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Editorial *Impact of rising poverty in the UK*

The striking impact of the government's austerity measures, and in particular the swingeing cuts to welfare, on the day-to-day lives of individuals is illustrated by cases reported in this edition of *Briefings*. Although not resulting in positive outcomes for the individual litigants, the cases have established some important principles which will be crucial for further challenges in relation to the provision of social services or welfare benefits.

Ms McDonald, for example, sought to judicially review her local authority's decision on how they allocated public resources to meet her care needs. The authority proposed to reduce her care package and its alternative option created, in her view, an *'intolerable affront to her dignity'*. She argued that by reducing funding available for her care needs, the authority had unreasonably and unlawfully failed to meet her assessed and eligible needs, and was in breach of its duties under the DDA and its obligation to protect her private and family life under Article 8 ECHR.

In appealing the Article 8 aspect of the case to the Strasbourg court, Ms McDonald has helped to establish the important principle that the withdrawal of care can constitute a negative 'interference' with the protected Article 8 rights – one which the state must justify. The case is also important because it is the first time that the ECtHR has recognised that considerations of dignity in the context of social care services for disabled people can engage Article 8.

In *Kurtagja v DWP*, it was confirmed that discrimination claims can be litigated under the EA even though the claimant's appeal against a refusal of employment support allowance had been allowed. The claimant's case was that as a result of the DWP's discrimination in its management of his claim, he had suffered anxiety, his benefits were stopped, he lost out on a community care grant and experienced the extreme stress of risk of homelessness due to rent arrears resulting from suspended benefits.

Advisers and practitioners are likely to be consulted on other possible challenges in relation to social care or welfare in the future. Poverty in the UK is rising. The Poverty and Social Exclusion in the UK research shows that the percentage of households which fall below society's minimum standard of living has increased from 14% to 33% over the last 30 years, despite the size of the economy doubling.[1]

The link between poverty and inequality is highlighted in a report commissioned by the Webb Memorial Trust for the All Party Parliamentary Group on Poverty which finds that *'inequality – the gap between the incomes of the rich and poor – has also grown significantly over recent decades'*.[2]

The DLA's annual conference in October aims to further explore whether there is a link between discrimination and economic inequality, and if so, to what extent do they overlap?

Inevitably as in previous *Briefings*, our attention comes back to whether those who believe their rights have been denied will be able to seek redress. The full impact of the cuts to civil legal aid and the proposed restrictions on judicial review are as yet unknown. What we are beginning to see is the impact of the imposition of ET fees.

There has been a huge drop in discrimination and other work related claims being lodged at the ET between January to March 2014; these are down 83% in comparison to the same period in 2013. The announcement that the Justice Secretary Chris Grayling is committed to reviewing the impact of the introduction of fees in the employment tribunal system is welcome news. But it is not yet clear whether this will go beyond the normal civil service review of any government project.

It will be vitally important for the review to be made aware of the extent to which fees have deterred people from claiming their rights. While we wait to learn the terms of the review, advisers and practitioners could begin to collect evidence from their own work, with as many examples as possible of people who had claims with a reasonable prospect of success which were never lodged because of the fees regime. Another barrier to justice needs to be fully exposed.

Geraldine Scullion, Editor

1. Economic and Social Research Council funded Poverty and Social Exclusion in the UK research project, University of Bristol, results showcased in London, June 2014.

2. A Study of Civil Society Initiatives and Fairness Commissions Approaches to Reducing Poverty and Inequality in the UK: Paul Bunyan and John Diamond Edge Hill University, May 2014, p5.

Please see page 35 for list of abbreviations

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Scope for pressurising respondents following statutory questionnaire repeal

Kiran Daurka, Principal Lawyer, Slater & Gordon Lawyers, reviews the abolition of the statutory questionnaire in relation to all acts of discrimination occurring after April 6, 2014. She examines the history of the questionnaire, the decision by the government to abolish it as part of the 'Red Tape Challenge', and explores what practitioners may do now to obtain information. This article focuses on Employment Tribunal matters, although most of the processes can apply equally to the County Court.

History

In 1975, a government white paper set out the purpose of the then proposed statutory discrimination questionnaire. It stated that its purpose would be to help *'the aggrieved person to ascertain the nature of the respondent's case at an early stage by means of a simple, inexpensive procedure, this provision will also enable complaints which are groundless or based on misunderstandings to be resolved without recourse to legal proceedings'.*

The questionnaire procedure was then enacted within the various discrimination statutes and most recently the Equality Act 2010 (EA) with a view to early determination of the issues and merits of a claim, as well as to assist in the establishment of a prima facie case and encourage early settlement of cases. The procedure proved to be of real benefit for potential claimants and respondents to the extent that this was recognised by successive governments and parliaments and extended to all the strands of unlawful discrimination in the employment, education, goods and services, and public service provision fields. The consequence of not answering a questionnaire, or doing so evasively, was to allow a tribunal or court to draw an adverse inference.

In May 2012, the government announced consultation, among other things, on repealing the statutory questionnaire. The government stated that the statutory questionnaire *'was never intended to encourage settlement of claims without recourse to tribunals or courts'* and that it created 'additional burdens' for business.

The government received a total of 157 responses to this joint consultation. Of those responses, 24 (15%) were in favour of repealing the questionnaire provisions and 130 (83%) were opposed. Responses which agreed to the proposed repeal came mostly from private and not-for-profit sector employers and business representative organisations. Responses which disagreed with the government proposals were mainly on behalf of unions, equality lobby groups, staff associations, the judiciary and members of the public.

Baroness Stowell of Beeston set out the government's reasoning for removing the legal requirement, and argued that *'the fact that there is no statutory process does not remove the risk to an employer or service provider of deciding not to respond to a claimant; it only removes the unnecessary and prescriptive process around that.'*

Notwithstanding the arguments in favour of retaining the statutory questionnaire, and evidence supporting the position, s66 of the Enterprise and Regulatory Reform Act 2013 abolished the statutory questionnaire procedure as of April 6, 2014.

ACAS guidance

Given the opposition to the repeal of s138 of the EA, and following the comments of Baroness Stowell, there was some concession and ACAS issued some non-statutory guidance to promote a more 'informal approach' to the obtaining of information relating to discriminatory conduct in the workplace. Helpfully, ACAS also clarify that the same guidance can be used in respect of other discrimination disputes between trade unions and their members, partnerships and other workplace relationships (i.e. workers, contractors and some staff associations.)

The ACAS guidance, *'Asking and Responding to Questions of Discrimination in the Workplace'*, recommends that when serving a questionnaire, the questioner should state that a response is required and should ask the responder to respond by a set date. The guidance recommends that a response should be provided within a 'reasonable time' and that if the responder cannot comply with the time limit set by the questioner they should contact the questioner and seek to agree an extension.

The guidance encourages responders to deal with questions concerning discrimination in the workplace 'seriously and promptly'. Whilst the guidance recognises that responders are under no legal obligation to respond to such questions, it does remind employers that:

- a failure to respond may lead to a claim that could have been avoided by providing clear answers;
- the tribunal may take into consideration whether, and how, the responder has answered such questions as a 'contributory factor' in making their overall decision on a claim; and
- the tribunal could, in any event, order a respondent to a claim to provide such information as part of the legal proceedings.

The ACAS guidance also details six steps to assist the parties when seeking and responding to questions relating to discrimination, with separate guidance for equal pay matters. However, the overriding issue remains as to whether there is an incentive for the responder to answer the questions now that there is no statutory discretion for the tribunal to draw adverse inferences.

It is worth briefly mentioning the case of *Dattani v Chief Constable of West Mercia Police* [2005] UKEAT 0385/04 as I have heard arguments that this case still assists practitioners. The case of *Dattani*, amongst other matters, dealt with a respondent's failure to respond to questions raised in the form of a letter. In that case, the prescribed statutory questionnaire was not used. The EAT concluded that the tribunal or court was still entitled to draw adverse inferences in accordance with statute even where the form of questions was not in the prescribed format. Given that the statutory provision has now been repealed, it is my view that the *Dattani* case is of no further assistance on the issue of adverse inferences as it refers directly to the statutory discretion given to the judiciary to draw such inferences.

The solution as to how a tribunal or court will deal with evasive or failed responses to the informal questionnaire is ultimately going to rely on case law to establish a common law ability to draw inferences. In the meantime, whilst we wait for further clarity, practitioners can rely on the ECJ case of *Meister v Speech Design Carrier Systems GmbH* C-415/10 [see Briefing 638], which states at paragraph 47 that:

> *It cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.*

This case establishes that there is no requirement for a respondent to answer questions seeking access to information, but a court or tribunal can take refusal to provide such information into account when considering whether facts establishing discrimination have been made out by the claimant. Whilst the case refers only to a failure to respond to questions, practitioners should be seeking to expand the same principle in respect of evasive responses.

As to non-employment discrimination matters (goods and services and public functions, premises, education and associations), the Government Equalities Office has issued similar non-statutory guidance to that prepared by ACAS.

Whilst it remains disappointing that there is no statutory incentive for a respondent to answer the questionnaire, the fact that there is still a non-prescriptive regime in existence may still put some pressure on respondents to provide answers, as failure to do so is still open to being criticised.

I will now turn to other potential ways in which information and/or documentation may be sought in ET or county court discrimination proceedings.

Disclosure of documents and information

Aside from the usual process of disclosure, rule 31, Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states that *'the Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff.'*

Rule 31 allows disclosure of information or documents to be ordered as might be done under the Civil Procedure Rules (CPR). This is interesting because CPR 31.16 also allows for pre-action disclosure giving the county courts the power to make an order to compel a party who is likely to be a party to subsequent proceedings to give standard disclosure of documents or classes of documents.

Whilst there would appear to be no process to make applications for pre-action disclosure in the ET and there are no provisions for fees to be paid on a pre-claim application, there may be some scope to argue that the provisions of CPR 31.16 apply. Where there has been some pre-claim correspondence as to the issues in dispute, these may be relied upon to demonstrate that a pre-claim application is proportionate and relevant. I anticipate that there may be some arguments as to what is meant by disclosure to a 'party', which suggests that litigation must already have commenced. However, in the absence of a clear definition of 'party', it must be at

least a possibility that party includes anyone likely to be a party to proceedings in the future.

Aside from possible arguments around pre-action disclosure, any other disclosure of documentation or written particulars will only be received once a claim has already been formulated and pleaded. It has been held in previous case law that equal opportunity monitoring statistics,[1] statistics related to pay practices[2] and job descriptions[3] may all be ordered for disclosure to assist claimants to establish their prima facie case or comparator. Claimants may increasingly seek early orders for further information and disclosure in their ET1 and Grounds of Complaint where key facts are yet to be established.

There may also be an increasing emphasis on pre-action correspondence. Whilst there is no obligation to engage in pre-action correspondence in the same way as in civil litigation, there is increasing reason for such correspondence particularly in order to obtain further information and early disclosure. Failure to engage in such discussion could be referenced in any costs application if early disclosure could have focused or eliminated a claim.

Subject Access Requests (SAR)

By virtue of the Data Protection Act 1998 (DPA), an individual has the right to make a request to determine what information is being held about them.

A valid SAR must (1) be made in writing; (2) be accompanied with a fee for £10; (3) include evidence confirming the identity of the individual making the request; and (4) include any information necessary to locate the information. The data controller (which could be an employer, public authority or any organisation or person that processes personal data) is required to provide the information sought within 40 days of a valid request. The Information Commissioner has issued a helpful Code of Practice in August 2013 explaining the right to make an SAR.

An SAR is a very useful tool for a claimant and can be used to complement the disclosure process in litigation. An SAR can also be made before any claim is issued and is a cost-effective way in which to obtain information. Further, unlike requests for disclosure, an SAR cannot be dismissed for resembling a 'fishing expedition' as there is no requirement to justify or narrow an SAR, although a very wide SAR may be resisted on the basis that it would take a disproportionate effort to supply the information.

In response to an SAR, there is an obligation to supply the requester with a copy of the relevant information unless it would involve 'disproportionate effort' to do so. The Code of Practice from the Information Commissioner states that this exception should be used in only the most exceptional cases as the right to subject access is a central right and there would be only very limited circumstances in which it would be disproportionate to provide the information requested.

It is also relevant to note that there are no limits to the number of SARs that an individual can make provided that they are made at 'reasonable intervals'. To consider whether an interval is reasonable, the data controller should consider whether the data requested is particularly sensitive, or how often the data is altered (i.e. has there been some further matters arising, such as the raising of a grievance or claim, in between requests which may give rise to new information).

Crucially, the Code of Practice also clarifies the following:

> *Where legal professional privilege cannot be claimed, you may not refuse to supply information in response to a SAR simply because the information is requested in connection with actual or potential legal proceedings. The DPA contains no exemption for such information; indeed, it says the right of subject access overrides any other legal rule that limits disclosure.*
>
> *…simply because a court may choose not to order the disclosure of an individual's personal data does not mean that, in the absence of a relevant exemption, the DPA does not require you to disclose it. It simply means that the individual may not be able to enlist the court's support to enforce his or her right.*

There are some exemptions which may limit the information available under the DPA, which include:

a) Confidential references – references that are given by a data controller are exempt, but references which are received from a third party should be disclosed following an SAR. The data controller can redact any personal data from the reference.
b) Personal data processed for purposes related to crime and tax is exempt from an SAR.
c) Personal data which is processed for management planning is subject to a qualified exemption to the extent that compliance with an SAR would be likely to prejudice the organisation's business.
d) Negotiations – where compliance with an SAR would

1. *West Midlands Passenger Transport v Singh* [1988] IRLR 186
2. *Gibson v Sheffield City Council* [2010] IRLR 311
3. *Clwyd County Council v Leverton* [1985] IRLR 195

be likely to prejudice negotiations, the data controller is exempt from providing the information.

e) Legal professional privilege – documentation which is privileged is exempt.

There are remedies available for failure to comply with an SAR, but one of the main criticisms of the SAR process is that there is a lack of reasonable penalties for failures by the data controller. An individual could make a statutory request to the Information Commissioner to determine whether an SAR has been properly addressed. The Information Commissioner's Code of Practice states that a failure to then adhere to an enforcement notice to comply with SAR rules is a criminal offence, but there is no requirement to take unreasonable or disproportionate steps to comply with an SAR.

Most breaches that are offences within the DPA can be tried either way in a Magistrates' Court or the Crown Court. A fine may be imposed of up to £5,000 if a person is found guilty of an offence in the Magistrates' Court, or an unlimited fine may be imposed if tried in the Crown Court.

Freedom of Information (FOI)

Where an employer, or other body accused of discriminatory conduct, is a public body, an FOI request may be made to them. An FOI request is an attempt to provide information which enables the public to participate in policy discussions and to hold public bodies to account. The person making the FOI request should hold a legitimate interest in the information sought.

One of the key factors in considering whether a public body should comply with an FOI request is cost. If compliance would exceed an allocated total time of 24 hours for central government bodies, or 18 hours for other bodies such as the police, health service or education authorities, then there is no obligation to comply. Requests should, therefore, be drafted carefully to limit the amount of work required to respond. The wider the request, the less likely that compliance will be required.

An FOI request which is repetitive or vexatious does not oblige the relevant body to comply. An FOI request can, however, be repeated where there is a reasonable interval between the two requests. As with SARs above, where the information sought may have been changed since the previous request, this is likely to be a reasonable interval.

Where an FOI request would result in the disclosure of trade secrets or other information likely to be prejudicial to the commercial interests of any person, the authority must still comply with the request unless the balance of public interest favours non-disclosure of commercially sensitive information. The exemption relating to trade secrets and commercially sensitive information is, therefore, qualified and must be assessed against what is in the public interest.

In most cases, there is a short 20-day period within which the request must be complied with. Where the public authority is required to balance public interest in considering a response to the FOI request, a further 20 days may be allowed for compliance.

In the recent case of *South Lanarkshire Council v The Scottish Information Commissioner* [2013] IRLR 899, an equal pay activist made an FOI request for details relating to the numbers of employees in a particular role and their position at a particular point on a pay scale. He did not ask for the names of the employees to be disclosed. The Supreme Court upheld the Scottish Information Commissioner's decision in ordering the information to be disclosed. It held that his status as an equal pay activist meant that he had a 'legitimate interest' in the information. There was no interference with the privacy of the data subjects.

Whilst there are criminal offences in the Freedom of Information Act 2000 if information is destroyed or concealed, there are no specific sanctions for failing to provide information when ordered to do so. A failure to provide the information will likely constitute contempt of court if the failure is in breach of a court order compelling the provision of information.

Conclusion

The loss of the statutory questionnaire is a real blow to claimants and creates further hurdles in making out claims for discrimination where the employer or organisation holds all of the information. However, there are other tools that are available and should be utilised. Further, helpful case law on the consequences of failing to respond to the new style questionnaire or evasive responses, should render them just as effective as the statutory questionnaire.

Homophobia in Sport

Lou Englefield is Director of the lesbian gay, bisexual and transgender (LGB&T) sports development and equity organisation Pride Sports. Here she writes about her perceptions of discrimination against LGB&T people in sport.

When Pride Sports was launched in 2006, there were very few performance lesbian, gay and bisexual athletes in the UK, in the world, who had been public about their sexuality. In fact, at that time, the most famous gay male athlete in the UK to reveal their sexuality was Justin Fashanu, the first black footballer to command a million pound transfer fee in Britain when he moved from Norwich City to Nottingham Forest in 1981. Fashanu ended his own life in May 1998.

Since 2006, whilst working to promote the inclusion of LGB&T people in sport, we have seen a number of high profile figures make their sexuality public; John Amaechi (former National Basketball Association player) in February 2007, Nigel Owens (Rugby Union referee) also in 2007, Donal Óg Cusack (hurler) 'came out' in October 2009, Gareth Thomas (Welsh Rugby Union international) in December 2009, Steven Davies (England cricketer) in February 2011, not to mention Robbie Rogers (professional footballer) in 2013, Thomas Hitlzsperger (professional footballer), Casey Stoney (England football international), Kate and Helen Richardson-Walsh (Olympic hockey players) and Tom Daley (Olympic diver) in 2014.

All this is good news, of course. This year England and Wales have passed the Marriage (Same Sex Couples) Act 2013 which has seen gay couples tie the knot since April; Scotland has passed the Marriage and Civil Partnership (Scotland) Act 2014 and the UK has some of the best protective legislation for LGB&T people in Europe.[1] Surely we would expect public figures in sport, as in other areas of society, to feel comfortable being open about their relationships and families? When we consider that an estimated 6%[2] of the population is thought to be lesbian or gay, and we know that the performance athlete population in the UK is in its thousands, we realise that lesbian, gay and bisexual people who are open about their sexuality remain underrepresented at the highest levels of sport in this country.

Continuing discomfort

Lesbian, gay and bisexual (LGB) people are not, of course, a visible minority, so this lack of visible representation indicates one of two scenarios; either LGB people do not progress in sport in the same way as their heterosexual counterparts, so they just don't reach the highest levels of sport; or LGB people are there, but we cannot tell who they are because they prefer to keep their sexuality hidden.

Either way, the lack of 'out' athletes indicates a continuing discomfort with homosexuality in sport here in the UK.

Many academics have written about the roots of this discomfort,[3] how a predominantly sex-segregated environment in British sport has lead to a highly gendered sports culture in which a particular construction of masculinity, a kind of 'super' or 'heroic' masculinity is prized above all else. This discourse results not only in a lack of interest and investment in women's sport, but also disadvantages men who may express diverse masculinities, and this may include men who are not heterosexual. The homophobia that has been routinely displayed in sports environments, in changing rooms, and training grounds for many years in the UK, is an expression of this phenomenon; a way of delineating what it is to be a 'real' sports man, a 'true' competitor. Terms such as 'faggot', 'poof', 'gay' have been used to describe men who do not make the grade in sport, who drop a ball, who fail to make the perfect pass, who refrain from a slide tackle. 'Man up' and 'playing like a girl' are current, apparently less inflammatory versions of this same expression.

But not all homophobia in sport has been expressed through verbal abuse. As a colleague recently wrote about his experience of aquatics:

> *For the whole time I have been swimming, I don't remember ever having been beaten up or verbally abused because of being gay. But writing this doesn't mean I deny the existence of homophobia. On the contrary, I believe it exists in a hidden way in everyday words and in*

1. http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe/score_sheets_2014

2. http://www.theguardian.com/uk/2005/dec/11/gayrights.immigrationpolicy

3. http://www.coe.int/t/dg4/lgbt /Source/HandbookSportNo4.pdf

silence…or because of silence.[4]

So homophobia can be experienced not only in direct physical or verbal abuse, but also in the making of lesbian, gay and bisexual identities invisible in sport. This is why performance athletes 'coming out' remains so important to many LGB&T people. By making themselves visible, lesbian, gay and bisexual athletes are challenging stereotypes, breaking taboos and beginning conversations that were started some time ago in other areas of public life.

For Pride Sports, lesbian, gay and bisexual performance athletes being visible in sport is, however, the tip of the iceberg, the part of the much bigger whole we can see above the water line. Despite the media obsession with who the next big name will be in the LGB&T sporting hall of fame, Pride Sports' real concern is with creating the conditions in which LGB athletes feel comfortable to be authentic both in their sexual identity and their athlete identity concurrently.

So what has changed on the ground?

During the 2007-2008 season, the English Football Association (FA) amended its Ground Regulations to include homophobic chanting and action as unacceptable behaviour in its rules of entry to football stadia. In 2012 it launched its own LGB&T Action Plan[5] which was underpinned by six themes: education, visibility, partnerships, recognition, reporting and monitoring. Since then, the FA has sanctioned players for homophobia and transphobia, introducing an education programme for sanctioned players to help them understand the impact of their actions and the language they use. In addition, we have begun to see action taken by the police and Crown Prosecution Service against fans for homophobic abuse, and in some instances where legal action cannot be pursued, clubs have taken their own stance against fans found to be expressing homophobic sentiments.[6]

Last season, the *Football v Homophobia* campaign, which was launched in 2009, gained the backing of 50% of all professional football clubs in the UK, with 16 of 20 Premier League clubs taking action during the month of February (LGBT History Month). Players wore *Football v Homophobia* t-shirts before matches to raise awareness of the campaign's message, articles were included in match day programmes and on websites and representatives of LGB&T communities were invited to games.

The 2013/14 season also saw the establishment of several LGB&T fan groups. Initiated by LGB&T people themselves, and often with the backing of the clubs they represent, they provide a voice within football for LGB&T fans, and offer support to clubs in challenging homophobia and transphobia.

Rugby league

Meanwhile, rugby league has been at the forefront of LGB&T inclusion in sport in the UK for a number of years. In 2010, the Rugby Football League (RFL), rugby league's governing body, famously hit its Super League club, Castleford Tigers, with a fine of £40,000[7] for a variety of offences, including homophobic chanting. The homophobia in question was targeted at Gareth Thomas, the only 'out' gay male professional rugby player to have crossed codes from rugby union to rugby league. Eventually, £20,000 of the fine was lifted by the RFL in acknowledgement of the positive educational work the club undertook with its fans to highlight the negative impact of homophobia.

During the following year, Championship club Sheffield Eagles undertook to wear a *Tackle Homophobia* strip during their first game of the season; an action which literally saw support from around the world. The RFL has also developed guidance for clubs to tackle homophobic abuse and behaviour and has produced recommendations on including young LGB&T people in rugby league following some consultation with young people themselves.

More widely, the inclusion of sexual orientation as a protected characteristic in the Equality Act 2010 and the consideration given to the participation of transgender people in sport within the legislation has undoubtedly had an impact on the sports landscape. Sport's governing bodies were given an incentive to ensure they were not discriminating against LGB&T people in their policy and practice.

Charter for Action

In 2011, the year before London's Olympic and Paralympic Games, the UK government launched its charter to tackle homophobia and transphobia in sport.[8] The original signatories to this charter were the FA, the

4. http://www.prideinsport.info/factsheets/swimming/

5. http://www.thefa.com/football-rules-governance/equality/LGBT-football

6. http://www.liverpoolecho.co.uk/news/liverpool-news/everton-fc-ban-supporters-following-7308392

7. http://www.telegraph.co.uk/sport/rugbyleague/7861067/Castleford-Tigers-fined-for-homophobic-chants-at-Crusaders-Gareth-Thomas.html

8. https://www.gov.uk/government/news/fight-against-homophobia-and-transphobia-in-sport

England and Wales Cricket Board, the RFL, the Rugby Football Union, the Lawn Tennis Association, and the London Organising Committee of the Olympic and Paralympic Games. The charter has subsequently been adopted by many other sports delivery organisations in the UK. This initiative undoubtedly went some way towards raising awareness in sport of the need to tackle homophobia and transphobia, to begin the conversation on LGB&T inclusion. However, the call to action has not always resulted in action itself, particularly within sports which do not court large crowds of spectators expressing homophobic and transphobic sentiment.

In many ways it is the silence that also needs to be tackled; the inaudible discomfort that surrounds LGB&T people in sport; the unspoken awkwardness of issues such as how to accommodate transgender people's needs in changing facilities, of LGB&T people's appropriateness as youth coaches, and their suitability as role models for children. We need to question deep-rooted stereotypes that tell us transgender women are cheats, that all women who play sport must be lesbians, that gay men will behave inappropriately in communal changing rooms. These are the issues that need to be tackled to make sport a more welcoming place for lesbian, gay, bisexual and transgender people, and this can only be achieved through comprehensive education and policy programmes which require investment.

There is a growing misconception in the media that once a Premier League footballer 'comes out' the campaign against homophobia in sport will be over. I find this baffling when you consider that the campaign against racism did not end with England's first black professional footballer, Arthur Wharton, joining the football league in the late 19th century.

Of course, a visible gay professional footballer with a successful career would undoubtedly challenge some stereotypes and help to change the landscape for other players and aspiring youngsters, but it would not fast-track the campaign against homophobia in sport or by-pass the work that still needs to be done. We need to actively create environments that safeguard LGB&T young people and value LGB&T adults in sport. We need to ensure that those LGB&T people who play, coach, administer, watch and support the sports they love, week in, week out, are afforded the same access to participation, progression and satisfaction as everyone else.

For Pride Sports, our next challenges are to ensure that 75% of professional football clubs take action on LGB&T discrimination during the 2014/15 season, to create new opportunities for LGB&T people to participate in sport and to continue and extend our educational work. To find out more about us, take a look at www.pridesports.org.uk or www.footballvhomophobia.com.

Briefing 709

Flexible working from June 30, 2014 could bring sea-change to working culture

Emma Webster,[1] solicitor at YESS (Your Employment Settlement Service), examines the changes to the right to request flexible working introduced by Part 9, Children and Families Act 2014 and the Flexible Working Regulations 2014 SI 1398 which came into operation on June 30, 2014. She provides practical advice for employees on how to approach making a request and hopes that the legislation will result in more employees being allowed to work flexibly and the current stigma that is primarily attached to women with childcare responsibilities will be removed.

Introduction

Until June 30, 2014 only employees with caring responsibilities could make a formal request for flexible working. From June 30th the requirement to be a carer is removed. Alongside the statutory changes and a helpful ACAS guide there is a short ACAS Code of Practice which ETs must take into account. The ACAS Code and guidance make a clear distinction between legal requirements ('must) and good practice ('should').

In an ideal world, if there is sufficient uptake of the right to apply, employees at all levels will no longer have to be visible to be appreciated. Employers may see the benefits of such arrangements when senior and well-regarded employees choose to work for employers offering flexible working. Working from home or part-time working may not have the same negative connotations if dynamic, senior child-free employees

apply to work 4 days a week so that they can indulge their passion for photography/study for a Masters degree/spend long weekends with aging parents, or if senior members of staff simply want to slow down a bit but not retire.

Negative connotations associating flexible working with caring and unreliability would fade and employing women would no longer be considered a 'risk' if more men start applying for flexible working. Recent research by Demos shows that 55% of men do value flexible working arrangements. However, many still balk at the idea of making that initial request thinking that it will single them out as not caring enough about their work. There is also a higher rate of refusal for men requesting flexible working (compared to women).

The practicalities of making an application remain broadly similar but the strict timetable for the employer's responses and meetings between the parties are removed. The penalties for an employer failing to follow the statutory procedures remain relatively small but, as before, the possibility of discrimination claims remain if applications are refused without good reason.

The legislation

In brief, the legislation (Part 9, Children and Families Act 2014 and the Flexible Working Regulations 2014 SI 1398 (FWR)) set out the following:

- all employees who have been employed for 26 weeks can ask to work flexibly, without giving a reason;
- the employer must consider the request in a reasonable way – see the ACAS Code of Practice;
- the employer can only refuse on prescribed grounds, (these are the same as previously);
- the employee must be told of the decision within 3 months;
- failure to consider the request and act reasonably may give rise to a claim for compensation, though this is limited;
- only one request can be made in any 12 months; but refusal of a further request could be discrimination;
- the change is usually permanent unless otherwise agreed;
- an employee must not be disadvantaged or dismissed for making a request;
- unjustified refusal of a request may be discrimination.

What is flexible working?

Readers of this article will be familiar with the different types of flexible working arrangements but employees and employers often have difficulty thinking beyond reducing the number of days that are worked.

As a practitioner it is worth exploring all the possible options with your client. The change could include:

- a change to the hours worked, e.g. reducing the number of hours or the times at which those hours are worked (i.e. working 2 hours from home in the evening if you've left at 3.00 to collect the kids from school);
- a change to the times of work, e.g. a later start or earlier finish;
- working from a different location, e.g. from home.

This would cover compressed hours, flexi-time, homeworking, job-sharing, shift working, term-time hours and most working patterns.

The application process

It is compulsory for the application to be:

- dated;
- in writing; and
- detailing any previous applications made to that employer and the dates of those applications (s4 FWR)

It is also highly recommended that the application includes:

- the proposed change to the applicant's working conditions and date from which they want that to take effect;
- the effects of the change on the employer and how to deal with these;
- if the reason for the change is to care for someone (e.g. a child or dependant), it is advisable to say this (though not compulsory), so the employer can take this into account. This may be relevant if the request is refused and the employee wants to bring a claim for discrimination.

The employer's obligations

The employer *must* consider the request and *should* consider:

- the benefits of the requested changes for the employee and the business;
- weighing the benefits against any adverse business impact;
- avoiding discrimination.

The employer should discuss the request with the employee as soon as possible, allowing the employee to be accompanied at that meeting – unless the request is agreed when it may not be necessary to meet.

The employer must then give a decision in writing as soon as possible, and within 3 months of the request.

The employer can refuse the request only on the following grounds:

- the burden of additional costs;
- an inability to reorganise work amongst existing staff;
- an inability to recruit additional staff;
- a detrimental impact on quality;
- a detrimental impact on performance;
- a detrimental effect on ability to meet customer demand;
- insufficient work for the periods the employee proposes to work;
- a planned structural change to the business.

The employer's main obligation is to act reasonably. It may be that if an employer consistently fails to comply with the 'shoulds' (as opposed to the 'musts') within the ACAS Code, this could amount to the employer dealing with the application 'unreasonably'.

Other points to note

- there is no obligation on the employer to hold a meeting but it may be unreasonable not to;
- there is no right for the employee to be accompanied at any meetings; although ACAS advise the employer to allow this;
- there is no right to appeal against the refusal of a request;
- an employee can withdraw an application any time after it was made;
- failure to attend two meetings may lead the employer to assume the application has been withdrawn;
- any change that is agreed will be a permanent change to the contract unless a trial period has been agreed.

What employees should do

Employees should consider all the options: part-time working (3/4 days per week), job-sharing, compressed hours (35 hours in 4 long days), a variation in hours (e.g. leaving at 5pm – and perhaps catching up in the evening), partial working from home (to save the commute), or term-time working. It will depend on the job so it is important to consider how the job could be done on the varied working pattern.

Remember that employees have no 'right' to work flexibly; it depends on whether the employer agrees, so a conciliatory approach is best; plan carefully what the employee will say to persuade their employer that it is good for the business as well.

Employees often take one of two approaches – either they assume that they are entitled to any working pattern that they think will work for them or they are very nervous and think that by asking to work flexibly they are likely to damage their reputation or possibly get dismissed. As a result they think that they should accept whatever the employer says. Neither approach is very helpful so try to keep them in the middle ground.

Employees should consider how the change would work and how flexible s/he can be, e.g.:

- the employee may prefer not to work Friday but may be refused if too many employees are off; can s/he choose another day?
- would partly working from home be viable; if so, how will the employee communicate with clients and colleagues?
- if the employee wants to do a reduced week, will they be available if there is an urgent matter?

Consider what issues the employer might raise and how the employee would deal with them, e.g.:

- how will the change impact on colleagues?
- who will cover the work if the employee wants to work reduced hours?
- will it be necessary to recruit someone else and how easy will that be?
- will there be issues around continuity of service to clients and how would you respond?
- if you know of other employees who have worked flexibly in similar jobs, give examples.

The employee should attend meetings if possible; they can ask that they take place over the phone or at a convenient location, such as at home or a nearby café.

If the employer is reluctant to agree the change, consider asking for a trial period to show how it would work. This could be working partly from home, compressed hours, shorter hours etc.

Be prepared (with all the arguments), **be positive** (about the advantages for the employer) and **be persuasive** (avoiding confrontation). Remember that the employee needs to try and maintain a good relationship with the employer to ensure that any change in working patterns is treated positively, not negatively.

When does a discrimination claim arise?

An unjustified refusal of a flexible working request may be indirect sex discrimination. This occurs when:

- there is a provision, criteria or practice (PCP), such as full-time working, long hours, which applies or would apply to all employees (i.e. it is not just directed at the individual);
- the PCP puts women at a particular disadvantage compared to men – because it is mainly women who need to work part-time to care for children;
- the PCP puts the woman at a disadvantage because, for example, she would not be able to get childcare or

would not be home in time to see her baby;
- the employer cannot show that the PCP (e.g. full-time working) is justified bearing in mind the needs of the individual woman and the needs of the business.

The employer does not need to show that it had no alternative but it does need to show that its decision was reasonably necessary to achieve a legitimate aim. Consider though whether the employer could have used a different, less discriminatory method to achieve the same aim. (*Kutz-Bauer v Freie und Hansestadt* [2003] IRLR 368).

When considering whether any such PCP is objectively justifiable, tribunals must carry out a balancing exercise to evaluate whether the business needs outweigh the impact on the protected group (e.g. women) and the claimant, taking account of the discriminatory effect, the proportion of people affected and the qualitative impact on the individuals.

Refusal of flexible working to a man may be **direct sex discrimination** if they can show that a woman in a similar situation would have been granted it.

Enforcement/remedies

Compensation is such amount as the tribunal considers just and equitable in all the circumstances, with maximum compensation of 8 week's pay (capped at £464 per week as at June 2014).

This may be awarded if there is a failure:
- to act reasonably;
- to notify the decision within 3 months;
- to refuse the request without it being one of the prescribed grounds;
- to base the decision on incorrect facts; or
- to treat the application as withdrawn when this would be wrong; this may occur if the employer wrongly thinks that the employee has not attended an arranged meeting on two occasions.

The tribunal can make an order that the employer reconsider the request and/or award the employee interest.

The tribunal can make a recommendation, e.g. that the flexibility sought is agreed, and/or order the employer to pay the employee compensation for the loss suffered as a result of the discrimination.

Less favourable treatment of a part-time worker may be indirect sex discrimination and a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 unless justified.

Conclusion

These changes, if embraced by all employees, could lead to a sea-change in a working culture that shifts people away from the *'long hours in the office'* culture, to a healthier work-life balance being available to people regardless of whether they're parents or not. That in turn could negate the continued, pervasive negativity attached to part-time working mothers despite obvious signs that more and more men and non-parents are looking for more from their working lives than being tied to their desks.

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McDonald: ECtHR finds Article 8 engaged in healthcare case

McDonald v United Kingdom [2014] ECHR 942; May 20, 2014

Facts

Ms McDonald (M) suffered from a condition which required her to access a toilet three or more times a night. Owing to her physical frailty (caused as a result of a stroke), such access had resulted in a number of falls some of which had resulted in her hospitalisation. In March 2007 she applied to the Independent Living Fund under s2(1) of the Chronically Sick and Disabled Persons Act 1970 and the National Health Services and Care Act 1990 for assistance. This required the local authority to make an assessment of her needs and to offer practical assistance if it was necessary to meet those needs.

Initially, she was provided with a care package by the local authority (the Royal Borough of Kensington and Chelsea) (the LA) which included seventy hours per week of night-time care. In January 2007 she was assessed as having a substantial need of assistance to manage continence at night. A further assessment was made in February 2008 which noted that:

> *Ms McDonald wanted to emphasise that she requires assistance with all transfers and when she mobilises. Ms McDonald requested night care in order [for] someone to assist her using [the] commode during the night. This is because Ms McDonald does not wish to use incontinence pads and sheets...*
>
> ***Summary of Needs Assessment***
>
> *Ms McDonald needs assistance to use the commode at night. Substantial need.*

Consequently she was assessed as requiring assistance to access a commode at night.

On October 17, 2008 a formal decision was taken to reduce the amount allocated for M's weekly care from £703 to £450. This figure appears to have been assessed on the basis that M would be provided with incontinence pads in lieu of night-time care. This decision was taken at a meeting between the LA and M at her home. She was formally notified of the decision by letter dated November 21, 2008. It noted that:

> *As stated at the meeting, the rationale behind the planned reduction is that we consider the current provision to be in excess of that required to meet your eligible needs under the council's Fair Access to Care Services criteria. The council has a duty to provide care, but we must do so in a way that shows regard for use of public resources.*

Judicial review

M considered that the proposal was an *'intolerable affront to her dignity'* in circumstances where she was not incontinent and did not wish to be treated as though she was. So on December 22, 2008 she applied for permission to judicially review the decision on the ground that the LA was unreasonably and unlawfully failing to meet her assessed and eligible needs. She further submitted that the LA's actions would cause her to suffer indignity which would amount to an interference with her right to respect for her private life in breach of Article 8 of the European Convention on Human Rights (ECHR).

Pending the hearing of M's complaints, a 'holding compromise' was reached: from November 2008 to December 2008 whereby she continued to receive night-time care five days a week. Between December 2008 and September 2011 she received night-time care four nights a week. During this period M's partner stayed with her when night-time care wasn't provided in order to assist her. In September 2011 all night-time care was withdrawn.

On March 5, 2009 the application for JR was refused by a Deputy High Court judge. Although the judge accepted that the LA was obliged to meet M's assessed need, she considered there were two ways to meet that need: the provision of a night-time carer or the provision of incontinence pads. The statutory scheme requiring that M's needs be met allowed the LA some flexibility about how that was to be done and it was therefore quite entitled to meet the need in the most economic manner. The judge further considered M's complaints under Article 8 to be 'parasitic' upon the first ground being established and did not, therefore, consider that they raised any issues which needed to be examined.

Following that decision, the LA carried out a Care Plan Review. The review, which was dated November 4, 2009, concluded that:

> *It remains Social Service's view that the use of incontinence pads is a practical and appropriate solution to Ms McDonald's night-time toileting needs. There does not seem to be any reason why this planned reduction to provide care should not go ahead...*

After a visit to M's home on April 15, 2010, a further

Care Plan Review was conducted. It was noted that *'Ms McDonald did not want to discuss the option of using incontinence pads or absorbent sheets as a way of meeting her toileting needs'*.

The Review concluded:

> *I remain of the opinion that Ms McDonald's need to be kept safe from falling and injuring herself can be met by the provision of equipment (pads and/or absorbent sheets). She has however consistently refused this option. I am aware that she considers pads and/or sheets to be an affront to her dignity. Other service users have held similar views when such measures were initially suggested but once they have tried them, and been provided with support in using them, they have realised that the pads/sheets improve the quality of life by protecting them from harm and allowing a degree of privacy and independence in circumstances which, as the result of health problems, are less than ideal. The practicalities can be managed within the existing care package to accommodate Ms McDonald's preferred bedtime and to allow her to be bathed in the morning and/or have sheets changed. If Ms McDonald were willing to try this option, she might similarly alter her views.*

Court of Appeal

M appealed to the CA against the refusal of permission to apply for judicial review on the grounds that:

1. the reduction in funding was inconsistent with the assessment of her night-time needs;
2. the reduction in funding violated her rights under Article 8 ECHR; and
3. in reducing her funding the LA had failed to comply with its obligations under the Disability Discrimination Act 1995 (DDA).

In particular, she argued that if forced to use incontinence pads she would *'lose all sense of dignity'* and, as a consequence, she would suffer considerable distress. The LA submitted that the provision of a night-time carer would cost £22,270 per year, which would have to be paid out of the adult social care budget from which all other community care services for adults in M's borough were funded. The LA also argued that the use of pads would ensure M's safety and provide her with greater privacy and independence in her own home. Finally, the LA submitted that the weekly funding of £450 could be used according to M's preferences. She could therefore pay for a bedtime visit for the purpose of fitting the pads, and even a subsequent visit if necessary.

The CA found that between November 21, 2008 (the date of the disputed decision letter) and November 4, 2009 (the date of its first Care Plan Review) M's assessed need had been for assistance to use a commode. In failing to provide such assistance, the LA had been in breach of its statutory duty. However, it had mitigated the breach by entering into an arrangement with M's partner. Moreover, the November 21, 2008 decision had not been put into operation and M's need had been reassessed in the Care Plan Reviews of November 2009 and April 2010. As a consequence, the court found that M had no substantive complaint under this head.

Supreme Court

The SC upheld the LA's right to amend a care plan where a cheaper alternative is available. The key was whether the alternative is suitable. In this case, by a majority, the SC thought that it was.

The SC agreed that the LA may not operate any *'practice, policy or procedure'* (PCP) which makes it impossible or unreasonably difficult for disabled persons to receive any benefit conferred on them. However, they concluded that M had failed to show that the LA's decision could properly be characterised as a 'PCP' and thus the LA did not breach its s2(1) duty under the DDA. Even if that were not so, the LA's actions would have been justified as constituting *'a proportionate means of achieving a legitimate aim'*.

Where the LA is discharging its functions under statutes which expressly direct its attention to the needs of disabled persons, it may be entirely superfluous to make express reference to the equality duty. It would be absurd on the facts of the present case to infer a breach of the equality duty from a failure to refer to it.

M's needs had been reassessed on November 4, 2009, as the LA had been entitled to do; so from that date onwards, there had been no interference with her rights under Article 8 and there had been no failure to comply with the DDA.

In Lady Hale's dissenting judgment she would have allowed M's appeal on a different basis, namely that it was irrational for the LA to characterise M as having a need different from one she actually has.

European Court of Human Rights

M appealed to the ECtHR on the ground that her rights under Article 8 ECHR had not been adequately taken into account.

The ECtHR considered that the first question was whether the facts of the case fall within the scope of the concept of 'respect' for 'private life' within Article 8 ECHR. The notion of 'private life' within the meaning of Article 8 is a broad concept which encompasses a

person's physical and psychological integrity and was *'relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants'.* Recalling that the *'very essence of the Convention was respect for human dignity and human freedom'* the court referred to Lady Hale's dissenting judgment which appeared to accept that considerations of human dignity were engaged when someone who could control her bodily functions was obliged to behave as if she could not. The ECtHR accepted that reducing the level of M's healthcare fell within the scope of Article 8.

Such an interference will be in breach of Article 8 unless it can be justified under Article 8 (2) as being '*in accordance with the law'*, pursuing one or more of the listed legitimate aims, and being '*necessary in a democratic society'* in order to achieve the aim or aims concerned.

The period from November 21, 2008 to November 4, 2009

The SC had held that the LA had been in breach of its statutory duty to provide care to M in accordance with its own assessment of her need for care (namely a need for assistance to use a commode during the night) between November 21, 2008 (the date of the letter from the LA withdrawing night-time care) and November 4, 2009 (the date of the LA's first Care Plan Review). In light of this finding, the government had accepted that during this period any interference with M's right to respect for her private life was not *'in accordance with the law'* as required by Article 8 (2).

The ECtHR could not but find that from November 21, 2008 to November 4, 2009 the interference with M's right to respect for her private life was in breach of Article 8 on this ground.

From November 4, 2009 onwards

From November 4, 2009 onward, the ECtHR had no doubt that the interference was *'in accordance with the law'*. The court also accepted that the interference was pursuant to a legitimate aim, namely the economic well-being of the state and the interests of the other care-users. The ECtHR had to consider whether the decision not to provide M with a night-time carer to help her to access a commode was *'necessary in a democratic society'* and whether it was proportionate to the legitimate aim pursued.

Bearing in mind that the state has a wide margin of appreciation the ECtHR was satisfied that the UK national courts had adequately balanced M's personal interests against the more general interest of the public authority in carrying out its social responsibility of provision of care to the community at large.

The ECtHR concluded that there had been a violation of Article 8 in respect of the period from 21 November 2008 to 4 November 2009. The remainder of her complaint was inadmissible. The ECtHR awarded M 1,000 euros in damages for the breach between November 2008 and November 2009 together with £9,500 for her costs and expenses.

Comment

The ECtHR did not accept M's submission that the LA had acted unlawfully and that there had been no proper proportionality assessment by the domestic courts. They concluded that the national courts had adequately balanced M's personal interests against the more general interest of the competent public authority in carrying out its social responsibility of providing care to the community at large.

> *In such cases, it was not for this Court to substitute its own assessment of the merits of the contested measure (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities (notably the courts) unless there were shown to be compelling reasons for doing so.*

The ECtHR therefore held that there had only been a violation of Article 8 in respect of the period the from November 21, 2008 to November 4, 2009, when the proposed care provision was *'not in accordance with the law';* after that time the LA not acted unlawfully in reducing her care-package. It could not be said that the competent authorities of the UK exceeded the margin of appreciation afforded to them, notably in relation to the allocation of scarce resources.

All courts are reluctant to interfere with the way that public funds are allocated and the ECtHR is even more reluctant than domestic courts because it must give states a margin of appreciation to decide how to implement the courts' decisions. Nevertheless, this case is important because it is the first time that the ECtHR has recognised that considerations of dignity in the context of social care services for disabled people can engage Article 8. It also recognises that the withdrawal of care can amount to a negative 'interference' with Article 8 rights which the state will then need to justify. It will mean that within the UK any decision to withdraw care without a lawful reassessment is likely to breach Article 8 ECHR.

Gay Moon
Equality consultant

Surrogate mothers not entitled to maternity leave

CD v ST Court of Justice of the European Union, Case C-167/12 [2014] IRLR 551; [2014] EqLR 298; March 18, 2014

Implications for practitioners

There is a peculiar anomaly in the law relating to which mothers qualify for maternity leave. Biological mothers get it. Adoptive mothers get it. But mothers who have a baby through a surrogacy arrangement, intended mothers, don't.

In this case, CD argued that, as an intended mother, she should be entitled to paid leave because she was a new mother, breastfeeding and wanting time to bond with her baby.

She asked the Court of Justice of the European Union (CJEU), but they said 'no'. Because of that, the position remains that the anomaly continues: intended mothers are the only mothers who can't have maternity leave.

Facts

CD, a midwife sonographer, works for an NHS Trust. She wanted to have a child and entered into a surrogacy arrangement compliant with the Human Fertilisation and Embryology Act 2008. The surrogate (biological) mother gave birth to a baby on August 26, 2011 and CD, the intended mother, began to mother and breastfeed the baby within an hour of the birth. She breastfed for a total of three months. CD and her partner were granted parental responsibility for the child on December 19, 2011.

The respondent hospital (ST) had provision for paid maternity and adoption leave but told her that she did not qualify for either of these because of her status as an intended mother. CD applied for paid leave but her request was rejected on the basis that there was no legal right to paid time off for surrogacy.

CD presented a claim to the ET on June 7, 2011 and, at a pre-hearing review on December 19, 2011, the tribunal determined that it would make a reference to the CJEU.

Court of Justice

CD's main contention was that, on a purposive approach, she qualified for protection under the Pregnant Workers Directive (92/85) (PWD) when read together with the Charter of Fundamental Rights of the European Union.

She said that she should be entitled to maternity leave under Articles 2 and 8 of the PWD because, as an intended mother – and, particularly, as a breastfeeding intended mother - she was analogous to a biological mother. Furthermore, the principle of protecting the special relationship between mothers and babies in the vulnerable period following pregnancy and childbirth applied to her as an intended mother because she was in the same position as a biological mother - a new mother bonding with her baby (*Kiiski* C-116/06).

ST countered that she should not be protected because she had not been pregnant and had not given birth.

Advocate General's opinion

AG Kokott's opinion, delivered on September 26, 2013, considered that intended mothers *did* have the right to receive maternity leave under Articles 2 and 8 PWD, where surrogacy is permitted, even where the intended mother does not breastfeed, although the intended mother and the biological mother must share the period of leave. (paragraph 90).

AG Kokott opined that intended mothers who breastfeed should be included in the protection given by Article 2 PWD on the basis of the PWD's objectives of (1) protecting vulnerable workers, and (2) protecting the special relationship between a woman and her child over the period following pregnancy and childbirth:

> *Breastfeeding intended mothers were just as vulnerable as breastfeeding biological mothers - in both cases there are health risks and particular time demands arising from childcare (paragraph 44).*
>
> *Moreover, as maternity leave is designed partly to protect the special relationship between mothers and children, that relationship would be adversely affected where the mother simultaneously pursues employment (paragraph 45).*

Furthermore, using a teleological analysis, the AG's view was that intended mothers who do ***not*** breastfeed should ***also*** be protected under the PWD because the PWD must be understood in functional rather than monistic terms: an intended mother takes the place of the biological mother after the child is born and, from that

point on, must have the same rights (paragraph 48 and 63).

CJEU judgment

However, the CJEU took a different view. It found that member states are ***not*** required to provide maternity leave to intended mothers (whom they referred to as 'commissioning mothers').

In an interesting take on the PWD, the court focused almost completely on the protection given to a woman's biological condition, and downplayed the issue of the protection of the special relationship between a mother and child. It said, in terms, that the purpose of maternity leave is to protect the health of the mother in the '*especially vulnerable situation arising from her pregnancy*' (paragraphs 35-36). It concluded that, even where an intended mother is breastfeeding, she is not entitled to protection, presumably because her vulnerable situation does not arise from pregnancy (although, of course, it arises from the, arguably, equally vulnerable situation of looking after a new baby).

Conclusion

Given the purpose of the PWD and the approach taken by AG Kokott, arguably, the court's approach is open to question in treating new intended mothers differently from other mothers:

1. First, breastfeeding intended mothers are in as equally a vulnerable position, in terms of their biological condition, as breastfeeding biological mothers;
2. Secondly, the protection afforded to the special relationship between new mothers and babies applies equally to all new mothers, whether they are biological or not. That is why there is maternity leave and adoption leave.
3. Thirdly, the relationship that new mothers (who are also intended mothers) have with their babies will be adversely affected where they must simultaneously pursue employment because they are not entitled to paid leave and this is contrary to the purpose of the PWD.

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1. Jane Russell was junior counsel representing CD led by Karon Monaghan QC and instructed by Kate Ewing of UNISON. The views expressed in the article are her own. She would like to thank her mini-pupil, Pedro Caro de Souza, who provided invaluable research and insight into this case note.

Briefing 712

Montreal Convention excludes damages for discrimination on board an aircraft

Stott v Thomas Cook Tour Operators Limited UKSC [2014] 15; [2014] EqLR 287; March 5, 2014

Facts

Mr and Mrs Stott travelled to Zante on holiday with Thomas Cook (TC). Mr Stott (S) is paralysed from the shoulders down and is a permanent wheelchair user. In accordance with the booking process S had informed TC of his requirement for assistance, including booking for his wife to sit next to him on the flight. This was confirmed in a phone call prior to the outbound journey.

The outward flight went relatively smoothly. Problems arose on the way home. At check-in, S was told that his wife could not sit next to him as the seat was already booked. A supervisor told them this could be changed at the gate. Unfortunately, when they reached the gate, they were told that other passengers had boarded and seats could not be changed. S was taken to the aircraft by ambulift. As he entered the aircraft, his wheelchair overturned and he fell to the floor of the cabin. S was embarrassed, humiliated and angry, as was his wife. No one appeared to know how to assist him appropriately. He was eventually helped to a seat and his wife was placed in the seat behind him.

This seating arrangement caused Mr and Mrs Stott great difficulty as Mrs Stott was not able to discretely or fully assist her husband with his meals, drinks, comfort, or the use of his catheter bag during the flight. The staff made no efforts to ask other passengers to move to accommodate them.

County Court

S claimed under the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007 (SI 2007/1895) (the UK Disability Regulations), for a declaration and damages in accordance with Regulation (EC) No. 1107/2006 of the European Parliament and the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air (the EC Disability Regulation).

In the Manchester County Court, S was awarded his declaration (and there was no appeal on that point). The court considered that S had suffered injury to feelings worth an award of £2,500. However, the court also found that they could not make such an award due to a lack of power to do so under the Montreal Convention, which it was said was the overriding legislation in this area.

Court of Appeal

The case was heard in the CA ([2012] EWCA Civ 66) and judgment was given by Maurice Kay LJ, with Sullivan LJ and Dame Janet Smith in agreement. [See Briefing 628]. They had sympathy with S, but found that the County Court Recorder had been correct.

Supreme Court

The SC outlined the fact that the UK Regulations are the enforcement of the EC Disability Regulation, but found that this is not a question of EU law or enforcement as such. They therefore declined to make any reference to the Court of Justice of the European Union (CJEU)(as requested by S).

Instead, the SC chose to focus on the exclusivity of the Montreal Convention. They highlighted: *'The question at issue is whether the claim is outside the substantive scope and/or temporal scope of the Montreal Convention, and that depends entirely on the proper interpretation of the scope of that Convention'.*

Background

The Montreal Convention (the Convention) (like the Warsaw Convention which it replaced) provides a no-fault recovery scheme for passengers for certain claims (loss of luggage, delay, personal injury etc.). In return it limits the amounts of damage recoverable. Part of the scheme dictates an exclusivity provision; that *'any action for damages, however founded, … can only be brought subject to the conditions and such limits of liability as are set out in this Convention... In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.'* (Article 29). The Convention covers accidents which happen between 'embarkation' and 'disembarkation'. The SC considered whether this claim fell within the criteria of the Convention and, returned to the Particulars of Claim which referred to S's feelings and the aggravated damages relating to events on the aircraft. The court held that the basis for his injury to feelings claim fell within the temporal period covered by the Montreal Convention.

The leading case is *Sidhu v British Airways plc* [1997] AC 430, where the House of Lords held that a claim for damages which lay outside the Warsaw Convention was left without a remedy. To allow an exception in which a passenger could sue outside the Convention for losses sustained in the course of international carriage by air, would *'distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier'.*

The SC also referred to *El Al Airlines Ltd v Tseng* 525 US 155(1999), a US case, which held clearly that '*the pre-emptive effect on local law extended no further than the Convention's own substantive scope'.* In that case the question was posed whether someone who was injured on the escalator in the terminal would be left without a cause of action. This idea was rejected and it was made clear that in that situation local law would apply.

However, the principle does not mean that discrimination claims are generically outside the scope of the Convention, as stated in *King v American Airlines Inc* 284 F 3d 352 (2002). The Court of Appeal (US) decided that *'Article 17 directs us to consider when and where an event takes place in evaluating whether a claim for an injury to a passenger is pre-empted.*' In that case, whilst the passenger could not therefore recover damages for discrimination, there were other remedies available via Federal law. Thus an injury on an escalator in the terminal would not be within the Convention, unless it was whilst the passenger was embarking or disembarking. Claims in the discrimination arena should not be considered in any different light.

The SC in this case, in line with *King*, held that there was no bar on a general class of claims for discrimination within the Convention, but that it is the 'when and where' which dictates whether they are covered by the Convention.

The SC recognised that there may be good reasons to suggest that the Convention should now be updated to reflect the evolution of equality law, in order that equal rights of race, disability and others should be reflected

in the claims covered.

The SC therefore concluded that whilst the EU and UK Disability Regulations were put in place to prevent passengers such as S suffering such humiliation and embarrassment, there would appear to be no means of compensating him for the same, as the Convention, which covers this incident, dictates that no non-compensatory damages can be awarded.

Analysis

The SC has chosen to take a relatively narrow interpretation of this issue. Whilst the judges (Lady Hale in particular) recognise the unfair nature of the outcome of this case, they consider that they are tied by the terms of the Convention.

The Convention is an international agreement and was signed by the EU on behalf of the member states. Whilst the Convention is generally enforced in the UK through the Carriage by Air Act 1961, carriers from other EC countries can be sued in the UK as the Convention would apply through the Montreal Regulation, which is enacted in this country by the European Communities Act 1972. It therefore has a European route into UK law.

S submitted that the Convention does not cover the type of claim which he brought and that the airline's failure to seat his wife next to him began prior to embarkation. He sought a reference to CJEU on 4 questions.

This request was denied by the SC which did not consider that this was an issue of the interpretation of the UK law within the EU Regulations.

The courts are tied by the terms of the Convention which indicate that damages are not to be awarded for non-compensatory damages (including injury to feelings). Until such times as the Convention is updated to reflect equal rights, it is difficult to consider that there is more that can be done to amend this inappropriate position.

Practical implications

A passenger who experiences difficulties when checking in would then be advised not to board the plane, so as not to come within the temporal frame of the Convention. In this case S would have been better served by refusing to board the plane when told that his wife could not sit next to him. At that point he would have been able to claim discrimination within local law (assuming such a law exists within Greece). Whether or not TC could be sued for discrimination in the UK would depend on issues of territorial jurisdiction and agency of the ground staff.

Disabled passengers are therefore still not protected from the upsetting nature of any bad handling when boarding, during or leaving a flight. It will take many years of further international negotiation to correct this error.

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Briefing 713

Post-termination victimisation recognised as unlawful

Jessemey v Rowstock Ltd & Anor [2014] EWCA Civ 185; [2014] EqLR 230; February 26, 2014

Summary

The drafting anomaly in the Equality Act 2010 (EA) is finally clarified to establish that it is unlawful for employers to impose a detriment on staff who complain of discrimination, even after the employment relationship has ended.

Implications for practitioners

The drafting of s108 EA left room for doubt as to whether it was unlawful for an employer to victimise a former employee once the employment relationship had ended. That doubt has now been removed and it is now established that it is definitively unlawful to victimise former staff. Practitioners should therefore note that the EAT judgment in this case has been overturned. The situation most commonly arises where employers give negative references to former staff who had complained of discrimination while still in employment.

Facts

Jessemey (J) was employed by Rowstock (R), a second hand car sales business. R dismissed J when he reached the age of 65. J complained of age discrimination. He sought alternative employment through an employment agency. When the agency contacted R for a reference, this was provided by a Mr Davis. The reference was negative. J claimed that this negative reference was as a result of his complaint of discrimination and was therefore unlawful victimisation. He brought this claim and a claim for unfair dismissal to the ET naming two respondents: R and Mr Davis.

Employment Tribunal and Employment Appeal Tribunal

The decision of Hardwick EJ at the ET of December 7, 2011 was that J had been unfairly dismissed, but that there was no provision in the EA that allowed a finding of victimisation. Hardwick EJ found that the detriment of the bad reference was caused by the complaint of discrimination, but that the detriment complained of occurred after the employment relationship had ended and post-employment victimisation was not unlawful under the EA.

J appealed to the EAT; Mr Recorder Luba QC (who also heard the CA case) rejected the appeal on the same grounds as Hardwick EJ. [See Briefings 681]

The law

Pre-Equality Act 2010

The CA judgment provides a helpful and comprehensive summary of the development of the law of post-termination victimisation. In summary, the 'first-generation' of discrimination statutes (the Sex Discrimination Act 1975, Race Relations Act 1976 and the Disability Discrimination Act 1995) also contained a lack of clarity as to post-termination victimisation, with prohibitions against victimisation by employers against individuals 'employed by' the employer.

Some case law initially reflected this, with a literal approach being taken by the CA in *Post Office v Adekeye* [1997] ICR 110 to find that post-termination victimisation was not unlawful, but the contrary being found by the European Court of Justice (ECJ) in *Coote v Granada Hospitality Ltd* (C-185/97).

In *Rhys-Harper v Relaxion Group plc* [2003] ICR 867, the House of Lords (HL) determined that post-termination victimisation was prohibited by statute. The Employment Equality (Religion or Belief) Regulations 2003 (and the equivalents for sexual orientation the same year and age in 2006) clarified that post-termination victimisation was unlawful. Therefore, by the time of the EA, the position was common to parliament and the court.

Equality Act 2010

The EA complications arose from the manner in which it was structured. In ss13-19, discrimination is defined as direct and indirect. 'Other prohibited conduct' is defined in ss26 and 27, being victimisation and harassment. There are three types of prohibited conduct therefore: discrimination, victimisation and harassment. This was a departure from the first-generation legislation which defined victimisation as a sub-set of discrimination, notwithstanding that no protected characteristic is required.

The manner in which this prohibited conduct applies to the employment field is addressed in Part 5 of the Act. S39 (1) relates to discrimination; it prohibits conduct by an employer against 'a person'. In contrast, s39(4), which deals with victimisation, prohibits an employer from victimising 'an employee' by exposing him to 'any other detriment'. All of the previous three categories of detriment at s39(1)-(3) deal with events that could only take place while the victim was in work with the victimiser. The only prohibition against post-termination victimisation could therefore be found in s39(4). However, the use of the word 'employee' in the s39(4) appeared – unaccountably – to revert to the pre-*Rhys-Harper* approach.

Additionally, s108 further complicates the matter. It expressly prohibits post-termination discrimination and harassment, but s108(7) states that *'conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.'* As set out in the EAT judgment, the *'intended effect is far from clear'.*

EU Law

The EA was intended to give effect to several discrimination-related EU Directives. Mr Recorder Luba QC cites three in the EAT judgment: Council Directive 2000/43/EC (the Race Directive), 2000/78/EC (the Framework Directive) and 2006/54/EC (the Recast Directive). Mr Recorder Luba QC found that the ECJ decision in *Coote* was clear that acts done post-employment were intended to be covered by the prohibition on victimisation set out in the directives.

Court of Appeal

Five reasons are given in the judgment for the finding that post-termination victimisation is in fact rendered unlawful under the EA:

1. At the time of the EA, there was settled law proscribing it, which included in *Rhys-Harper* the finding of the HL that there would be no rational basis for not doing so;
2. There was no indication from the government in promoting the EA that the removal of the protection was intended;
3. The Explanatory Notes to the EA specifically stated that post-termination victimisation was provided for;
4. The UK would be in breach of its obligations under EU law if it did not proscribe post-termination victimisation;
5. No rational basis was proposed to the court for treating post-termination discrimination and harassment (both expressly proscribed) differently from post-termination victimisation.

In reaching its conclusion, the CA relied on *Ghaidan v Godin-Mendoza* [2004] 2 AC 57 to apply a broad approach to interpreting UK law in light of European Directives. However, the court also held that the narrower, domestic approach to interpretation would also justify the same conclusion. As a result, the appeal was upheld and the matter remitted to the original ET for assessment of compensation.

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Briefing 714

Immigration status and racial discrimination

Onu v Akwiwu & another; Taiwo v Olaigbe & another [2014] EWCA Civ 279; [2014] EqLR 243; March 13, 2014

Facts

Onu (O) and Taiwo (T) are both Nigerian women who came to England on migrant domestic worker visas to work as domestic servants.

Both had their passports retained by their employers, and were paid a minimal amount (£100 or £200 per month) for long hours of work with little or no holiday. Other examples of the abusive treatment they suffered include not being given enough to eat, inadequate accommodation and being threatened and shouted at.

The nature of a domestic migrant worker visa is that an employee is very dependent on their employer for their legal right to be in the country. It may be very difficult for a domestic servant to find alternative employment, but even if they do, the UK Border Agency can decide not to renew the visa.

Employment Tribunal

O and T brought claims for race discrimination (direct and indirect), failure to pay the National Minimum Wage, breach of the Working Time Regulations, and failure to provide written particulars of employment. O also brought claims for unfair dismissal, racial harassment and victimisation.

Both O and T's race discrimination claims were founded on the basis that their treatment was because of their precarious immigration status, which in turn was linked to their nationality.

All claims were upheld, with the exception of O's claim for victimisation, and T's claim for race discrimination. In O's case, the tribunal found that treatment against an employee because she is a vulnerable migrant worker constitutes direct race discrimination:

> *[Mr and Mrs Akwiwu treated the claimant in the way they did] because of her status as a migrant worker which was clearly linked to [her] race.*

O's claim for victimisation failed as it took place after her employment relationship had ended, and because the employer did not specify the discrimination element of the claim when he referred to the tribunal claim (and encouraged O to withdraw her claim).

In T's case, the tribunal found that the reason for her mistreatment was not her Nigerian nationality but her position as a vulnerable migrant worker.

Employment Appeal Tribunal

Both O and T appealed. In separate judgments, Langstaff P dismissed both appeals. [See Briefing 681] On race discrimination, Langstaff P held that O and T's

vulnerability was not *'indissolubly linked with migrant status'*, as there were other factors – an inability to speak English, a poor socio-economic background and the lack of a support network, all of which contributed to this vulnerability.

On indirect discrimination, Langstaff P held that the *'practice, criterion or provision'* argued for – the mistreatment of migrant workers – was unsustainable, as it was circular. It only applied to migrant workers, and there was no room for one racial group to be disproportionately adversely affected compared to another racial group.

Langstaff P held that post-employment victimisation was covered by the Equality Act 2010, following *Rowstock Limited v Jessemey* [see Briefing 713 in this edition] and that the tribunal had been obliged to make a finding of victimisation.

Court of Appeal

Underhill LJ gave the lead judgment and held that it was accepted that a race discrimination claim could be brought on grounds of not being a particular nationality; that is, the treatment by your employers is because you are not British.

The claims fail, in Underhill LJ's analysis, because although immigration status and nationality may be 'intimately associated', they do not correspond to each other exactly. There may be a great deal of overlap, but the two categories are not identical – many non-British nationals working in the UK are not migrant domestic workers.

On indirect discrimination, Underhill LJ was clear that this was not a case where there was a practice, or a requirement, or provision – just a series of specific acts against a particular employee.

The victimisation claim was upheld – it did not matter that the employer did not reference the discrimination claims being brought, provided that he was aware of them. In this instance the employer had failed to show that he was not aware that race discrimination claims were being brought.

Underhill LJ expressed sympathy with the aim of achieving recognition of the abuse and exploitation of domestic migrant workers, but was clear that a discrimination claim was not the only avenue to achieve this.

Analysis

All three judgments agree that the treatment O and T underwent was because of their immigration status. The difference in result is whether that treatment constituted race discrimination.

While disappointing in its effect, Underhill LJ's analysis is clear. It is not enough that an employee is treated in a particular way if they are a domestic migrant worker, a successful claim must also rely on being able to link that treatment with a protected characteristic. All domestic migrant worker visas will be given to non-British nationals, but this does not mean that immigration status becomes nothing but a placeholder for nationality. Provided there is still room between those two categories, a direct discrimination claim is always going to be unsuccessful.

Practical implications

Pending the outcome of the further appeal to the Supreme Court, advisers should continue to claim race discrimination in domestic migrant workers cases. If the trend set by the EAT and CA continues though, the focus will shift to the National Minimum Wage aspect of these claims, which remains the most financially viable aspect of these types of claims.

The loss of a potential 'injury to feelings' award is unlikely to have a significant impact on the financial value of domestic migrant workers claims, but the real purpose of categorising these cases as race discrimination is to ensure this type of treatment attracts the appropriate level of opprobrium and social stigma. All obnoxious treatment of employees may not be discriminatory treatment, and yet the work of the Anti-Trafficking and Labour Exploitation Unit at Islington Law Centre, whose support was fundamental in bringing these claims, is to ensure that these cases cannot be dismissed as minor breaches of employment 'red tape', but something more fundamental.

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Removal of police dog is discriminatory

Keohane v The Commissioner of Police for the Metropolis UKEAT/0463/12/RN; March 4, 2014

Summary

A Police Constable successfully defended an appeal against a finding that the effect of decisions to remove her police dog when she told her employer she was pregnant and not to reallocate a dog to her following maternity leave was direct pregnancy discrimination. The claimant had suffered a detriment immediately by being exposed to a 'real risk' that on her return to work she would suffer financial loss and career disadvantage. The acts were because of her pregnancy and maternity, and so were direct discrimination. The employer's reason for removing the dog - that it needed the dog to remain operational while its handler was not - did not prevent the acts from being 'because of' pregnancy/maternity. This was not too broad an approach to the question of causation.

The Metropolitan Police Service's (MPS) policy concerning the retention, reallocation and withdrawal of police dogs was also potentially indirectly discriminatory; the fact that the policy only produced disadvantage in some cases did not exclude it from causing indirect discrimination. The same 'real risk' can amount to a 'substantial disadvantage' for the purposes of an indirect sex discrimination claim. The heads of claim were different and so it was possible for the same events to give rise to both direct pregnancy discrimination and indirect sex discrimination.

Facts

PC Keohane (K) was a 'dual' narcotics search dog handler with MPS, which enhanced her career prospects and gave her the opportunity to earn overtime.

MPS operated a '*retention, reallocation or withdrawal of police dogs*' policy which set out the criteria managers should take into account when making decisions about search dogs where handlers were off sick, performing recuperative or restricted duties, pregnant, on maternity leave or suspended from operational duties. The policy specified that female officers would generally not be permitted to continue as operational dog handlers during pregnancy.

In October 2010, K told MPS she was pregnant. She could not do operational duties while pregnant for safety reasons. She attended a meeting at which Chief Inspector Cooper took a decision to reallocate one of her two search dogs to another officer and the dog was reallocated on November 1, 2010. K complained to an ET that the decision was unfavourable treatment because of her pregnancy, contrary to s18(2) of the Equality Act 2010 (EA). She submitted a further claim near the end of her maternity leave that the rejection of her request to have the dog returned to her before she returned to work was a further breach of the EA.

Employment Tribunal

Direct pregnancy/maternity discrimination

S18 provides that a person directly discriminates against a woman at work if he treats her unfavourably 'because of' pregnancy during the protected period which starts from the beginning of the pregnancy.

The tribunal decided that on the reallocation of the dog to another officer in November 2010 K suffered a detriment in that she knew that there was a serious risk that after her maternity leave she would return to less favourable working conditions than those at the time she had notified MPS of her pregnancy. The tribunal accepted that the risk of loss of opportunity for overtime and damage to career prospects were 'detriments' about which K could claim even though they were likely to last only around 8 months.

To be direct pregnancy discrimination, the unfavourable treatment must be 'because of' the pregnancy. The tribunal found there was a direct link between the pregnancy and the removal and non-return of the dog which caused K to suffer the detriment identified such that the removal of the dog was 'because of' K's pregnancy. It was also clear from comments Chief Inspector Cooper made at the meeting in October 2010 about this being K's second pregnancy within 17 months and the importance of the return to work date, that factors concerning K's pregnancy were operative in his decision-making. MPS had failed to show its need to keep the dog operational meant its decisions were not 'because of' K's pregnancy.

Indirect sex discrimination

Indirect discrimination is defined in s19 EA. Pregnancy and maternity is not one of the protected characteristics

for this type of discrimination so any allegation of indirect discrimination in relation to pregnancy must be claimed as sex discrimination and must fit the criteria:

> *A discriminates against another B if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's; a provision, criterion or practice is so discriminatory if A applies it to everyone, it puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with others, it puts B at that disadvantage and it is not a proportionate means of achieving a legitimate aim.*

The tribunal held that the provision, criterion or practice was *'the Respondent's policy relating to the removal and reallocation of dogs which is applied to dog handlers who are non-operational'*. It said that as the list of circumstances in which the policy was applicable applied equally to men and women except for maternity leave, the policy was likely to be applied more frequently to women than to men. It found, however, that as the disadvantage of reallocation of the police dog provided for within the policy was 'only a risk', the policy could not be said to put women at a particular disadvantage compared to men. As it was only a potential disadvantage, the tribunal rejected the complaint of indirect sex discrimination.

Employment Appeal Tribunal

Direct pregnancy discrimination

MPS appealed the finding that it had directly discriminated against K 'because of' her pregnancy on the basis that the ET had (1) erred in giving the words 'because of' in s18 a broad meaning and (2) failed to deal with MPS's argument that the decisions under challenge were made because of the operational requirement that police dogs needed to be deployed and it devalued an expensive asset to leave the dog with a handler who was non-operational.

In relation to point (1), the EAT found that the tribunal had not applied a broad meaning to 'because of' but in any event held that case law showed that the test was broad: whether the prescribed characteristic is *'a "contributing cause" in the sense of a "significant influence"'* (*Law Society v Bahl* [2003] IRLR 640) rather than a background factor; or the behaviour was 'by reason that' or 'on account of' the protected characteristic. The ET had taken the correct approach:

> *For an act to be one of direct discrimination does not mean that the detriment complained of as a result of the act was caused solely, or even mainly, by an act which was discriminatory. It is enough if the act was a significant and material influence.*

The second point of appeal was linked to the first. The EAT considered that MPS's case that its decisions were based on its need to keep the narcotics dog operational had been recognised by the ET. However, that did not exclude other factors too from influencing the decisions under challenge; the ET had noted what had been in Chief Inspector Cooper's mind and found as a fact that the reason why he acted as he did was K's pregnancy. In any event, the detriment to which K had been subject was being put immediately at risk that on her return to work she would have lost the opportunity of overtime and her career prospects would have been damaged. That detriment was clearly suffered because of her pregnancy.

The detriment was subjecting K to the risk itself, not whether it actually materialised on return to work and it did not matter that the risk was only likely to happen for a few months.

Indirect sex discrimination

K cross-appealed on the basis that the ET appeared to say she could not succeed in claiming that the acts complained of were both direct pregnancy/maternity discrimination and indirect sex discrimination.

The EAT said that being exposed to a real risk that one's police dog might be reallocated created a detriment. If the application of a policy has the inevitable result that a woman will suffer that disadvantage whereas a man will not, it is directly discriminatory. If suffering that disadvantage is not inevitable but the policy has a differential impact on the two gender groups as a whole, then it is indirectly discriminatory unless justified. K was one of those who were actually disadvantaged by the policy as her dog was reallocated and was not to be returned. The ET had been wrong to reject 'risk' or 'potential' as being no immediate disadvantage. Subject to whether applying the policy could be justified objectively despite its discriminatory impact, the basis of a claim for indirect discrimination was made out.

The EAT allowed the cross-appeal and remitted to the tribunal the issue of whether MPS's policy was justified. The EAT thought the need to keep dogs operational while their handlers are absent may be sufficient if it is proportionate to invoke the policy without offering some guarantee that a dog handler deprived of a second dog will not be put at a disadvantage on her return to work.

Implications for practitioners

A 'real' risk of something occurring in the future can amount to a 'detriment' for the purposes of direct discrimination in employment.

The presence of another reason for an act does not prevent it from being 'because of' a protected characteristic; so long as there is a direct link and the protected characteristic was a significant influence, that is sufficient for a direct discrimination claim.

The case confirms that indirect sex discrimination and direct pregnancy discrimination can both arise from the same set of facts.

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Briefing 716

Inappropriate manifestation of a religious belief

Grace v Places for Children UKEAT/0217/13/GE; November 5, 2013

Facts

This case considered the dismissal of the claimant (C) by the respondent (R) on November 16, 2011. C was the nursery manager at R's nursery in Islington before she was dismissed summarily for gross misconduct. She claimed discrimination and discriminatory dismissal because of religion.

R's Managing Director, Ms Jenkins (J) said she dismissed C because:

- she had held an unauthorised training session for staff which resulted in complaints by some of those who attended;
- she had frightened a pregnant staff member leaving her believing she would suffer a miscarriage; and
- she had scared another staff member by telling her that something was going to happen in the nursery which would have a ripple effect.

Relying on these reasons J concluded in her dismissal letter that C had *'behaved extremely unprofessionally'* and stated *'your actions and behaviour in regards to the training session and your discussions with staff members within the nursery have damaged the trust and confidence we have in you, to the extent that we are no longer able to trust you to act in a professional manner'*. J also wrote that C's behaviour towards other members of staff had been 'inappropriate and harassment'.

C is a Christian and she alleged that she had been discriminated against because of her religion as follows:

- on November 2nd J allegedly said to her *'don't you think it is unsuitable to have discussions about God in the workplace'* and *'your conversations with members of staff during break times about God are unsuitable'*;
- in September Ms Deol (D) of R's human resources department allegedly said it was not company policy for the C to hold Bible sessions with individuals who had consented to it; and
- on November 16, 2011. R dismissed her.

Employment Tribunal

The ET found against C on all of her claims. The allegations against D from November 2nd were not upheld; it found that D had used only words to the effect that while employers were under a duty to allow prayer they were not under a duty to facilitate group prayer sessions. It also found that D had not stated that R was opposed to group meetings to discuss the Bible and R did not have a policy restricting staff discussions on religious matters during break time.

With regard to words alleged to be used by J, the ET found that J had not used those specific words but that they did give an indication of her approach to C's faith. It found that J considered that C had blurred the boundary between her work and non-work related matters and this had had an adverse effect on the wellbeing of staff.

The ET considered the lawfulness of the dismissal taking into account the decision in *Chondol v Liverpool CC* [2009] UKEAT0298/08/1102. In that case Mr Chondol was a social worker and religiously Christian. The ET in that case had found that Liverpool CC had lawfully dismissed Mr Chondol for 'improperly foisting' his beliefs on service users. The EAT had subsequently agreed with the ET that a distinction could be drawn between Mr Chondol's religious beliefs and the manner in which he promoted those beliefs.

Citing *Chondol*, the ET concluded in the present case:

> *… the Claimant in this matter was not treated as she was because of her religion, but rather because of the way in which she manifested or shared it. This indeed was the Claimant's own conclusion. She agreed that she would have been treated in the same way regardless of her particular religion or had she had no religion at all. This cannot therefore constitute direct discrimination because of her religion and in the circumstances the claim falls. (paragraph 7.4).*

However, the ET observed that had C been able to bring an unfair dismissal claim it would have been concerned by the lack of warning or procedure followed prior to dismissal.

Employment Appeal Tribunal

C appealed asserting that there had been an error of law in the ET's reasoning because it relied on the case of *Chondol* to reach its decision where the facts of the two cases were distinguishable.

The EAT considered the ET's conclusion and cautioned against interpreting the decision as asserting that a clear distinction could be drawn between a religious belief and manifesting a religious belief. It would not agree with such a principle. It recognised that there was no clear dividing line between holding and manifesting a belief; unjustified unfavourable treatment because an employee had manifested their belief could amount to unlawful discrimination. On this, it cited the Code of Practice on Employment 2011 issued by the Equality and Human Rights Commission.

The point which the EAT agreed with and clarified was that C had been dismissed because *the way in which* she had manifested her religion was inappropriate and upset other members of staff. It was not for the impermissible reasons of holding her religious belief or manifesting her religious belief.

The EAT held that whilst the facts of *Chondol* were distinguishable, it did not follow that there was an error of law. What mattered was careful examination of the facts and reaching *'sustainable conclusions upon those facts'*. The EAT found that there had been no error of law and the conclusions of the ET were sustainable.

Implications for practitioners

Practitioners should be mindful that tribunals may be more inclined now to accept a distinction between holding a belief and the manifestation of the belief, albeit that a clear distinction in principle cannot be drawn. This may result in more employers trying to justify unfavourable treatment by seeking to isolate particular manifestations of a belief as objectively unacceptable. There is a risk that the scope of the anti-discrimination provisions of the Equality Act 2010 will be eroded.

Claimant practitioners can rely on this case as confirmation that a clear distinction in principle *cannot* be drawn between holding a religious belief and manifesting that belief where an employer seeks to rely on such a distinction to justify unfavourable treatment.

Setting aside the inevitable polarisation of claimants and respondents on this issue, all practitioners can acknowledge that there will be cases where an employer is reasonable to dismiss an employee because of their disruptive conduct, even where that conduct is related to the employee's religious belief.

The nature of the behaviour in question will vary significantly and such cases will always have to be dealt with on the specific facts. However, a good starting point for practitioners in direct discrimination cases of this kind will be to compare the way the employee was treated to the way a hypothetical comparator who exhibited the same behaviour but did not hold a religious (or philosophical) belief would have been treated. If the treatment would have been the same, it was unlikely to have been discriminatory.

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‘Something more’ required: shifting the burden of proof

Solicitors Regulation Authority v Mitchell UKEAT/0497/12/MC, February 17, 2014

Introduction

The shifting burden of proof set out in s136 of the Equality Act 2010 is a familiar concept to discrimination lawyers: if the claimant shows facts from which the ET could decide, in the absence of any other explanation, that the respondent discriminated against him, the ET must hold that the discrimination occurred unless the respondent shows that it did not discriminate. The following case was decided under s63A of the Sex Discrimination Act 1975 (SDA) which used different language to express the same concept.

It is well-established that less favourable treatment combined with a difference in protected characteristic is not sufficient in itself to shift the burden of proof: ‘something more’ is required. In *Glasgow City Council v Zafar* [1998] ICR 120 (a case predating statutory provision for a shifting burden of proof) it was held that unreasonable treatment, coupled with a difference in a protected characteristic, was insufficient to raise a prima facie case of discrimination. More recently, in *Madarassy v Nomura International plc* [2007] EWCA Civ 33 (a case to which the shifting burden of proof in s63A SDA applied) it was held that a claimant had to show more than a difference in treatment and a difference in sex to establish a prima facie case of sex discrimination.

In *Mitchell* the EAT considered, amongst other things, whether the ET was entitled to find that the respondent’s explanation for its less favourable treatment of the claimant constituted ‘something more’ for the purposes of shifting the burden of proof.

Facts

Mrs Mitchell (M) was employed by the Solicitors Regulation Authority (SRA) as a costs recovery officer. Following her return to work from maternity leave in 2001, M was allowed to work from home on two days each week to facilitate childcare. Another member of the costs recovery team, Mr Singh (S), had a son with health difficulties and, due to his childcare arrangements and lengthy commute, the SRA agreed that he could work flexible hours similar to those worked by M.

In 2011 M’s manager (C) revoked her flexible working arrangement. In its place M was offered flexibility in relation to her start and finish times, but was only permitted to work from home on an ad hoc basis (and only when agreed in advance).

M raised a grievance which was rejected. She subsequently brought a sex discrimination claim alleging that she had been treated less favourably than S.

Employment Tribunal

C gave evidence before the ET as to the reasons for her decision to revoke M’s flexible working arrangement:

- M no longer needed to work from home as her children had started school;
- other members of the team wanted flexible working arrangements similar to M’s for reasons not connected with childcare;
- ‘operational reasons’;
- she had received confidential comments from other team members about the work M was doing or her working arrangements;
- she had concerns about M’s pattern of leave during school holidays; and
- she believed that M was not a team player and was always out to look after herself.

The ET was critical of the evidence given by C, describing it as ‘unsatisfactory’. The ET considered it particularly significant that the assertion that M was not a ‘team player’ did not appear in C’s witness statement and was made only in oral evidence. It stated that:

> *We were not satisfied that [C] gave the [ET] a full and frank account of the reasons for her action… What [C] revealed in our view in oral evidence was that there were other, more personal, and less justifiable motives which explained why she acted as she did.*

The ET held that S was an appropriate comparator because of his childcare commitments. It noted that the comparator is required to be ‘comparable’ but not identical to the complainant and S’s relevant circumstances were not materially different to M’s.

On the central question of the burden of proof, the ET concluded that M had proved facts from which it could conclude, in the absence of an adequate explanation, that the SRA had discriminated against her in revoking the flexible arrangements. It held that there was evidence that she had been treated differently and less favourably than the relevant male comparator, S. The

ET went on to find that, the burden of proof having shifted, the SRA had failed to discharge it by proving that its treatment of M was not influenced by reasons of sex.

Employment Appeal Tribunal

The SRA appealed to the EAT arguing, amongst other things, that:

1. the ET had erred in determining that S was a proper comparator because:
   a) there was no finding as to the length of his commute (he had an 80-mile round-trip whereas M had a round-trip of eight miles),
   b) there were no findings as to the severity of S's son's health difficulties,
   c) M had a materially different contractual arrangement from S (who, unlike M, had applied for his flexible working arrangement under the SRA's policy),
   d) S had three children whereas M had two; and
2. the ET had erred when applying the shifting burden of proof on the basis that it made no findings as to what the 'something more' beyond less favourable treatment together with a difference in sex was (the SRA submitted that C's lack of veracity was not capable of being 'something more').

The EAT held that the ET was entitled to find that S was an appropriate comparator and remarked that *'a comparator does not have to be a clone of the claimant.'* It found that, on the material before it, the ET was entitled to conclude that, although S's situation was not identical to that of M, it was not materially different and the relevant circumstances were the same. The EAT commented that:

> *The argument as to whether [S] was a valid comparator… appears to us to be an attempt to re-argue the factual merits of the case and does not raise a point of law.*

The EAT went on to conclude that the burden of proof had shifted to the SRA and that the SRA had failed to discharge it. Citing the judgments in *Anya v University of Oxford* [2001] IRLR 377, *Law Society v Bahl* [2003] IRLR 640 and *Birmingham City Council v Millwood* [2012] UKEAT 0564, the EAT stated that:

> *It was not simply a question of the Respondent putting forward no explanation but having given a false explanation. That was very clearly capable of being 'something more'.*

In essence, the EAT found that C's false explanation, combined with the less favourable treatment of M and the difference in sex between M and S, triggered the burden of proof to shift and, that being the case, the ET was bound to conclude that the SRA had discriminated against M in the absence of any other explanation for the less favourable treatment.

Implications for practitioners

This is a helpful judgment as it brings together the key authorities in relation to the shifting burden of proof. It contains useful guidance, particularly with respect to (i) the requirement for 'something more' than just less favourable treatment combined with a difference in protected characteristic and (ii) the circumstances in which the requirement will be satisfied.

This decision is an important reminder to practitioners that explanations put forward by respondents for alleged less favourable treatment can amount to that vital ingredient of 'something more' for the purposes of shifting the burden of proof and, as such, should be scrutinised very carefully.

This case comes at an interesting time given that from June 30, 2014 the right to request flexible working will be extended to all employees with at least 26 weeks' continuous employment (irrespective of any caring responsibilities). [See Briefing 709 in this edition.] The implications of this change will depend on the degree to which more employees take up the opportunity to make a flexible working request, particularly in view of the fact that many employers already offer flexible working to all their employees. However, employers could face a challenging situation in having to determine multiple flexible working requests from employees with differing personal circumstances. This case makes it clear that in order to protect against possible discrimination claims employers will need to adopt a logical and consistent approach to the consideration of flexible working requests and provide employees with accurate and legitimate lawful explanations for any refusal.

Peter Nicholson
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Stewarts Law LLP

Illegally employed worker has protection from unlawful harassment

Wijesundera v Heathrow 3PL Logistics Ltd [2014] ICR 523, UKEAT/0222/13, December 5, 2013

The doctrine of illegality does not protect employers who harass employees without the right to work in the UK.

Facts

Ms Wijesundera, (W) a Sri Lankan national, held a work permit that was valid only while she worked with a particular employer. After she was made redundant, she started work for Heathrow 3PL Logistics Ltd and one Mr Raj (who was also an employee or agent of Heathrow 3PL). This was unlawful, in that she had no right to work for them until her visa was transferred.

Both before she started work and while she was working W was sexually assaulted. She was ultimately dismissed.

Employment Tribunal

W brought discrimination claims in relation to both the harassment she was subjected to and her dismissal. The tribunal accepted her evidence, concluding that she had been subject to sexual harassment of *'a serious and repeated nature'*.

But they found against her on the basis that she had been working illegally from the beginning and was well aware she had no right to work for Heathrow 3PL.

Employment Appeal Tribunal

The EAT overturned the ET. President Langstaff divided the harassment into two catergories: harassment that occurred before W started work and harassment that started after.

In relation to the harassment that occurred before she started work, he concluded that there was no illegality. W knew that she needed her visa transferred to a new employment – but until she started work she did not know this would not be done. The tribunal had jurisdiction to consider the harassment, because she had applied for employment and the relationship was not yet tainted with any illegality arising from her immigration status.

In relation to the harassment while W was an employee, the President reviewed the key cases on illegality in the context of discrimination claims: *Leighton v Michael, Hall v Woolston Hall Leisure, Vakante v Addey and Stanhope School*, and *Hounga v Allen* [see Briefing 641].

From these he concluded that the correct test was for the tribunal to assess whether the discrimination claim was inextricably bound up with the claimant's illegal conduct. This required consideration of all the facts. It was not sufficient to apply a causation test of *'would the discrimination have occurred if the illegal conduct had not happened?'*

It was therefore unsurprising, the President concluded, that claimants working illegally and complaining of dismissal failed. Dismissal was inevitably closely connected with the fact of employment. A claimant working illegally and claiming for dismissal was saying that they had '*been done wrong by being removed from a post which one should never have occupied in the first'*. Allowing such claims would inevitably involve condoning the illegality.

But, the President went on to find, the situation in relation to harassment at work was quite different. There was nothing about being an employee that leads to sexual harassment. Employment might provide the opportunity for the harasser – but that did not amount to an inextricable link.

Therefore the EAT allowed the appeal save in relation to the dismissal itself.

Comment

Although many readers will hope that the EAT's conclusion on dismissals will be overtaken by the Supreme Court's judgment in *Hounga v Allen*, overall this is a welcome judgment.

The EAT judgment highlights the need to view illegality in the context of any individual case and soundly rejects the attempt to apply a blanket rule to discrimination against those working illegally while they remain in employment. The President's robust conclusion that harassment is likely to be unrelated to the employment relationship means that illegality is unlikely to shield employers who mistreat employees working unlawfully.

This must be a good thing – not least because it reduces the incentive for employers to seek out those working illegally to avoid potential claims.

Michael Reed
Free Representation Unit

Social security appellant can bring disability discrimination claim under EA

Kurtagja v Department of Work and Pensions Sheffield County Court Case No. 3SE507111

Implications for practitioners

The Equality Act 2010 (EA) prohibits discrimination in the exercise of a public function. Although not a judgment on the merits of the claim, this judgment explores the capacity of the EA to challenge the operation of the social security system. It also has some useful comments on the courts' evolving approach to challenges on 'abuse of process'.

Facts

Mr Kurtagja (K) was granted employment support allowance (ESA) in March 2011 on the basis that he had depression and post traumatic stress disorder. In August 2012 the Department of Work and Pensions (DWP) instructed him to attend a medical assessment. He failed to attend.

In response to a letter from DWP asking the reason for this, K stated that he had forgotten the appointment due to the side effects of medication for depression. DWP subsequently informed him that his benefit would be stopped because of his failure to attend. K's appeal against this decision was rejected by DWP in a letter dated November 27, 2012 on the basis that he had failed to show good cause for failing to attend the assessment. In June 2013 K's appeal was heard by the Social Entitlement Chamber of the First Tier Tribunal (FTT). The appeal was allowed, on the basis that a side effect of K's medication caused memory loss and in any event this was the first failure by K to attend an appointment and was rectified by him when it was brought to his attention.

County Court

K brought EA claims for direct and indirect disability discrimination, for discrimination arising from a disability and for failure to provide reasonable adjustments in relation to the exercise of a public function. Whist the success of his FTT appeal meant that his benefit had been re-instated and arrears paid, K had suffered feelings of helplessness, frustration and anxiety as a result of the decision to stop his benefits, lost out on a community care grant (due to the absence of passporting benefits) and experienced the extreme stress of risk of homelessness due to rent arrears resulting from suspended benefits.

K sought:

- a declaration that he had been discriminated against;
- an order that the DWP change its policies to take into account existing medical evidence of those who miss medical assessment appointments in determining 'good cause' and to routinely offer a second medical to those with recorded mental health issues unless exceptional circumstances apply; and
- damages for injury to feelings.

DWP's application to strike out

DWP applied for the claim to be struck out under Civil Procedure Rules: CPR 3.4(2) provides that a court may strike out a statement of case if it appears to the court:

a) that it discloses no reasonable grounds for bringing or defending the claim;
b) that it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

There were five strands to the DWP's argument; specifically it argued:

1. This was an attempt to re-litigate previously decided issue. *Henderson v Henderson* [1843] established that the parties should bring forward their entire case during the course of one set of proceedings. The appeal before the FTT was a hearing at which K had had his concerns ventilated and been granted a remedy.

   However, the judge ruled that *Henderson* did not apply here. The issue before the FTT was whether the K was entitled to ESA, whereas the issue presented in this claim is whether the DWP acted in a discriminatory manner so as to give rise to a cause of action under the EA. That claim could not have been brought before the FTT.

2. DWP claimed abuse of process in that the claim should have been brought by way of judicial review.

The DWP argued that K's claim sought 'sweeping mandatory orders' affecting a wide class of people such that it should have been brought by way of judicial review. This claim, it was suggested, was an attempt to circumvent the time-limit for judicial review, which is shorter than that for EA claims (3 as opposed to 6 months)

The judgment emphasised that this issue of choice of proceedings should be considered in the light of the recent changes brought about by the CPR, such that parties are now under an obligation to help the court ensure that cases are dealt with expeditiously and fairly. In principal the plaintiff may choose the court and the procedure which suits him best. The onus lies upon the DWP to show an abuse of process and *'the burden is not a light one to discharge.'* Unjustified delay can be taken into account, as can the nature of the claim. Here the claim is for damages rather than review a discretionary remedy (where judicial review might be more suitable).

Furthermore, s119 EA states that if a claim is brought in the county court, then the range of potential remedies includes not only those remedies which could be awarded in proceedings in tort, but also the type of remedy available on a claim for judicial review. Thus in relation to the EA, parliament has expressly stated that proceedings in the county court under the Act may seek judicial review type remedies. Taking these factors into account the judgment held that there was no abuse of process in failing to bring a judicial review.

3. The DWP operates a scheme offering *'Financial Redress for Maladministration'*, which includes cases where there had been mistakes. The DWP submitted that this was the correct route of redress, and on that basis these proceedings were an abuse of process. The judgment ruled that since the scheme had no statutory basis there was nothing before the court to suggest an abuse of process to bring this claim.

4. Social Security Administration Act 1998

   S17 of this Act provides for the finality of decisions made under it. The DWP cited *Jones v Department of Employment* [1989] 1 QB 1 as establishing that no claim for damages could arise out of decisions which are subject to appeal rights to the FTT.

   However, the judgment distinguished *Jones* as a case in which the court considered whether there was a common law duty of care in making a decision (establishing that there was not). Here there was a clear statutory right to compensation under the EA.

5. Statutory authority

   Schedule 22 Paragraph 1 EA provides that there is no contravention of certain parts of the Act if a person does anything which they *'must do pursuant to a … requirement in an enactment'*. The DWP sought to rely on this exception.

   In rejecting this submission, the judge described it as 'startling' because the exception does not provide for immunity where there is simply a statutory underpinning for action. It applies only where the actor is compelled by statute to act in the manner complained of. Here the statute vests a discretion in the decision-maker. It does not compel them to make a decision which is discriminatory.

For the increasing number of claimants whose benefits are suspended, the distress and economic consequences are not redressed even where benefits are subsequently reinstated and backdated. This case raises the prospect of securing compensation through the EA where disability discrimination can be established.

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Equality law and policy consultant

Recent developments at the Employment Tribunal

Peter Daly, Bindmans LLP outlines the recent developments in the Employment Tribunal, including the worrying trend as evidenced by recent statistics showing a remarkable drop in employment claims.

Claims statistics

On June 12, 2014, the Ministry of Justice released the latest set of tribunal statistics covering the period January to March 2014. These show a remarkable drop in the claims being made against employers. The release stated that ET claims were down 83% on the same period last year, and single claims – i.e. those brought by one individual in respect of one employer – were down by 58%.

The number of discrimination claims disposed of roughly halved on the same period last year: disposed discrimination claims account for 16% of all claims (58,907) in January to March 2013, but only 8% of 58,407 claims in 2014. The number of 'single' claims is roughly at the level it was at two years ago and half the level it was at in 2008/9.

These statistics appear to demonstrate that the introduction of tribunal fees has directly caused the number of people seeking to claim for unlawful treatment by their employer to be significantly reduced.

This may, in turn, feed into the Court of Appeal consideration of UNISON's judicial review into tribunal fees, particularly since the High Court's refusal of the JR at first instance relied upon the absence of statistical evidence which demonstrated that the introduction of fees would lead to significantly fewer claims being pursued.

The evidence now appears conclusive.

ACAS Early Conciliation

As of May 6, 2014, all claimants are required to enter into a conciliation process prior to lodging a tribunal claim.This conciliation lasts for a month, and if it is not successful, ACAS issues a certificate confirming that the attempt to negotiate has been made.The reference number on this certificate is now a required field on the ET1 claim form, meaning that if ACAS do not provide confirmation, the claim will not be accepted by the tribunal.

The effect of a claimant opening conciliation through ACAS is to stop the clock on the limitation period for bringing the claim.The deadline of three months from the date of the act complained of (for the vast majority of) claims is therefore extended.The mechanism for this is slightly complicated:

- Once the claimant submits the request for conciliation to ACAS, the clock stops on the limitation period.
- The conciliation ends, and the clock restarts, at the earlier of:
  - the end of a month, unless both parties and ACAS believe settlement may yet be found, in which case a further 14 days may be agreed; and
  - one or both parties confirming to ACAS that they are not interested in any conciliation.
- At the end of the conciliation, if no agreement is found, the limitation clock starts running again. If there was less than a month remaining on the clock at the point at which the claimant applied to ACAS, a month is granted to the claimant to prepare and bring their claim.

ACAS's methods for pursuing conciliation appear, anecdotally, to vary slightly from caseworker to caseworker. On receipt of the form, a caseworker should call and speak to the claimant. Some caseworkers will insist on speaking directly to the claimant, while others are satisfied to speak to a representative. Some will also ask for some detail of the proposed claim. However, once this initial conversation has taken place, caseworkers appear uniformly to be content to deal with the claimant's representative.

Financial penalties for employers

From April 6, 2014, ETs have the power to issue financial penalties to unsuccessful respondent employers in the ET where aggravating features are identified. A definition of 'aggravating features' has not been issued, but it is expected to include situations where the respondent is of a substantial size and with a developed human resource function.

The amount of any penalty will be 50% of the compensation awarded to the claimant, subject to a minimum of £100 and maximum of £5,000, with a 50% reduction applying for early payment.

Some have said that the penalties (emanating from the Department of Business, Innovation and Skills controlled by the Liberal Democrat Secretary of

State Vince Cable) are an attempt to stem criticism that tribunal changes by the Coalition have been primarily anti-claimant. The cap on tribunal awards and the extension of qualifying service requirements for unfair dismissal, and of course the introduction of tribunal fees have been cited in support of this contention.

It is also the case that any tribunal time spent considering whether to apply penalties will represent time incurred for the financial benefit of the Exchequer (to whom the penalties are paid) and not the individual claimant, who may incur costs if her representative makes submissions arguing for the penalty to be applied.

However, it is expected that tribunals will be able to impose penalties even where no submissions have been made.

Increased limits

As of April 6, 2014, the following increases on compensation limits were introduced:

- the limit on a week's pay for statutory redundancy payments and unfair dismissal basic awards increases from £450 to £464.
- the maximum statutory redundancy payment and basic award for unfair dismissal increases from £13,500 to £13,920.
- the maximum compensatory award for unfair dismissal introduced in July 2013 is retained: the lower of 52 weeks' gross pay or an upper limit, which is increased from £74,200 to £76,574.
- the maximum total compensation for unfair dismissal (the aggregate of the maximum basic and compensatory awards) rises from £87,700 to £90,494.

New EU Directives covering equal treatment

Freedom of Movement Directive

Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers was adopted on April 14, 2014. The new Directive aims to ensure the better application at national level of EU citizens' right to work in another member state. It aims to remove existing obstacles to the free movement of workers, such as the lack of awareness of EU rules among public and private employers and the difficulties faced by mobile citizens to get information and assistance in the host member states. To overcome these barriers and prevent discrimination, the Directive will require member states to ensure:

- one or more bodies at national level will provide support and legal assistance to EU migrant workers with the enforcement of their rights, including their right not to be discriminated against on grounds of nationality
- easily accessible information in more than one EU language on the rights enjoyed by EU migrant workers and jobseekers.

Procurement Directive

Directive 2014/24/EU on public procurement (repealing Directive 2004/18/EC) came into force on April 17, 2014, confirming that the principle of equal treatment applies to national procurement procedures and public contracts. Article 18 of the new Directive requires for the first time that:

> *Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.*

The preamble to the Directive also states:

> *The relevant measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment (para 37).*
>
> *To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision (para 90).*

On May 16, the government stated that is it aiming to transpose the procurement directive quickly. It will launch a formal consultation on the draft implementing regulations in due course.

EU member states have up to 2 years to implement the directives in national legislation.

Draft Deregulation Bill

The Draft Deregulation Bill has now gone through the House of Commons and is making its way through the House of Lords. Particular provisions which may concern DLA members include:

1. provisions to remove the power of ETs under the EA to make general recommendations to employers who are found to have discriminated.

The Joint Committee on Human Rights in its legislative scrutiny of the Bill commented that the EHRC regards the power as useful, both for the employer to whom the recommendation is made and to the Commission itself for following up tribunal decisions; it does not consider that sufficient evidence has been gathered to make out the case for abolition. The DLA also believes the power of ETs to make wider recommendations in discrimination cases should be retained.

2. new duty on Regulators who *'must, in the exercise of the function, have regard to the desirability of promoting economic growth'.*

The government appears to intend this economic growth duty to apply to the EHRC. Concerns have been expressed this will pose a significant risk to the EHRC's independence, and therefore to its compliance with the Paris Principles and the Equal Treatment Directives as implemented by the EA. This could lead to the possibility of the EHRC's accredited 'A' status being downgraded which would put the UK in breach of its obligations under EU equality law.

Criminal Justice and Courts Bill

This Bill has now gone through the House of Commons and is making its way through the House of Lords. The Bill contains proposals in relation to JR applications including:

- requiring the court to consider the likelihood of whether there would have been a substantially different outcome for the applicant;
- third party interventions – presumption that they should be liable for the costs caused by their intervention;
- restrictions on the award of 'cost-capping' orders – they are only used when cases are considered to raise a serious issue which affects or may affect the public generally. It enables claimants to bring cases where they might otherwise be reluctant because of the risk of an adverse costs order.

In its report of April 20, 2014, the Joint Committee on Human Rights expressed concern *'that the Criminal Justice and Courts Bill will introduce a significant deterrent to interventions in judicial review cases'.* It recommended changes to the draft Bill to restore judicial discretion. It expressed the view that *'restricting the availability of costs capping orders to cases in which permission to proceed has already been granted by the court is too great a restriction and will undermine effective access to justice'*. The Committee noted that *'quicker and more cost-effective mechanisms may be possible, the legal enforceability of the public sector equality duty is crucial in ensuring the implementation of, and compliance with, equality law by public authorities, and that the ultimate legal enforceability of the duty by judicial review should therefore be retained'.*

In relation to the government's proposed reforms to JR, the Committee noted that:

> *evidence is lacking to support the reforms to judicial review proposed by the government. While restrictions on access to justice are in principle capable of justification, they must be proportionate, reasonable and based upon clear evidence as to their necessity, and the Committee makes clear that the evidential basis for the government's proposals is weak.*

The government argues that the JR system needs reforming because of a massive expansion in the number of applications. While recognising that there has been an increase, the Committee points out that:

> *this has been largely because of the predictable and foreseen increase in the number of immigration cases being pursued by way of judicial review. Such cases have been transferred from the High Court to the Upper Tribunal since November 2013 and no assessment has been made since of whether the number of judicial review cases is still increasing. The number of judicial reviews has remained remarkably steady when the increase in the number of immigration judicial reviews is disregarded. We therefore do not consider the government to have demonstrated by clear evidence that non-immigration related judicial review has 'expanded massively' in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate.*

Small Business, Enterprise and Employment Bill

The Queen's Speech on June 4th included an indication that the government would introduce legislation to *'reduce delays in employment tribunals'.* On June 24, 2014 the Small Business, Enterprise and Employment Bill was published. The Bill will, among other things, make provision about employment law and the exercise of procurement functions by certain public authorities.

Clause 136 proposes to amend the Employment Tribunals Act 1996 (ETA) in relation to financial penalties payable to the Secretary of State for failure to pay sums ordered to be paid or settlement sums; Clause 137 proposes amendments to the ETA to include provision for limiting the number of relevant postponements available to a party to proceedings, with new requirements around imposing costs for late postponement applications.

Clause 138 makes provision for extra fines for employers who don't comply with the minimum wage regulations. Similarly there are fines for employers who don't pay ET awards – but if the employer disappears, goes into liquidation or simply successfully avoids payment this will be no improvement.

Clause 139 makes it illegal for employers to insist on exclusive zero hours contracts.

Abbreviations

AC	Appeal Courts
AG	Advocate General
ACAS	Advisory, Conciliation and Arbitration Service
BIS	Department of Business, Innovation and Skills
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CPR	Civil Procedure Rules
ESA	Employment Support Allowance
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
DPA	Data Protection Act 1998
DWP	Department of Work and Pensions
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EqLR	Equality Law Reports
ERA	Employment Rights Act 1996
ET	Employment Tribunal
ET1	Employment Tribunal claim form
ETA	Employment Tribunal Act 1996
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FA	Football Association
FOI	Freedom of Information
FTT	Social Entitlement Chamber of the First Tier Tribunal
FWR	Flexible Working Regulations 2014
HHJ	His/Her Honour Justice
HL	House of Lords
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
JR	Judicial review
LGB&T	Lesbian, gay, bisexual and transgendered
LJ	Lord Justice
LLP	Legal liability partnership
MOJ	Ministry of Justice
NHS	National Health Service
PCP	Provision, criterion or practice
PSED	Public sector equality duty
PWD	Pregnant Workers Directive (92/85)
QB	Queen's Bench
QC	Queen's Counsel
RFL	Rugby Football League
SAR	Subject Access Request
SC	Supreme Court
SDA	Sex Discrimination Act 1975
WLR	Weekly Law Reports

Briefings