess the progress of a public authority on a yearly basis and identify lessons to be learnt. The proposals refer to statistics in these target areas. For example, at the HM Treasury there is a 26% pay gap between male and female staff. The government will be consulting further before putting forward proposals about which public bodies should be listed in the legislation and on the specific information they should be required to publish.

It is important that the proposal in respect of the identified priorities being the gender pay gap, ethnic minority employment and the employment of disabled people is not set in stone to the exclusion of necessary and proportionate action in other areas. Furthermore, it should be noted that there is far less statistical information available in respect of the newer anti-discrimination strands including sexual orientation,

1. Note that it is currently being proposed to include children in the public equality duty with some exceptions, such as in the provision of schools etc

religion or belief and age. There ought to be an onus on the public authority in question to monitor, in accordance with the principles of necessity and proportionality, all equality areas to determine which areas require action.

Public Sector Procurement

Government statistics confirm that 80% of people are employed in the private sector and it is vital that there is a drive to achieve progress due to the inherent inequalities still existing in this sector. For example, the gender pay gap in the private sector is double that of the public sector. The government envisages driving progress in a number of ways such as using the spending power of the public sector to deliver greater transparency in the private sector.

The equality duty requires public bodies to tackle discrimination and promote equality through their procurement of goods and services from the private sector. Government figures suggest that the public sector spends £175 billion per annum purchasing such goods and services. Almost a third of British companies are contracted by the public sector; hence public authorities can have a significant influence on equality outcomes in the private sector through their purchasing power.

The existing race, disability and gender equality duties have led to a fresh focus on public procurement as a tool for the elimination of discrimination and promotion of equality. The Commission for Racial Equality, the Disability Rights and Equal Opportunities Commissions all issued detailed guidance indicating how authorities can comply with their equality duties in carrying out procurement and illustrating how the promotion of equality does not conflict with EU rules and UK laws and policies. This guidance was generally well received by public bodies.

The proposals suggest that the new equality duty will *'clarify and strengthen existing requirements and give a greater focus on increasing transparency'*. The government is currently reviewing how public bodies can comply with the duty more effectively through legislative and non-legislative mechanisms to encourage greater transparency among private sector contractors to contribute to the delivery of equality targets.

Any new equality duty should be drafted with regard to the 2004 EC Directive on public contracts which provides for social issues to be taken into account in public procurement.

It should be noted that the government's Discrimination Law Review (DLR) concluded that there was no need to include equality in procurement in legislation defining the general equality duty, or to make it a specific duty. Instead the DLR recommended that practical guidance be adopted jointly by the EHRC and the government. However, good clear guidance has already been published by the CRE, DRC and EOC, yet the majority of public authorities in Britain have remained reluctant to accept the need for equality considerations to form part of their procurement processes. Hence guidance on its own is not sufficient. The Equality Bill could include a separate provision requiring public authorities designated by the Secretary of State to take all reasonably practicable steps in the procurement of works, goods and services to eliminate discrimination and to promote equality of opportunity. Such a statutory requirement could be supported by regulations setting minimum standards and an EHRC code of practice offering guidance on implementation.

Banning secrecy clauses about discussing pay

It is difficult to identify where inequalities of pay exist without greater transparency. Pay secrecy clauses are an obstacle to such transparency and therefore encourage the status quo. The EOC carried out research in 2004 which suggested that 22% of employers did not permit employees to share pay information with their colleagues. The Equality Bill will make such pay secrecy clauses unlawful. It will also make it unlawful for employers to stop their employees from discussing their pay if they wish.

Equal Pay Job Evaluation Audits

Equal pay job evaluation audits are a tool that has been used by many public authorities in examining how women and men are paid in an organisation in order to address gender pay gaps. Additionally, some private sector companies are also using them on a voluntary basis, although these have had mixed results. The proposals suggest that the government will work with the CBI, unions and other stakeholders in order to gather evidence on the effectiveness of equal pay evaluation audits in narrowing the pay gap and encouraging best practice.

It is important that the government consults widely on this complex issue including consulting organisations representing people who have suffered historical differentials in pay.

Sectoral inquiries

The government recognises that the level of inequality can vary between different industries and sectors. In

particular, it highlights the inequality evident in the financial and professional services sectors as well as the construction industry. The financial sector employs over 1 million people. The gender pay gap is 41.5% compared with 12.6% for the population at large. The proposals also comment that even sectors which have received large government contracts and public funding, exhibit inequality; for example, the construction industry where only 2.5% of workers are from ethnic minorities compared with 8% for the working population as a whole. It is envisaged that the EHRC will launch a number of inquiries into inequality in the financial, professional services and construction industries.

It is important that these priorities are regularly reviewed as there are many other industries where there are inherent historic inequalities which are starker than the general picture.

An equality 'kite mark'

The proposals state that many businesses want to be able to demonstrate their *'equality credentials'* because such information is of interest to customers, shareholders, the media and the work force.

The government suggests that it will work with business, the EHRC and others to develop a *'kite mark'* scheme for employers who are transparent about reporting their progress on equality. However a kite mark in and of itself can be limited in its effect in that it is a *'light touch'* equality tool.

A better way of encouraging equality would be to have a compulsory accreditation scheme or the introduction of some form of monitoring procedure. Additionally, the Equality Bill could include a provision enabling the EHRC to issue a Code of Practice to cover equality and the promotion of diversity within the private sector.

Positive action

The government's Equalities Review noted that *'there are some areas where inequalities are so deep seated that not taking alternative action is condemning a whole generation or more to living with disadvantage and inequality'*. Hence there is a need to broaden the law to permit *'measures which prevent or compensate for disadvantages or to meet special needs linked to the protected ground.'* Many groups do not get the same opportunities as others despite having similar skills and qualifications. The proposals cite the following examples:

- only one High Court judge is from an ethnic minority background;
- only 8% of university Vice Chancellors are women;
- only 11% of directors in the UK's top 100 companies are women;
- there is not a single member of parliament who is an Asian woman.

The proposals confirm that positive action provisions will be extended to allow employers to take under-representation into account when selecting between two equally qualified candidates. Employers will also be given greater freedom to 'fast track' or select recruits from under represented groups, as long as they are equally suitable and there is no fixed rule that this must be done in all cases. Interestingly, most stakeholders including the CBI, TUC and the EHRC support some form of positive action.

It is important that there is a clear and strong positive action regime. The importance of positive action to the achievement of substantive equality, together with a clear statement that it will not amount to unlawful discrimination, could be included in any preamble and/or purpose clause to the Equality Bill.

It is intended that the EHRC will publish guidance on the new measures to illustrate the range of practices which employers and service providers could undertake if they wish to do so.

Political candidates

Political parties have been allowed to use women-only shortlists in order to address the lack of representation of women in parliament. The number of women MP's increased from 16 in 1992 to 128 in 2005. The Equality Bill will extend the use of women-only shortlists from 2015 to 2030.

The government seems to have taken on board that selection criteria referring to protected grounds other than gender are more problematic and at this stage has decided not to legislate to allow all-ethnic minority shortlists. Part of the problem of having such shortlists are complex questions such as how do you identify who is from an ethnic minority?

The government proposes non-legislative measures as an alternative to increase black and ethnic minority representation.

Public appointments

The government is considering whether the Commissioner for Public Appointments should have a specific power to encourage diversity in public appointments. This is probably a move to be encouraged and is consistent with the general equality duty.

Strengthening enforcement

The government states that *'strong and effective enforcement is necessary to make a reality of legal rights'*. It suggests a number of areas where enforcement can be strengthened including recommendations by employment tribunals, allowing multiple discrimination claims and the possibility of representative actions. The proposals also point to the development of the role of Trade Union Equality Representatives. The government has, so far, invested £1.5 million in 15 pilot projects through the Union Modernisation Fund to help develop a union infrastructure to support the activities of work-place equality representatives.

Recommendations by Employment Tribunals

A core part of anti-discrimination law is the redress which is available before a tribunal for victims of discrimination. Currently tribunals are able to make recommendations where an employer is found guilty of discrimination. However, such recommendations can only be made if they directly benefit the person who has been discriminated against. More often than not, the victims of discrimination in the work place (around 70%) have left the organisation and therefore the recommendations that an ET can make are extremely limited.

The Equality Bill will allow tribunals to make wider recommendations in discrimination cases which will benefit the wider workforce and help prevent similar types of discrimination occurring in the future. The proposals use the example of a tribunal recommending that an employer should review its policies on pay or introduce an equal opportunities policy. This may not benefit a claimant who has left the work place but would benefit all the women remaining in the work force. Such a broadening of the law is to be welcomed and recognises the need for 'dissuasive' sanctions and could form part of the arsenal of tools which can be used to address group and/or systemic disadvantage.

It is disappointing that the strengthening of other remedies has not been proposed. For example, unless an employee also has unfair dismissal claim, he or she cannot ask for reinstatement or re-engagement. Many victims of discriminatory dismissals lack the continuity of employment required to bring unfair dismissal claims and are therefore precluded from applying from reinstatement or re-engagement. In many cases, re-engagement in gainful employment may be more important to a potential claimant than a pecuniary award.

Additionally, awards in discrimination cases do not, as a general rule, reflect a reasonable relationship of proportionality to the harm suffered by the claimant. In 2006, the average award for injury to feelings was £5,660 and the median was £4,875. The introduction of extra statutory guidelines for injury to feelings, perhaps along the lines of the Judicial Studies Board Guidelines for awards in personal injury cases, would help ensure that the amounts awarded under this head more fully reflect the degree of harm suffered.

Furthermore, the ET ought to have the power to make exemplary awards. In order to avoid over-compensating the victim, such awards could be put towards a fund to help support victims of discrimination and employers who want to make progress in the equality field.

Multiple discrimination

Multiple or intersectional discrimination happens when someone experiences discrimination on more than one ground and the grounds interact with each other in such a way that they are inseparable, so that it is not possible to identify the grounds separately. For example, when a disabled person over 60 is treated less favourably as an *older disabled person*, or where a young person who is disabled is treated less favourably because she is a *disabled young person*; that person is discriminated against on the grounds of a combination of their age and disability. The proposals also cite the example of a black woman who may suffer prejudice or harassment of a type not faced by a black man or a white woman.

The government has indicated its wish to allow discrimination claims to be brought on combined multiple grounds. However, it states that this is a very complex area and it is exploring how legislation would work in practice and what the costs and benefits would be.

At present, multiple discrimination has no remedy under UK law. In the CA's decision in *Bahl v The Law Society* [2004] IRLR 799 it was confirmed that each ground of discrimination must be considered separately and a ruling made in respect of each even if the claimant's experience was discrimination on an indivisible combination of grounds.

The grounds on which a complaint of discrimination is formulated could permit a claim on multiple discrimination grounds. This could form part of the definition of *'protected grounds'*. A clause in a new single Equality Act could state:

> *A discriminatory act or practice includes an act or practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.*

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It has been pointed out by some commentators that there may not be a clear comparator in multiple discrimination cases. However, it is entirely possible to construct a hypothetical comparator if an actual one is not available. The case of *Shamoon v the Chief Constable of the RUC* [2003] IRLR 284 HL points out that 'evidential comparators' can be used as building blocks from which, with other evidence, for example remarks by a respondent that *'all Muslim men are terrorists'*, can infer direct discrimination.

Representative actions

The proposals accept that the present situation where individuals have to bring discrimination cases in respect of treatment they have suffered, can lead to financial and emotional costs. There may also be representational issues which prevent them from pursuing their cases. Additionally, much discrimination is systemic and often groups of workers suffer as a result.

The government proposes that representative actions be allowed enabling bodies such as trade unions or the EHRC to take cases to court on behalf of a group of individuals as a single claim. In principle such a change is to be welcomed although for such measures to be effective they should cover all areas of equality law. The Civil Justice Council is currently considering the case for introducing representative actions. Representative actions would be a major step forward for UK equality law and could have a profound effect on achieving equality on a much wider scale than claims brought by individuals.

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Bibliography:

Government Green paper *A Framework for Fairness.*
Discrimination Law Association's response to the Discrimination Law Review, published by the DLA, September 2007.
Framework for a fairer future – the Equality Bill published by Government Equalities Office, June 2008.
Select Committee to inquire into the Equality Bill: What steps should the DWP take to achieve greater equality? Works and Pensions Committee Press Notice, October 2008
British Muslims expectations of the Government – Social Discrimination across the Muslim Divide by Saied Ameli, Manzur Elahi and Arzu Merali, 2004.

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Equality Conflicts: From Conflict to Cohesion

Maleiha Malik is a Reader in Law at the School of Law in King's College, University of London and is the co-author of *Discrimination Law: Theory and Context*, Sweet and Maxwell, 2008. In this article, which is based on *From conflict to cohesion: competing interests in equality law and policy* commissioned by the Equality and Diversity Forum[1] in 2008, she explores how equality conflicts, often exaggerated by racism, may arise and suggests how these can be avoided by the adoption of human rights and equality principles.

The public debate about 'equalities' in Britain has often focused on problems which arise from the regulation of discrimination on grounds such as race, sex, religion and sexual orientation. The expansion of the grounds of discrimination law beyond the traditional categories of race and sex to also include disability, sexual orientation, religion or belief and age – which are due to be consolidated in a forthcoming Single Equality Bill in 2009 – has made 'equality conflicts' an important issue. The increasing recognition of 'equality' and 'non-discrimination' as important constitutional rights also raises the spectre of conflict with other human rights such as the right to freedom of expression.

The nature of 'equality conflicts'

Conflicts or competing interests can arise in equality law and policy in a number of ways. In some situations, an individual can bring themselves within more than one protected ground: e.g. an African woman may be able to argue for legal protection under sex, race and religious discrimination law. This category can be called *multiple discrimination* because the presence of more than one ground of discrimination 'adds' to the nature of the discrimination. If there are two grounds the quantity is doubled, and if there are three grounds, it is trebled.

There can also be situations where the presence of more than one ground of discrimination leads to a transformation in the nature of the discrimination experienced. In these situations, the sex and race components of an African woman's discrimination cannot be easily distinguished. It could be argued that the presence of both these categories at the same time transforms the grounds of both sex and race: i.e. she experiences discrimination as a woman in a way that is distinct from other women who are not African; and she experiences discrimination as an African in a way that is distinct from other Africans who are not women. We can call this *intersectional discrimination.*

There may be other situations where fundamental human rights conflict which give rise to a conflict between equality rights and other types of rights. This raises a serious problem because the foundational principles of constitutional and human rights law seem to be irreconcilable. This can lead to an overall weakening of the system of liberal democracy. Such *'conflicts of rights'* can arise when it is not possible to reconcile two or more competing rights.[2] There often seems to be an overlap between 'conflicts of rights' and 'conflicts of equality grounds' especially in those situations where equality norms are protected in a constitutional or human rights document (e.g. the Canadian Charter of Rights and Freedoms or the Human Rights Act 1998). Such conflicts of rights cannot be resolved permanently because no constitution or Bill of Rights can provide an answer in all situations.

The problem of 'conflicts of grounds' raises a different set of questions. This problem arises when there is an incompatibility or conflict between giving effect to the principle of non-discrimination to protect one group (e.g. women) at the same time as protecting another group (e.g. believers in a particular religion). In some cases the failure to consider the grounds of discrimination (e.g. sex) in a sufficiently wide way to accommodate all those who may fall within its protection (e.g. women who are also racial or religious minorities) means that a situation is misleadingly treated as a conflict of grounds or rights. In other situations it may be impossible to reconcile the claims of one group to non-discrimination on one protected ground (e.g. sex) and the claims of another group which is also relying on a right in discrimination law on a different protected ground (e.g. religion). This can be an example of a *tension or conflict between grounds of discrimination*. In some situations, discrimination law has recognised that there may be such conflicts and made exceptions for these situations by creating specific exclusions (e.g. the appointment of ministers of religion is not covered by the prohibition on sex discrimination in employment).

Finally, some sources of 'competing interests' may arise from questions about justice and the fair distribution of resources. This is especially relevant in the case of equality grounds such as disability or age which raise difficult questions for government and public authorities about levels of welfare and support for those with special needs. In relation to age and disability, a major issue concerns the fair distribution of resources to individuals and groups who are often victims of social exclusion.

The exaggeration of conflicts

Public discussion has sometimes presented the problem of conflicts in equality law and policy as widespread and intractable. There are, however, a number of ways in which this picture of a vast and intractable conflict between individuals and groups is an exaggeration of the problem.

One reason for this exaggeration is the role racism has played in misrepresenting the nature of some types of social problems, e.g. forced marriages or 'honour' killings. Anne Phillips has summarised this particular problem in the following terms: *'[…] principles of gender equality were being deployed as part of the demonisation of minority cultural groups. Overt expressions of racism were being transformed into a more socially acceptable criticism of minorities said to keep their women indoors, marry off their girls young to unknown and unwanted partners and to force their daughters and wives to wear veils'*.[3] In situations where the 'conflict' involves ethnic, cultural or religious minorities the principles of gender equality and secularism are also sometimes being used as a weapon with which to attack minority communities rather than acting as a guide to pursuing a coherent equalities framework.

The exaggeration of the problem of conflict between different groups – and especially races, cultures and religions – gives rise to an assumption that there is a

1. The views expressed in this article are those of the author and not of the Equality and Diversity Forum or its members. Copies of the report can be obtained from the EDF at www.edf.org.uk.

2. For a detailed discussion of the term 'fundamental legal rights' and conflicts of such rights, see Lorenzo Zucca *Conflicts of Fundamental Legal Rights in Europe and the USA*. Oxford: Oxford University Press.

3. Anne Phillips *Multiculturalism without Culture*, Princeton and Oxford: Princeton University Press: 2007.

radical difference of values between different social groups in society. This source of competing interests is likely to continue as past and present patterns of migration into Western Europe from non-Western cultures are mapped on to majority/minority asymmetries of power. The representation of social problems such as forced marriage or 'honour' killings as deeper problems of culture also dovetails with state policies in areas such as immigration. In the area of forced marriage, for example, a number of commentators have noted that presenting these issues as part of a problem of minority cultural values has provided a justification for the introduction of more restrictive immigration rules, which may in fact exacerbate problems for minority women.[4]

In many situations, what seem to be deep-seated conflicts about fundamental rights or values are in fact issues about how best to design policy responses to what is recognised by all those involved (including the minority culture) to be a problem. To give an example, the problems of 'honour' killings or forced marriages are often presented as being an example of a deep value conflict between the rights of women and cultural or religious equality. This assumes that there is a wide-ranging consensus within the cultural or religious group that the use of violence against, or coercion, of women or young girls is justified. This, in turn, is based on a definition of the cultural or religious group which takes the viewpoint of some of the most extreme members as being representative of the group as a whole. This approach is problematic because it does not recognise the diversity within racial, cultural or religious groups. Moreover, it under-estimates the extent to which there is often a great deal of consensus about the value of consent or the rights of women in minority cultural or religious groups, although there may be disagreement about the appropriate public policy response to problems such as 'honour' killings or forced marriages.

A framework for reform

General principles and a purpose clause

It is impossible to eliminate conflicts in equality law and policy. However, it is possible to design legal principles and social policy in ways which prevent some conflicts from arising. There are some common principles which can guide decision makers. At the most general level, equality conflicts should be resolved by treating human rights standards as the non-negotiable floor upon which all equality law and policy analysis is based. Where conflicts do emerge, it is possible to manage or resolve them through the application of the principles of human rights law, as well as equality principles.

Where there is a conflict between constitutionally protected rights (e.g. gender equality v religious freedom) it is important to take an approach that does not create a hierarchy between rights or equality grounds. As Judge Tulkens stated in the context of the headscarf cases: *'In a democratic society, I believe it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.*[5] These general principles also include, inter alia, respecting human rights as a non-negotiable floor for the analysis of conflicts and maintaining the belief-conduct distinction. It is also important to ensure that derogations from the principle of non-discrimination should be avoided in favour of narrowly drafted provisions which are annually supervised by parliament, for example, by the Joint Committee on Human Rights.

More specifically, the forthcoming Single Equality Bill 2009 provides an invaluable opportunity to address potential equality conflicts. A purpose clause in the proposed Single Equality Bill could be useful in bringing together constitutional and statutory discrimination law principles into one coherent framework. The government response to the Discrimination Law Review confirmed that the Single Equality Bill would continue the present strategy of keeping statutory discrimination law separate from constitutional sources such as Article 14 of the European Convention on Human Rights.[6] The government's strategy, therefore, suggests treating a purpose clause (which refers to the constitutional value of equality) as a matter for the Bill of Rights rather than the Equality Act.

One consequence of the present separation is that it makes it difficult to resolve 'equality conflicts' by referring to equality and non-discrimination as important constitutional values which co-exist with the Human Rights Act. Both categories of norms –

4. Zohra Moosa ed. *Seeing Double: Race and Gender in Ethnic Minority Women's Lives* London: Fawcett Society, 2008). Moira Dustin *Gender Equality, Cultural Diversity: European Comparisons and Lessons* London: The Nuffield Foundation, 2007.

5. Leyla Sahin v Turkey, European Court of Human Rights, Decision of 10 November 2005, Application No. 44774/98, per Judge Tulkens, para 4.

6. Government Equalities Office (2008) *The Equality Bill – Government Response to the Consultation* London: HMSO, at paras 14.3 – 14.6.

equality and non-discrimination, as well as human rights – are important to establish a framework of fundamental rights within which 'equality conflicts' can be resolved. There is, therefore, a need to ensure that equality law and policy is directly related to constitutional and human rights law, which can be done through the introduction of a purpose clause in the proposed single Equality Bill. These principles could also be translated by local authorities into concrete policies through the introduction of a harmonised equality duty.

Conflicts of religion and belief

Religion or belief, or religious culture is a particular focus for this discussion because many recent political incidents and cases have involved a conflict between these grounds and sex, or sexual orientation. Where there is a conflict between religion or belief/culture and sex or sexual orientation discrimination, it is important to take a dual track approach. In these situations, it is important to respect the rights of belief and conscience of individuals (belief), while at the same time taking a strict approach to discriminatory conduct by limiting the scope of exceptions as well as evaluating the impact of these exceptions in practice (conduct). Discriminatory belief may be given wider latitude because it is protected as the individual's right to religion or belief. Discriminatory conduct, however, should be strictly regulated. This approach has been endorsed in *Ladele v London Borough of Islington*[7] (see Briefing 523) where a Registrar of Births, Deaths and Marriages claimed that her employer had subjected her to direct discrimination, indirect discrimination and harassment on the grounds of her religion by requiring her to participate in civil partnership services against her orthodox Christian beliefs. The ET found in favour of the applicant on all three grounds but the EAT allowed an appeal from this decision.

It is also important for equality law and policy to recognise diversity within social groups. This should make decision makers more sensitive to power relations within groups, recognising the issue of 'minorities within minorities' who are often not fully represented in formal consultations with equality groups. This focus would ensure that these individuals are empowered within their communities rather than expecting them to exit their preferred social group.

Where there are conflicts between religion or belief/culture and sex equality, it is essential that the state obligation to protect women and children from violence and harm is taken as the starting point. This requires a zero tolerance approach to practices that involve violence against, and coercion of, women. In this context, there is also a need to recognise women's autonomy so that policies empower women within the communities concerned and support them in working towards improved protection. This approach requires better resources to enable women's groups to carry out research and funding for education and public service provision.

Managing equality conflicts

Some conflicts of grounds and conflict of rights cases could be resolved in a forum other than courts. In some situations, it may be appropriate to have a more wide-ranging debate which allows greater public participation in determining the appropriate balance between conflicting equality groups or between equality and other human rights. In some limited contexts, it may be possible to give greater powers of investigation and supervision to national and local assemblies: for example, the UK Parliament and local authorities, as well as the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales. For example, in the context of the exemptions which have been granted to religious organisations to discriminate on the ground of sexual orientation (regulation 7, Employment Equality (Sexual Orientation) Regulations 2003 (SOR)), the Joint Committee on Human Rights could hear evidence from a wide range of individuals and groups in civil society (including organisations such as Stonewall) about their experience of these exemptions. The Committee could then evaluate and report on their impact in an annual review thus providing an open and transparent procedure.

Local authorities implementing a harmonised equality duty which covers religion or belief, as well as sexual orientation and gender, should be encouraged to devise processes of consultation with local communities and civil society which bring together a wide range of groups and individuals before significant conflicts arise. These consultations could also inform the design and implementation of equality action plans. An early process of consultation may help to resolve conflicts within, as well as between, different groups. It has been argued that the new public sector equality duty should not cover religion or belief in the same way that it covers the other equality grounds. The most conclusive argument against the claim that religion or belief should not be covered is the recent report on the operation of the equality duty in Northern Ireland

7. London Borough of Islington v Ladele (Liberty as Intervenor), Appeal No: UKEAT/0453/08/RN, Decision of December 10, 2008.

which covers religion and belief under s75 of the Northern Ireland Act 1998.[8] This evidence based report concluded that the impact and outcomes on individuals of the s75 duty, especially in relation to processes of consultation (including the limb relating to religion and belief), has been positive.

In some contexts it may be possible to use consultation with groups and individuals to resolve an ongoing and recurring problem which causes an equality conflict. For example, the problem caused by Muslim objections to guide dogs led to tensions between protecting religion and belief and disability rights. A proactive strategy by the disability rights organisations of co-oordinating a response from Muslim representative organisations was successful. The issue was considered by the Muslim Council of Britain who ruled that British Muslims should, in compliance with disability legislation, allow guide dogs to enter taxis and restaurants. In this way, a process of consultation successfully and permanently eliminated the 'equality conflict'. The specific risk of a conflict between Islamic belief on dogs and the possibility of direct or indirect disability discrimination against blind people was resolved through non-legal mediation and proactive policies. Moreover, this clarification of Islamic norms in relation to guide dogs has been so successful in transforming Muslim social attitudes that it has led to a retriever being specially trained to become the first dog in Britain to be permitted to enter a mosque, acting as a guide for its blind Muslim owner.[9]

The principles of non-legal mediation and arbitration can be applied through human resources policies which ensure better training and management in the workplace to prevent disputes (for example, between religious conscience and sexual orientation equality) from arising or becoming acrimonious. In some cases, the reallocation of work duties and rosters can address the issue without the need for disciplinary proceedings or litigation. ACAS should consider whether there is a need to issue guidance or a code of practice about how employers can reconcile their responsibilities under the SOR and the Employment Equality (Religion or Belief) Regulations 2003.

Conclusion

Conflicts in equality law and policy require a range of responses. The institutional context is critically important in such conflicts. The debate about how to resolve conflicts, and the resulting negotiations between groups, needs to be carried out within mainstream political and legal institutions. Civic society and the media are also important players within this process. We must recognise diversity within groups as well as being vigilant about the risk of harm to vulnerable individuals from oppression within groups. This procedure is likely to ensure the broadest range of participation in public debate and political negotiations. In this way the painful compromises which are an inherent part of giving effect to a sophisticated regime of equality law and policy, are more likely to command the consent of all those involved. Points of difference and friction between individuals and groups can often act as a catalyst towards a stable form of integration. In some cases we must be satisfied with an outcome that is a patient and resigned *modus vivendi*. More optimistically, this approach also has some potential to generate a deeper and more meaningful identification with national and local institutions, in a joint enterprise, which creates social cohesion and sustains a coherent political community rather than a plethora of self-interested splinter groups. Discussions about competing interests and conflicts which are conducted in this spirit may be able to contribute to a sense of belonging on the part of all citizens, which can be effectively hammered out through debate and compromise carried out in the public sphere.

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8. *Section 75 – Keeping it Effective: Reviewing the Effectiveness of section 75 of the Northern Ireland Act 1998,* Equality Commission for Northern Ireland, May 2007.

9. 'Muslims Break Taboo To Allow Guide Dog Into Mosque', The Times, December 23, 2007.

Financial inclusion and ethnicity

In a deepening economic recession where access to financial services has become much more limited, it is important to explore how financial exclusion impacts on Black and minority ethnic people and how social justice models might provide some alternatives. Omar Khan, Senior Research and Policy Analyst, at the Runnymede Trust summarises the main themes in the Trust's report on financial inclusion and ethnicity.

Runnymede's report *Financial Inclusion and Ethnicity: An agenda for research and policy action* is the conclusion of a wide-ranging scoping exercise to gain a better understanding of how Black and minority ethnic (BME) people experience financial exclusion. The report makes 24 recommendations for future research and policy action. The most significant is that financial inclusion should be conceptualized more broadly as a component of social justice.

Policies to tackle financial inclusion among BME communities will be effective only if they accommodate the diverse circumstances and preferences of differing groups. This study suggests that taking a more individual approach, one that focuses on personal well-being, autonomy and social justice, will facilitate new, and more responsive, solutions to financial exclusion. A copy of the report is available at www.runnymedetrust.org

Financial inclusion

Financial inclusion refers to access to financial goods and services such as bank accounts, credit, insurance, savings and advice. In the current economic environment, financial exclusion may seem more relevant as access to credit tightens or becomes more expensive. Certain groups are at greater risk of financial exclusion; for instance, some BME communities are more likely to be living in social housing, or in deprived areas, which can affect individuals' ability to access affordable financial services as they are seen as higher-risk customers. This risk assessment is twofold – an individual lack of assets, and the more general effect of postcode analysis of risk.

Financial Inclusion and Ethnicity argues that tackling financial inclusion effectively means putting it in the context of social justice, especially because lack of access to financial goods and services, such as a bank account and savings, directly impacts on individual wellbeing and one's capacity to participate in a democratic society.

Social justice and financial inclusion: the impact on wellbeing and participation

People are financially excluded because of their experience of disadvantage; the evidence suggests that unemployment, housing tenure and poverty correlate with financial exclusion. Existing data are not suitably refined to determine whether financial exclusion for BME people is based on reasons of poverty or ethnicity.

The consequences of financial exclusion are not limited to lack of a bank account or having access to (affordable) credit. Market-based economies require individuals to have access to basic financial goods and services in order to participate and participate as an equal. The economics Nobel Peace prizewinner Muhammad Yusuf suggests that access to credit should be seen as a 'right', similar to a social or economic right.

Financial inclusion policy

Although financial inclusion is a relatively new policy area, in the past few years the UK government has adopted a range of policies aimed at tackling financial exclusion, including basic bank accounts, the Saving Gateway and the Child Trust Fund.

But despite the growing research and policy in addressing financial exclusion, there is virtually no research, data collection or analysis on levels and experiences of financial exclusion by ethnicity. Policy is being rapidly developed in this area without gathering and considering evidence on the possible differential impact of the policy on BME groups. For example, funding under the Social Inclusion Fund is being granted to a range of organisations, including at least one major consortium of community based money advice/support providers, without exploring whether or not there may be a need for targeted outreach to BME groups.

Financial exclusion and ethnicity: surveying the evidence

Runnymede has called for further qualitative and quantitative research to determine the reasons for

people's financial exclusion. Research areas include: the labour market – where different employment experiences and migration status may make some BME groups at greater risk of financial exclusion; housing – including the relative value of home-ownership, and the impact of right to buy; and education – where different outcomes may be based on discrimination or on different preferences in terms of degree courses or university choices.

Such research would generally explore how different preferences or behaviour lead to differential outcomes in terms of access to or take-up of financial goods and services. A discrimination lawyer might focus on the 'supply' side of financial inclusion, namely whether the practices of financial institutions are directly or indirectly discriminatory, but to tackle financial exclusion we must also explore the 'demand' side, namely how individuals understand and respond to various financial goods and services. Unequal outcomes in the take-up of financial products may derive from differential personal preferences rather than discrimination, but policy may still need to respond if that inhibits individual wellbeing or social goods.

Preferences, markets and indirect discrimination

Various individual characteristics may result in a person having less access to financial goods and services. While financial institutions may not directly discriminate against a person or a group of people, their procedures may inadvertently result in some people ending up worse off.

The obvious difference between indirect discrimination and differential access to financial goods and services is that the latter is usually accepted as driven only by market-based principles. If a particular person or group of persons is unprofitable for a financial institution, that institution is not obliged to offer those people a particular good or service. This might be a case of justifiable differential outcomes, whereas indirect discrimination refers to practices that lead to unjustifiably different outcomes.

In unequal societies, market-based principles are likely to result in some people having reduced access to financial goods and services. The question then becomes whether policy or the law should respond to that differential access, or, whether such access is justifiable because those goods and services are not fundamental rights or central to human wellbeing. Most financial goods and services are delivered in large part according to market forces, and are not the object of government policy, though they are of course regulated to protect customers' rights.

On the other hand, financial exclusion affects people's lives. To the extent that it is necessary to have a bank account to enter the labour market and to pay rent and bills, to get home-contents insurance to rent a property, to get life insurance, to get a mortgage, and to have a pension to pay for retirement, certain financial goods and services may be viewed as 'basic goods' for a decent life in the UK.

Risk: statistical scoring and its limits

There are already limits to the extension of market principles to the delivery of financial goods and services, most notably restrictions on the operation of risk. Most financial goods and services, such as credit (including mortgages) and insurance are determined by assumptions about the likelihood of an individual keeping up with payments or making an insurance claim. Statistical scoring, e.g. on the basis of gender or postcodes, is based on the probability of risk. This correlates a high or low risk with a particular characteristic despite the fact that individual members sharing that characteristic may in fact contradict that general tendency.

Even if statistical scoring were perfectly capable of predicting a person's risk, there is the additional question of whether some characteristics are unethical or otherwise undesirable to use in risk scoring. For example, research has suggested that ethnicity *is* a fairly good predictor of risk, but financial institutions in the UK reject its use in determining risk-scores for their various products. This raises a more general issue: are some risk-predictive characteristics *unethical* to collect, even if they accurately predict risk? Should some characteristics also be ruled illegal?

In response to these questions, we probably need to decide collectively how we want to distribute – or indeed redistribute – risk in our society. As all of us are likely to end up on the wrong end of a risk assessment at some point in our lives (from young male drivers to older people applying for travel insurance), this is not simply a technical question, but one that affects everyone. Furthermore, it may seem particularly worrying that certain disadvantaged groups – including BME people – would have to pay more for a financial product such as home contents insurance because they are more likely to be burgled.

On the other hand, it also seems unfair to make low-risk people pay the costs of high-risk behaviour. Should travellers who avoid skiing holidays pay higher premiums because those who like to ski raise the cost of travel insurance for everyone? Some risks are associated with individual choices or preferences for which people

should be responsible; other risks derive from characteristics that people do not choose, but nevertheless have a negative impact on their access to financial goods and services.

Conclusion: from financial inclusion to social justice

We may need to make more explicitly political decisions about how society wishes to tackle these difficult questions. A social justice model is necessary to achieve outcomes guided by principles of fairness. In existing free-market democracies such as the UK, access to basic financial goods and services – starting from a bank account – are necessary for individuals to participate fully in many institutions in British society.

To the extent that access to financial goods and services enhances personal autonomy, it has wider implications. Two areas which legal scholars and practitioners should consider further include the use of the concept of indirect discrimination in relation to differential access to financial goods and service; and, second, the use of legal constraints on the operation of statistical risk-scoring, for example disallowing the use of probabilistic characteristics such as race, gender, age, disability or sexual orientation in determining how much someone should pay for a financial product.

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Background to a disability dialogue; the UN Convention on the Rights of Persons with Disabilities

Dr Richard Light, OBE, spoke on the UN Convention on the Rights of Persons with Disabilities at the DLA's annual general meeting in December 2008. In this article Catherine Casserley sets out a broad summary of his presentation and provides an update on ratification with some thoughts on how the Convention can be used. The next edition of Briefings will contain an article explaining the Optional Protocol which the UK Government has now signed and is committed to ratifying.

The need for a thematic convention and disabled people's response

That United Nations human rights instruments apply to all human beings – that they are universal – is acknowledged by the UN Charter: *'… the promotion and encouragement of respect for human rights and fundamental freedoms is an undertaking to be carried out for all.'*

Subsequently, the Vienna Declaration[1] confirmed that disabled people are included within the protection afforded by the International Bill of Human Rights;[2] Article 63 of the Declaration states:

The World Conference on Human Rights reaffirms that all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities. Every person is born equal and has the same rights to life and welfare, education and work, living independently and active participation in all aspects of society. Any direct discrimination or other negative discriminatory treatment of a disabled person is therefore a violation of his or her rights.

Dr Light said, whatever the rhetoric, experience – and more recently, empirical evidence – has made it abundantly clear that the human rights of disabled people are inadequately respected, as the UN's own reports have repeatedly shown.[3]

1. Adopted by the World Conference on Human Rights on 25 June 1993.

2. There are five elements to what is usually described as the 'International Bill of Human Rights' that together comprise an authoritative interpretation of the human rights clauses of the UN Charter. They are: the Universal Declaration of Human Rights (1948) the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and its two Optional Protocols (1966 and 1989).

3. See, for example, Erica-Irene Daes, *Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder*, New York: United Nations, 1986 (Sales No. E.85 XIV.9); Leandro Despouy, *Human Rights and Disabled Persons,* New York: United Nations 1993 (Sales No. E.92.XIV.4); Bengt Lindqvist, *Monitoring the Implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities,* New York: United Nations, 1997, Document A/52/56 and *Monitoring the Implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities,* New York: United Nations, 2000, Document E/CN.5/2000/3; Dimitris Michailakis, *Government Action on Disability Policy: A Global Survey,* Stockholm: Office of the United Nations Special Rapporteur on Disability, 1997.

Disabled people and their representative organisations have supplemented UN reports with evidence of their own; for example, in a project whose roots can be traced to the Independence '92 Conference in Vancouver, Canada, in 1999 Disability Awareness in Action (DAA) launched a database of verifiable infringements of disabled people's human rights, measured against the Universal Declaration of Human Rights, 1948 (UDHR).

The final report on the DAA human rights database summarised cases and materials entered between 1990 and October 19, 2004. The database contained **2,248** cases, affecting at least **2,219,150** disabled people (though Dr Light emphasised that this is likely to be an underestimation).[5]

The most alarming statistic revealed by the database was the number of cases resulting in the death of the victim. In October 2004, **250 cases** documented the death of at least **305,229** disabled people, as a direct result of human rights abuse. In line with findings in previous years, the evidence showed that almost 14% of victims listed on the database had died as a result of abuse.

Article 5 of the UDHR – addressing torture, cruel, inhuman and degrading treatment or punishment – remained the abuse about which DAA received most reports. Breaches of Article 5 had affected at least **426,032** disabled people, a staggering **34%** of cases recorded on the database.

Looking at the numbers of *identifiable victims* – rather than the number of cases – provides equally chilling statistics: although the Article 26 'right to education' was denied to **35%,** Article 3 – the 'right to life, liberty and security of the person' affected a little over **28%** of identifiable victims, while the Article 5 prohibition of torture affected **19%**.

Dr Light said that while it is entirely appropriate to emphasise the work required in the majority world, it would be dangerous to assume that there is nothing that need be done here. Thirty-four per cent of the cases recorded on the DAA database occurred in Western Europe.

The Ad Hoc Committee

On the December 19, 2001, the UN General Assembly adopted **Resolution 56/168**, on a *'Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities'*. Paragraph 1 of the resolution called for the establishment of:

> *… an Ad Hoc Committee, open to the participation of all Member States and observers of the United Nations, to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development;*

As a result of that resolution – and continued support for its objectives from most of the international community – there were eight formal sessions of the Ad Hoc Committee (AHC),[6] beginning on July 29, 2002 and concluding on December 5, 2006, supplemented by a working group to make initial proposals for the text of the Convention in January 2004. The final text of the Convention was passed from the AHC to the UN General Assembly on December 5, 2006.

On December 13, 2006 the UN General Assembly adopted, by consensus, the Convention on the Rights of Persons with Disabilities and its Optional Protocol, a separate but necessarily linked instrument which deals with aspects of a new 'Committee on the Rights of Persons with Disabilities', including individual communications.

The Convention

The 50 articles comprising the Convention provide, Member States insist, the additional means required to ensure that disabled people could enjoy their human rights, on an equal basis with others. The Convention does not create new or free-standing rights, although it is not entirely clear how confidently this assertion will

4. Over 2,000 delegates at the Independence '92 Conference, in Vancouver, Canada, called on Disabled Peoples' International [DPI] to investigate the possibility of launching a human rights watch system, loosely based on the Amnesty International model.

5. Primarily because systemic abuse is often recorded in broad percentage terms, rather than precise figures, and because of the substantial difficulties associated with evidence gathering. The difficulties associated with such evidence gathering are summarised in Richard Light *A Real Horror Story: the Abuse of Disabled People's Human Rights* London: Disability Awareness in Action, 2002.

6. First Session, 29 July to 9 August 2002
Second Session, 16 to 27 June 2003
Working Group on convention, 5 to 16 January 2004
Third Session, 24 May to 4 June 2004
Fourth Session, 23 August to 3 September 2004
Fifth Session, 24 January to 4 February 2005
Sixth Session, 1-12 August 2005
Seventh Session, 16 January to 03 February 2006
Eighth Session, 14-25 August and 5 December 2006

continue to be made or for how long, precisely because a significant part of the text might be thought of as indicating 'reasonable adjustments' and additional measures required to ensure that the objects and purposes of the Convention can be met (see, for example, Article 8: Awareness-raising and Article 9: Accessibility).

In summary, the Convention specifically provides that its purpose:

> *... is to **promote, protect** and **ensure** the **full** and **equal enjoyment** of all human rights and fundamental freedoms by all persons with disabilities, and to **promote respect for their inherent dignity**.*
> *(Article 1 – Purpose)*

The protected class has, unfortunately, been delimited, but in an ungainly fashion. Preambular paragraph (e) recognises:

> *... that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,*

While this may be helpful, the contents of Article 1 – which deals with the purpose of the Convention, before moving to other definitions in Article 2 – is less than ideal:

> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*
> *(Article 1 – Purpose)*

It should be emphasised that the inclusion of such a definition was not merely at the behest of States Parties, but was actively sought by many of the disabled people present at the relevant session of the AHC. It is to be hoped that this definition will *not*, unlike the Americans with Disabilities Act and the Disability Discrimination Act, provide an evidentiary barrier that must be crossed before there can be *any* consideration of the circumstances complained of, not least because none of the essential elements within the 'disguised definition' are, themselves, defined within the Convention.[7]

Article 3 states that the general principles of the Convention are:

> *a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;*
> *b) Non-discrimination;*
> *c) Full and effective participation and inclusion in society;*
> *d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;*
> *e) Equality of opportunity;*
> *f) Accessibility;*
> *g) Equality between men and women;*
> *h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.*

Subsequent articles address, *inter alia:*

- women with disabilities – Article 6
- children with disabilities – Article 7
- accessibility – Article 9
- right to life – Article 10
- situations of risk and humanitarian emergencies – Article 11
- equal recognition before the law – Article 12
- access to justice – Article 13
- liberty and security of person – Article 14
- freedom from torture or cruel, inhuman or degrading treatment or punishment – Article 15
- freedom from exploitation, violence and abuse – Article 16, and
- liberty of movement and nationality – Article 18.[8]

It should be noted that the UK took an active role in negotiation of the Convention and, to its credit, was amongst the first states to include a disabled person in their official delegation. Importantly, that disabled person was the nominee of organisations of disabled people, rather than the Government, and I had the honour of representing disabled Britons from the Second Session of the AHC.[9]

In closing, Dr Light said there was a clear and pressing need for NGOs to play a *full* role in the establishment of effective mechanisms for the promotion, protection and monitoring of implementation of the Convention, the need to raise awareness of the Convention, and to establish a UK-wide consortium of organisations which will contribute to the implementation process and, if necessary,

7. It seems likely that the Committee on the Rights of Persons with Disabilities will eventually be called upon to define or clarify one or more of the following elements of the definitions: 'long-term', 'physical', 'mental', 'intellectual' and 'sensory impairments' and when and upon what terms their 'interaction' with, potentially, *specific* barriers may be thought of as 'hindering the 'full and effective participation' in society 'on an equal basis with others'.

8. A list of Articles and their subject matter is included at the end of this paper.

9. Whilst attending the First as the Delegate for Disabled Peoples' International [DPI]

provide authoritative 'shadow reports' to the Committee on the Rights of Persons with Disabilities.

Where we are now

The UK signed the UN Convention on March 30, 2007 and signed the Optional Protocol on February 26, 2009. The government has not ratified either instrument. Anne McGuire, the previous Minister for Disabled People, had expressed the hope that the UK would ratify before the end of 2008; however, when presenting oral evidence to the Joint Committee on Human Rights her successor, Jonathan Shaw, announced that this aspiration could *not* now be met and he is hoping for ratification by the '*spring of 2009*'.

As of March 2009, the Convention had been signed by 139 of the 192 UN Member States; there have also been 82 signatories to the Optional Protocol, 50 ratifications of the Convention and 29 ratifications of the Optional Protocol.

While it is true that few EU Member States have ratified the Convention, Austria, Germany, Hungary, Slovenia, Spain and Sweden have done so.

The UK Government is likely to seek to enter reservations and based on public comments, most recently by Jonathan Shaw at a hearing of the Joint Committee of Human Rights on November 18, 2008 – it appears that the following areas are being considered:

- **Article 12.4 'legal capacity'** – the Department of Work and Pensions are considering a reservation in respect of the need to review arrangements for benefit appointees.
- **Article 18 'liberty of movement and nationality'** – The Home Office seems likely to insist on a reservation in order to retain the right to apply immigration rules and the power to introduce wider health screening in the future.
- **Article 24 'education'** – it would appear that the UK is likely to enter an interpretative declaration to recognise that the general education system in the UK includes a range of provision, including mainstream and special schools; there is also the possibility of a reservation in respect of disabled children whose needs are best met through specialist provision which may be some way from their home.
- **Article 27 'work and employment'** – the Ministry of Defence has indicated that it intends to enter a reservation in respect of the Armed Forces, reflecting the EC Framework Directive on Employment [2000/78/EC] and the DDA.

Use of the Convention

While individuals will not be able to instigate proceedings for a breach of the Convention (other than under the Optional Protocol mechanism, for more on which see the next edition of *Briefings*), it is well established that the European Court of Human Rights may have regard to UN human rights instruments as an aid to interpretation of the ECHR provisions (see for example *T and V v United Kingdom* [2000] 30 EHRR 121). It will therefore be important for any practitioners in equality/human rights law to bear in mind the Convention's provisions – which are, as indicated above, fairly wide, and which place much emphasis on the importance of adjustments.

Catherine Casserley
Cloisters

The 'British Obama' Debate

The DLA marked the inauguration of President Barack Obama by hosting a debate entitled *Where is the British Obama: The Democracy and Diversity Debate*. Ulele Burnham records the different views expressed on how leadership from black and ethnic minority people might be promoted in the UK; what shines through the debate is the sense of hope and enthusiasm the emergence of an African-American US President has inspired.

On January 20, 2009, Barack Hussein Obama emerged from the Capitol to take the oath of office as the 44th President of the USA. He stepped forth not merely to the thunderous applause of the millions sandwiched between Washington DC's most famed monuments, but to the delight of a much larger international audience. Enrapture, however distasteful the religious metaphor, seemed a true (and faithful) description of the response of an overwhelming majority of those who looked on. For African-Americans, for the hopelessly diasporised and ethnically heterogeneous people of the world never able to call themselves white, for all those who had taken the time to grapple with the scandalous place of instrumental racism in American and Western global dominance, there was no mistaking the magnitude of the moment and no cliché too hackneyed to describe it: whatever Obama might be constrained by the structures of power – and his own humanity – to become, however inevitable the dashing of our audacious hope, this *was* a new dawn, a new day.

It is true that circumstances appeared to conspire to make Obama's bid for the White House less of the apparently grandiose gesture than it might have at first appeared. When he announced his candidacy on the steps of the Old Capitol in Illinois, he sought deliberately to ally himself to the image of Abraham Lincoln who had in 1858 begun his political career on those very steps with an appeal to the country to unite in its opposition to slavery. Even those who spurred Obama on must have worried that his claim to Lincoln's legacy was premature. Much more than a small aspect of Obama's success was undoubtedly his remarkable personal characteristics. He was decisive and thoughtful, literary and logical, inspiring and able to listen. And what was more, his qualities seemed so beautifully matched with the challenges a US President would now face. Where the 'War on Terror' had etched in blood the hypocrisy of America's claim to truth and justice on a global scale, he could introduce integrity and truly cosmopolitan ethics. As the self-regulating market imploded to reveal the vulnerability of the neo-liberal economic model to avarice, he like few others, could credibly say that he came with clean hands. Nonetheless, his most ardent supporters were not convinced he could achieve an electoral victory in a country where the voting practices of a significant number remained informed by enduring notions of white superiority. That he emerged triumphant – in the country in which anti-miscegenation laws were repealed only in 1967 and where in 1954 the 'Little Rock Nine' could only take their rightful places in a de-segregated school by courtesy of the 101st Airborne Division – confounded conventional wisdom.

So striking was his apparent slaying of the 'race' dragon, and so palpable his appeal to so many other previously marginalised groups, that the DLA thought it fitting to mark his inauguration by hosting a fundraising event to direct our gaze at diversity and political power in Britain. The event, entitled: *Where is the British Obama: The Democracy and Diversity Debate* was held at Eversheds LLP on January 22, 2009. We invited a bevy of speakers (Simon Woolley of Operation Black Vote, Sundar Katwala of the Fabian Society, Kwame Kwei-Armah, Playwright and Diane Abbott MP) to turn their attention to what implications – political, cultural and psycho-social – the Obama presidency might have for diversity in Britain.

Poignantly opened by Rabinder Singh QC with a quotation from *Dreams of my Father* about the importance of the rule of law, the lively, sometimes raucous and illuminative two-hour session did not disappoint. There was little disagreement amongst the panellists about the significance of Obama, a self-described black man of bi-racial heritage, becoming one of the world's most important political actors. Simon Woolley spoke candidly about how moved he was to finally feel that there might be commonality of outlook and experience as between himself and an important Western political figure. Kwame Kwei-Armah and Diane Abbott both fixed on what Obama's leadership would do to inspire 'self-belief' for black and

minority ethnic people (BME). So much of what led to inconsistent and disproportionately low levels of participation in mainstream society by BMEs, they suggested, was linked to a lack of such belief.

Where the topics for discussion begged the question of whether a change in the 'colour' of the UK parliament would substantively and positively alter race relations in the UK, a relaxed and candid Dianne Abbott told the audience that increasing the number of BME representatives was crucial for many reasons. Whilst representatives from non-traditional backgrounds continued to carry with them the scars and fears of 'unbelonging' and inferiority, a commitment to increasing presence would, on its own, lighten the load. Her statement: *'You have to worry much more about being crap when there are only four of you than when there are twenty,'* was a welcome reminder of the particular ways in which BME members 'represent' their communities. Whereas the traditional white male MP perhaps has only to worry about representing the views of his constituents, the BME MP both represents the views of her or his constituency and is seen to 'represent' the BME community with which she or he is most closely associated. As Diane Abbott said of her anxieties early in her parliamentary career: *'how could I possibly represent* ***all*** *black people?'*

But there was no uniformity of approach to increasing ethnic minority representation. For Dianne Abbott, Kwame Kwei-Armah and Simon Woolley, the answer was clear: UK society would not produce a more diverse parliament, nor reflect its true multicultural character, without positive measures such as ethnic minority shortlists. Their experience demonstrated that structural disadvantage was never historically overcome by wishful thinking. And recent history did seem to lend support to their position. Would the movement towards gender equality, however belated and incremental, have made progress without positive discrimination and the implementation of equality guarantees from Europe?

Sundar Katwala of the Fabian Society disagreed. For him, ethnic minority shortlists would be a retrograde step. Younger potential candidates did have the confidence, the self-belief, to compete and win without the introduction of measures which could have the effect of undermining their legitimacy. The more subtle and complicated problem alluded to by Katwala had its roots in the heterogeneity of BME experience. It was difficult enough to make the politically pragmatic assumption that the variety of women's interests could be adequately represented by a clutch of women who made it through an all-women shortlist. This difficulty would surely be magnified in any attempt to 'represent' the wildly divergent interests of multicultural Britain? One of the important messages communicated by Sundar Katwala of the Fabian Society was the diversity of experience within and between different ethnic minority communities. Not all ethnic minorities and/or mixed-race people identify as 'black' today. What ought not to be lost about Obama's contribution to the politics of race, he indicated, was the constructed and fluid nature of identity. Obama's identification as African-American was born not only of biology but was arrived at through lived experience. His description of how he came to inhabit his black identity didn't seem to make white identity a polar opposite which must necessarily be disavowed. Notwithstanding this, Obama's identity formation, Katwala suggested, could not be regarded as a template for all those of bi-racial heritage. Mixed race people with ancestors from the Indian sub-continent were likely to have a very different process of identity formation from those of Afro-Caribbean or African-American descent. As much as it is important for BME groups to act as collectives in relation to shared interests and shared opposition to all forms of exclusion, their particularity should not be forgotten, not least when it came to representation. Bengali women's interests were not necessarily coterminous with those of African-Caribbean gay men and for each BME group that could be identified there were at least a further hundred sub-cultural groups within it vying to have their own needs met.

The 'British Obama' debate was stimulating of the life of the mind and, the DLA hopes, will be generative of new and better ways of achieving equality for Britain's diverse population. There was optimism in the voices of the speakers and in the audience, but there was a clear recognition that no naïve assumptions could be made that the conditions which were creative of an Obama victory could simply be transposed onto the UK context. The aim ought not to be to try, as some are already inclined to do, to find an Obama clone and see how quickly a black or mixed race man can climb Westminster's greasy poles to 10 Downing Street. Rather, the search should be for representatives whose political consciences have been formed by lived diversity and careful analysis of what it really means to pursue equality.

While talk of Obama's victory could not help but make ethnic diversity a focal point, we at the DLA wish to use this, our first fundraising debate, as a platform for promoting discussion about equality and diversity in all its forms. This was our starting and not our end-

point. We seek now to foster public debate about how multiple and other forms of discrimination might best be understood and tackled by legislative and other means. With the Equality Bill in danger of being lost to those who wish to see serious review, there seems no better time to facilitate open discussion. We at the DLA very much hope to make this kind of debate part of our annual programme of activities. We extend our sincere gratitude to all of our excellent speakers, to Eversheds, our other sponsors Cloisters and Doughty Street Chambers, and, of course, to Barack Obama, for making the night a success.

Ulele Burnham
Doughty Street Chambers

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Briefing 515

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ECJ rules on the Heyday challenge to the UK age regulations

R (on behalf of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform Case C-388/07, March 5, 2009.

Implications for practitioners

The provisions of the Employment Equality (Age) Regulations 2006 (AR) which enable employers to dismiss their employees at or above age 65 on grounds of retirement undoubtedly discriminate on grounds of age; the question whether that is unlawful and contrary to the EC Framework Directive on Employment (2000/78/EC) (the Directive) will now be decided by the Administrative Court in accordance with the ruling of the ECJ in this case.

The task for the UK will be to prove, to a '*high standard of proof*', the legitimacy of the aim relied on as a justification. This may well not be possible because the ECJ also pointed out that although the UK, in choosing the means capable of achieving its social policy objectives, enjoys broad discretion, nevertheless that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.

Moreover, the ECJ made a more general ruling in relation to the provisions of AR regulation 3 which purport to permit an employer to justify what otherwise would be unlawful direct age discrimination in other cases not concerned with retirement. It held that article 6(1) of the Directive must be interpreted as meaning that it does not preclude a national measure which, like regulation 3, does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. However, article 6(1) offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. Thus employers will have to show that they have a social policy objective and will not be permitted to derogate on other grounds. This will be a substantial restraint on the otherwise unlimited range of possible justifications in regulation 3.

Background

Age Concern England (ACE) brought a challenge against the AR. They alleged that the AR, in particular regulations 3, 7(4) & (5) and 30 did not correctly implement article 6 (1) of the Directive which provides that:

> *Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.*

Such differences of treatment may include, among others:

> *a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection..*

c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

ACE's arguments were (a) that regulations 7(4) & (5) and 30 were not objectively justified within article 6 and (b) regulation 3 which states that only differential treatment on grounds of age which is not objectively justified is unlawful was inconsistent with article 6 since it did not set out in a list, or other measure, what kinds of justification were permissible. The UK by contrast argued that retirement provisions were outside the Directive altogether.

Questions referred to the European Court of Justice

The Administrative Court referred the following questions to the ECJ in August 2007:

In relation to … Directive 2000/78...[As regards] [n]ational retirement ages and the scope of the Directive[:]

1) does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?

2) does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement where they were introduced after the Directive was made?

3) in the light of the answers [to the preceding questions,]

- *were section 109 and/or 156 of the 1996 Act, and/or*
- *are Regulations 30 and 7, when read with Schedules 8 and 6 to the Regulations, national provisions laying down retirement ages within the meaning of recital 14?*

[As regards] [t]he definition of direct age discrimination: justification defence [:]

4) Does Article 6(1) of the Directive permit Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measure which is similar in form and content to Article 6(1)?

[As regards][t]he test for the justification of direct and indirect discrimination[:]

5) Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the Directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the Directive?

European Court of Justice

The ECJ examined questions 1, 2 and 3 together and concluded following its own earlier judgment in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, that the scope of the Directive does extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement even when such rules were introduced after the passing of the Directive.

The Court then went on to note, at paragraph 27, that the relevant regulations in the AR:

do not establish a mandatory scheme of automatic retirement. They lay down the conditions under which an employer may derogate from the principle prohibiting discrimination on grounds of age and dismiss a worker because he has reached retirement age...a provision such as Regulation 7(5) of the Regulations deprives workers who have reached or are about to reach the age of 65 and are covered by Regulation 30 of any protection against discrimination in recruitment on grounds of age.

Question 4 related to the interpretation of article 6(1) of the Directive. The ECJ noted that the principle of equal treatment under the Directive means that *'there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 [which includes age]'*. Regulation 30 does impose less favourable treatment on people reaching the retirement age in question. However, article 6(1) provides that such differences of treatment may be permissible if they are objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The ECJ held that Member States have a broad discretion in the way they implement directives; they do not have to employ the same words as are found in the Directive, however:

that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim. (para 51)

The ECJ then went on to consider the submissions from ACE that there had to be list or some similar

measure setting out what the UK considered to be permissible bases for a justification for direct age discrimination. The ECJ held:

> *Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which, like Regulation 3 of the Regulations, does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. However, Article 6(1) offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim.*

In relation to the last question the ECJ held –

> *Article 6(1) of Directive 2000/78 gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are 'objectively and reasonably' justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary. It imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. No particular significance should be attached to the fact that the word 'reasonably' used in Article 6(1) of the directive does not appear in Article 2(2)(b) thereof.*

Conclusion

It will take some time for the full significance of these provisions to be fully understood. However it is clear that one justification which the UK has stated for regulation 3 having been written in the way that it was – that other justifications may emerge in the future – is unlikely to be held to be consistent with article 6. Such an assertion is obviously a generalisation and the possibility that the state has not contemplated what justifications on social policy grounds there may be is merely an abdication of its obligations when invoking the derogation in article 6.

Gay Moon
Equality and Diversity Forum

Briefing 516

Homophobic bullying of a heterosexual man can be harassment on the grounds of sexual orientation

English v Thomas Sanderson Blinds Ltd [2009] IRLR 206

Facts

Mr English (E) was subjected to 'homophobic banter' by his co-workers. This consisted of repeated suggestions that he was gay – because he had been to boarding school and lived in Brighton. E's colleagues knew that he was heterosexual.

Employment Tribunal

The ET dealt with the case by examining the preliminary issue of whether such bullying could, in principle, amount to harassment on the grounds of sexual orientation. They concluded that it could not: *'to find in the claimant's favour would extend the ambit of the Regulations'.*

Employment Appeal Tribunal

The EAT agreed, concluding that, since the behaviour was not based on the perception or assumption that E was gay, it could not be harassment on the grounds of sexual orientation.

Court of Appeal

E appealed successfully. Collins LJ and Sedley LJ concluded that homophobic bullying of a heterosexual could be harassment on the grounds of sexual orientation.

Both considered that the natural meaning of the words *'on the grounds of'* covered a wider range of behaviour than the ET or EAT had allowed for. In particular, they saw little difference between homophobic bullying of a person wrongly believed to be gay, which would clearly be harassment, and homophobic bullying of a person known not to be gay. The latter, they concluded, should also be protected on public policy grounds.

Laws LJ dissented, concluding that the natural

516 wording of *'on grounds of'* could only cover behaviour motivated by somebody's actual, perceived or assumed sexual orientation.

Comment

English is a continuation of the higher Courts' attempts to steer a safe path between a narrow approach to *'on grounds of'* which would exclude people who deserve protection and a wide one which would undermine the purpose of the equality legislation.

The difficulty can be seen by comparing the cases of *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7 with *Redfearn v Serco Ltd* [2006] IRLR 623. In *Showboat* a white man who was dismissed because he refused to exclude black customers was unlawfully discriminated against. In *Redfearn* a member of the BNP failed to show he was racially discriminated against after he was sacked as a result of concerns raised by other employees about his racist views.

One may think that both cases are right, but it is difficult to formulate a legal definition of *'on grounds of'* that protects Mr Owens while excluding Mr Redfearn. Interestingly, both Sedley LJ and Laws LJ expressed concerns about the decision in *Redfearn*, while acknowledging that it is binding.

English does not take us any further towards that ideal definition, but confirms the previous approach which is to focus on the purpose of the equality legislation, rather than on a legalistic analysis of the statutory wording.

Michael Reed
Free Representation Unit

517 Briefing 517

Time limits for bringing complaints about continuing failures to make reasonable adjustments

Matuszowicz v Kingston Upon Hull City Council ([2009] EWCA Civ 22

Implications for practitioners

There has been conflicting authority on the question of whether a failure to make adjustments under the Disability Discrimination Act 1995 (DDA) is an act or an omission, and at what point the time limit starts to run. *Humphries v Cheveler Packaging* (unreported, EAT Appeal No. UKEAT/0224/06DM) held that a failure to make adjustments is an omission, and that time runs from the point at which the employer makes it clear that no further adjustment can be made. In *Smith v Network Rail Infrastructure* UKEAT/0047/07/DA, which concerned whether there was, or was not, a need for a further grievance regarding a failure to make adjustments by not finding a disabled claimant alternative employment, the EAT held that

> *The position is quite different in our view when what is complained of in the grievance letter, as in the instant case, is that the respondent has not been assisting the Claimant to find employment. That is a continuing complaint. It is a complaint that looks forward as well as back.*

The Court of Appeal has now considered the issue and its decision accords with that in *Humphries*.

Facts

The claimant (M) had his right arm amputated above the elbow. On September 15, 2003 he commenced work for the respondent (K) as a teacher in Hull prison. Because of his impairment he had difficulty coping with the heavy doors in the prison. In July 2005, he was transferred to a different prison, Evertorpe, where it was hoped that the doors would be easier for him. However, the difficulties did not ease. From October 2005 M was placed on lighter duties. From December 2005, he was placed on 'gardening leave'.

On August 1, 2006, K transferred the teaching function to Manchester City College and M was also transferred to the College.

On October 4, 2006 M presented a grievance to K relating to matters occurring up until July 31, 2006. The grievance included complaints about a failure to transfer him to suitable employment. K contended that the complaint was out of time and there was a pre-hearing review to determine this issue. The relevant provisions of Schedule 3 of the DDA are as follows:

> *3(1) An employment tribunal shall not consider a complaint under section 17A or 25(8) unless it is presented before the end of the period of three months*

beginning when the act complained of was done.

2) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

3) For the purposes of sub-paragraph (1)

a) where an unlawful act is attributable to a term in a contract, that act is to be treated as extending throughout the duration of the contract;

b) any act extending over a period shall be treated as done at the end of that period; and

c) a deliberate omission shall be treated as done when the person in question decided upon it.

4) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of this paragraph to decide upon an omission

(a) when he does an act inconsistent with doing the omitted act; or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done.

Employment Tribunal

The ET found that the complaint about failing to transfer M was not out of time as it was a continuing act.

Employment Appeal Tribunal

On appeal by K, the EAT upheld the appeal on the basis that the failure was a one-off omission and thus out of time. M appealed to the Court of Appeal.

Court of Appeal

The CA upheld M's appeal. Lloyd LJ said that the provisions of para 3(3)(c) and para 3(4) of Schedule 3 to the DDA posed the question whether the effect of para 3(4) was to treat as a deliberate omission something which, but for the paragraph, could not properly be described as deliberate. In terms of identifying an act of discrimination giving rise to a substantive remedy, it is unnecessary to consider whether an omission to comply with the duty to make reasonable adjustments is deliberate or not. Either the duty is complied with or it is not.

The classification of the omission, if it is an omission, becomes necessary only for the purposes of the time limit under para 3 of Schedule 3. In the context of the legislation and of the duty to make reasonable adjustments, even if the employer was not deliberately failing to comply with the duty, and the omission to comply with it was due to lack of diligence, or competence, or any reason other than conscious refusal, the omission was to be treated as having been decided upon at what was, in one sense, an artificial date. Certainly it might not be a date which was readily apparent either to employer or to employee.

The issue of uncertainty, which Lloyd LJ accepted was real and may be more substantial in this legislation than in other anti-discrimination legislation, is considerably alleviated by the provisions of para 3(2) which creates the opportunity for an extension of time if it would be just and equitable. That provision is capable of accommodating situations in which the employee does not realise that the start date has occurred or, for example, the employer's decision has not been communicated to him. It could also avoid a problem which might otherwise arise if the employer were to seek to lull the employee into a false sense of security by professing to continue to consider what adjustments it ought reasonably to make, at a time long after the moment has arrived under paragraph 3(4)(b) when the employee is entitled to make a claim and time has started to run for the making of such a claim.

In the ET the complaint of failure to make reasonable adjustments was treated as an allegation of an act, or of continuing acts running through from August 2005 to August 1, 2006. However, that was not the correct analysis. A failure to make adjustments was an omission, not an act. It seemed to his Lordship that the allegation was one of a continuing omission which continued until August 1, 2006. It was common ground that, if the start date did not occur until that date, the claim was in time. The appeal would accordingly be allowed and the matter remitted to the ET to proceed on the merits.

Comment

It is not uncommon for an employee to give their current employer a considerable amount of time to comply with their request for reasonable adjustments; going to tribunal is a stressful, time consuming and expensive process. However, this decision now makes clear that advisers need to consider very carefully the time limits involved in a reasonable adjustment case and the likely arguments which will arise. Lloyd LJ made an interesting observation when he said that *'It is ironical that, in the context of time limits, it would be in the interests of the respondent to allege that it might reasonably have been expected to have dealt with the position much earlier than it actually did, whereas it would be in the appellant's interests to assert that it would have taken as long as it in reality did, so as not to give rise to an earlier date as the starting date under Schedule 3 paragraph 3.'*

Sedley LJ, who concurred with the judgment,

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observed as follows:

For obvious reasons this can create very real difficulties for claimants and their advisers. But there are at least two ways in which the problem may be eased.

One is that claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission.

The other is that, when deciding whether to enlarge time under paragraph 3(2), tribunals can be expected to have sympathetic regard to the difficulty paragraph 3(4)(b) will create for some claimants. As Lloyd LJ points out, its forensic effect is to give the employer an interest in asserting that it could reasonably have been expected to act sooner, perhaps much sooner, than it did, and the employee in asserting the contrary. Both contentions will demand a measure of poker-faced insincerity which only a lawyer could understand or a casuist forgive.

Catherine Casserley
Cloisters

518 Briefing 518

The complexities of transporting children to school

D v Bedfordshire County Council & Another [2008] EWHC 2664 (Admin)

Implications for practitioners

This case highlights the difficulties which Special Educational Needs and Disability Tribunals face in applying complex legislation even in simple cases. Delivering his judgment on the November 4, 2008, Sir George Newman described it as a case which *'must mirror what is a day-to-day occurrence for local authorities and parents throughout England and Wales – namely transporting children to school'.*

Facts

D, a 15 year old boy with Asperger's Syndrome, was transported from home to school with other children. The bus was provided free of charge by the Local Education Authority (LEA), Bedfordshire County Council, as obliged under s508B of the Education Act 1996 (the 1996 Act). This provision requires them to provide *'suitable home to school arrangements, for the purpose of facilitating the child's attendance at the relevant educational establishment'.*

D attended the Samuel Whitbread Community College which was not his nearest school but the one closest to meet his needs. He shared the bus with several other children. Having developed an interest in the technical aspects of theatre production, D became interested in an after school club. The 'tech club' finished at 4.30pm and his parents asked for an adjustment to his usual transport pick-up time of 3.00pm, to allow him to attend. As the other children on the shared bus could not be expected to remain until 4.30pm, it was clear that in order for D to attend, the LEA would be required to provide transport at a different time. They refused to do so and the parents complained to Special Educational Needs and Disability Tribunal (the tribunal).

Special Educational Needs And Disability Tribunal

The parents contended that by refusing to provide transport to the after school club, the LEA had failed in their duty to take reasonable steps to ensure that D was not placed at a substantial disadvantage in relation to education and associated services provided for pupils at the school, in comparison with pupils who were not disabled (s28C (1)(b) Disability Discrimination Act 1995 (DDA)). They argued that this failure was not justified and was unlawful discrimination.

During the hearing it was noted that one reason the LEA decided not to alter the transport arrangements was that D shared it with others. Relying on s28G (3)(b) and s28C (2)(b) DDA which state that the duty to take such steps does not extend to the provision of 'auxiliary aids or services', the tribunal rejected the parents' claim and upheld the LEA's decision on the grounds that the provision of transport, whether for educational or non-educational provision, was an 'auxiliary aid or service'. As such it fell within the exception. D appealed against the decision.

Administrative Court

In delivering the judgement, the court noted firstly, that D was simply asking the LEA to make an adjustment to something which was already being

provided. Therefore, it could not be said that the substance of the statutory function carried out by the LEA was altered by a request to provide it to a different time. The local authority was under a duty to ensure that, by the taking of reasonable steps, a disabled child was not discriminated against and that the substance of the statutory function being performed was not altered by a request for an adjustment.

Secondly, an 'auxiliary aid or service' in the context of the exercising of the statutory educational function, must be something auxiliary to those functions, such as the provision of medical equipment or the wheelchair used to get the child onto the bus. The court noted the LEA's submissions that the tribunal had not erred in concluding that the provision of transport was an auxiliary aid or service and, in any event, any discrimination caused was justified.

Auxiliary Aid or Service

Although invited by the LEA to leave the issue of 'auxiliary aid or service' until issues of reasonable adjustments and justification had been dealt with, it was clear that the court considered this to be the main issue. Firstly, the court drew together the legislative provisions within the DDA and the 1996 Act under which the LEA has duties in connection with special educational needs (Part IV of the DDA) and for the provision of transport (Part IX of the 1996 Act).

The court considered that although it was apparent that the tribunal was alive to the interaction between the disability discrimination framework and the education law framework, it had erred in its conclusion on the provision of transport. In essence, the tribunal concluded that the provision of transport was an auxiliary service which enabled a particular child to attend a particular school. This was clearly wrong in the court's opinion.

The travel arrangements made by the LEA were under its s508B duty to secure D's attendance at the Samuel Whitbread Community College. These arrangements represented the discharge of that duty regardless of their duty to discharge their obligations in respect of the other children.

Addressing the 'reasonable adjustments' issue, the court observed that if D had been the only disabled child for whom arrangements had been made, plainly what was being asked for would be a reasonable adjustment so as to enable D to attend after school activities, as and when they occurred. Accepting the example used by D, the court agreed that an example of an auxiliary aid or service would be a wheelchair used to get a child to the bus.

Concluding the issue of 'auxiliary aid or service', the court highlighted that much emphasis had unnecessarily been placed on the fact that D shared his bus with others. The court agreed that D was simply asking for an adjustment to something he already received. He was asking for an adjustment to alter the time the transport picked him up from school on certain afternoons. As a disabled child, if he was entitled to transport home and the alteration merely amounted to an adjustment, then it did not cease to become an adjustment and become an auxiliary aid or service, simply because the LEA owed duties to other children. The tribunal had therefore erred in their decision.

Comment

Overall the court considered that as the tribunal had concluded that the reasonable adjustment requested amounted to a request for an 'auxiliary aid or service', they had failed to consider the facts and matters relevant to justification. As the DDA makes clear, there must be a substantial reason for failure to make adjustments in each particular case. The LEA had not considered this threshold properly and the case was therefore remitted for fresh consideration by the tribunal.

Finally, the court made the following observations: *'These provisions [are] complex and difficult. The range of material, much of it lengthy Codes of Practice, which comment upon a labyrinthine set of interlocking statutory provisions, is particularly challenging.'* These observations will chime with the experience of parents and practitioners both of whom must navigate the labyrinth.

Cheryl Thornley
Bar Vocational Course Student

EAT apply *Malcolm* principles to disability discrimination in employment

Child Support Agency (Dudley) v Truman [2009] UKEAT/0293/08

Implications for practitioners

The narrower *Malcolm* comparator replaces the *Novacold* comparator in cases of disability-related discrimination in employment.

Facts

Ms Truman (T) began working for the Department for Work and Pensions on June 19, 1972. She had been employed as a complaints officer by the Child Support Agency (CSA) since August 1994. T suffered from low back pain and prolapsed discs and she had been on special leave with full pay from June 21, 2007. Her condition deteriorated. It was common ground that she was disabled with in the meaning of s1 of the Disability Discrimination Act (DDA).

In 2005, it was agreed that she could work 4.5 days per week from home, coming into the office for half a day each week. It was agreed that equipment, such as a specialised desk and chair, would be provided to facilitate her home working. Without a specialist desk, T worked on top of her cooker, the highest surface in her house.

The specialist chair was delivered in January 2006 without the desk. T waited in all day on February 24, 2006 for her desk to be delivered but no desk arrived. She was very angry and phoned the CSA's accommodation department and spoke to Angelina Mathers. The tribunal found that she did shout at Ms Mathers, but did not use the foul language alleged.

On March 13, 2006, a desk was delivered to T's home but it was not height adjustable. T telephoned and spoke to Ms Mathers; she was very angry but did not use foul language. Occupational health specialists recommended an electric powered height adjustable desk and this was not provided until November 1, 2006.

On April 5, 2006, Ms Mathers made a formal complaint against T arising out of the telephone calls to her. Initially it was not upheld but Ms Mathers successfully appealed that decision. T was asked to attend a mediation hearing so that she could apologise for her actions. No such meeting was set up and no disciplinary action was taken against T.

Following a restructuring plan known as the 'new world', the CSA withdrew the facility to work at home. T was encouraged to apply for medical retirement, which she did. The doctor to whom she was referred concluded that, contrary to all previous medical opinions, she was capable of working 5 days a week in the office and her application for ill health retirement was refused.

Home working throughout the organisation ended in January 2007. T was informed that, with effect from June 25, 2007, she could not continue home working. She remained on paid leave from that date.

Employment Tribunal

T issued a claim in the employment tribunal claiming that:

- there had been a failure to make reasonable adjustments by failing to supply her with an appropriate home workstation between October 2005 and November 2006;
- that she had been subject to either direct or disability related discrimination by being threatened with disciplinary action and being invited to apologise to a colleague (the Angelina Mathers incident);
- that the respondent had failed to make reasonable adjustments to enable her to work from home in the light of national restructuring;
- that the respondent had failed to make reasonable adjustments to enable her to work at home after June 2007;
- that she had been subject to either direct or disability related discrimination by obliging her to seek ill health retirement.

The ET found in T's favour on all claims except direct discrimination. The CSA appealed to the EAT.

Employment Appeal Tribunal

Central to the appeal was the decision in *London Borough of Lewisham v Malcolm* [2008] UKHL 43, which was handed down after the tribunal had reached its decision, and whether it applied to employment claims. (See Briefing 497)

The EAT upheld the appeal. In the judgment of HHJ Peter Clark, it held that the narrower comparator favoured by the majority in *Malcolm* applies equally in the employment context. The wider comparator used in *Novacold* should no longer apply (unless and until

the legislation is further amended by Parliament). It held this for the following reasons:

Section 3A(1)(a) defines disability-related discrimination in the employment context as follows:

> *'for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply.'*
>
> *It will be immediately apparent that the wording of s24 (1)(a) is identical to that of s3A (1)(a) following amendment and s5 (1)(a) prior to amendment. It would therefore seem surprising if the comparator in one provision was different from that in the other.'*

It was not accepted by the EAT that justification provisions were different in the housing provisions under s24 (1)(b) to the employment provisions under s3A (1)(b) (formerly s5 (1)(b). *'Section 24(1) (b) reads 'he cannot show that the treatment in question is justified'; s3A (1)(b) is in identical terms, as was s5 (1)(b). In any event, the nature of the defence of justification cannot, in our view, impact on the question as to who is the appropriate comparator for the purposes of prima facie unlawful discrimination (leaving aside the burden of proof) subject to the defence of justification.'*

Close examination of each of the speeches in *Malcolm* led the EAT to conclude, contrary to T's submission, that all five members of the HL Committee were of the opinion that no distinction could be drawn between the comparator identified in s24 (1)(a) and s3A (1)(a) (formerly s5 (1)(a)).

Any policy consideration of adopting the wider construction in employment cases and the narrower in housing cases were a matter for parliament.

The EAT set aside the finding of disability related discrimination in relation to the Angelina Mathers incident and remitted the ill health retirement matter to the tribunal to determine the correct comparator.

Comment

Since the decision of the Lords in *Malcolm*, there has been some uncertainty as to whether *Clark v Novacold* still applies in the employment sphere. Many tribunals have been operating on the assumption that it does not, and this decision supports that assumption. There was, however, no consideration by the EAT of the obligations under Directive 78/2000/EC and how the *Malcolm* approach impacts upon the government's fulfilment of those; nor any examination of how direct discrimination (s3A (5)) operates when disability-related and direct discrimination are now effectively the same. It is understood that this case is to be appealed but, for the present, it is clear that *Novacold* can no longer be relied upon.

Geraldine Scullion
Editor

Briefing 520

Justification for age discrimination cannot be based on assumptions and stereotypes

Seldon v Clarkson Wright & James [2008] UKEAT/0063/08

Facts

Mr Seldon (S) was an equity partner in a solicitors' firm Clarkson Wright & James (CWJ) which compulsorily retired him in accordance with the terms of the partnership deed at the end of the year following his sixty-fifth birthday.

The terms of the partnership deed contained the compulsory retirement age of 65, although an equity partner could continue beyond the age of 65 with the consent of the other partners. An equity partner could not, however, be expelled on grounds of poor performance. S requested that he continue to work part-time beyond 65 but his request was declined and he brought a claim for direct age discrimination in the employment tribunal.

Employment Tribunal

The ET held that although there was direct age discrimination against S, it was justified. It identified three legitimate aims of the compulsory retirement age:

- ensuring that associates were given the opportunity of partnership after a reasonable period to ensure they did not leave the firm;
- facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise; and
- limiting the need to expel partners by way of performance management, which contributed to the firm's congenial and supportive culture.

The ET then examined whether the means used to

achieve those aims in having a compulsory retirement age were proportionate and concluded that they were and that the age discrimination was therefore justified.

Employment Appeal Tribunal

S appealed on various grounds and the Equality and Human Rights Commission (the Commission) was given permission to intervene and make submissions on a number of issues. The EAT judgment provided an analysis of a number of significant issues relating to direct age discrimination.

The correct test for justification

The Commission argued that the test to assess whether direct age discrimination was justified was different to the standard applicable for indirect age discrimination and that only *'very weighty considerations'* could justify direct age discrimination.

It was argued that the test for direct age discrimination in article 6 of Council Directive 2000/78/EC – whether the legitimate aim is *'objective and reasonable'*, is materially different from the test for indirect age discrimination in article 2 which only requires that the legitimate aim is *'objective'*.

The EAT held that there was no material difference in the nature of the two tests under the Directive; they agreed that there may be a difference in the application of the concept of proportionality given that the discriminatory effect of a measure will be greater where there is direct, rather than indirect, discrimination. The EAT referred to and relied on the opinion of the Advocate General in *The Incorporated Trustees of the National Council of the Ageing v Secretary of State for Business, Enterprise and Regulatory Reform* Case C-388.07 which considered the same issue of the test for direct and indirect age discrimination, although noted that the decision of the ECJ was still awaited. (Issued March 5, 2009; see Briefing 515)

Whether the legitimate aims need to have been consciously recognised at the material time

The EAT rejected the argument that there could be no justification where an employer had never considered the impact of the age discrimination legislation or whether the policy was justified. Although it may be more difficult for an employer or other body to justify discrimination where there was no conscious understanding of the discriminatory effects at the time the policy was adopted (as in, for example, *Elias v Secretary of State for Defence* [2006] 1 WLR 3213), that does not mean that there can never be justification in such circumstances.

The significance of consent

The EAT also considered that the fact that the policy was agreed by the partners with equal bargaining power and benefited the partnership as a whole was a material consideration in deciding whether discrimination was justified.

Although the EAT acknowledged that consent could not justify what would otherwise be unlawful discrimination, agreement by all partners was a material factor. The EAT in this regard made an analogy with the collective bargaining agreement reached in the case of *Palacios de la Villa v Cortifel Servicios SA* [2007] IRLR 989 which involved national rules for retirement ages and agreements made with trade unions. The EAT considered that the same principles could be applied to private employers.

Focus on the individual's treatment or the general policy?

The EAT rejected the arguments of S and the Commission that in determining whether direct discrimination was justified it is necessary to focus solely on the individual treatment of the claimant and not whether the policy itself has a legitimate aim. S submitted that there was no justification in this case as there was no associate waiting to be promoted.

The EAT stated that only in exceptional circumstances would it be likely that the particular application of the rule to an individual need to be justified.

Performance assumptions and stereotypes

In one important respect the EAT accepted the submissions of S and the Commission. In determining whether the selection of the retirement age of 65 was justified and proportionate, the EAT held that CWJ could not assume that a person's performance would decline from the age of 65 and that to do so was a stereotype.

The EAT held this to be the case even though 65 was the same age at which employees could be compulsorily retired. It noted that the latter provisions were adopted for national labour market considerations rather than because performance was deemed to diminish at that age.

CWJ produced no evidence that performance would decline and the evidence that, on agreement by the partners, a person could continue working undermined that argument. The EAT concluded that what was required in such circumstances was *'…evidence of a considered and reasoned explanation as to why the particular age had been chosen. Mere assertion would not be enough'.*

On this point the EAT decided that the direct age discrimination was not justified and therefore ordered the matter to be remitted to the ET.

Implications for practitioners

It is important to note that this decision has developed the law in relation to the issue of compulsory retirement ages in partnerships, not in employment relationships. In seeking to prove that such direct age discrimination was justified, it held:

- there must be some cogent evidence provided by the partnership as to why a particular age was chosen under the policy
- mere assumptions or stereotypes concerning a person's performance are unacceptable and will not be sufficient to establish the partnership's evidential burden
- partnerships need to consider retirement ages based on their own particular circumstances and cannot rely on the compulsory retirement age for employees of 65.

Peter Reading
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Equality and Human Rights Commission

Briefing 521

Inferring age discrimination

Live Nation (Venues) UK Limited v Hussain UKEAT/0234/08/RN

Implications for practitioners

The EAT has in this case given some guidance to tribunals as to when they may safely infer age discrimination. It will not simply be enough for an employer to express ageist views or, as in this case, attribute ageist views to the claimant. The tribunal will have to be satisfied, having heard all the evidence, that age discrimination was indeed the effective cause of the discrimination. The ET was criticised for inferring too readily from comments which were made about the claimant's own attitude that the employer was himself discriminating on the grounds of age.

Facts

Mr Hussain (H) (who was born in 1955) had worked for Live Nation (LN) since 1980; he was employed as a front of house manager and had always received exemplary appraisals; indeed the tribunal commented on the number of witnesses who attended and were able to speak highly of his abilities. Friction arose when two younger female managers were appointed to line-manage him and they complained about his attitude towards them. It was believed that he did not like the idea of being supervised by younger members of staff, in particular a Ms Keight who became general manager at the theatre where he worked. In his annual appraisal, she described him as only *'meeting expectations'* an assessment which automatically involved the employee receiving coaching and training to ensure that all the requirements of the post were achieved. This appraisal upset the claimant and affected the bonus he received.

The following year, H was assessed as unsatisfactory by Ms Keight's deputy manager Ms Hawke and informed he would not receive a bonus. This assessment was left in his pigeonhole and, when he received it, H confronted Ms Hawke in her office. The two managers regularly complained about H to human resources and to a Mr Newman (N) and Mr Murtagh (M), two managers from head office who were named respondents in the case.

In March 2007 just before H went on holiday, he was summoned to a disciplinary hearing for failing to attend the theatre when rostered to attend. It was alleged that he was angry and aggressive when he attended this meeting with Ms Hawke. Ms Hawke and Ms Keight made a further complaint and N and M, who were dealing with their complaints, suspended H. When H attended a meeting on April 12, 2007 he was refused the right to have a trade union representative present as it was not a disciplinary meeting; he was informed that he was going to be dismissed. His appeal was rejected.

Employment Tribunal

At the ET LN conceded unfair dismissal and the tribunal concluded that since there would not have been a dismissal if fair procedures had been followed, it was inappropriate to make a reduction in compensation for contributory fault on the part of H.

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Age discrimination

The ET noted management's view that the tensions created between the claimant and Ms Keight and Ms Hawke were because he found it difficult being managed by two younger female members of staff. The tribunal said that management had an unsubstantiated belief that the claimant was using his age to his advantage and that he was too old to change his ways. The tribunal concluded that this could well have been a significant factor in the decision to dismiss him and, accordingly, the burden of proof shifted to the respondent under the test in *Igen v Wong* [2005] EWCA Civ 142. The ET concluded that the explanation provided by the respondents was so unsatisfactory and the failure to follow proper procedure so baffling, the respondents would not have taken a similar approach with a younger man.

Employment Appeal Tribunal

The EAT upheld the appeal against the finding of age discrimination and rejected the other grounds of appeal. Management had indeed recorded on the claimant's file their conclusion that they thought he was ageist and sexist in his attitude towards the two female managers. The EAT agreed with LN that it cannot be right to say that because a senior member of staff had these suspicions about an employee, any action taken against that employer would be on the grounds of sex or age. Mr Justice Elias stated that *'if an employer genuinely forms the view that an employee is guilty of racism or sexism and dismisses for that reason* it *provides no scintilla of evidence that the reason for the dismissal is sex or race as the case may be. That is so even if the employer's perception is unjustified or misguided.… An unjustified or unreasoned belief that the claimant himself has ageist tendencies may render a dismissal unfair, but it does not begin to justify an inference that he has been dismissed by reason of his age.'*

The view that the claimant was 'too old to change' might have provided some basis for inferring age discrimination but the EAT found that in this particular case there was no evidence to justify that conclusion.

The ET appeared to be too heavily influenced by the glaring procedural failings which occurred. However, the evidence suggested that N and M were genuinely reacting to complaints by the two female managers and this is what led to the unfair dismissal.

Comment

This case underlines the importance of having a sufficient evidential basis on which to invite a tribunal to draw an inference of discrimination. H was unrepresented before the EAT and may well have presented the case himself at first instance. He sought to raise before the EAT evidence which suggested that older employees were being replaced by younger ones. This evidence was not heard by the EAT as it had never been presented to the ET. It might also have been interesting to explore whether the attitudes of the two female managers had been ageist themselves and whether this had also coloured their complaints and seeped into the management processes of M and N. The EAT was right to point out that a manager is not acting in a discriminatory fashion simply because he believes (rightly or wrongly) that the claimant holds particular discriminatory views, otherwise no employer could safely discipline an employee for racist/sexist behaviour.

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Briefing 522

The medical expert's opinion and defining disability

McKechnie Plastic Components v Grant [2009] UKEAT/0284/08

Implications for practitioners

The definition of disability continues to be the subject of a significant number of appeals to the EAT. In this case the EAT considered whether an employment tribunal is free to reach a finding of discrimination when an agreed expert's medical report does not support such a finding. This case is of particular interest as it concerns a stress related condition.

Employment Tribunal

The claimant presented her claim of disability discrimination to the ET and a preliminary hearing was held to determine whether she met the definition of disability. There was a jointly instructed medical expert, Dr Alexander, who concluded on the basis of an examination and medical notes as follows:

- that the claimant suffered from work related stress; a description which does not constitute a mental

impairment for the purposes of the Disability Discrimination Act (DDA)
- that such impairment was not substantial and did not have an adverse effect on the claimant's ability to carry out day-to-day activities
- that the claimant suffered from the condition for a period of only ten months (October 2006 – August 2007) and therefore the condition was not long term
- that the claimant at the time of the examination, but not at the time of the alleged discriminatory acts, was suffering from mixed anxiety and depressive disorder

The employment judge had difficulty in reconciling this report with evidence about her condition from the claimant, her husband, her son and a friend, Mrs Palmer, which he found to be compelling. The evidence painted a picture of the claimant as a recluse; imprisoned by her own anxiety from any contact with people without the support of the family. Although a keen gardener, she could only work in the rear garden where she would not meet anyone.

The employment judge noted that at the time of the examination the claimant was diagnosed as suffering from a mixed state of anxiety and depressive disorder and that it was therefore justifiable for him to conclude that these symptoms had existed from January 2007 and that therefore she had suffered a mental impairment since that date. The tribunal held that she had a disability. The employer appealed.

Employment Appeal Tribunal

The nub of the appeal was that the ET erred in law in its conclusion and that it was, in effect, substituting its own finding for qualified and informed professional opinion. This, it was said, offends against the guidance given in cases such as *Morgan v Staffordshire University* [2002] IRLR 190 and *Dunham v Ashford Windows* [2005] IRLR 608

The EAT held that the ET was drawing an inference which, in the light of the evidence it had heard, it was entitled to draw, by concluding that the condition which had been found by Dr Alexander on examination had existed prior to the date of the examination. The case of *John Grooms Housing Association v Ms Burdett* UKEAT/0937/03/TM suggests that it is open for a tribunal to infer that a claimant who suffered from a condition at the time of a medical examination also suffered from the condition at the time of the act of discrimination.

Moreover, the 2005 amendments to the DDA removed the need for claimants to demonstrate that a mental impairment resulted from a clinically well recognised illness.

There was no error of law in this ET's decision that the claimant was suffering from a mental impairment and it had a substantial effect on her ability to carry out day-to-day activities.

However, the EAT upheld the appeal in relation to the approach the ET adopted on the question of whether the mental impairment was long term. It was not clear why the ET decided that the mental impairment had started in January 2007 nor was it clear whether the tribunal had in mind the full statutory test which has three categories concerning the impairment: namely that it has lasted for 12 months; the period for which it lasts is likely to be at least 12 months or it is likely to last for the rest of the person's life. The case was remitted to the same ET to ask it to reconsider the issue of whether the claimant's mental impairment was long term within the meaning of the DDA.

The EAT made a number of comments on the purpose and nature of medical reports including the following:
- it would be an abdication of responsibility for courts or tribunals to accept uncritically the conclusions of any medical expert without ascertaining the factual basis upon which such conclusions are reached
- the experience of the courts in the area of personal injury litigation, physical and sexual abuse of children or psychiatric or psychological assessments, is that there will be cases in which, on a critical analysis of the evidence, the expert's conclusion crucially depends on a finding of fact that rests on the credibility of what a party to the litigation is saying rather than on objective clinical assessment which only an expert can make.

To give a trite example: in the case of a traffic accident the diagnosis of whether the injured person has suffered a fractured bone is a matter of clinical expertise; the prognosis of the condition may be partly a matter of medical expertise but also in part may rest on the credibility of the injured person as to whether he or she is telling the truth about the symptoms. The injured person may claim that as a result of the accident he, or she, suffers from fear, helplessness and a horror of driving or being a passenger in a motor vehicle. It is a matter of expert evidence as to whether these complaints constitute post-traumatic stress disorder and the evidence of the psychologist or psychiatrist may assist the court in making its assessment of the credibility of the claimant as to whether he or she does experience the symptoms claimed. However, in the final analysis, it is a matter of fact for the court whether the claimant is relating a real experience rather than a fabricated account deriving from other sources.

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The EAT found that Dr Alexander had at various stages made judgments or assessments which were, arguably, concealed findings of fact. For example, he stated that there was no evidence that work related stress contributed to any problems the claimant had in carrying out any normal day-to-day activities. That is, said the EAT, the sort of statement that sits more happily in a judicial decision rather than in a medical report. It was unfortunate that he had not been called to give evidence. In many cases it would be preferable for a tribunal in this position to adjourn the hearing to seek the views of the medical expert.

Comment

This case raises two main issues: firstly, the importance in many cases of calling the medical expert to give evidence, though this may well increase costs, as well as ensuring that instructions to them make clear the boundaries of their role; and secondly, stress as a disability. When the requirement for a mental illness to be clinically well recognised was removed by the 2005 DDA, there was concern that it would lead to a flood of 'stress' claims. This has not been the case. However it is possible for a claim to be based on stress; but a claimant would still need to pass the long-term test which is likely to be the most significant barrier.

Catherine Casserley
Cloisters

523 Briefing 523

Requiring a Christian Registrar to perform civil partnership ceremonies is not religious discrimination

London Borough of Islington v Ladele [2009] IRLR 154

Facts

Ms Ladele (L) was a Registrar of Births, Deaths and Marriages for the London Borough of Islington. She was also a committed Christian. Her religious views included a belief that marriage was the union of a man and a woman. She was opposed to civil partnerships between homosexual and lesbian couples.

When the Civil Partnerships Act 2004 came into force L told the council that she was unwilling to officiate over such partnerships.

The council suggested that she might deal only with a form of civil partnership confined to a simple signing process rather than officiating at a ceremony, but this was rejected. For a time L was able to avoid civil partnerships by switching rosters with co-workers. However, two colleagues objected to this practice.

Disciplinary proceedings were begun against L on the basis that she was in breach of the council's policy. At this point L brought proceedings in the employment tribunal.

Employment Tribunal

The ET found in L's favour concluding that the council's actions amounted to direct and indirect religious discrimination as well as harassment.

Employment Appeal Tribunal

The EAT allowed the appeal, concluding that the ET had gone badly wrong on both direct and indirect discrimination.

In relation to direct discrimination the ET made two major mistakes. Firstly, they failed to appreciate that treating all employees in the same way could not be direct discrimination Secondly, the ET failed to appreciate the distinction between action taken because of L's beliefs and action taken because of her behaviour motivated by her beliefs. The council's actions did not arise from its opinion about L's religion, but from her behaviour based on her belief. The council's actions did not, therefore, constitute direct discrimination.

The finding of indirect discrimination was also rejected. The ET had viewed their task as balancing L's religious rights with the rights of gay couples. This, the EAT concluded, was the wrong approach. The ET's responsibility was to decide whether the respondent had been pursuing a legitimate aim with proportionate means. Viewed in this light, the council's actions were justified. They were under a duty to provide a service in a non-discriminatory way and they were entitled to impose the same duty on their employees.

Liberty, who intervened in the appeal, argued that

this was the only lawful approach the council could have taken. It would, they suggested, have been wrong for L to be accommodated by the council by, for example, permitting her to officiate over only heterosexual marriages. This argument was rejected by the EAT who concluded that, while it had been lawful for the council to refuse such an accommodation, it was an option open to them.

The EAT also overturned the harassment conclusion, finding that the ET had failed to consider the council's motives. Since the council had been concerned with her behaviour, rather than her motives, there was no basis for the finding of harassment.

Comment

This judgment makes clear that direct discrimination on the basis of religion and belief is a narrow category. It will normally be restricted to cases of bigotry or prejudice.

The case also highlights that it will be difficult for employees of public bodies to succeed in claims for indirect discrimination where their employer is attempting to implement equality principles. This will almost always be a legitimate aim and *Ladele* makes clear that it will normally be proportionate to give priority to the users of the service, rather than the employees.

Michael Reed
Free Representation Unit

Briefing 524

Age discrimination v the 'inevitable consequence of age'

Chief Constable of West Yorkshire Police & Others v Homer [2008] UKEAT/0191/08

Implications for practitioners

The EAT ruled that West Yorkshire Police did not indirectly discriminate on grounds of age by imposing a requirement for a law degree for a top graded post. Any disadvantage suffered was the 'inevitable consequence of age' rather than indirect age discrimination. Guidance was also given on justification.

Facts

Following a 30 year career in the police service retiring at the rank of detective inspector, Mr Terence Homer (H) started working in 1995 as a legal adviser with the Police National Legal Database (PNLD), a department of West Yorkshire Police. In 2004 a new job profile for the post stated that a law degree was 'essential'. H didn't have a law degree but had qualified with experience. PNLD offered to pay for him to obtain a law degree, but at the time he saw no reason to undertake the onerous burden of a part-time degree. He anticipated retiring at age 65 and would not, in any event, have had sufficient time to finish the degree before then. At that stage, the fact that he did not hold a law degree had no implication regarding his pay scale.

In 2005 his employers, after obtaining advice on recruitment and retention by Michael Page Legal, introduced a requirement that, in order to be at the top grade and receive the higher salary linked to that grade, an employee had to possess a law degree.

In 2005, PNLD implemented a new, graded career structure involving three grades with better pay conditions in an attempt to attract and retain suitable candidates for the legal adviser post. H was successfully re-graded in respect of the first two grades. He then applied to be re-graded at the top of the three new grades but was turned down because he could not satisfy one of the nine criteria - the requirement to have a law degree. He was now aged 61 years of age. He appealed and raised a grievance, both of which were dismissed.

Employment Tribunal

H contended before the ET that this was age discrimination. He alleged that the requirement to have a law degree amounted to indirect age discrimination because his age prevented him from completing the degree course prior to his retirement. The ET agreed on the grounds that given his age – he was 61 – he was not able to obtain a degree before he retired, unlike younger workers who would be able to do so. The ET held that there was discrimination directed against those without a law degree who were within the 60-65 age bracket.

The ET considered the issue of justification but concluded that although the employers were seeking to achieve a legitimate objective, namely the recruitment

and retention of staff of an appropriate quality, the imposition of this criterion was not a proportionate means of achieving it.

The ET found that it was, in principle, a legitimate aim to adopt criteria to facilitate the recruitment and retention of staff of the appropriate quality. However, it concluded that the means PNLD adopted in achieving this aim were not proportionate. The ET referred to the ACAS guidance on age discrimination in respect of proportionality:

> *When answering the question 'What is proportionate?' the ACAS guidance goes on to suggest that the following should be considered:*
>
> *(a) What the employer is doing must actually contribute to a legitimate aim and the employer ought to have evidence that the provisional criterion is actually contributing to that aim.*
>
> *(b) The discriminatory effect should be significantly outweighed by the importance and benefits of the legitimate aim.*
>
> *(c) The employer should have no reasonable alternative to the action that it is taking. If the legitimate aim can be achieved by a less or non-discriminatory means then these 'must take precedence.*

The ET found that the appropriate standard could have been achieved without the requirement for the law degree in all cases. The ET pointed out there was nothing in the Michael Page Report which supported the need to require a law degree to be graded at the third level, or indeed any level. Additionally, a requirement to have '*appropriate skills and experience*' could have been imposed. In any event, the tribunal found that the provision, criteria or practice (PCP) of requiring a law degree, did not achieve its objective of retaining current members of staff or improving the quality of job applicants. As a result, H's indirect age discrimination claim was upheld. The ET also noted that an exception could have been made for the claimant. It would have been reasonable to have permitted him to be re-graded to the third level of pay even if he fell outside the established criteria.

Employment Appeal Tribunal

The respondent appealed to the EAT, arguing that the ET had erred in two fundamental respects. Firstly, by finding that the PCP put those in H's age group at a particular disadvantage; and secondly, by finding that the discrimination, if indeed there was any, was not justified.

The EAT in a judgment given by Mr Justice Elias, upheld the appeal on the first ground finding that there was no discrimination on grounds of age and that the claimant had not suffered any particular disadvantage as a result of his age. He was treated in precisely the same way as everyone else. The requirement for a degree was not something required for those over a certain age. The barrier applied to all equally. While it was true that he could not materially benefit from any law degree he might obtain, that was because his working life was limited.

The EAT held that any improvement in terms which an employer gives will generally benefit older workers for a shorter period of time than younger ones. Any disadvantage can properly be described as the consequence of age, but is distinguished from being the consequence of age discrimination.

Interestingly the EAT went on to find that if the claimant been able to establish the requisite disadvantage within his age group, it would have upheld the finding that any age discrimination was not justified. The EAT gave further guidance on justification stating it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is not permissible is a justification based simply on subjective impression or stereotyped assumptions.

Comment

The EAT also observed that it was difficult to see why an exception was not made for H as other exceptions had been made. Whether a claim of direct discrimination brought on the failure to apply an exception would have found more favour is unknown. H's case was solely advanced on grounds that he would not be able to complete the course prior to retiring. His case was not presented on the basis of any general disadvantage that persons aged 60-65 were less likely to have a law degree than those of a different age group, owing to the growth in higher education. The EAT commented that would have been a different case. Whether or not the requirement to obtain a degree of itself was prima facie indirect age discrimination remains to be the subject of future determination.

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Disability discrimination in the provision of goods and services

David Allen (A child by Ceri Allen his Litigation Friend) v The Royal Bank of Scotland Group Plc [2008] Sheffield County Court, Claim No 7SE51122

Facts

The claimant Allen (A) is a child who has Duchenne Muscular Dystrophy and uses an electric wheelchair. He has a bank account with the Church Street Sheffield branch of the Royal Bank of Scotland (RBS).

The branch advertised that it was accessible to wheelchair users. A sought to use the branch counter banking facilities on a number of occasions but was unable to do so as it had, in fact, no wheelchair access. RBS admitted the branch had no wheelchair access and that A had a disability within s1 of the Disability Discrimination Act (DDA).

A brought a claim of disability discrimination in the provision of goods and services under s19(1)(b) which provides that it is unlawful for a provider to discriminate against a disabled person in failing to comply with the duty to make reasonable adjustments under s21 of the DDA.

Further, under s20(2), for the purposes of s19, a provider of services discriminates against a disabled person if they fail to comply with the s21 duty and cannot show that the failure to comply is justified.

Section 21(2) of the DDA provides that where a physical feature makes it impossible or reasonably difficult for a disabled person to make use of a service, the provider has a duty to take such steps that are reasonable to:

- remove the feature;
- alter it so it no longer has that effect;
- provide a reasonable means of avoiding the feature;
- provide a reasonable alternative method of making the service available to disabled persons.

A was represented by the Sheffield Law Centre which was funded to support the case by the Equality and Human Rights Commission.

County Court

The court found that the RBS had failed to properly consider the possibility of installing a lift at the branch. As a result, the bank was required to establish that the failure to make reasonable adjustments was justified.

A number of factors were taken into account in determining whether the failure to make reasonable adjustments was justified:

- although the alteration to the premises would cost approximately £200,000, the RBS did not claim that the cost of the alterations was a relevant factor;
- RBS claimed that the effect of the loss of an interview room was a relevant factor; however, it provided no evidence of the effect that the adjustments would have on the number of interview rooms available;
- the expert's report did not demonstrate that all of the methods of achieving disabled access were unreasonable; in fact he concluded that a platform lift was a possible solution;
- alternative counter services at other branches were not 'reasonable' in all the circumstances given the difficulties A faced in accessing public transport to those branches, and A's desire for A not to rely on his parents and to maintain his independence.

In light of all the above factors the court found that there had been a failure to make reasonable adjustments and that such failure could not be justified.

Remedies

The court found that A had suffered considerable embarrassment in attending and being unable to use counter services at the Church Street branch and an alternative NatWest branch offered by the RBS. The fact that the RBS claimed he had received better treatment than others by being allowed to open his savings account in the street ignored the privacy to which A was entitled when conducting his banking.

As a result the court decided to award A £6,500 damages for injury to feelings.

In addition the court decided it was an appropriate case in which to make an order for an injunction to preclude further discrimination and ordered that the RBS was to install a platform lift at the premises by the end of September 2009.

Implications for practitioners

The decision was significant for a number of reasons:

- it was the highest award for damages in a case of disability discrimination in the provision of goods and services
- it was the first case in which a judge has ordered an injunction to force an organisation to make physical changes to its property to prevent continuing discrimination
- it will set an example for other organisations in terms of understanding and complying with their duty to make reasonable adjustments for disabled persons.

Peter Reading
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Equality and Human Rights Commission

Statement to UN General Assembly condemns discrimination of LGBT

On December 18, 2008 the UN General Assembly was presented with a statement endorsed by 66 states calling for an end to discrimination based on sexual orientation and gender identity. A coalition of international human rights organisations urged all the world's nations to support the statement in affirmation of the Universal Declaration of Human Rights basic promise – that human rights apply to everyone.

Changes to Tribunal Rules

The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008 come into force on April 6, 2009. These regulations make changes to the tribunal rules to accommodate the repeal of the statutory disputes procedures and other technical procedural issues.

See the Employment Act 2008 (Commencement No. 1, Transitional Provisions and Savings) Order 2008 for details. Note that the old rules continue to apply in certain dismissal and statutory grievance cases where action under the old procedures has been initiated before, or continues after, April 6.

A new Acas Code on Disciplinary and Grievance Procedures comes into effect on April 6, 2009, when the statutory dismissal and grievance procedures are abolished. An unreasonable failure by an employer to follow the Code will result in a tribunal having the power to increase any award by up to 25%.

NI Children's Commissioner found to lack standing to bring case on behalf of victims under the Human Right Act

In an appeal regarding an application for judicial review, the Northern Ireland Appeal Court has held that the NI Commissioner for Children and Young People is not a victim for the purposes of section 7 of the Human Rights Act 1998.

The Commissioner had sought to challenge the lawfulness of article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006 which leaves intact the defence of parental punishment to what would otherwise be an assault on a child. The Commissioner argued that this was incompatible with articles 3, 8 and/or 14 of the European Convention on Human Rights (the Convention). The High Court and the Appeal Court considered whether the Commissioner was the victim of a violation of one of the Convention rights under Article 34 of the Convention and decided that it did not fulfill the test of victimhood stating: *'What emerges from the Strasbourg case law is that the test of standing under the Convention does not permit a public interest challenge or actio popularis nor does the making of a complaint entitle the Court to review the law in the abstract.'* The Commissioner is considering whether to appeal the judgment. See *Northern Ireland Commissioner for Children and Young Peoples' Application* [2009] NICA 10.

Duty on public bodies to tackle socio-economic inequality

The Government Equalities Office initiated a consultation in February 2009 on a proposed duty on public bodies to tackle socio-economic inequality. Recognising that socio-economic disadvantage leads to significant inequalities and gaps in outcomes which have a significant effect on people's life chances, (for example in relation to education, employment, financial capability, crime and health) the government is considering legislation to make tackling such disadvantage and narrowing these gaps a core function of key public services. In its response to the consultation, the Equalities and Diversity Forum welcomed the proposal but warned that the *'design of the duty needs to be more robust if it is to have a significant impact. In addition, it needs to be accompanied by appropriate measures to monitor, evaluate and enforce it.'* The government plans to introduce a legislative proposal in April 2009.

Upcoming UKREN Roundtable on Positive Action, March 27, 2009

On March 27, 2009 the roundtable *Positive Action in Theory and Practice: experiences from the UK and Europe* organised by UKREN and hosted by Eversheds Law Firm will take place in London. The roundtable aims to bring together equality organisations, civil servants, academics and other interested stakeholders to discuss the concept of positive action and its use in addressing discrimination. Confirmed speakers include Razia Karim (Equality and Human Rights Commission), Melanie West (Government Equalities Office), Amanda Ariss (Equality and Diversity Forum), Audrey Williams (Eversheds Law Firm), Maleiha Malik (King's College London), and Maggie Beirne (Committee on the Administration of Justice). A good practice discussion panel with businesses, NGOs and public authority representatives including Mebs Ahmed (Lancaster Black Police Association), Sushel Ohri (Transport for London), Becky Mason (British Telecom) and Simon Woolley (Operation Black Vote) will be outlining examples of positive action measures and policies. Places are free but limited. For more information or to register, contact the UKREN Secretariat directly at: **ukren@runnymede trust.org**

Age limits for training as an air traffic controller ruled unlawful

London Central Employment Tribunal has ruled that the National Air Traffic Service Limited's (NATS) practice of refusing to consider any potential recruit over the age of 35 is unlawful. The case was brought by Mr Baker who made an online application to NATS on August 18, 2007, a few weeks after his 50th birthday. His application was automatically rejected because of his age. NATS had tried to justify their policy on the basis of concerns about safety, alleged declines in performance amongst older controllers, and a need to recoup the cost of training (which they estimated to be around £600,000 per trainee air traffic controller). However the ET rejected the evidence produced in support of these factors and stated, *'confusion appears to have infected the respondent's reasoning throughout'*. The ET concluded that NATS wished to retain an age limit primarily for its own sake, based on commonplace views within the organisation that there were 'difficulties' associated with older recruits. It found that the age limit operated to exclude individuals with relevant experience, which was 'irrational'.
The judgment is available at **http://www. cloisters.com/news_story.php?newsID=183**

New three-year strategy for people with learning disabilities

Valuing people now: a new three-year strategy for people with learning disabilities sets out the government's three-year strategy for people with learning disabilities. It also responds to the main recommendations from an independent inquiry into healthcare access for people with learning disabilities (see *Briefings* Volume 35).

EDF leaflet on European law and equality

The Equality and Diversity Forum (EDF) has just published a guide to the role of European law in UK equality law. It is available on request from the EDF and is downloadable from the website at **http://www.edf.org.uk/blog/?p=1466**

Briefings

Abbreviations

ACE	Age Concern England	DDA	Disability Discrimination Act 1995	ECtHR	European Court of Human Rights	PHR	Pre-hearing Review
AHC	Ad Hoc Committee (UN)	DJ	District Judge	ECJ	European Court of Justice	RRA	Race Relations Act 1976
ACAS	Advisory, Conciliation and Arbitration Service	DLA	Discrimination Law Association	EDF	Equality and Diversity Forum	SDA	Sex Discrimination Act 1975
AR	Employment Equality (Age) Regulations 2006	DPI	Disabled Peoples International	EHRC	Equalities and Human Rights Commission	SOR	Employment Equality (Sexual Orientation) Regulations 2003
BME	Black and Minority Ethnic	DLR	Discrimination Law Review	EOC	Equal Opportunities Commission	TUC	Trade Union Congress
BNP	British National Party	DRC	Disability Rights Commission	ET	Employment Tribunal	UN	United Nations
CA	Court of Appeal	EAT	Employment Appeal Tribunal	HC	High Court	UDHR	Universal Declaration of Human Rights
CBI	Confederation of British Industries	EC	European Commission	HL	House of Lords	UKREN	UK Race and Europe Network
CRE	Commission for Racial Equality	ECHR	European Convention on Human Rights	HRA	Human Rights Act 1998		
DAA	Disability Awareness in Action			PCP	Provision, Criterion or Practice		