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Editorial

Need for effective protection reinforced as momentous events unfold

Briefings goes to press at an extraordinary time in the UK's constitutional political history. The EU referendum has delivered an instruction to the government which now appears unexpected and unplanned for. Although the general population of the UK is split as to Brexit's impact, it is clear to the DLA that the people who are at the rough end of discrimination look set to see restrictions on, and a rowing back from, some of their fundamental rights.

As *Briefings* regularly demonstrates, the development of UK discrimination jurisprudence benefits from the overview from Europe and guidance on the parameters of the European directives which the UK has done so much to shape. For many of our members, the CJEU is a voice of reason and compassion in the application of equalities law, and a source of both thoughtful comment and reasoned argument on some of the most morally and jurisprudentially difficult issues of our times.

For example in *Rasmussen*, Briefing 787 in this edition, the CJEU arguably widens access to justice and enforceability of EU rights for ordinary workers when considering the enforceability of key age discrimination principles. Advocate General Kokott's opinion in *Achbita* explores the question of religious dress and the legal balancing act required of national courts when looking at the application of this very public law in the private workspace. In a careful and potentially controversial opinion, she concludes that the banning of religious dress in the workplace is not discriminatory in this instance.

The impact of and timetable for Brexit remain uncertain. What has been laid bare are the divisions and differences in our society which the political debate around the country has highlighted; and these are having a real impact on the lives of some of the most vulnerable in our society. Both before and since the vote there has been an undercurrent of racism and xenophobia aimed at immigrants, migrant workers and people from diverse communities up and down the country.

A worrying number of anti-Polish and anti-Muslim hate crime incidents have been reported in the media following the referendum. Figures from the National Police Chiefs' Council confirm that there was a 57% increase in reports of hate crime to True Vision (a police funded online hate crime reporting website) compared to the same time last month (85 reports between Thursday 23 – Sunday June 26 compared with 54 reports the corresponding 4 days four weeks ago). Although this should not be read as a national increase in hate crime of 57% but an increase in reporting through one mechanism only, it is an alarming development.

Immigration has been front and centre in the EU referendum campaign, with a tone of intolerance at best and racism and xenophobia at worst. Two cases reported in *Briefings* highlight the appalling treatment suffered by some workers which a climate of racism and xenophobia can lead to. They also highlight the difficulty faced by people made vulnerable by immigration status in accessing or enforcing the most fundamental of human rights, the right to freedom from slavery.

In *Galdikas* the High Court awarded damages to workers abused as slaves and pointed to the reason for the vulnerability of the workers and the cause of abuse as being their immigration status. Although in *Taiwo* and *Onu*, the SC found that the exploitation or abuse the claimants suffered because of their immigration status was not race discrimination, the court heavily underlined that the abuse in this case arose because of the individuals' socio-economic status as immigrant or migrant workers.

The lawyers and campaign groups who continue to fight for and represent these people, often pro bono, demonstrate all that is best in a legal system, which in so many ways is failing to offer any protection from exploitation either in the criminal or civil courts. The cases demonstrate why enforceable integrated laws which protect and support all migrant workers and those vulnerable because of race and immigration status are so vital in a civilised society. Without them, ignorance and intolerance make a fertile breeding ground for racism, abuse and indifference to the suffering of our fellow humans. Without strong legal protection of human rights and anti-discrimination rights, as well as the right of movement of workers, ordinary people, vulnerable for no reason other than their nationality and immigration status, can fall prey to exploitation, abuse and modern-day slavery.

With a very large number of people citing concerns about immigration as a key reason for voting to leave the EU, there is a need for a tolerant and thoughtful debate on race and immigration. Whilst our politicians

talk of trying to unite a divided people, we may judge them by their actions in government.

The recent Justice Select Committee report which reviewed fees in the courts and tribunals criticised the minister, one Michael Gove, for his lack of cooperation by not releasing his review into ET fees. The committee concluded that the current levels of fees across the employment tribunals are creating barriers to justice.

Briefings flags up the forthcoming July launch of Rights Watch (UK)'s research report on Prevent – the centrepiece of the government's preventative counter-terrorism strategy. This strategy raises serious questions about what some consider to be state sponsored racism directed at UK residents. We will report in future editions on Rights Watch UK's research conclusions and recommendations.

At the time of going to press, the ever-evolving political developments have been hard to keep up with and it is hard to predict where they will lead. A week which started with the Justice Select Committee's report ended with a demonstration of democracy which looks set to challenge, if not completely undermine, some of the key foundations of UK's equality laws. Those who consider that voting changes nothing look set to be proved wrong. Whilst most of the equality laws are made by the UK under the EA, the continued development of those laws, and their interpretation, has been influenced and informed by the collective expertise of judges from across Europe. The future development of our anti-discrimination laws may well slow down, stop or, as many fear, go into reverse as we disentangle ourselves from Europe.

Growth of inequality

What will not cease or slow down we fear, is the growth of inequality. The referendum has thrown up some very worrying divisions in society, not only between the older and younger members of society, but between different social and economic groups, between north and south, urban and rural, and between the four constituent countries of the UK. The economic impact of Brexit is unknown but there is real concern that the economic inequalities in our society will be deepened, rather than reduced, as we move into the new era.

As we consider how best to work to represent those at the rough end of discrimination and inequality, we could do worse than re-read s1 of the EA. If implemented, the section would place a clear duty on public authorities *'when making decisions of a strategic nature about how to exercise its functions, [to] have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'.* This home-grown UK clause is sensible, workable and already contained in legislation. There has never been a more appropriate time to lobby for its implementation.

Catherine Rayner,
DLA Chair

Geraldine Scullion
Editor

Discrimination Law Association

Annual Conference

The DLA's annual conference will take place on **Monday, November 14, 2016** at the offices of Baker & McKenzie, 100 New Bridge Street, London EC4V 6JA. Contact the DLA administrator Chris Atkinson for information on booking your place: **info@discriminationlaw.org.uk**.

The conference will include a morning panel of speakers with topics for debate being finalised, and will be followed in the afternoon by the ever popular practitioner up-date sessions. A thought provoking debate on the challenges of the future will conclude the afternoon.

Once again we are grateful to the generosity of Baker & McKenzie for hosting the conference.

Who is a Gypsy or Traveller?

Chris Johnson, team leader of the Travellers' Advice Team, Community Law Partnership Solicitors, Marc Willers QC of Garden Court Chambers and Dr Simon Ruston, Member of the Royal Town Planning Institute, describe how the government has intervened in planning policy to change the criteria by which Gypsies and Travellers are defined for the purposes of planning law. In this article they address the recent amendment of the government's planning definition and the removal of the statutory duty to assess the needs of Gypsies and Travellers. They set out the action those working on behalf of Gypsies and Travellers hope to take to address these regressive measures.

Introduction

It may seem surprising but there have been a variety of different legal definitions of what it means to be a Gypsy or Traveller.

The Equality Act 2010 (EA) recognises the fact that Romani Gypsies and Irish Travellers[1] have been held to be members of two separate ethnic minorities groups and protects them from discrimination. Meanwhile, planning policy designed to promote the provision of caravan sites for Gypsies and Travellers defines them as *'persons of a nomadic habit of life, whatever their race or origin…'* (the planning definition).

Whereas, the assessment of the accommodation needs of Gypsies and Travellers has used a third wider and more inclusive definition which includes all those people *'with a cultural tradition of nomadism or of living in a caravan …'*, as well as *'all other persons of a nomadic habit of life, whatever their race or origin …'* (the housing definition).

The change to the planning definition of *'gypsies and travellers'*[2]

On August 31, 2015 the government published a revised version of its *Planning policy for traveller sites* (PPTS).[3] The PPTS[4] replaced the previous version issued in 2012 and came into force with immediate effect.

The most controversial change was to the planning definition of *'gypsies and travellers'* in the PPTS. In the Annexe to the PPTS the government explains that any reference in the policy to *'gypsies and travellers'* means:

> *Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel* ***temporarily****, but excluding members of an organised group of travelling showpeople or circus people travelling together as such.* (emphasis added)

It follows that if a Gypsy or Traveller stops travelling permanently for health reasons or reasons of old age, he or she will no longer fall within the planning definition and will not then be able to rely on the PPTS when trying to obtain planning permission for a Gypsy/Traveller site.

In the 2012 version of the PPTS, the planning definition of *'gypsies and travellers'* had included the words *'have ceased to travel temporarily or permanently'* which meant that Gypsies, Travellers and Travelling Showpeople who had stopped travelling on a permanent basis because of ill-health or old age, were able to seek planning permission for a caravan site to meet their accommodation needs and rely upon the positive planning guidance in the PPTS when doing so. This is no longer the case.

The change to the definition brings us back to the situation that we were faced with at the time of the CA judgment in *Wrexham CBC v The National Assembly for Wales & Berry* [2003] EWCA Civ 835 i.e. that Gypsies and Travellers would apparently stop being Gypsies and Travellers if they retired. It is perhaps useful to note the following from Sullivan J in *Berry* (whose judgment in favour of Mr Berry was overturned by the CA):

> *As a matter of common sense, the time comes for all of us, gypsy and non gypsy, when we become too old and/or too infirm to work. Old habits, whether nomadic or not, die hard. It could not be right for a gypsy who had been*

1. For Romani Gypsies, see *CRE v Dutton* [1989] 1 All ER 306, CA; for Irish Travellers, see *O'Leary v Allied Domecq* August 29, 2000 (unreported), Central London County Court.

2. Similar and equally offensive changes were made to the planning definition of 'travelling showpeople'.

3. Note that the government persists in using the lower case when referring to Gypsies and Travellers, despite the fact that Romani Gypsies and Irish Travellers are recognised ethnic minority groups. Where we quote from government policy in this article we will do the same but otherwise we will use the upper case.

4. It should be read in conjunction with the National Planning Policy Framework.

> *living all his life on a gypsy caravan site or sites whilst he was still young enough and fit enough to travel to seek work to be told when he reached retirement age that he had thereby ceased to be a gypsy for the purposes of the application of planning policy. It would be inhuman pedantry to approach the policy guidance in Circulars 2/94 and 76/94 upon that basis.* (see paragraph 20 of his judgment at [2002] EWHC 2414 Admin).

The government recognised the implications of this change in policy in its Equalities Statement[5] which accompanied the consultation that took place in 2014 with regard to the new PPTS:

> *This proposal would impact on those Gypsies and Travellers who have given up travelling permanently for whatever reason, but in particular on the elderly who no longer travel due to reasons related to ill-health or disability. Similarly, it would also impact on children and young people including those with disabilities or special educational needs who use a settled base in order to access education; as well as women who have ceased to travel in order to care for dependents.*

However, the government also went on to state that it:

> *… is fundamentally of the view that where travellers have given up travelling permanently, they should be treated in the same way as other members of the settled community for planning purposes.*

In other words, the government was fully alive to the implications of this change of policy, but continued regardless.

It is questionable how practical this measure will be for local planning authorities (LPAs) to enforce. Before its revision, the planning definition functioned relatively well in comparison to its predecessor simply because it took account of the needs of elderly and disabled Gypsies and Travellers. The change to the planning definition introduces a considerable burden on already over-stretched LPAs who in many cases will have to demand, and then assess, significant amounts of information relating to 'gypsy status'.

At the time of the consultation, Catriona Riddell, the Planning Officers' Society's Strategic Planning Specialist, commented that *'the proposed changes to the definition of "travellers" which distinguishes between travellers that travel and those that have ceased to travel, will be very difficult to apply in practice.'*[6]

The repeal of the Housing Act 2004 definition

S225 of the Housing Act 2004 imposed a duty on local housing authorities to assess the accommodation needs of Gypsies and Travellers residing or resorting to their area. S226 of the same Act required guidance on how to undertake such an assessment to be placed before parliament. Then, in 2006, the government issued regulations which set out a definition of the term Gypsies and Travellers to be used by local authorities when carrying out Gypsy and Traveller Accommodation Needs Assessments (GTANAs) of their accommodation needs.[7]

Housing (Assessment of Accommodation Needs) (Meaning of Gypsies and Travellers) (England) Regulations 2006 states:

> *Gypsies and Travellers means:*
> *a) persons with a cultural tradition of nomadism or of living in a caravan; and*
> *b) all other persons of a nomadic habit of life, whatever their race or origin, including*
> *i) such persons who, on grounds only of their own or their family's or dependant's educational or health needs or old age, have ceased to travel temporarily or permanently; and*
> *ii) members of an organised group of travelling showpeople or circus people (whether or not travelling together as such).*

In contrast to the planning definition, the housing definition had a wider application and took account of Gypsies and Travellers who had been forced into bricks and mortar housing, often against their will. It is well known that many Gypsies and Travellers have been forced to move into conventional housing and that, in many cases, this has had an extremely detrimental effect. Many of those Gypsies and Travellers really require site accommodation. Indeed this can be seen as a form of hidden homelessness. In the most severe cases, Gypsies and Travellers are suffering psychologically because they are forced to live in bricks and mortar.

The authors of this article have long argued that the housing definition should have also been applied in the context of planning as this would have been a more fair and equitable situation for many ethnic Gypsies and Travellers who wished to live in culturally appropriate accommodation (i.e. caravans) but had, for whatever

5. Department for Communities and Local Government (DCLG) Consultation: planning and travellers – equalities statement https://www.gov.uk/government/consultations/planning-and-travellers-proposed-changes-to-planning-policy-and-guidance

6. http://www.planningofficers.org.uk/Planning-Officers-Society-News/POS-welcomes-the-Government's-consultation-on-changes-to-Planning-Policy-for-Travellers-But-Expresses-Concern-_298.htm

7. A very similar definition is contained in s108 Housing (Wales) Act 2014.

reason, ceased to travel.

Regrettably, s124 of the recently enacted Housing and Planning Act 2016, repealed ss225 & 226 of the Housing Act 2004 and abolished the need to carry out a separate assessment of the accommodation needs of Gypsies and Travellers – rendering the housing definition redundant.

Instead, LPAs will be required to address the needs of 'caravan dwellers' within their general housing strategies, a requirement which Gypsies and Travellers and their supporters fear will make the provision of sites even less likely.[8] The government has produced draft guidance on the assessment of the accommodation needs of caravan dwellers and others.[9] However, in the absence of a specific requirement to assess the accommodation needs of Gypsies and Travellers, the authors consider that there is little chance that the final version of the guidance will ensure that those needs will be properly addressed.

Potential legal challenge

The authors believe that the government's new planning definition discriminates against Romani Gypsies and Irish Travellers, breaches their human rights, breaches the EA and is ripe for challenge by way of judicial review.

Three Romany Gypsies are attempting to obtain legal aid to take challenges against this new planning definition. They are likely to argue that there is a clear breach of Article 8 (right to respect for private and family life and home) in conjunction with Article 14 (non-discrimination) of the European Convention on Human Rights. It may further be argued that there is a breach of the public sector equality duty under s149 EA.

It may also be argued that there is a breach of the Framework Convention for the Protection of National Minorities. In particular, Article 5 states:

1. *The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.*
2. *Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.*

Conclusion

It is important that the discriminatory new planning definition is tested in the courts for the reasons explained above. A very large number of individuals and organisations opposed the introduction of the new planning definition during the consultation process.[10] However, the government has ignored these submissions and it is clear that those campaigning against the new definition must now rely on the courts to stop the devastating effects of this change.

It is only a matter of time before we hear of planning permission refusals due to the new definition. In the meantime, some local authorities have taken the opportunity to use the new planning definition as the basis for fresh GTANAs and have consequently produced assessments which show a reduced need for pitches in their areas.[11] Clearly, if there is to be any hope of adequate site provision in the future, the new planning definition must be revoked.

8. See, for example, the Friends, Families and Travellers website: http://www.gypsy-traveller.org/lobby-your-mp-about-the-housing-and-planning-bill/

9. https://www.gov.uk/government/publications/review-of-housing-needs-for-caravans-and-houseboats-draft-guidance

10. See details on the Community Law Partnership website: http://www.communitylawpartnership.co.uk/noticeboard/campaigns-and-consultations

11. Old Oak and Park Royal Development Corporation and London Borough of Newham.

The Battle of Orgreave: why an inquiry is needed

Henrietta Hill QC, Doughty Street Chambers, draws parallels between the way police are alleged to have acted in south Yorkshire at Orgreave during the 1984/5 miners strike and at the terrible events in 1989 at Hillsborough football stadium, Sheffield. She concludes that an inquiry into Orgreave is required especially when rights to freedom of peaceful assembly, and trade union rights more generally, remain under the microscope following the recent passage of the Trade Union Act 2016.

Battle of Orgreave

The 'Battle of Orgreave' as it has become known has been described as a turning point in both industrial relations and policing in this country.

The 'battle' took place in the midst of the 1984/5 miners strike against pit closures. The National Coal Board claimed that it only wanted to close 20 pits, but the National Union of Mineworkers maintained – and subsequent events have proved them right – that more than 70 pits were on the NCB's closure list. The NUM called for a mass picket on June 18, 1984, aimed at disrupting the supply of coke from the Orgreave coking plant near Rotherham. It followed a series of smaller demonstrations at the plant in May and early June.

The pickets gathered in the sunshine, and, they say, engaged in nothing more than ritual but ineffectual pushes against the police lines. The contemporaneous footage appears to corroborate the pickets' version of events. Despite this, there came a point when dozens of mounted officers, armed with long truncheons, charged up the field, followed by snatch squad officers in riot gear, with short shields and truncheons. Many pickets were seriously injured by police baton strikes, and dragged back through the police lines to the temporary detention centre opposite the plant. Ninety-five miners were arrested and later charged with riot or unlawful assembly.

Almost a year later, in May 1985, the first of the trials, of 15 of the miners, commenced at Sheffield Crown Court. The trial collapsed after 48 days of hearings, when the prosecution abandoned its case as it became apparent that police evidence could not be relied upon. It also emerged during the trial that police were following new guidance from the Association of Chief Police Officers on public order policing, which permitted them to use force not only in self-defence, but also to 'incapacitate' demonstrators. This is legally dubious at best. The prosecution then dropped the charges against the other miners.

There was never any investigation into the conduct of the police at Orgreave and at the trials. Civil claims brought by a number of miners were settled without any admission of liability or public ventilation of the issues. Important issues therefore remained entirely unanswered and unaccounted for.

Yet the distrust in the police which Orgreave engendered remained endemic in former mining communities, and was understandably passed down through the generations to, now, many grandchildren of the pickets.

There is a wider political context, namely the concern that the police were being used at Orgreave to break the will of the striking miners, who the then Prime Minister, Margaret Thatcher, had famously described as *'the enemy within'*. In an interview for Channel 4 on May 10, 2016 the local Policing and Crime Commissioner, Dr Alan Billings, said that the policing of the miners strike is *'the nearest we came in my life to a politicised police force. I think the police were dangerously close to being used as an instrument of the state'*, and many share that view.

Mrs Thatcher's private office files and Cabinet Office records from 1984/5 have recently been released under the 30-year rule. They raise a range of issues about the extent to which national government was involved in the policing of the strike and the due process that followed any arrests. They show, for example, that the government suggested laying criminal conspiracy charges against union leaders for *'inciting'* the pickets to violence, and appeared to want to *'make an example'* of any miners who were convicted of criminal offences.

Orgreave Truth & Justice Campaign and links between Orgreave and Hillsborough

The Orgreave Truth and Justice Campaign was formed in 2013, committed to the securing of a full and independent inquiry into what happened at Orgreave. The campaign has the support of a large number of MPs and trade unions.

The work of the Orgreave campaign has become very high profile in recent months, in light of developments

in the Hillsborough case. In April 1989 a massive crowd crush had developed at the Hillsborough football stadium as a result of which 96 football fans died. The original inquest verdicts of accidental death were set aside in 2012 after a sustained campaign by the families, who never accepted the police account and its attempt to blame the fans for the disaster. Fresh inquests took place and in April 2016, the jury concluded that the fans had been unlawfully killed, and entirely vindicated the fans of any role in the disaster.

There are some key links between Orgreave and Hillsborough.

The two events took place around eight miles from each other, and just over five years apart. Both cases have at their heart South Yorkshire Police (although Orgreave involved officers from many other forces as well).

Both cases involve apparent serious wrongdoing by police. At Orgreave this involved alleged assaults, wrongful arrests and false prosecutions of the miners and perjury in court; at Hillsborough the inquest jury has now found that the police's serious actions and omissions contributed to the deaths of the 96 fans. The Crown Prosecution Service is currently considering whether any criminal charges should be brought.

Both cases appear to involve strikingly similar attempts by the police to manipulate the evidence: after Orgreave junior officers have come forward and said that parts of their statements, supposedly their own personal recollection of events, were dictated to them by senior officers; and in the Hillsborough inquest, many officers gave evidence that they were told not to write up their notebooks in the usual way, but instead to write undated statements on plain paper, which were then edited, often quite radically.

It is alleged that both cases also involve the police colluding with the media to portray a false picture of events and blame the innocent so as to conceal their own wrongdoing and failings: after Orgreave, apparently encouraged by the police, the media unfairly vilified the miners for provoking the violence when it is alleged that it was the police who instigated it; and after Hillsborough, apparently encouraged on by the police, the media unfairly blamed the fans for the disaster.

More fundamentally, it may well be that there was a direct chronological link between the two events: did the police's alleged abuse of power at Orgreave and attempts to suppress the truth about it foster the culture of impunity which allowed a cover up after Hillsborough to take place?

The role of public inquiries

After Hillsborough, the circumstances in which the 96 fans died meant that there had to be inquests to establish the causes of their deaths. No-one died at Orgreave (albeit that serious injuries were sustained by many of the miners), and so whether or not there is now an inquiry into what happened is a matter of ministerial discretion.

Under s1 of the Inquiries Act 2005 Act, a minister has power to set up an inquiry where it appears that *'(a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred'*. Recent inquiries instituted under this power include the Al-Sweady Inquiry (into allegations of unlawful killing and ill treatment of Iraqi nationals by British troops in Iraq in 2004) and the Leveson Inquiry (into the culture, practices and ethics of the press). In addition to statutory public inquiries, ministers also have the power to establish non-statutory inquiries, thematic reviews or panel reviews.

All of these inquiries share to some degree common purposes: (i) establishing the facts; (ii) ensuring accountability, identifying wrongdoing, blameworthy conduct and culpability; (iii) learning lessons; (iv) restoring public confidence in a public authority or the government; (v) providing an opportunity for catharsis, reconciliation and resolution; (vi) (in some cases) developing policy or legislation; and (vii) discharging investigative obligations derived from the ECHR.[1]

The key themes that emerge from Orgreave remain very current. Groups such as Defend the Right to Protest continue to raise concerns about the policing of lawful protest, in particular inappropriate 'kettling', excessive force, mass arrests, collusion with the media, overcharging and police impunity at demonstrations. There remain concerns about the manner in which police officers record their accounts after serious incidents and about police links with the media. During the passage of the controversial Trade Union Act, which came into force in May 2016, the TUC alleged that the Bill *'threaten[ed] the basic right to strike'*; the International Labour Organisation called on the government to review parts of the Bill.

While some of the most controversial provisions of the Bill were dropped before it received Royal Assent, there remain concerns about provisions such as the new thresholds for strike action and new rules about identifying picket leaders to police. Gregor Gall,

1. Beer, *Public Inquiries*, paras. 1.01-1.10

786 Professor of Industrial Relations at the University of Bradford has said that overall the Act is *'expected to make proposed large strikes in both the public and private sectors more difficult to organise'*.[2]

Accordingly there is a real necessity for an Orgreave inquiry, so that this crucial point in the history of industrial relations in this country can be properly analysed and truth and catharsis delivered to those most adversely affected by it.

2. Gall. G, The Trade Union Bill Is Now Law – Assessing the Campaign to Stop It, Huffington Post, 5 May 2016: http://www.huffingtonpost.co.uk/gregor-gall/trade-union-bill_b_9845574.html

787 Briefing 787

EU principle trumps national law in age discrimination case

Dansk Industri v Estate of Karsten Eigil Rasmussen [2016] CJEU C-441/14 [2016]; April 19, 2016

Discrimination on the grounds of age continues to raise interesting questions about the relationship between the rights of the individual, the obligations of member states and the duties of national courts when applying national laws to situations between private individuals. In this case, the CJEU make a very clear statement about how national courts should approach a discriminatory national law which has an adverse affect on, or disadvantages an individual employee or ex-employee, where the disadvantage arises in the context of a private employment relationship.

Facts

When Mr Rasmussen (R) was dismissed from his job he had reached an age when he was entitled to claim the state's old age pension under Danish law. As a result, again, under Danish law, he was precluded from benefiting from the payment, usually made to all qualifying employees, of compensation for loss of employment. National rules provided that where the dismissed employee was entitled to the pension, they could not also be entitled to the compensatory 'loss of employment' benefit. Unsurprisingly, the company which had employed R did not pay him the benefit.

R took up employment elsewhere and did not in fact claim the old age pension. Following his death, his heirs brought the claim for the payment against the company in a private action with support from R's trade union.

A central proposition was that if the law which prevented him from receiving payment was contrary to the general principle of EU law which prohibits age discrimination, the individual who was denied the benefit ought to be able to make a direct claim against an employer which failed to make the payment, even though the employer was only following the strict letter of the law.

National law

The national court recognised that the company which had employed R had complied with the letter of Danish national law. It also recognised that the private individual could not benefit from the direct effect of the general principles of EU law, but only from the Directive, and sought guidance from the CJEU on how to proceed in this situation.

It asked two questions. First, was the rule itself precluded by EU law prohibiting discrimination on grounds of age? This was a question about the legality of the national law. If the law was deemed to be contrary to the principle of equal treatment, then the second question was – how should the national court deal with that law, where the issue before it concerned not a challenge against the state, but a dispute between private parties? In particular, the national court asked whether it could, in reaching its decision, balance factors such as the employee's legitimate expectation of his rights to receive the benefit, and the need for legal certainty nationally.

Court of Justice of the EU

The CJEU in a short judgment reasserts the right not to be discriminated against on grounds of age as a fundamental principle of the EU, which will thus effectively trump other considerations at a national level. This is the case even where the law is the result of a national provision, and not a workplace rule or contractual matter.

If the provision is discriminatory on grounds of age, and in this case the CJEU had no doubt that it was contrary to the general principle of equality and the prohibition on age discrimination, then the national court must ensure that the individual who is disadvantaged is given a complete remedy. The national court must disapply the offending national provision and compensate the individual.

The court stated:

EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.

Implications for practitioners

In terms of the application in the UK, practitioners will be aware of cases where our courts have interpreted UK national laws in line with EU provisions, as well as cases where that has not been the outcome. This judgment underlines that where the disadvantage is contrary to the overarching principles of equality within the EU, it does not matter whether or not the legislative provision can be interpreted so as to give effect to the principle; the national court must give effect to the principle even where there is no direct effect.

Notwithstanding that direct age discrimination contrary to the Equality Act 2010 (EA) can be objectively justified in some circumstances, this judgment will be helpful to many practitioners and judges in the ETs when considering the inter relationship of EU general equality principles, and the interpretation of the EA. Since the general principle of non-discrimination is not itself limited to employment and occupation, it will be interesting to see if the judgment has any possible wider application outside the employment field.

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7 Bedford Row

Briefing 788

Immigration status as migrant domestic worker is not a facet of nationality and so not protected by the EA

Taiwo (Appellant) v Olaigbe and another (Respondents) Onu (Appellant) v Akwiwu and another (Respondents) 2016 UKSC 31; June 22, 2016

The appeals in this matter were brought on behalf of two domestic workers who had been trafficked to the UK for the purposes of labour exploitation. Trafficking in human beings is defined as *'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.'*[1]

Facts

Ms Taiwo (T) was employed by the respondents between February 2010 and January 2011. A migrant domestic worker visa had been obtained by her employers enabling T to lawfully work and reside in the UK. T was severely mistreated and subjected to onerous working hours, restricted access to food, and physical and verbal abuse. T brought a number of complaints to the ET including a claim for direct, or alternatively, indirect race discrimination. The ET accepted nearly all of her claims but held that the treatment she had suffered did not amount to direct or indirect race

1. The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (also know as the Palermo Protocol)

discrimination as her treatment was due to her status as a migrant worker, as opposed to her nationality.[2]

Ms Onu (O) worked as a domestic worker between March 2008 and June 2010. Again a domestic worker visa was obtained. O was also subjected to abuse and exploitation during her employment, including the removal of her passport and the requirement to sign an agreement precluding her from leaving her employment, which if she were to do so could result in her arrest and imprisonment. The ET upheld all of her complaints finding that her treatment was as a result of her non-British nationality, as her immigration status was part and parcel of her nationality. *'Her migrant status allowed the respondents to offer her poorer terms of employment than would be given to a British worker … [and] gave them the option to exercise control over the claimant in a way that they would not conceivably have attempted with a worker of British national origin'*.[3]

Following an appeal brought on behalf of T and appeal by the respondents in Onu, the matters were joined and heard by the EAT in November 2012. [See Briefing 681.]

Employment Appeal Tribunal

T and O argued that their immigration status as migrant domestic workers was indissociably linked with their nationality and so mistreatment because of their immigration status amounted to direct race discrimination on the grounds of nationality. As such their treatment amounted to direct race discrimination pursuant to s13(1) of the Equality Act 2010 (EA). Only a non- British national would be required to have a visa to work in the UK and so be reliant (or believe themselves reliant) on their employer for their continued right to work in the UK. The reason they could be subjected to mistreatment was their limited immigration status and the lack of knowledge of the norms of UK employment.

In the alternative, they argued that they had suffered indirect discrimination pursuant to s19 EA as the respondents had applied a provision, criterion or practice (PCP) of mistreating migrant workers, which placed them at a particular disadvantage in comparison to others, which could not be objectively justified.

The EAT found that T and O were mistreated not because of their nationality but because they were vulnerable – a 'characteristic' not of itself protected in law. *'Although being a migrant worker was part of the background to that vulnerability, it was not a reason in itself for the mistreatment.'*[4]

As to the complaint of indirect discrimination the EAT rejected the PCP pleaded on the basis that it showed no comparative disadvantage. It could not be said that a PCP of mistreating migrant workers would have a disproportionate adverse effect on those of one racial group, although, the then President Langstaff concluded:

> *that although exploitation of the vulnerable may occur amongst those who are British it is likely to be easier to exploit the vulnerabilities of those who are not British. We suspect that it is not beyond the wit of a lawyer to identify a PCP which may factually have been applied, applicable to all, but disadvantaging some, and amongst those it disadvantaged, in particular the domestic migrant worker in question.*[5]

Court of Appeal

The CA rejected the submission that T and O's immigration status was so intimately linked with nationality that to discriminate on the grounds of immigration status was to discriminate on the grounds of nationality. [See Briefing 714.]

To say that their immigration status (in that sense) is 'intimately associated' with their non-British nationality – or, as the Tribunal in Onu put it, that the two are 'linked' – is to say no more than that only people with non-British nationality are migrant domestic workers. That is obviously so; but what matters is that not all non-British nationals working in the UK are migrant domestic workers or share an equivalent vulnerability. There are very many non-British nationals working in the UK whose conditions of leave to enter or remain permit them to work freely and entail none of the peculiar vulnerability of those whose right to work is in practice dependent on their current employer.[6]

And so in the absence of exact correspondence between immigration status and nationality it could not be said that the appellants had suffered direct race discrimination.

2. The cases straddled the Race Relations Act 1976 and the Equality Act 2010; it was therefore argued that T and O had suffered direct discrimination on the grounds of both nationality and national origin as, prior to the EA, discrimination on the grounds of nationality in a private household was lawful. References to nationality should therefore also be taken to refer to national origin.

3. Para 113 ET 3303543/2010

4. Para 46 *Taiwo v Olagibe & Anor* UKEAT/0254/12/KN & UKEAT/0285/12/KN see also para 49 *Onu v Akwiwu & Anor* UKEAT/0022/12/RN: *Akwiwu & Anor v Onu* UKEAT/0283/12/RN

5. Para 57 *Onu v Akwiwu & Anor* UKEAT/0022/12/RN: *Akwiwu & Anore v Onu* UKEAT/0283/12/R

6. Para 50 *Onu v Akwiwu & Anor: Taiwo v Olaigbe & Anor* [2014] EWCA Civ 279

As to indirect discrimination the CA upheld the view of the EAT that the PCP of mistreating migrant workers was flawed but further stated that '*The factual situation in this case has nothing to do with the kind of mischief which the concept of indirect discrimination is intended to address*'.[7]

Supreme Court

The SC found that the reason T and O had been mistreated was their status as migrant domestic workers, but that immigration status could not be said to be a proxy for nationality. Therefore they could not be said to have suffered discrimination on the grounds of nationality.

Similarly, they concluded that in these cases no provision, criterion or practice had been identified that would be applied to all workers regardless of immigration status.

The SC did however accept that the mistreatment suffered by migrant domestic workers is fact sensitive and so could found a complaint of indirect discrimination if an appropriate PCP could be identified.

Implications for practitioners

A discrimination complaint is still open to migrant workers who have been mistreated in the manner of O and T, where the poor treatment is because of their caste or perceived low status. This status is likely to have at least some link to the claimant's descent and as such is within the scope of EA, see *R v Governing Body of JFS (United Synagogue Intervening)* [2010] 2 AC 728; *Chandhok and anor v Tirkey* [2015] ICR 527 [see Briefing 555].

Comment

The judgment highlights the lack of an effective civil remedy for victims of trafficking and modern slavery. The government introduced the Modern Slavery Act in 2015 with the stated aim of reducing the *'scourge of human trafficking and modern slavery'* yet failed to make express provision for those seeking to obtain compensation directly from their trafficker. An amendment proposed to include a civil remedy for victims was not taken forward on the basis that there were sufficient existing remedies. However, it is currently unclear as to what those remedies might be, as to date the vast majority of compensation claims have been by way of a complaint to the ET. Were government to adopt the SC's recommendation and *'give tribunals jurisdiction to grant compensation for ill treatment meted out to workers'*[8] then it could indeed be said that there are existing and effective remedies for victims.

With the introduction of the Deduction from Wages (Limitation) Regulations 2014 (which came into force on January 9, 2015) there is now a protection gap in the law for victims of trafficking and modern slavery, one which government needs to address urgently.

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7. Para 58 *Onu v Akwiwu & Anor: Taiwo v Olaigbe & Anor* [2014] EWCA Civ 279

8. *Para 34 Onu v Akwiku & Anor* [2016] UKSC 31

Clarification of the territorial scope of work-related EA claims

R (Hottak & another) v Secretary of State for Foreign and Commonwealth Affairs & another
[2016] EWCA Civ 438; May 9, 2016

Implications for practitioners

The CA has confirmed that the same test applies to determining the territorial reach of claims under Part 5 (work) of the Equality Act 2010 (EA) as it does to determining the territorial reach of unfair dismissal complaints under the Employment Rights Act 1996 (ERA). That test is the well-established test in *Lawson v Serco* [2006] UKHL 3. Significantly, the CA held that discrimination claims do not benefit from a more generous or flexible approach to extra-territorial jurisdiction.

Facts

The claimants (Cs) were Afghan interpreters working for the British armed forces at Camp Bastion, Afghanistan. Both left their employment following intimidation and death threats because of their work. They sought to bring claims for direct or, alternatively, indirect race discrimination against the British government (R) as the benefits package they were entitled to on the termination of their employment was less generous than that offered to staff in similar employment in Iraq. The Cs brought their claims by way of judicial review. Their primary argument was that they were victims of work-related discrimination, contrary to s39 EA (contained in Part 5 EA). Alternatively, they argued that R was subjecting them to discrimination in the exercise of its public functions contrary to s29 EA (contained in Part 3 EA). The Cs also contended that R had failed to have regard to the public sector equality duty (PSED) and that no s149 equality assessment had been carried out prior to the formulation of the Afghan benefits package.

The decision at first instance

The Cs' discrimination claims under s39 failed in the Divisional Court ([2015] EWHC 1953 (Admin); [2015] IRLR 827). [See Briefing 770.] Burnett LJ, with whom Irwin J agreed, noted that, save for some minor provisions, the EA is silent in respect of territorial jurisdiction. In order to discern parliament's intention, Burnett LJ turned to the Act's explanatory notes, which state:

> *As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the Employment Rights Act 1996, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain…In relation to the non-work provisions, the Act is again generally silent on territorial application, leaving it to the courts to determine whether the law applies.*

Burnett LJ held that the same test should apply in determining the territorial scope of claims under s39 EA as applies to unfair dismissal claims under the ERA 1996, namely the now well-established test in *Lawson*. In *Lawson*, the House of Lords held that, as a general rule, employees ordinarily working in the UK at the time of dismissal would be able to benefit from the protection of the ERA. Other exceptional categories of employees would also be able to benefit, such as peripatetic employees based in the UK at the time of dismissal, expatriate employees posted abroad by their British employer, and any other employees with an *'equally strong'* connection to Great Britain.

It was conceded by the Cs that they were not working in the UK at the time of dismissal (in fact their employment was exclusively in Afghanistan), and nor were they peripatetic or expatriate employees. However, they argued that they had sufficiently strong connections with British employment law so as to come within the jurisdictional bounds of the EA. On the facts, the Divisional Court was not persuaded.

The Divisional Court also rejected any suggestion that jurisdiction should be wider in respect of discrimination claims because, as submitted by the Cs, protection from discrimination is *'more fundamental'* than ordinary employment rights. He said that there was *'much to be said for symmetry'* between Part 5 of the EA and s94 ERA because commonly both claims are brought together in the employment tribunal. However, he reached this conclusion with some hesitation, suggesting that there may be a case for discrimination having a **narrower** territorial scope, as principles of non-discrimination contained in the EA may *'conflict with local laws and customs'*.

Burnett LJ then went on to dismiss the s29 claim, reasoning that it could not have been parliament's intention that work-related claims that had failed for want of jurisdiction under Part 5 could instead be brought by way of Part 3.

He did, however, allow the claim in respect of the government's failure to have regard to the PSED and granted the claimants' declaratory relief. The fact that the policy decisions had extra-territorial implications did not mean that the PSED did not apply.

Court of Appeal

The CA upheld the Divisional Court's decision in full and confirmed that the *Lawson* test determines the territorial scope of s39 EA in just the same way as it does the territorial scope of unfair dismissal claims. Rimer LJ, with whom Richards and Arden LLJ agreed, also rejected as *'artificial, unjustified and unwise'* the submission that because Part 5 EA is directed at outlawing discrimination *'and so concerns matters viewed by this jurisdiction as going to the very essence of man's humanity'*, it should have wider territorial reach than domestic legislation dealing with ordinary employment rights. He said, at para 47:

> *If the proposition [that the EA should have wider territorial scope] goes to the length of suggesting that Parliament must be assumed to have intended its anti-discrimination provisions in Part 5 of the 2010 Act to operate on a world-wide basis, I regard it as wrong. Had that been Parliament's intention, it would have said so. If the proposition amounts to no more than a submission that an overseas employee's complaint of work-related discrimination should and will have an easier territorial passage through the eye of the needle than his complaint of unfair dismissal (a complaint that might also be brought in the same proceedings), it amounts to reading into Parliament's silence on the question of territoriality a subtly nuanced variance of legislative intention as between the two types of case. There is no warrant for that.*

Comment

This case provides useful clarification of the territorial scope of EA claims, at least in relation to extra-European cases. The decision that the territorial scope of work-related discrimination claims mirror that of unfair dismissal claims is helpfully straightforward. However, the reasoning behind the assumption that the two categories of claim must have the same territorial jurisdiction appears somewhat thin. The EA's explanatory notes do not state that parliament intended that precisely the same test must apply in relation to discrimination and unfair dismissal claims, merely that just as is the case with ERA claims, flexibility is given to the judiciary to determine the extent of territorial scope. Moreover, the assumption that it is desirable for there to be *'symmetry'* between Part 5 of the EA and the ERA simply because claims are often brought together is simplistic. There are already significant jurisdictional differences between the different causes of action; for example, a broader definition of workers is able to benefit from the protection of the EA than the ERA, as well as employees with less than two year's service.

The CA, at least, does not expressly endorse Burnett LJ's notion that discrimination claims should have a narrower territorial scope than unfair dismissal claims because of the potential to clash with local customs. Given that the rights to equality and non-discrimination are designed to protect human dignity and the *'recognition of the equal worth of every individual'* (per AG Maduro in *Coleman v Attridge Law* [2008] IRLR 722 (CJEU)), why should local customs be able to trump rights protected by the EA? Certainly, Langstaff P in *Olsen v Gearbulk Services Ltd* [2015] IRLR 818 at [39], suggested obiter that wider jurisdiction may be desirable in discrimination cases because of the public interest in countering discrimination.

Neither the CA nor the Divisional Court gave much consideration to the territorial scope of the predecessor equality legislation. It is now possible that, if *Lawson* is the sole test for territorial jurisdiction, discrimination claims that could have been brought pre-EA may now fail.

For example, the Race Relations Act 1976 and the Employment Equality (Age) Regulations 2006 benefitted employees who worked *'wholly or partly'* in Great Britain. In *Mak v British Airways* [2011] ICR 735, 16 Chinese cabin crew working on flights to and from London and Hong Kong brought claims in the ET for race and age discrimination. The CA was satisfied that the tribunal had jurisdiction to hear their claims as the claimants worked 'partly' in Great Britain. It is far from clear whether the cabin crew would satisfy the *Lawson* test if their claim was brought today, but it is doubtful that it was intended that workers who previously would have benefited from the protection of equality legislation would be deprived of that protection under the EA.

It also remains to be seen whether the *Lawson* test will apply in cases where the rival jurisdiction is an EU member state, following the decision of Elias J in *Bleuse*

789 *v MBT Transport Ltd and another* [2008] IRLR 264 in which it was held that the territorial limitation articulated in *Lawson* should be modified where a claimant is seeking to enforce rights that are directly effective under EU law. *Bleuse* concerned a German national who brought a claim for holiday pay in reliance on the Working Time Directive.

That said, *Hottak* makes clear that, at least in respect of extra-European discrimination claims in which there is no whole or partial employment in Britain, the *Lawson* test is appropriate for determining jurisdiction.

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790 Briefing 790

Relevance of mutuality of obligation to the extended concept of employment in the Equality Act

Secretary of State for Justice v Windle and Arada [2016] EWCA Civ 459; May 12, 2016

Background

Complaints of discrimination under Part 5 of the Equality Act 2010 (EA) may be brought in relation to an enlarged concept of employment, defined by s83(2) to include *'employment under…a contract personally to do work'*. People without a contract of service but who come within this category are often referred to as *'employees in the extended sense'*. Case law has distinguished between a person who performs services for and under the direction of another person in return for remuneration, who meets the test and an independent provider of services who is not in a relationship of subordination with the person receiving the services, who does not, see: *Hashwani v Jivraj* [2011] 1 WLR 1872 SC and Lady Hale's discussion in *Bates van Winkelhof v Clyde & Co* [2014] 1 WLR 2047 SC.

Implications for practitioners

In this case the CA concluded that an absence of mutuality of obligations between a series of short-term contractual engagements was relevant to an assessment of whether the claimants were within this category of employees in the extended sense.

Facts

The two claimants in these proceedings were professional interpreters, respectively of Czech and Algerian origins. They both undertook work for Her Majesty's Courts and Tribunals Service (HMCTS), though also for other institutions. A lot of their work was for HMCTS; it was as high as 80% in one case. HMCTS was under no obligation to offer them work and they were under no obligation to accept it when offered. They were paid for work done, with no provision for sick pay, holiday pay or pension. They considered themselves as self-employed and were so treated for tax purposes. They accepted that they did not have contracts of service.

Both claimants brought proceedings against the Ministry of Justice (MOJ) alleging race discrimination in relation to aspects of their terms which were less generous than those accorded to British Sign Language interpreters.

The respondent raised a preliminary objection that they were not employees in the extended sense.

Employment Tribunal

The preliminary issue was decided in the MOJ's favour and the claims were dismissed.

Having found that a contract was entered into in relation to each occasion the claimants accepted a specific interpreting assignment from HMCTS, the ET considered whether the circumstances met the s83 definition. The tribunal found that there was no 'umbrella contract' in light of the absence of any obligation to offer or accept assignments. It then concluded that the absence of mutuality of obligation between the assignments pointed away from them being employees in the extended sense, as it indicated a lack of direction and subordination and supported the proposition that they were independent providers of services.

Employment Appeal Tribunal

However, the EAT allowed the claimants' appeal, holding that the ET had erred in law by taking into account the absence of an umbrella contract operating between assignments in assessing whether they were employees in the extended sense. Judge Clarke distinguished observations made by Elias LJ in *Quashie v Stringfellows Restaurants Ltd* [2013] IRLR 99 CA as to the relevance of a lack of mutuality, as related to whether the claimant in that case had a contract of service and thus was an employee within the s230 Employment Rights Act 1996 (ERA) definition. [See Briefing 744.]

Court of Appeal

The CA allowed the appeal and restored the decision of the ET to dismiss the claims.

Underhill LJ, giving the leading judgment, rejected the submission that the test only focused upon the nature of the relationship during the contractual period when the work was undertaken:

> *It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employment status even in the extended sense.*

Underhill LJ did stress that the lack of an umbrella contract would not always militate against a finding of employment in the extended sense; its relevance would depend upon the particular facts of the case. However, the EAT was wrong to find that it was incapable of bearing upon the issue.

Although *Quashie* was concerned with whether a contract of service existed, Elias LJ's words were nonetheless pertinent, particularly his observation that:

> *Whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually or intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee.*

Underhill LJ said that the underlying point was the same; the factors relevant to assessing whether the claimant was employed under a contract of service were not essentially different from those relevant to assessing whether he or she was an employee in the extended sense, albeit the 'pass mark' is lower.

Comment

Although the CA stressed that the evaluation was always fact-specific and that the weight to be attached to a lack of mutuality between short contracts would vary with the circumstances, the overall effect of this decision will be to make it harder for individuals working outside of traditional employment situations to show that they come within s83(2) EA. Plainly this is a concerning development, given that so many people work on a casual/freelance basis.

Furthermore, respondents will be able to argue with some force in light of the CA's reasoning and reliance upon *Quashie*, that a similar approach should apply to the determination of whether a person is a 'worker' within the meaning of s230 ERA.

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Jurisdiction of the ET to hear complaints against qualification bodies

Michalak v The General Medical Council & Others [2016] EWCA Civ 172; March 23, 2016

This case considered the ET's jurisdiction to hear a complaint against a qualifications body. The General Medical Council (GMC) argued, unsuccessfully, that the ET's jurisdiction was ousted because of the availability of judicial review.

Facts

The appellant (M) is a registered medical practitioner formerly employed by the Mid Yorkshire Hospitals NHS Trust (the Trust). She successfully brought a claim in the ET for unfair dismissal and in 2011 recovered damages in respect of claims for sex and race discrimination and unfair dismissal against the Trust and three senior staff members. The Trust issued a public apology.

However, pending the outcome of M's claim, the Trust had referred her to the GMC. Following her referral, the GMC investigated and proceeded to conduct a hearing. M complained that by investigating and conducting the hearing of her case, the GMC acted to her detriment and in a manner that was unlawful under the Equality Act 2010 (EA). She consequently brought a claim in the ET.

The law

It was common ground[1] that the GMC is a 'qualifications body' as defined in s54 EA.

Under s53 EA it is unlawful for a qualifications body to discriminate against, harass or victimise a person upon whom it confers or has conferred a relevant qualification by, inter alia, withdrawing or varying the terms on which that qualification is held, or subjecting that person to any detriment.

S120(1) EA describes the jurisdiction of the ET to determine a complaint under Part 5 EA of which s53 is a part. However s120(7) EA provides that subsection (1)(a) does not apply in so far as the act complained of may, *'by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal'*. This subsection mirrors identical provisions that were to be found in s54(2) of the Race Relations Act 1976 (RRA) and s63(2) of the Sex Discrimination Act 1975.

Employment Tribunal

A preliminary hearing was listed to determine the issue of jurisdiction at which Judge Keevash found that the ET had jurisdiction to hear the appellant's claims against the GMC under the RRA (in respect of matters that pre-dated October 1, 2010) and under the EA (in respect of matters that post-dated or were continuing at October 1, 2010).

Employment Appeal Tribunal

The respondents appealed this decision on the basis there was binding precedent, namely the EAT's decision in *Jooste v GMC* [2012] EqLR 1048 that the ET had no jurisdiction to entertain such a claim because of the operation of s120(7) of the EA.

In *Jooste* HHJ McMullen QC had held that an application to the ET under s120(1) EA was precluded by s120(7) EA because of the availability of judicial review under s31 Senior Courts Act 1981. Langstaff J held that the ET was in this case bound to follow the decision in *Jooste* but gave M permission to appeal.

Court of Appeal

Giving the leading speech Ryder LJ, with whom Moore Bick LJ and Kitchin LJ agreed, overturned *Jooste* and held that the ET did have jurisdiction over the claim. The availability of judicial review did not mean that the decision or act in question could be *'subject to an appeal or proceedings in the nature of an appeal'*. This is because, properly understood, judicial review is not an appeal but a collateral challenge.

HHJ McMullen QC had reasoned in *Jooste* that *'An appeal simply is the opportunity to have a decision considered again by a different body of people with power to overturn it'* at [44]. Ryder LJ disagreed. He set out the limitations upon the remedies that were available to a claimant in judicial review under s31(5) namely *'the High Court can quash a decision of the GMC but cannot make an award of damages without other relief. Although the High Court can grant a declaration it would not ordinarily make a finding on contested evidence and cannot issue a recommendation in respect of the unlawful treatment alleged, namely discrimination, harassment or*

1. Before the EAT

victimisation. Furthermore, because the GMC is not a tribunal or court for the purposes of section 31(5A), the High Court cannot substitute its own decision for the decision in question. The GMC is not empowered to make a decision in respect of a section 53 complaint with the consequence that although a decision infected with unlawful treatment can be set aside, the claimant cannot obtain any other effective remedy for it' [36].

Further, Ryder LJ reasoned it could be inferred from s120(7) that parliament intended a specialist tribunal to be charged with taking decisions on discrimination and he concluded that the ET rather than the administrative court is the specialist tribunal charged by parliament to make decisions of this kind [37].

However, the court also confirmed that *Khan v General Medical Council* [1986] ICR 1032 remained good law. In *Khan* the court was asked to consider the precursor to s120(7) EA 2010, namely 54(2) RRA. The issue that the CA was asked to determine was whether or not the procedures provided for by s29 of the Medical Act 1983 (now repealed) were '*proceedings in the nature of an appeal*'. S29 provided a two-stage process whereby once a decision had been made, that decision was open to review by a review board. Although the review board had no power itself to alter the decision, it was able to make a recommendation to the President of the GMC. The President could then alter the decision. The court held that where there is a defined statutory route of appeal for actions upon a medical practitioner's registration, the jurisdiction of the ET under s53 is precluded. *Khan* remains authority for that proposition.

Implications for practitioners

This is an important case which has the potential to affect a number of regulatory bodies and the individuals who are regulated by them. It expands the remedies available to individuals who claim to have suffered from discrimination, victimisation, harassment or detriment in the treatment they have received from a qualifications body under s53 EA. It will now be easier to mount a challenge against qualifications bodies when decisions or investigations with respect to registration are made which arguably contravene s53 EA as the ET has no permission stage and more limited cost exposure.

The effect of this, however, will be limited to decisions by qualification bodies for which there is no *'route of appeal'*. *Khan* remains good law where such a route exists. It should also be noted that the CA held that a broad interpretation should be given to *'route of appeal'* so that the right to an internal review or appeal would also be sufficient to oust the jurisdiction of the ET.

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Briefing 792

Supporting evidence needed for legal aid applications

R (Rights of Women) v Lord Chancellor and Secretary of State for Justice [2016] EWCA Civ 91; February 18, 2016

Introduction

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) made legal aid for private family law matters conditional on the applicant providing evidence of domestic violence perpetrated by their ex-partner, in addition to meeting the means and merits tests.

In order to be granted legal aid, applicants must produce evidence of having experienced domestic violence in one of the forms specified by regulations (Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012).

Regulation 33 provides that legal aid will not be available unless documentary verification of domestic violence is provided within the 24 month period before the application for legal aid is made, save for instances of an unspent conviction, un-concluded criminal proceedings and existing police bail for a domestic violence criminal offence.

Rights of Women (ROW) brought judicial review proceedings arguing that regulation 33:

- went beyond the regulation-making power contained in s12 of LASPO and so was *ultra vires* the statute; and
- that it frustrated the purpose of LASPO, therefore breaching the principles to be found in *Padfield v Minister of Agriculture* [1968] AC 997 (the *Padfield* doctrine).

ROW also argued out that none of the requirements of regulation 33 was geared to that part of the definition of domestic violence which refers to financial abuse, which is included in the cross-governmental definition of domestic violence contained in LASPO and is defined as:

> *any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.*

Divisional Court

The DC (Fulford LJ and Lang J) held that regulation 33 was within the regulation-making power conferred by s12 of LASPO and did not frustrate the purpose of the Act (the *Padfield* doctrine argument).

Court of Appeal

Both the DC and the CA were presented with a considerable body of evidence which it was acknowledged tended to show that potential applicants for legal aid had been (or were likely to be) refused legal aid in circumstances in which parliament had intended legal aid to be available.

In the CA Lord Justice Longmore began his judgment with the words, *'Legal aid is one of the hallmarks of a civilised society*', and went on to observe that, *'Domestic violence is a blot on any civilised society but is regrettably prevalent.'*

The CA rejected ROW's *ultra vires* argument that the requirement for the evidence of domestic abuse to be dated within the 24 months prior to the application for legal aid operated as a substantive bar to the application and was therefore beyond the power conferred by s12.

The CA accepted the alternative *Padfield* doctrine argument, finding that the evidential requirement of regulation 33 and its lack of provision for victims of financial abuse did frustrate the purposes of LASPO.

The CA reaffirmed that in considering arguments based on *Padfield* principles *'it is for the court, not the minister or his officials, to ascertain the purpose of the statue from its wording'*. The court found that the purpose of the relevant parts of the statute is *'partly to withdraw civil legal services from certain categories of case in order to save money but also to make such services available … to the great majority of persons in the most deserving categories*', including victims of domestic violence.

ROW and others had lobbied government on the time limit on the forms of evidence; it had been removed twice by the House of Lords but reinstated by the House of Commons on both occasions during the bill's passage through parliament. The government argued that ROW was attempting to achieve through the courts what they had not been able to achieve through parliament, and it was not for the court to intervene. The CA rejected this submission observing that this argument confused the *Wednesbury* jurisdiction with the *Padfield* jurisdiction of the court, when they are separate concepts.

The court reiterated the public law principle that any discretion conferred on a minister *'should be used to promote the policy and objects of the statute*', citing the SC decisions in *R (Electoral Commission) v Westminster Magistrates' Court* [2010] UKSC 40; [2011] 1 AC and *R (GC) v Commissioner of Police of the Metropolis* [2011] 1 WLR 1230.

The CA held that: '*any inquiry as to frustration of purpose must consider whether there is a rational connection between the challenge requirement and the legislation's purpose.'*

The CA also confirmed that in considering arguments based on the doctrine of *ultra vires* or the *Padfield* doctrine, the court is not obliged to show a similar *'blanket respect for the legislature'* as it would in cases founded on assertions of a breach of the European Convention of Human Rights.

Implications for practitioners

In response to the judgment the Ministry of Justice committed to undertaking a review of the regulations for family law legal aid and the impact of the domestic violence evidence.

In the meantime the government has introduced interim regulations to deal with the two areas of concern:

- The interim regulations extend the time limit on the forms of evidence of domestic violence from two years to five years.
- From April 25, 2016 the Legal Aid Agency has discretion to consider forms of evidence of financial abuse not currently set out in the list of evidence in the regulations.
- Guidance issued to Legal Aid Agency caseworkers contains an evidence checklist which includes forms of evidence including bank statements, communications with the perpetrator (texts or emails), a letter from a domestic violence support service or a narrative statement from the survivor.

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Time limits and effective remedies for a breach of EU rights

Mulvenna and Smith v The Secretary of State for Communities and Local Government, the Equality and Human Rights Commission intervening [2015] EWHC 3494 (Admin); December 4, 2015

Introduction

This case follows on the heels of the High Court decision in *Moore and Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin)(M&C) judgment delivered on January 21, 2015. [See Briefing 741.]

M&C involved a challenge to the Secretary of State's (SOS) July 2013/January 2014 policy decisions to recover planning appeals from planning inspectors in respect of Travellers' sites in the Green Belt. The primary legislation governing planning determinations is the Town and Country Planning Act 1990. The aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. The court found the impugned recovery policy contrary to the Equality Act 2010 (EA): that it breached the s149 public sector equality duty, and constituted indirect discrimination contrary to s19. Evidence was led, and not refuted, that the SOS takes significantly longer than planning inspectors to issue determinations which led to a finding that the increased time taken to reach determinations breached ECHR Article 6. *M&C* was an important application of the EA in the field of planning law providing protection to Travellers against arbitrary and discriminatory government policy and decision-making. It was not appealed by the SOS.

Facts

Bernadette Mulvenna (BM) is an Irish Traveller who owns land within the Green Belt in Southport where she has a mobile home and caravan. She sought planning permission from West Lancashire Borough Council for a change of use to permit the stationing of caravans for residential occupation for a Gypsy Traveller family. The Council turned down the application. BM appealed and a planning inspector was appointed to consider the appeal. In the meantime in July 2013 the SOS recovered the appeal. Although the Inspector recommended conditional planning permission for five years, in August 2014 the SOS dismissed the appeal. Following issuance of the *M&C* decision, BM issued a judicial review in March 2015.

Elias Smith (ES) is a Romany Gypsy. He sought planning permission from Hyndburn Borough Council for a change of use to allow inter alia a residential caravan site. The Council turned down the application. He appealed and a planning inspector was appointed to consider the appeal. The SOS recovered the appeal in January 2014. The Inspector recommended temporary planning permission of three years duration. In July 2014 the SOS rejected the recommendation and dismissed the appeal. Following the *M&C* decision, ES issued a judicial review in April 2015.

High Court

It was accepted on behalf of the SOS that following the *M&C* decision the recovery of the appeals in both cases was unlawful. The central question posed by the judge was *'what are the consequences for a decision which has been made on the back of an unlawful decision'*. In his view delay was a key factor. Whilst planning judicial reviews must be lodged within six weeks of the decision, these challenges were lodged 20 months and 15 months late respectively, i.e. they were well out of time.

In the light of *M&C*, it was contended that time should be extended: (1) the claimants only became aware that the recovery decisions were unlawful in January 2015; and, (2) a refusal to extend time would deprive them of an effective remedy for a right recognised in European Union law, the right not to be subject to discrimination under the Race Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Delay

The court was not persuaded that the delay could be justified. It emphasised the importance of prompt JR challenges – *'for reasons of good administration our system of public law cannot work on the basis of persons holding back from legal challenges until another claimant in a similar position has a success in court'*.

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Effective remedy

The judge considered whether in EU effective remedy cases a change in the law such as occurred in this case creates a fresh opportunity to launch a JR challenge from the date of the issuance of the judgment by reason of the claimants' lack of actual or constructive knowledge of the unlawfulness prior to the *M&C* decision. The claimants relied on a passage in the 'White Book' postulating that this was the favoured approach in such cases. However maintaining that the claimants could have lodged sufficiently prompt challenges as occurred in *M&C*, the judge stated:

> *53. The principle of effectiveness in EU law is that the rules governing domestic actions in EU Member States should not make it virtually impossible or excessively difficult to exercise the rights EU law confers: Levez v TH Jennings (Harlow Pools) Ltd (C-326/96) [1998] E.C.R. I-7835; [1999] 2 C.M.L.R. 363; R. (on the application of Unison) v Lord Chancellor [2014] EWHC 4198 (Admin); [2015] I.C.R. 390 at [25]. The Treaty on European Union art.19 now states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, and the Charter of Fundamental Rights of the European Union art.47 provides for a right to an effective remedy and a fair trial. Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, the Race Directive, requires Member States to ensure that judicial and administrative procedures for the enforcement of obligations under the Directive are available to persons who consider themselves wronged by the failure to apply the principle of equal treatment to them.*
>
> *54. The principle of effectiveness was successfully invoked in Levez v TH Jennings (Harlow Pools) Ltd (C-326/96) [1999] 2 C.M.L.R. 363. There the legislation placed a two-year limitation period on equal pay claims but the delay was attributable to the employer deliberately misrepresenting to the female claimant the remuneration paid to the man she replaced. In another equal pay case, Alabaster v Barclays Bank Plc [2005] EWCA Civ 508; [2005] 2 C.M.L.R. 19, the Court of Appeal held that to give effect to*J.P.L. 500 the female claimant's EU rights in UK national law the part of the Equal Pay Act 1970 imposing a requirement for a male comparator had to be disapplied. Johnston v Chief Constable of the Royal Ulster Constabulary (C-222/84) [1987] Q.B. 129 held that the Sex Discrimination (Northern Ireland) Order 1976 (NISI 1976/1042) art.53, which provided that a certificate signed by the Secretary of State was conclusive proof that the applicant had been refused employment on the grounds of national security, public safety, and public order, contravened Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40 art.6 on the implementation of the principle of equal treatment for men and women and, specifically, its requirement that all persons be given a right to an effective remedy.*
>
> *55. To my mind the EU principle of effectiveness does not have any purchase in this case. The editors of the White Book have extrapolated from two procurement cases a conclusion which has no basis in authority and whose far-reaching implications they fail to explore. Authorities such as Levez, Alabaster and Johnston involved situations when claimants would have been shut out from a remedy altogether. The EU principle of effectiveness does not mandate that domestic remedies cannot be subject to appropriate time and other procedural limits. In R. (on the application of Unison) v Lord Chancellor [2014] EWHC 218 (Admin); [2014] I.C.R. 498 the claimant challenged the introduction of fees in the employment tribunal, inter alia, because it violated the principle of effectiveness. Although agreeing that the principle of effectiveness applied, Moses LJ and Irwin J were unpersuaded that there was a breach since: 'The very use of the adverb 'excessively' in the jurisprudence suggests that the principle of effectiveness is not violated even if the imposition of fees causes difficulty and renders the prospect of launching proceedings daunting, provided that they are not so high that the prospective litigant is clearly unable to pay them.'([40] per Moses LJ)*
>
> *56. The time limit for planning judicial reviews is tight, but as illustrated by the successful claims in Moore and Coates not impossible to meet. For the reasons given by Moses LJ in the Unison case, there was no breach of the EU effectiveness principle.*

Nullity

The claimants further argued that the decisions were a nullity by reason of the decision in *M&C*, i.e. (1) the SOS can only decide appeals he lawfully recovers; (2) the recovery decisions were unlawful; (3) therefore the SOS's planning appeal decisions based on unlawful recovery

decisions were a nullity and ultra vires.

The judge disagreed, reasoning that (1) the recovery decisions may be void and a nullity by reason of the decision in *M&C*; (2) it is trite law that if a body does not have jurisdiction to make a decision then the subsequent decision is unlawful; (3) but, in this case the determination of the appeals were not automatically nullified because the statutory framework conferred jurisdiction on the SOS to determine the appeals.

Notably issue is taken with this reasoning by the commentator in the Journal of Planning and Environmental Law [2016] page 506 who suggests the decision on this point *'does not grapple with the Town and Country Planning Act 1990 Schedule 6 para 1(2) that the classes of appeal which regulations prescribe to be determined by an Inspector 'shall be so determined' unless the regulations or directions provide otherwise.'*

Comment

The decision is in part premised upon the diligent and insightful test-case litigation pursued by the Community Law Partnership Ltd and their counsel who, *'saw the pattern of recovery decisions with Gypsy and Traveller appeals and decided to advance an Equality Act 2010 claim'* consequently lodging JR challenges with sufficient promptitude [para 50]. For Cranston J this set an attainable standard. Consequently he was not persuaded that the principle of effectiveness had 'purchase' in the present cases.

On one view this potentially sets the bar too high. Where the outcome of litigation cannot be reliably predicted with confidence by counsel with expertise in the field, and given such germane difficulties as the securing of public funding and/or the prospect of costs orders if the litigation is unsuccessful, arguably the approach of Cranston J sits uneasily with the principle of effectiveness and is overly harsh. Indeed the commentary in the White Book might not be so far off the mark – in JR a time-based refusal to permit a claimant to pursue a challenge under EU law following a successful test case establishing that relevant decisions were discriminatory and unlawful, may well breach the right to an effective remedy. An appeal is under way.

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Briefing 794

Philosophical belief discrimination: 'public service was improperly wasteful of money'

Harron v Chief Constable of Dorset Police UKEAT/0234/15/DA; January 12, 2016

Introduction

In the landmark case of *Grainger plc and others v Nicholson* [2010] IRLR 4, the EAT set out the criteria that a belief would need to satisfy in order to constitute a *'philosophical belief'* under the Employment Equality (Religion or Belief) Regulations 2003 (the Religion or Belief Regulations) and, as such, be capable of protection against discrimination [see Briefing 549].

The '*Grainger* criteria' are as follows:

1. The belief must be genuinely held.
2. It must be a belief, not an opinion or viewpoint based on the present state of information available.
3. It must be a belief as to a weighty and substantial aspect of human life and behaviour.
4. It must attain a certain level of cogency, seriousness, cohesion and importance.
5. It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The Religion or Belief Regulations have been replaced by the Equality Act 2010 (EA) but the *Grainger* criteria still apply and are used to determine whether a belief is a '*philosophical belief*' for the purposes of s10 EA.

In the recent case of *Harron*, the EAT considered whether a belief held by Mr Harron (H), *'in the proper and efficient use of public money in the public sector'*, amounted to a *'philosophical belief'* by reference to the *Grainger* criteria.

Facts

H worked for Dorset Police. He claimed that he felt compelled to express his belief that public service was improperly wasteful of public money and, as a result, had suffered discrimination on the ground of his philosophical belief.

Employment Tribunal

At a preliminary hearing the ET held that H's belief satisfied the first and fifth *Grainger* criteria, but not the second, third or fourth. The ET noted that H's belief *'is entirely confined to the workplace rather than human life and behaviour in general'*. It went on to state that:

> *In the Tribunal's judgment the belief contended for is not so much a belief but a set of values which manifest themselves as an objective or goal principally operating in the workplace…In the judgment of the Tribunal a 'philosophical belief' must have a status or cogency that is similar to that of a religious belief.*

H appealed against the ET's decision arguing that (i) the word 'philosophical' in s10 EA was an unnecessary restriction on the scope of a belief following jurisprudence from the ECtHR (particularly *Eweida and others v United Kingdom* [2013] 57 EHRR 8); (ii) the ET adopted too high a threshold when applying the *Grainger* criteria to his belief; and (iii) the ET gave insufficient reasons for its decision.

Employment Appeal Tribunal

The EAT held that that H's belief that public service is improperly wasteful of public money could amount to a '*philosophical belief*' under the EA and remitted the case to the same ET for reconsideration.

The EAT rejected H's first ground of appeal, finding that *'there is no material difference between the domestic approach and that under Article 9 [ECHR]'*.

In relation to H's second ground of appeal, relying on the judgment of Lord Nicholls in *R (Williamson) Secretary of State for Employment and Education* [2005] 2 AC 246 HL, the EAT held that the ET had adopted too high a threshold in its application of the *Grainger* criteria. It noted that Lord Nicholls's judgment included *'a plea not to set threshold requirements at too high a level'*.

The EAT also upheld H's third ground of appeal, holding that the ET failed to provide sufficient reasons for its findings.

With regards to H's argument that the ET had introduced a further hurdle for him to navigate by excluding a belief that operated merely in the workplace, the EAT did not accept that this amounted to an error of law. Rather, it accepted that where a belief has too narrow a focus it may not satisfy the *Grainger* criteria.

Comment

The EAT's finding that H's belief that public service is improperly wasteful of public money could amount to a '*philosophical belief*' is significant and it will be very interesting to see what decision the ET reaches when it reconsiders the case.

The EAT gave useful guidance on the approach to be taken in cases concerning philosophical beliefs. It stated that the proper approach to determining whether or not there is a qualifying belief is not simply to set out the wording in the Employment Statutory Code of Practice or the *Grainger* criteria, but to have regard also to the way in which the criteria are to be applied (avoiding setting the bar too high).

Harron is the latest in a fascinating line of cases exploring the concept of *'philosophical beliefs'* under the equality legislation. If H's belief that public service is improperly wasteful of public money is ultimately found to amount to a *'philosophical belief'*, it will arguably mark a further extension to the protection given to employees' beliefs in the workplace.

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Degree of knowledge required in disability discrimination claim

Gallop v Newport City Council (2016) UKEAT/0118/15/DM; March 4, 2016

Implications for practitioners

The salient principle in *Gallop* is that, in the case of a single person alleged to have made a discriminatory decision, that decision-maker must have actual or constructive knowledge of the disability. It is insufficient to show that the decision-maker had imputed knowledge of the disability from, for example, an occupational health (OH) department in the employer's organisation.

Facts

Mr Gallop (G) was employed by Newport City Council (the Council) and had been off work sick on three separate occasions. His GP had diagnosed him as depressed. The Council's OH department was aware of G's stress and depression but did not consider he had a disability under the Disability Discrimination Act 1995 (DDA).

After returning to work, G faced disciplinary proceedings and was dismissed on allegations of misconduct. He made the following complaints against the Council:

1. unfair dismissal;
2. direct disability discrimination;
3. disability discrimination by failure to make reasonable adjustments in relation to: managing his workload; implementing the recommendations of the OH department; making adjustments in the disciplinary proceedings.

'Beard' Employment Tribunal

In 2010 an ET led by Judge Beard (the Beard ET) upheld the complaints of unfair dismissal. In relation to the discrimination claims, the Beard ET found that G was not dismissed because of disability discrimination, but rather because his colleagues were not willing to work with him. The reasonable adjustment claims were dismissed on the ground that at the material times the Council did not know or could not have known of G's disability. Without such knowledge, the employer was not required to make reasonable adjustments. G appealed on various aspects of the decision to the EAT, but was unsuccessful in relation to disability discrimination.

Court of Appeal

G further appealed to the CA (*Gallop v Newport City Council* [2013] EWCA Civ 1583) [see Briefings 669 & 698] on the disability discrimination issue. It was held that the employer must decide whether the claimant is a disabled person, and cannot substitute its decision and duty to ask relevant questions by 'rubber stamping' the opinion of the OH advisor.

The CA decided the Beard ET had failed to perform the task of deciding whether the Council had actual or constructive knowledge of the disability. The claim was remitted to a differently constituted ET for re-consideration of the following questions:

a. *Whether, at the times material to the discrimination claims, the Respondent had actual or constructive knowledge that the Claimant was a disabled person.*
b. *If so, whether the Respondent discriminated against the Appellant on the grounds of his disability.*
c. *Whether the duty to make reasonable adjustments arose and if so, whether the Respondent failed in its duty to make such adjustments.*

'Cadney' Employment Tribunal

Under Judge Cadney (the Cadney ET), the ET dismissed G's claims of disability discrimination on, inter alia, the ground that the Council did not know that G was disabled at the time of dismissal. Furthermore the Council could not have known because the knowledge of the disability, which the OH department possessed, could not be imputed to the decision-maker. G appealed.

Employment Appeal Tribunal

G appealed on a number of grounds; among others, these included that:

1. the Cadney ET made an error of law by holding that the conclusions of the Beard Tribunal, as to the reason for the claimant's dismissal, were binding on it;
2. in relation to the reasonable adjustment claim in the context of the dismissal proceedings (a) the Cadney ET had enough material from the claim form in order to understand how the claim was being put; and (b) the Cadney ET erred in refusing to consider the failure to make a reasonable adjustment allegation because it related to only one matter, and one matter cannot amount to a provision, criterion or practice (PCP).

In respect of ground 1, the EAT held that the Beard ET's conclusion on the reason for dismissal was in fact binding on the Cadney ET. What the Cadney ET was entitled to

decide was whether the decision-maker had been significantly influenced by G's disability in arriving at the conclusion to dismiss him, which the decision-maker would not have otherwise reached.

With regards to ground 2(a), the EAT held that the Cadney ET found that the Council only had knowledge of the disability *after* the dismissal. Thus a reasonable adjustments claim in the context of the disciplinary process could not be brought. The EAT affirmed the Cadney ET's alternative conclusion that G had insufficiently evidenced the reasonable adjustments claim. He did not advance this proposition in his witness statement, oral submissions or cross-examination of witnesses. For example, G failed to put to the decision-maker, Mr Davison, that disability had played any part in his decision to dismiss and never defined the PCP.

G had argued that *Bowers v William Hill* (2009) UKEAT/0046/09/DM and paragraph 15 of the DDA *Code of Practice: Employment and Occupation 2004* established a principle of imputed knowledge of general application. *Bowers* decided it was artificial to state that a composite employer did not know of the disability when one department knew and the other did not. The EAT decided that these references were not authority for the proposition that knowledge of disability could be imputed from one department or individual to another for the purpose of deciding whether there had been discriminatory conduct.

In any event, a general principle of imputed knowledge would have been overruled by the decision in the recent case of *CLFIS (UK) Ltd v Reynold*s [2015] EWCA Civ 439; [2015] IRLR 562 [see Briefing 749]. In CLFIS, the claimant's contract had been terminated as a result of misleading, tainted information about her performance, which had influenced the decision-maker. The CA decided that the individual responsible for the decision to dismiss must have been motivated by the claimant's protected characteristic for the claim to succeed. The *CLFIS* claim failed for this reason.

In both *CLFIS* and G's case, it was only the decision of one particular manager that was in question. The EAT stated that the focus should be on the mental process of that individual committing the alleged discriminatory acts. As in *CLFIS*, the decision-maker lacked the actual or constructive knowledge of the disability at the times relevant to the discrimination claims, and this caused G's claims to fail. The EAT concluded:

> *In anticipation of the decision of the Court of Appeal in CLFIS it seems to me that the Cadney Tribunal quite correctly concentrated upon the state of mind of Mr Davison, the person solely responsible for taking the decision to dismiss. In my argument there is no room for imputed knowledge in this context.*

In relation to ground 2(b), the EAT reiterated that the remarks of the Cadney ET on the PCP were merely comments made in the alternative to point out that the reasonable adjustments claim lacked the requisite evidence. Although the word 'practice' appeared to suggest repetition, the EAT declined to accept that as a matter of principle a single event could not amount to a PCP. Instead establishing a PCP was *'fact/context sensitive issue not susceptible to general statements of principle'* (para 65).

Comment

Gallop extends the *CLFIS* principle that the decision-maker cannot be considered to discriminate merely because the information upon which he/she based her decision may have been tainted by a discriminatory motive. This case confirms that a decision-maker is not discriminating if they are relying on information from an OH department.

However, practitioners should note the clear message to employers from the CA decision in *Gallop* that they have a duty to ask relevant questions to ascertain whether or not someone is disabled. Employers cannot unreservedly accept the advice of OH experts to satisfy this duty.

In respect of the reasonable adjustment claims, the EAT decision reiterates the importance of clearly defining and evidencing the PCP and date of knowledge of the disability. One question the EAT leaves unanswered is what elements of the disability must the decision-maker know in order to satisfy the knowledge requirement. In practice the boundaries between constructive and imputed knowledge may be difficult to draw. A claimant would likely be able to establish constructive knowledge if the decision-maker knew of the claimant's depression and that it has or will last 12 month or is reoccurring. If one of these facts were unknown to the person responsible for the decision, would constructive knowledge be demonstrated? The danger for claimants following this decision is that if they do not disclose their disability directly to their manager, the employer may evade the duty to provide adjustments. The borders between constructive and imputed knowledge will surely be tested in subsequent cases.

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Day-to-day activities should be defined broadly

Banaszczyk v Booker Ltd UKEAT/0132/15; [2016] IRLR 273; February 1, 2016

Implications for practitioners

ETs must apply EU law relating to disability discrimination in employment and occupation.

- The United Nations Convention on the Rights of Persons with Disabilities was ratified by the EU in 2009. It defines disabled persons as including *'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'.*
- The definition in the UN Convention must be understood as referring to a hindrance to, not the impossibility of, exercising a professional activity.
- The focus is on the impact of the impairment on the individual.
- The time taken or needed to carry out a normal day-to-day activity should be considered when assessing whether the effect of the impairment is substantial.
- Think about costs applications.

Facts

Mr Banaszczyk (B) worked as a picker in a regional distribution centre for a chain of wholesale warehouses. His job involved selecting and loading cases of goods in wholesale quantities, each weighing up to 25 kilos. The target 'pick rate' of 210 cases an hour, with a minimum standard of 85% of that rate, had been agreed with the recognised trade union.

Following a car accident in 2009, B experienced a series of episodes of low back pain. By 2012, his GP asked that he be excused from heavy lifting as it made his back worse. Referral to occupational health (OH) indicated no realistic prospect of increasing his pick up speeds: he could manage 85% of the pick rate for half the time but only 70% to 80% for the rest. He was dismissed on grounds of incapability in July 2013. He complained of unfair dismissal and disability discrimination.

Employment Tribunal

The employer (BL) challenged B's disability status. At a preliminary hearing, heard by a judge sitting alone, the tribunal accepted the evidence of the OH doctor (which had been supported by B's GP). However, the judge saw B's evidence as exaggerated in some respects and relied instead on contemporaneous medical reports and notes. The other findings made by the employment judge (EJ) were all about what B could do.

Despite having also cited the cases of *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706 and *Ring v Dansk Almennyttigt Boligselskab* [2013] IRLR 571[see Briefing 674], the EJ decided that on these findings, B was not a disabled person.

Employment Appeal Tribunal

HH Judge Richardson was trenchant in his view, observing that he found it *'impossible to discern from his reasons why the EJ decided the case as he did. His final paragraph amounts to no more than a conclusion without reasoning'.*

BL had argued that the 'pick rate' meant that lifting and moving cases was not a *'normal day-to-day activity'*. Rejecting that submission, Judge Richardson said it confused the activity itself with an employer's requirements about the manner and speed at which the activity was to be performed. If *'disability law is to be applied correctly it is essential to define the activity of working or professional life broadly; care should be taken before including in the definition the very feature which constitutes a barrier to the disabled individual's participation in that activity'.* The 'pick rate' was not the activity, the activity was manually lifting and moving cases.

Going on to deal with a submission that B's case could be equated with that of a specialist worker such as the silversmith or watchmaker, Judge Richardson was as robust: that was *'not remotely arguable'*, so he did not address whether the 2011 Guidance remains *'entirely correct'* in the light of *Ring*.

The effect of B's long-term physical impairment was that he was significantly slower than others when carrying out the activity of lifting and moving cases. The 'pick rate' was not the activity; but it was potentially a barrier which interacted with B's disability to hinder his full participation in working life.

The key finding of fact was that the EJ had accepted

796 the OH doctor's evidence. Given the current case law, as cited by the EJ but analysed by the EAT, no other result could be possible on those simple facts. So, HH Judge Richardson was able to substitute a declaration that at the relevant time B had a disability for the purposes of the EA.

Comment

Why this case had to go as far as the EAT is surprising. Given the medical evidence and the approach in *Paterson* and *Ring* and paragraph B2 of the 2011 Code of Guidance, the result seems inevitable.

The judgment outlines without comment the ET findings about the things B could do. That does not appear to have been a ground of appeal, yet since *Goodwin v Patent Office* [1999] IRLR 4, it has been clear that the statutory focus is on the things the person either cannot do or can do only with difficulty, rather than on the things that the person can do. The EA is no different to the Disability Discrimination Act 1995 in that respect. Those findings were irrelevant.

Sadly, the judgment is silent on whether there was an order that BL pay B's hearing fee under rule 34A(2A).

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797 Briefing 797

Disciplining an employee for improper manifestations of religious beliefs

Wasteney v East London NHS Foundation Trust UKEAT/0157/15/LA; April 7, 2016

Introduction

This case concerns improper manifestations of a person's religious beliefs in the workplace and appropriate responses by employers wanting to discipline staff for such unacceptable conduct.

Facts

Miss Wasteney (W) was the Head of Forensic Occupational Therapy and a senior member of staff at East London NHS Foundation Trust (the Trust). W is a Christian. Complaints were made against W by a junior Muslim member of staff (referred to as EN throughout the proceedings). The complaints concerned various interactions between W and EN, which EN characterised as 'grooming'. These included:

- providing EN with a book about a Muslim woman's conversion to Christianity;
- providing EN with a DVD concerning human trafficking;
- praying for EN in a 1:1 meeting and touching EN; and
- inviting EN to services and events at W's church.

The Trust investigated these complaints under its disciplinary procedure and found W guilty of serious misconduct. In particular, they found that W had blurred the professional boundaries and subjected EN, a junior member of staff, to improper pressure and unwanted conduct.

The Trust however dismissed the allegation regarding the DVD as both W and EN shared a common interest in campaigns relating to human trafficking, and so they deemed that this was not unwanted conduct.

The Trust gave W a final written warning, reduced to a first written warning on appeal.

Employment Tribunal

W brought claims of direct and indirect religious discrimination and harassment. W argued that the interactions and exchanges where *'consensual'* and *'voluntary'* and therefore the Trust's decision to undertake a disciplinary process was an act of discrimination and harassment as it was because of, and related to, the fact that she had manifested her religious belief. W's challenge to the Trust's grounds for engaging the disciplinary process was premised on her contention that EN consented to the interactions and exchanges, which the Trust did not find.

W also argued that the Trust wrongly engaged its disciplinary policy when it should have engaged its Dignity at Work policy and offered mediation as a resolution to the matter.

The ET found that, while religion was the context for the events, her employer had not taken action on the basis that W manifested her religious belief. The ET found that they had taken action because she had subjected a subordinate colleague to unwanted and

unwelcome conduct, going substantially beyond 'religious discussion', and without regard to her own influential position. Therefore, the treatment of W was because of, and related to, her inappropriate actions and not any legitimate manifestation of her religious belief. Lastly the ET also rejected W's claim of indirect discrimination, a decision which W did not appeal to the EAT.

The ET dismissed her case.

Employment Appeal Tribunal

W appealed to the EAT on 9 grounds (Grounds A – I).

- Grounds A – C concerned W's ECHR rights under Article 9, namely her right to manifest her religious beliefs.
- Ground D concerned W's argument that the ET misdirected itself in finding that her religion was merely a context for her employer's actions.
- Ground E was withdrawn by W at an early stage.
- Ground F concerned W's ECHR rights under Article 9 in respect of EU Directive 2000/78 (which underpinned the relevant provisions of the EA).
- Ground G concerned W's contention that the ET misdirected itself with regards to the burden of proof under s136 Equality Act 2010.
- Ground H was a complaint that the ET failed to properly engage with W's argument that her employer wrongly applied its disciplinary policy as opposed to its Dignity at Work policy.
- Finally, in Ground I, W complained that the ET's conclusion was perverse in respect of the DVD allegation.

The EAT dismissed all 9 grounds of appeal and upheld the ET's judgment. In doing so, it confirmed that the ET made the right assessment of the facts in determining that the employer had rightly decided there was a disciplinary case to answer. It agreed that EN's complaints were serious in nature and warranted investigation. It also agreed that the sanction applied (a final and or written warning) was not an oppressive sanction where there were findings of misconduct.

With regard to W's complaint that her employer should have engaged the Dignity at Work policy and offered mediation, the EAT agreed that this was not an appropriate course of action given that EN had left the organisation by the time of the disciplinary action and given EN's description of the distress W's *'grooming'* had caused her.

The EAT also agreed that the employer had engaged its disciplinary procedure for the right reasons, namely that W had manifested her beliefs in an inappropriate manner and put undue pressure on a junior member of staff without regard to her position of seniority, amounting to a serious misuse of power.

The EAT concluded that it was *'satisfied that the ET approached its task correctly and provided a proper and adequate explanation of its reasons'.*

Implications for practitioners

The EAT judgment is succinct and easy to follow. Useful guidance for practitioners and employers can be found at paragraph 55 of the judgment.

In summary, one must look at the *reason why* the conduct happened and what the conduct *related to.* So, as in the present case, disciplinary action is not an act of direct discrimination or harassment if instigated because of, and related to, an employee's *inappropriate manifestation of their religion or belief* which subjected another employee to improper and unwanted conduct.

Employers must be clear as to their reasoning behind taking action against an employee and must ensure to frame any outcome or decisions with reference to the inappropriate and unwelcome nature of the employee's conduct, not the mere conduct itself.

Daniel Zona
Bindmans LLP

Taxation of discrimination settlements

Moorthy v HMRC (Equality and Human Rights Commission intervening) [2016] UKUT 0013 TCC; January 14, 2016

Implications for practitioners

For some time the tax courts and employment tribunals have approached the taxation of discrimination awards differently. The Upper Tribunal (Tax and Chancery Chamber's) judgment in *Moorthy* has provided some clarification of the law, essentially providing for a broader reach of taxation than the employment tribunal's case law suggests. Pending the appellant's appeal to the Court of Appeal, practitioners will need to consider the Upper Tribunal's approach in *Moorthy* when advising clients in employment discrimination cases, settling any claims or making submissions on remedy to the ET.

Facts before the First Tier Tribunal

Mr Moorthy (M) had been dismissed from his employment. He brought unfair dismissal and age discrimination complaint in the ET which he settled for £200,000. HMRC sought to tax all of this amount save for £30,000 which it agreed was exempt from tax by virtue of the threshold set by s403 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA), and £30,000 which it was willing to attribute to tax-free damages for age discrimination. On August 21, 2014, the First-Tier Tribunal (UKFTT) held that the entirety of the £200,000 fell to be taxed, save for the £30,000 which fell below the s403 threshold (see *Moorthy v HMRC* [2014] UKFTT 834 (TC)).

M appealed to the Upper Tribunal (Tax and Chancery Chamber)(UT).

Upper Tribunal (Tax and Chancery Chamber)

The scope of s401 ITEPA

The first question for determination by the UT was the approach to be taken to s401 ITEPA. The effect of this section is that payments and other benefits which are received *'directly or indirectly in consideration or in consequence of, or otherwise in connection with'* the termination of a person's employment, a change in the duties of a person's employment, or a change in the earnings from a person's employment, are liable to tax.

In *Crompton v HMRC* [2009] UKFTT 71 the UKFTT decided that in order for s401 to apply, it was necessary to find a connection between the compensation paid and the termination, which it described as *'... some sort of link, joint or bond'* between the two things. In *Oti-Obihara v HMRC* [2010] UKFTT 568 (TC) the UKFTT held that the proper approach was to take a figure which represented only the financial loss arising from the termination of the employment, and treat that as taxable, with the balance being compensation for discrimination and other infringements of rights not relating to financial loss which was not taxable.

In *Moorthy* the UT held that *Oti-Obihara* was wrongly decided: rather, the focus must be on the statutory language of s401. This is broad, with its reference to *'directly or indirectly'* and *'in consideration or in consequence of, or otherwise in connection with'* termination or the other events described in s401.

Moreover, held the tribunal, the statutory language does not distinguish between pecuniary and non-pecuniary losses, and accordingly damages for the latter can fall within s401 provided there is the necessary connection between them and the termination or other event described in s401.

Injury to feelings

The second question addressed in *Moorthy* was whether *'injury'* within s406 ITEPA includes *'injury to feelings'*. The heading of s406 is '*Exception for death or disability payments and benefits*' and it has the effect of exempting from tax *'a payment or other benefit provided ... in connection with the termination of employment by the death of an employee, or on account of injury to, or disability of, an employee'*.

Horner v Hasted (Inspector of Taxes) [1995] STC 766 had held that 'disability' for these purposes meant a total or partial impairment on the employee's ability to perform his or her duties, and that for the section to apply it must be established that the disability was the reason for the payment. However in *Orthet Ltd v Vince-Cain* [2005] ICR 324 and *Timothy James Consulting Ltd v Wilton* [2015] ICR, the EAT held that injury to feelings awards in discrimination claims, whether arising from termination of employment or

otherwise, were not taxable. In *Timothy James*, Singh J set out several reasons why in his view *Horner* did not apply to injury to feelings awards.

In *Moorthy*, the UT declined to follow *Orthet* and *Timothy James* and held that s406 does not apply to injury to feelings awards: rather, the section only applies to medical conditions which result in the termination of employment etc.

In light of its findings, the UT held that HMRC had not been entitled to offer M a concession that £30,000 of the settlement amount could be attributed to injury to feelings and so not liable to tax, and he was liable to tax on the entire £200,000 save for the first £30,000 that was exempt.

Comment

Moorthy means that the inconsistencies within some of the tax cases have been resolved, in the short term at least, and it is perhaps likely that HMRC will follow it despite it being expressly at odds with the EAT cases of *Orthet* and *Timothy James*. It means that practitioners seeking to settle claims will need to be live to the broad taxation reach of s401 and the fact that, per *Moorthy*, injury to feelings awards are not protected by s406. It may be prudent, in agreeing settlement terms, to specify any element of damages that the parties consider is not connected with termination of employment or the other events set out in s401 ITEPA. In practical terms employees will no doubt look to their former employers to make good the tax liability for them, to ensure that their damages remain intact.

M has been granted permission to appeal to the CA, whose judgment should bring additional clarification to these tricky issues.

Henrietta Hill QC & Louise Price
Doughty Street Chambers

Briggs review

The Civil Courts Structure Review by Lord Justice Briggs, although not including employment tribunals within its remit, provided plenty of interest for employment lawyers in its Interim Report.

The DLA welcomed the report's focus on access to justice and the acknowledgment that the *'weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals'.* The DLA considers that this is fast becoming a feature of the ET as well the civil courts.

The DLA has concerns about aspects of the report's proposals to address this lack of access of justice, for example, the suggestion to develop an online court. The DLA considers that an online court would not do justice to the nature and complexity of discrimination cases. And, while the use of technology is welcome and some technology provides benefits in relation to accessibility for disabled users, the DLA has concerns about the disparate impact on older age groups and other minorities that a wholly (or predominantly) online system would bring.

The DLA also has concerns about the report's suggestion to bring the employment tribunal system within the civil court system. However, it considers that the idea of an Employment and Equality Court as a separate court within the new structure, with jurisdiction to deal with employment and non-employment cases, has merit.

See the DLA consultation response on our website for more details: www.discriminationlaw.org.uk.

The DLA understands the full report is expected in July 2016, and further updates will follow.

Appeal judgments awaited in important discrimination cases

Paulley v First Group plc

On June 15, 2016, the SC heard the appeal in *Paulley v First Group plc* in which Mr Paulley (P), supported by the EHRC, argued that bus companies must ensure that wheelchair users like him must have priority in using wheelchair spaces, and why bus companies must end *'first come, first serve'* policies.

In February 2012, wheelchair user P tried to board a FirstGroup bus from Wetherby to Leeds. A mother with a pushchair and a sleeping child was using the wheelchair space. She refused the driver's request to move or fold the chair and so the driver told P he could not board the bus. That decision caused P considerable distress as he missed a vital rail connection.

P successfully sued FirstGroup at the county court for unlawful discrimination and was awarded £5,500. The county court stated FirstGroup's policy placed P at a substantial disadvantage and they could have made changes to avoid it. These changes would require a non-wheelchair user in a wheelchair space to move from it if a wheelchair user needed it.

This decision was overturned on appeal. The CA said this would be a step too far. The court asked whether the policy put P as an individual at a disadvantage rather than applying the wider test of whether it put disabled persons at a disadvantage, taking account of the potential effects on all disabled people. [See Briefings 693 & 738.]

The EHRC took P's case to the SC to argue that the CA's ruling undermines the effectiveness of the need to make reasonable adjustments by anticipating what changes may be needed even before a disabled person uses the service. The judgment is awaited.

Lee v McArthur

On May 12, 2016, an appeal was heard by the Northern Ireland CA in the case of *Lee v McArthur*, better known as the Ashers case. [See Briefing 757.]

Ashers Baking Company run by the McArthurs sought to overturn a finding that it acted unlawfully in refusing to bake a cake for Mr Lee (L) decorated with Sesame Street characters Bert and Ernie below the slogan 'Support Gay Marriage'. The cake was for an event to mark International Day Against Homophobia. The bakery refunded the money for the order on the basis that the message was against the owners' Christian faith.

Supported by the Equality Commission of Northern Ireland, L claimed discrimination on the grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations (NI) 2006 and discrimination on grounds of religious belief and political opinion contrary to the Fair Employment and Treatment (NI) Order 1998.

In May 2015 Belfast County Court held that the bakery had discriminated against L on grounds of sexual orientation and religious belief or political opinion. The bakery was ordered to pay him £500 compensation.

The McArthurs appealed. The appeal was scheduled for earlier this year, but was halted after an intervention by Northern Ireland's Attorney General, John Larkin. The Attorney General was granted permission to take part in the case after senior judges decided he had raised an arguable case that sexual orientation laws in Northern Ireland directly discriminate against those who hold religious beliefs or political opinions.

Mr Larkin argued that the issue in the case was about freedom of expression and *'whether it's lawful under Northern Ireland constitutional law for Ashers to be forced ... to articulate or express or say a political message which is at variance with their political views and in particular their religious views'.*

Counsel for the cake company argued that *'the reason the order was declined was conscience, it was nothing to do with this customer or any customer's political opinion'.*

The CA has reserved its judgment but pledged to give its verdict as soon as possible.

First High Court hearing on modern slavery finds in favour of six men trafficked into the UK

The High Court has decided a case under the Modern Slavery Act 2015 in favour of six Lithuanian workers who had been trafficked to the UK and then subjected to appalling working conditions.

In *Galdikas & Ors v DJ Houghton Catching Services Limited* [2016] EWHC 1376 (QB); June 10, 2016, Justice Supperstone dismissed the defence brought by the company and the company officers, Darrell Houghton and Jackie Judge. He ruled that they had failed to pay the claimants for their work in line with the minimum wages for agricultural workers; and had breached conditions regarding the prohibition on charging workers fees, on making deductions from wages and on providing facilities to wash, rest and sleep.

The judgment highlights not only the appalling conditions to which these and other workers were being subjected, but also the fundamental difficulty for foreign workers to gain assistance and legal advice because of their isolation and vulnerability as workers. The legal complaint brought by the men, who were aged between 19 and 58, stated that they were driven from farm to farm across the UK, travelling up to seven hours before being put to gruelling work in filthy conditions without adequate personal protective equipment, clothing or proper pay.

The company, based in Kent, ran a business providing labour to poultry farms across the UK, including farms that supply chickens and free-range eggs for major brands available in supermarkets across Britain. The men's pay was calculated on the number of chickens they caught, without consideration for the number of hours worked, time spent travelling or time spent on-call.

The claimants alleged that their wages were often docked or withheld entirely, and that workers were threatened and abused by supervisors, including with the use of dogs.

The claimants' lawyer, Shanta Martin, partner with Leigh Day, said:

> *This is the first time the High Court has ruled in favour of victims of trafficking against a British company. It is an extremely important step towards proper compensation for our clients and should be seen as a warning to British companies that they must eradicate all forms of modern slavery from their businesses, whether in the UK or elsewhere.*

A hearing will be scheduled for the assessment of damages in respect of the claims in which the claimants obtained judgment. Other aspects of the claim, such as personal injury claims, also remain to be determined.

The impact on children of the UK's counter extremism strategy Prevent

Over the past year, Rights Watch UK[1] (RW(UK)) has been conducting extensive research into Prevent – the centrepiece of the government's preventative counter-terrorism strategy, and its impact on children in the UK. The research report sets out RW(UK)'s findings on how Prevent is affecting children's human rights, particularly their rights to education, freedom of expression and religion. The report is the most comprehensive human rights analysis carried out into Prevent's impact on children. It documents how Prevent is stifling the freedoms of children in the UK and is ultimately counter-productive. Far from assisting the fight against terrorism, RW(UK) argues that Prevent is alienating the very people and communities the government must work with to address this challenging issue.

The report will be launched on July 13, 2016 at 18.30 in Committee Room 2a of the House of Commons. Chaired by Baroness Helena Kennedy, the panel will include Yasmine Ahmed, Director of RW(UK), Kevin Courtney, Acting General Secretary of the National Union of Teachers, Rob Faure-Walker, teacher and academic, and Rahmann Mohammadi, a 17-year old Luton student.

RW(UK) has issued an open invitation to attend; for more information and a copy of the final report, email info@rwuk.org.

1. RW(UK)'s mission is to draw on the lessons of Northern Ireland to promote, protect and monitor human rights in the context of UK engagement in conflict and counter terrorism measures. See http://rwuk.org/

Justice Committee says ET fees have significant adverse impact on access to justice

The House of Common's Justice Committee Report on Courts and Tribunal Fees was published on June 20, 2016. The report makes compelling reading for anyone who has argued that the introduction of fees in the ETs has damaged access to justice. The committee has taken particular note of the impact of fees on certain groups, and refers to the evidence received on discrimination from organisations including the DLA.

Significant reduction in fees

Whilst not recommending a complete removal of fees, the committee does recommend a significant reduction in fees, finding that the objective of deterring vexatious and unworthy claims must be balanced against the need to ensure access to justice. The committee specifically concludes *'that the regime of employment tribunal fees has had a significant adverse impact on access to justice for meritorious claims'.*

The committee states that whilst recommendations would have cost implications for the Ministry of Justice, the increase in the number of legitimate claims which would follow such a fee reduction would in itself bring in additional fee income, Secondly, the committee emphasised that if it comes to a choice between the two, then access to justice must prevail over the desire for income from fees.

Unpublished review of ET fees

The committee criticises the government for not publishing the now long overdue report into the review of ET fees, stating that it has not appreciated *'being strung along in this fashion; it has been detrimental to our work'*. It recommends that the government publishes forthwith the factual information which it has collated as part of its post-implementation review of ET fees. It further recommends that:

- the overall quantum of fees charged for bringing cases to ETs should be substantially reduced;
- the binary Type A/Type B distinction should be replaced: acceptable alternatives could be by a single fee; by a three-tier fee structure, as suggested by the Senior President of Tribunals; or by a level of fee set as a proportion of the amount claimed, with the fee waived if the amount claimed is below a determined level;
- disposable capital and monthly income thresholds for fee remission should be increased, and no more than one fee remission application should be required, covering both the issue fee and the prospective hearing fee and with the threshold for exemption calculated on the assumption that both fees will be paid;
- further special consideration should be given to the position of women alleging maternity or pregnancy discrimination, for whom, at the least, the time limit of three months for bringing a claim should be reviewed.

Private members bill to improve accessibility

The DLA is pleased to learn that one of its members, Guide Dogs, an organisation campaigning for the rights of people with visual impairment, has moved a step nearer to implementing a change in the law requiring all taxi licence applicants to receive training on the rights of blind people with guide dogs to access their services. The Accessibility Bill, which DLA was delighted to support, is being introduced as a private members bill by Andrew Gwynne MP in the House of Commons who drew 14th in the ballot. The Bill's First Reading was on June 29, 2016, and the full Bill, with more substantial detail, will be introduced later this year.

Blind people with guide dogs have a legal right to access taxi services but some drivers refuse to accept their custom, which can be confidence shattering.

To stop refusals happening, drivers need a full understanding of the rights of disabled people. The Bill will require all taxi and minicab drivers to undertake disability equality training as a condition of obtaining their licence.

Advocate General's opinion that headscarf ban is justified as genuine occupational requirement

Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, Case C-157/15 (Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation), Belgium)

The opinion of Advocate General Kokott on the question of whether a private employer was permitted to prohibit a female employee of Muslim faith from wearing a headscarf in the workplace and dismiss her if she refuses to remove it, provides a useful and careful analysis of the relevant law on religious discrimination.

The AG's opinion analyses EU law specifically in the light of the prohibition on discrimination based on religion or belief. Following an in depth analysis of the applicability of direct and indirect discrimination AG Kokott concludes that:

> *The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive.*
>
> *Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard.*
>
> *In that connection, the following factors in particular must be taken into account:*
>
> - *the size and conspicuousness of the religious symbol,*
> - *the nature of the employee's activity,*
> - *the context in which she has to perform that activity, and*
> - *the national identity of the Member State concerned.*

The opinion is an interesting and useful explanation of how the discrimination law operates in the context of faith-based dress as a particular issue in the workplace, and the parameters which determine whether or not an employer's rules cross the line from what is legitimate and proportionate, to what is discriminatory.

Abbreviations

AC	Appeal Cases
AG	Advocate General
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Reports
DC	Divisional Court
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EJ	Employment Judge
EqLR	Equality Law Reports
ERA	Employment Rights Act 1996
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GTANAs	Gypsy and Traveller Accommodation Needs Assessments
HHJ	Her/his Honour Justice
HL	House of Lords
HMCTS	Her Majesty's Courts and Tribunals Service
HMRC	Her Majesty's Revenue and Customs
HRA	Human Rights Act 1998
HRLR	Human Rights Law Reports
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
IRR	Institute of Race Relations
ITEPA	Income Tax (Earnings and Pensions) Act 2003
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LJ	Lord Justice
LLP	Legal liability partnership
LPAs	Local planning authorities
NHS	National Health Service
OH	Occupational health
PCP	Provision, criterion or practice
PH	Preliminary hearing
PPTS	Planning policy for traveller sites
PSED	Public sector equality duty
QC	Queen's Counsel
RRA	Race Relations Act 1976
SC	Supreme Court
STC	Simon's tax cases
TCC	Tax and Chancery Chamber
UKFTT	UK First-Tier Tribunal
UKSC	United Kingdom Supreme Court
UT	Upper Tribunal (Tax and Chancery Chamber)
WLR	Weekly Law Reports

Briefings