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Editorial *A brighter more secure future: for whom?*

Equality and human rights activists face difficult times. To maintain existing rights will be a major challenge; to strengthen rights and increase access to justice will demand even greater energy, determination and commitment.

The Conservative manifesto catalogues the challenges: scrapping the Human Rights Act and introducing a British Bill of Rights; breaking the formal link between British courts and the European Court of Human Rights; continued modernisation of the courts system and review of legal aid. In addition, there is the pledge 'to reclaim powers from Brussels' which raises questions about the impact of a change in the UK's relationship with Europe on the many equality rights we enjoy as a result of EU directives.

We do not yet know how these changes will impact on access to justice for victims of discrimination or on the hard won legislation to secure equality rights. The Lord Chancellor and Secretary of State for Justice Michael Gove MP in a recent speech identified *'two nations in our justice system…the wealthy ... and everyone else'.* The Minister's public acknowledgment of the gross inequality of our justice system must be welcomed, but, sadly, not his proposed solutions.

The DLA will continue, with the support of its members, to defend the rights of those who experience unlawful discrimination. It will in particular focus its energies on areas such as tribunal reform, support to maintain the Human Rights Act (HRA) and continued active involvement with local, national and European equality and human rights organisations recognising the importance of European-wide cooperation and joint working to combat discrimination.

In relation to tribunal reform, the DLA will focus not only on the detrimental impact of the imposition of fees, but also on the changes needed to improve the system for claimants and their representatives. In her article addressing concerns for claimants accessing justice in the employment field, Catherine Rayner highlights the immense scope for improvements in the enforcement regime at the Employment Tribunals. She sets out issues which need to be addressed in the debate about which improvements would work best and calls for creative thinking on ensuring that rights enshrined in legislation are enforceable in practice.

The DLA will maintain a watchful brief on any changes to existing equality legislation and in particular to the s149 EA public sector equality duty, which is scheduled for thorough review in 2016. In her article Louise Whitfield reviews recent public sector equality duty cases and concludes that the PSED is alive and well. She highlights that many public authorities reported to the 2013 government review that the duty was an important way to avoid inadvertent discrimination and develop policies in a positive and proactive way, and that there was widespread support for its principles. A PSED challenge can often lead to a better result or at least a better process – in contrast to the case of *Coll* which highlights the weakness of an individual litigant approach in a sex discrimination challenge.

The need for protection from discrimination for vulnerable individuals is highlighted by the cases in *Briefings*. Two successful county court challenges on the provision of goods and services are reported – the first on the grounds of sexual orientation and the second on grounds of race and ethnic origin. In *Akerman-Livingstone* the SC confirmed that the substantive right to equal treatment enjoyed by an individual with mental disabilities was protected by s15 EA and that this is different from and additional to his ECHR Article 8 rights.

This is a critical time for those concerned with the realisation of equality and human rights in the daily lives of ordinary people – the Justice Minister's 'everyone else'. Perhaps underestimating support for abolition of the HRA, the government has kicked this project into the long grass for the moment. This provides a breathing space for the DLA to collaborate with other groups making the case for fairer access to justice so that the government's attack on the HRA can be stoutly resisted.

Our equality and human rights laws and their enforcement systems are at risk, possibly as never before. There is now an urgent need to develop strategies and build alliances to ensure that there is a bright future for all, not just the privileged few.

Geraldine Scullion, Editor

Please see page 35 for list of abbreviations

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The public sector equality duty – an update on recent cases

Louise Whitfield, solicitor with Deighton Pierce Glynn, reviews recent public sector equality duty (PSED) cases where the success rate has waxed and waned as public authorities have became more familiar with their equality duties. She reflects on the key principles from the cases, the types of issues addressed, where the cases arise and the range of claims that have won and lost. She concludes that the PSED is still alive and well, although it should be relied on with caution; she highlights some interesting issues which may be challenged in the future.

Introduction

At a recent permission hearing on a PSED case, when asked by counsel whether the judge was familiar with the duty, he indicated that he was and that no judge currently sitting in the Administrative Court could fail to be familiar with it. This certainly reflects the regularity with which s149 of the Equality Act 2010 (EA) is used in cases and not only those relating to cuts to services which was the focus of many of the early successful cases back in the mid to late 2000s. The PSED's success rate in litigation (or that of its predecessor versions) has waxed and waned depending very much on the facts of each case and the steep learning curve that many public bodies faced since its first incarnation as the race equality duty in 2001. In my experience over the last couple of years, cases that would have been successful at trial a few years ago are now routinely settled pre-issue as defendants are now more inclined to realise they have not met the duty and should simply re-take the decision under challenge on a lawful basis. Whilst the ultimate outcome in this scenario may be a lawful decision reaching the same conclusion, it can often lead to a better result or at least a better process, and sometimes without the need for litigation.

A government review in 2013 did not lead to the duty being scrapped as had been feared – the review being part of the government's 'red tape challenge' – partly because many public authorities reported that it was an important way in which inadvertent discrimination could be avoided and policies developed in a positive and proactive way; there was widespread support for the principles although there continued to be problems with implementation of the duty. The PSED therefore remains an important part of anti-discrimination provisions in the UK and there have been a number of recent decisions reflecting how the courts now approach its key principles, the types of issues addressed, where the cases arise and the range of claims that have won and lost.

Key principles

There is now an easy route into the current principles which pulls together many of the decisions since the leading case of *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 seven years ago. What is more, it is a decision by the Court of Appeal, so provides a happy shortcut in one – albeit fairly lengthy – paragraph. The factual background to the claim also provides an object lesson in cases that can win or lose on the judge's factual findings as to due regard, as explained below.

In *R (Bracking & Others) v Secretary of State for Work & Pensions* [2013] EWCA Civ 1345, (see Briefing 702) a number of severely disabled people challenged the government's decision to close the Independent Living Fund (ILF). A fairly shoddy consultation process was held to be lawful but the claimants also sought a quashing order on the basis that the decision-maker (the Minister for Disabled People no less) had failed to have due regard to the need to eliminate discrimination and to advance equality of opportunity for disabled people.

Giving judgment in November 2013, McComb LJ set out s149 EA pointing out that there was little dispute between the parties as to the principles; he then listed them before describing them as 'uncontroversial' (paragraphs 24-27).

His exposition and consideration of the PSED imposed on public authorities is set out overleaf.

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S149 Public sector equality duty

In *R (Bracking & Others) v SSWP* McComb LJ set out and considered the PSED imposed on public authorities by s149 EA:

S149 Public sector equality duty

1) A public authority must, in the exercise of its functions, have due regard to the need to –

a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

a) tackle prejudice, and

b) promote understanding.

6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

7) The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

McComb LJ summarised the relevant principles as follows:

1. Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation (*R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274].
2. An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision-maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB)
3. The relevant duty is upon the minister or other decision-maker personally. What matters is what he or she took into account and what he or she knew. Thus, the minister or decision-maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27]
4. A minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rearguard action', following a concluded decision: *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
5. These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
   a. The public authority decision-maker must be aware of the duty to have 'due regard' to the relevant matters;
   b. The duty must be fulfilled before and at the time when a particular policy is being considered;
   c. The duty must be *'exercised in substance, with rigour, and with an open mind'*. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
   d. The duty is non-delegable; and
   e. Is a continuing one.
   f. It is good practice for a decision-maker to keep records demonstrating consideration of the duty.
6. General regard to issues of equality is not the same as having specific regard, by way of conscious approach

to the statutory criteria; *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved by the CA in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

7. Officials reporting to or advising ministers/other public authority decision-makers, on matters material to the discharge of the duty, must not merely tell the minister/decision-maker what he/she wants to hear but they have to be *'rigorous in both enquiring and reporting to them'*: *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79].

McComb LJ recalled passages from the judgment in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

> *(i) Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision-maker to decide how much weight should be given to the various factors informing the decision. [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision-maker. In short, the decision-maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.*
>
> *(ii) It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. … the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.*

McComb LJ concluded *'It is the application of these uncontroversial principles (relating to consultation and the PSED) that is in issue in this case.'* [27]

The leading case on the PSED

The principles are indeed uncontroversial and McComb LJ drew on a number of cases going back almost ten years. The most useful and significant points in terms of giving the duty more clout are the last three:

- firstly that general regard to equality issues is not enough, the decision-maker must have specific regard, by way of a conscious approach to the statutory criteria;
- secondly, officials must not simply tell decision-makers what they want to hear; and
- thirdly, there is a duty of sufficient enquiry, so that if the material necessary to have due regard is not available, it should be acquired – and in some instances, this may even mean more consultation.

Thus the ILF claimants won on the basis that (a) having a job title with the word 'disabled' in it did not equate with having a specific regard for and conscious approach to the statutory criteria; that (b) if officials want to put a positive spin on devastating cuts they cannot complain if what they say is taken at face value (i.e. if they were being too optimistic they were not giving the decision-maker the right information to have due regard); and (c) if the information available did not give the proper flavour of the impact of the decision to close the fund, the Department of Work and Pensions needed to go and get it. Unfortunately they did and re-took the decision, closed the ILF and the second judicial review was lost – see below.

Thus *Bracking* is now the leading case on the PSED and is generally cited in both the Equality and Human Rights Commission's guidance (for example the Technical Guidance updated in August 2014) and reported decisions. It gives a neat summary of the law and clear examples of how public authorities still get it wrong if they either fail to focus on the three specific statutory needs (eliminating discrimination, advancing equality of opportunity and fostering good relations), or

fail to get the right information about the impact of the decision or policy.

Types of issues addressed in recent PSED cases

Existing policies

There have also been other developments raising useful points to extend the reach of the PSED in a range of areas. Several cases looked at existing policies and whether their introduction or ongoing development had complied with the PSED.

It became clear in the case of *R (Cushnie) v Secretary of State for Health* [2014] EWHC 3626 (Admin) relating to healthcare provision for migrants, that even if regulations have been in place for many years, they could be challenged by a claimant at the point at which the regulations were applied to them. This case also has the amusing excuse from the defendant that they did not meet the equality duty in respect of disabled people because no one told them to during the consultation exercise (they had only considered race). Mr Justice Singh commented:

> *It was submitted on behalf of the Secretary of State that he was not to blame for the omission to refer expressly to the protected characteristic of disability, since no one drew this to his attention despite the opportunity to do so in the consultation exercise which preceded the making of the Regulations. However, in my judgment, this is to miss the point. There is no question of casting blame on anyone. The question is whether the duty imposed by Parliament in section 149 of the Equality Act was complied with or not. It is also important to recall that Parliament has imposed that duty on the relevant public authority: a failure to comply with it cannot be excused by saying that others did not draw the decision-maker's attention to the relevant protected characteristic and should have done so.*

Similar issues came up in the case of *R (Fakih) v Secretary of State for the Home Department* IJR [2014] UKUT 513 (IAC) which was again a claim brought on behalf of a disabled person excluded from access to services as a result of their immigration status, their leave to remain in the UK having been granted on the basis of '*no recourse to public funds*'. Again these were rules made years ago but the claimant successfully challenged them at the point they impacted on their access to services. Again the defendant had failed to consider the adverse impact on disabled people of such a restriction, having only considered the impact on race equality when attempting to meet the PSED. The Upper Tribunal found the Secretary of State to be in breach of the duty.

Continuing nature of the duty

The continuing nature of the duty has rarely been challenged, even though this is one of the well-established principles, and although the claim failed, there were useful findings on this aspect of the duty in *R (BAPIO) v (1) Royal College of General Practitioners (2) General Medical Council* [2014] EWHC 1416 (Admin). This was a case about whether the defendants were meeting the PSED in the context of clinical skills assessments for doctors; BME candidates were far less likely to pass than white candidates, and the claimants sought to argue that steps taken to date to investigate and address this apparent discrimination were ineffective. Mr Justice Mitting held that the s149 duty was to have due regard in the exercise of functions whether or not a change in the manner in which the functions were exercised was contemplated and that the defendant public bodies could only discharge the duty by conscientiously applying their minds to the statutory needs. The court held that a formal equality impact assessment was not necessary and that obtaining expert reports might suffice, but in the case of a long-standing problem that might not be enough; to identify the need and then do nothing about it would not be having due regard to meeting that need. Unfortunately the judge found that the defendants were doing enough at that point in time, but it is a useful case to rely on in terms of a defendant who is not specifically planning to change how they exercise a function but has been alerted to a significant problem for those with protected characteristics and then fails to do anything about it.

Weight and extent of PSED is highly fact-sensitive

To set the above in context, it is of course important to remember the short point made by the Supreme Court in the conjoined housing appeals of *Hotak & Kanu v London Borough of Southwark* [2015] UKSC 30 in May 2015: that the weight and extent of the equality duty were highly fact-sensitive and dependent on individual judgment. Undoubtedly, the judgment will make decisions where due regard has not been given to the equality duty much easier to challenge. However, this is nothing new and reflects the fact that the principles of the PSED have changed little over the years and could be so readily re-stated in *Bracking* and described as uncontroversial: the decided cases rarely throw up new legal principles and are invariably looking at whether the decision-maker had due regard or not on the facts of the case. Mr Hotak and Mr Kanu's cases were about the assessment of whether they, as homeless applicants, were

'vulnerable' for the purposes of the Housing Act 1996; the court held that a reviewing officer making that assessment had to focus on whether they had a disability, the extent of it, its likely effect and whether they were vulnerable as a result. Thus the SC did not decide, nor need, to break new ground about whether local authorities should meet the PSED in deciding homelessness applications for disabled people; they clearly should but how much weight they placed on it and how they met it was going to depend on the individual case and the council's judgment.

Where the cases arise

Many of the recent PSED cases have, unsurprisingly, been in the context of funding cuts. It is well recognised that those with protected characteristics are the most likely to be adversely affected by changes to benefits and reductions in council services. Unfortunately as with the second ILF challenge explained below, a number of important cases using the PSED in the context of benefits cuts have been unsuccessful, although some are under appeal.

R (A) v Secretary of State for Work & Pensions [2015] EWHC 159 (Admin) was about the impact of the bedroom tax on women in council accommodation adapted under the sanctuary scheme after they had fled domestic violence. The court described the scheme as a major government policy designed to address a deficit and held that whilst in some respects it might have been beneficial to have regard to all the effects of that policy, the requirement was 'due' regard, and that qualification had to be informed by the nature of the decision; the claim failed. However, the claimant's application for permission to appeal is due to be heard later this month.

The consultation on changes from disability living allowance to personal independence payments was under attack in *R (Sumpter) v Secretary of State for Work & Pensions* [2014] EWHC 2434 (Admin) but again the court did not accept there was a breach of the duty in the circumstances. According to Judge Hickinbottom, the entire exercise concerned disabled people and, on any consideration of the history, it was simply not arguable that the secretary of state was not at all relevant times fully aware of the impact of the proposed reforms on disabled people. This does not reflect the CA's approach in *Bracking* as outlined above, and an appeal is due to be heard this month.

The bedroom tax case, *R (MA & Others) v Secretary of State for Work & Pensions* [2014] EWCA Civ 13, (see Briefing 690) heard in the CA in early 2014 where the claimants were disabled people challenging the introduction of the policy on the basis of discrimination and a breach of the PSED, are pursuing an appeal but not on the PSED point. In this case the CA decided that it was obvious that the secretary of state had been aware of the serious impact the bedroom criteria would have on a disabled person and had devoted a great deal of time to seeking a solution; thus there was no breach. The appeal being pursued on the discrimination arguments will be heard by the SC in March 2016.

What wins and what doesn't

There are fewer easy wins now that defendant public bodies are more adept at meeting the duty – or possibly are getting better advice about which cases to fight and which to concede. As outlined above, fewer PSED cases are going to trial as they routinely settle pre-issue, once the defendant public body has received a well-drafted letter before claim pointing out the error of their ways.

However, there are still examples of cases where a public body will get it wrong and fight on. When Waltham Forest Council revoked a soup kitchen's licence and offered alternative premises which were unsuitable, they tried to meet the duty but did not go far enough. In *Blake & Others v Waltham Forest London Borough Council*, the court held that whilst the defendant had identified the group affected and that its decision would have an adverse impact on them, the council failed to engage with mitigating measures to address that impact, by not engaging with the very real prospect that the soup kitchen would close altogether. The PSED was breached because Waltham Forest Borough Council had not considered and weighed in the balance the consequent risk of the kitchen having to close and had not assessed the impact of closure or addressed steps to mitigate the impact.

In *Griffiths v Secretary of State for Justice* [2013] EHWC 4077 (see Briefing 703 and 750 in this edition) the lack of enough approved premises to accommodate women released from prison on licence was challenged on the basis of direct and indirect discrimination and a breach of the PSED at the every end of 2013. The discrimination arguments lost, but the PSED claim succeeded as it was apparent that the secretary of state had done nothing to meet the duty since 2008, some five years earlier, despite the continuing nature of the duty and the obvious problems facing women released from prison on licence who would be accommodated many miles from their homes and families, with detrimental effects on their rehabilitation and

745 reintegration into the community. The court held that the defendant needed to address those possible impacts, assessing whether there was a disadvantage, how significant it was and what steps might be taken to mitigate it. In the context of advancing equality of opportunity, that meant taking the opportunity to see whether more might be done for women, having regard to their particular circumstances. Nothing even approaching that had been done. The secretary of state thus needed to undertake the analysis necessary to fulfil his equality duty under the EA.

The second ILF challenge, *R (Pepper & Aspinall) v SSWP* [2014] EWHC 4143 (Admin) was one of the cases that lost. Following the CA decision in November 2013, the government moved quickly to take a fresh decision in March 2014, not with new evidence or following further consultation but by providing the new minister for disabled people with a more realistic view of what Lord Justice Elias had described as *'the inevitable and considerable adverse effect which the closure of the fund will have, particularly on those who will as a consequence lose the ability to live independently'*. The claimants argued that the information was still inadequate, but the judge found otherwise. The court held that even though the minister could have found out more, he had enough for the purposes of the duty in the circumstances. Thus if a public body can do enough to show they have properly considered a devastating outcome, they are off the hook, regardless of how disastrous that outcome is for large numbers of people with protected characteristics.

Conclusion

The PSED is therefore still alive and well, although it should be relied on with caution. The interesting cases to consider in future will be those where there is no fresh decision or policy to challenge, but a discriminatory status quo that a public body is doing nothing about despite being aware of the adverse impact on those with protected characteristics. This has been hinted at more than once (as illustrated by at least two of the cases above), and as the PSED gets older, there will be less and less scope for public bodies to do nothing in the face of a challenge.

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Tribunal fees fuel growing concerns over access to justice

Catherine Rayner, barrister with 7 Bedford Row chambers and chair of the Discrimination Law Association's executive committee, examines the landscape of post-election employment law and sets out concerns for claimants accessing justice in relation to employment and equality. She explores what issues need to be addressed when considering alternatives to the current system and enforcement mechanisms. She argues that the growth in discrimination legislation over the last 20 years requires equally robust enforcement mechanisms in order for the development of rights to have meaningful impact.

Starting point

The apocryphal answer to the traveller's request for directions is *'I would not start from here.'* Employment lawyers could be forgiven for giving a similar answer, when asked, how best to deal with claims of employment and equality. In the landscape of post-election employment law, the starting point is far from ideal.

Just for starters, concerns from advisers and practitioners of discrimination law that fees in the tribunal are having a serious impact on access to justice are largely borne out. The most recent statistics from HM Courts and Tribunal Service for the first quarter to June 2015 show an extraordinary reduction in the number of clams being filed at employment tribunals, with the number of single claims received being 25% fewer than the same period for January to March 2014. Overall, there were 16,456 single claims received in 2014/15 representing a decrease of 52% compared to the numbers received in 2013/14. This decrease reflects the timing of the introduction of fees in July 2013.

Charging for justice

Whilst some multiple claims, notably in holiday pay cases and equal pay, have skewed figures to some extent, the only conclusion is that the introduction of fees in the ET has led to a huge and sustained reduction in the number of claimants bringing complaints before the tribunal. It is unlikely that the

reduction of claims is due to any real changes in the behaviour of employers or a reduction in discriminatory behaviour in the workplace. There are really only two possible explanations. One is that fees have weeded out unworthy or unwinnable or vexatious claims as argued by business, and notably the CBI; the other is that claimants who have suffered real potential injustice in the work place are being deterred from pursuing claims because of fees.

The evidence has never supported the arguments that there were floods of vexatious claims before the ETs, and the view of most practitioners, advisors and academics is that it is the cost of issuing a claim that has made employment rights unenforceable for a huge number of workers.

Despite this background, the government has given no indication of any immediate review or any inclination to remove or reform the levels of fees. UNISON's legal challenges continue to underline the strong moral case for removing fees, and the figures indicate that access to justice is being denied; but Shailesh Vara MP, the new Ministry of Justice (MOJ) Parliamentary Under-Secretary of State, Minister for Courts and Tribunals, Legal Aid, Administrative Justice and Legal Services was clear in his support for their introduction. Defending the introduction of fees, he said: '*It is not fair for the taxpayer to foot the £74m bill for people to escalate workplace disputes to a tribunal*'. Whether he considers it fair to continue to place the entire cost of issue on the claimant, the alleged victim, and not the alleged perpetrator of the unlawful acts when all the evidence suggests it acts as a disincentive to claims of valid injustice, remains to be seen. The fact that the people using the tribunals are also taxpayers is not addressed.

An alternative system?

Whilst this was a topic of debate during the election campaign in some quarters, and despite valiant efforts of practitioners and advisors and trade unions to challenge the fees, both through evidence based argument, media stories, and the courts, post-election we can assume that ET fees will remain a fixture. The reality is that charging for justice is the new norm placing centre stage the question of whether there may not be a better, or at least more affordable way, for workers and dismissed workers to enforce their legal rights not to be discriminated against.

Whilst many practitioners agree that the ET system is a far from perfect mechanism for determining issues of discrimination, it is a system which does deliver an unbiased judgment of events. If it is slow and at times overly legalistic, that is because the rights which are being challenged and enforced are complex and the issues often intellectually and philosophically difficult.

The fact that the enforcement regime remains unwieldy and ineffective, and that the successful claimant has only an even chance of being paid their compensation without further action, is a disgrace and an ongoing cause of concern for all users, and the delays and listings practise in some areas are unhelpful and expensive to say the least. The real question is what are the alternatives? Is there a better way of resolving fairly the issues which currently come before the tribunals?

With no prospect of a review of fees, and a focus from central government, whether it is MOJ or the Department for Business, Innovation and Skills, on cuts and cost savings, some creative thinking will be required. Some suggestions are that all claims which deal with equalities issue and discrimination should be dealt with by one specialist court. This could be achieved either by extending the jurisdiction of the ETs to handle non-employment based discrimination, or by moving all employment claims involving discrimination to an alternative forum such as an equality and employment court.

Issues facing discrimination claimants

Of course to discuss improvements some agreement will be needed on what particular issues face those who claim discrimination. What are the problems which would be addressed by any alternative dispute resolution mechanism?

One issue is complexity of cases. As well as being reflected in the higher issue fee, the difficulty of proving discrimination is reflected in the burden of proof provisions in the Equality Act 2010. The requirement for perpetrators to provide a full explanation for their adverse treatment upon certain facts being proved is vital for claimants, and with proper evidence has proved a really useful and successful measure. However, the removal of the questionnaire procedure has created difficulty in extracting the evidence such as information about equalities monitoring, or workforce profiles. Any future review should consider this issue with care. How can claimants gain the information they need at an early stage to assist in the assessment of whether a claim can be proved or not?

Claimants and their advisers would like to see far greater consideration being given to the impact on claimant health of not only the discrimination, but the process for challenge as well. One of the most distressing results of discrimination can be the impact on an individual's physical and mental health, as recognised by the first legislative drafters by the inclusion of the unique aspect of compensation through injury to feeling awards. These awards aim to compensate for the horror and distress experienced by many claimants of not only being discriminated against, but also of having that discrimination denied, and of being vilified and marginalised because of the making of a complaint.

Whilst injury to feeling awards can and do include awards for injury to health and can include an element to compensate for the manner of litigation, there is currently a tension between the personal injury claim in the county court and any discrimination claim in the ET. Claimants have to choose their forum with care, and the discrimination element can be left for months whilst personal injury claims are dealt with. One court dealing with all injuries arising from discrimination could end this difficulty.

Inquisitorial approach

The practical result of damage to health is also a key issue. Many claimants feel that they are disadvantaged in their ability to represent themselves before an ET because of the damage to their health. The ET remains adversarial in nature and requires forthright cross examination, and challenge of truth. This can be devastating for a vulnerable claimant, and shocking even to the most robust. Some have suggested that an inquisitorial approach would be preferable, giving the judge a different role and power to demand documents and evidence. With increasing number of claimant litigants-in-person it may be time for the ET to give guidance on this in any event.

Enforcing awards

One matter that requires urgent consideration, and which the government has indicated it may be prepared to look at, is that of enforcement of awards. This is an issue for almost half of the successful claimants in the ET. Government research shows that only 49% of all successful claimants were paid in full, and 16% in part, without having to take further enforcement action, and that less than half of the successful claimants who did not receive their compensation took any enforcement action. The research suggests that this is largely because of lack of awareness of the enforcement process.

Specialist equality and employment court

One suggestion being mooted is for a court which specialises only in equality and employment matters. A recent Employment Law Association survey of its members reports that whilst 80% of respondents felt that the ET had been effective before the introduction of fees, 64% now considered that a new court covering all issues of equality and employment would be an improvement.

There are however no present proposals for any reforms or reviews although there is much discussion of their desirability. At present it appears that the main direction of travel is likely to be cost cutting and saving, rather than innovation, unless innovation is also more cost effective. This debate is set to continue, and DLA members have an early opportunity to hear the views from the top, as we look forward to welcoming Brian Doyle President of the Employment Tribunals (England and Wales) to speak at our annual conference in October.

The growth in legislation dealing with discrimination over the last 20 years has been extraordinary, and a real achievement of practitioners, campaigners and politicians; but one consequence of comprehensive rights across 10 protected characteristics, in work, service provision, education, housing and transport is an expectation of proper enforcement mechanisms for aggrieved individuals. If equality of access to the opportunities and benefits of a democratic society is a cornerstone of modern democracy, then the battle for the next 20 years may well be to ensure that those rights are enforceable. This will require some creative thinking across the board.

Substantive right to equal treatment protected by the EA

Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited)
[2015] UKSC 15, March 11, 2015

Introduction

A housing case, in the form of *Malcolm*[1] (see Briefing 497), was the undoing of the disability related discrimination provisions in the Disability Discrimination Act 1995 at the House of Lords, leading to a significant weakening of the provisions. Ultimately, however, it did lead to the much more robust s15 of the Equality Act 2010 (EA). In *Akerman-Livingstone*, the Supreme Court once again considered a housing case and disability, also involving someone with mental health issues and the concept of discrimination based on disability going beyond direct discrimination – s15. Fortunately, it did not go the way of *Malcolm*.

The court considered in particular the test of justification for discrimination under s15 EA as compared with justification for Article 8 of the European Convention on Human Rights (ECHR).

Facts

Mr Akerman-Livingstone (AL) has chronic and severe mental ill health; it was not disputed that he met the definition of disability under s6 Equality Act 2010 (EA). AL had been placed in housing association accommodation after becoming homeless in 2010. The local authority had a duty to provide him with secure accommodation under the Housing Act 1996 but that duty would cease if he refused an offer of suitable accommodation elsewhere. AL had refused numerous attempts to find him permanent occupation and so he was notified in April 2011 that the duty had been discharged and possession of his housing association flat was sought.

Proceedings

AL's defence was that the possession order would amount to disability discrimination and it would breach his rights under Article 8 ECHR; his defence was supported by medical evidence of his vulnerability and need for intensive therapy. The Bristol County Court at first instance held that neither defence was arguable; that the same proportionality assessment applied to the defence under s15 EA as applied to Article 8 and that AL's defence could be summarily disposed of.

AL was granted permission to appeal on whether the discrimination defence should be treated in the same way as an Article 8 defence. Cranston J dismissed that appeal on the ground that the usual structured approach to proportionality issues in discrimination claims should not apply because of the context, which was the homelessness duties of local authorities. The same reasons, given in *Manchester City Council v Pinnock* [2010] UKSC 45 and *Hounslow London Borough Council v Powell* [2011] UKSC 8, for rejecting the structured approach to an Article 8 defence applied to a discrimination defence.

A further appeal to the CA was also dismissed;[2] the CA held that the approach to proportionality was the same under the EA as it was under Article 8 (para 27) and the weight to be given to the interests of a social landlord was no different (para 29). For a tenant to succeed in a disability discrimination case *'he will have to show some considerable hardship which he cannot fairly be asked to bear'* (para 37). There was no difference between a social landlord acting on the instructions of a local housing authority and the local housing authority itself (para 46).

Supreme Court

Though AL was unsuccessful on his appeal in respect of the facts, he was successful in respect of his arguments as to the approach to be taken to the EA defence.

In dismissing the appeal the SC stated that a complaint of disability discrimination under s15 EA in response to an eviction raises two key questions: (i) whether the eviction is *'because of something arising in consequence of'* the complainant's disability; and (ii) whether the landlord can show that the eviction is a proportionate means of achieving a legitimate aim.

A court considering whether an eviction is proportionate when a defence under Article 8 is raised can assume that a possession order would meet the legitimate aims of vindicating a local authority's property

1. *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43

2. See [2014] EWCA Civ 1081, [2014] 1 WLR 3980

747 rights and of enabling the authority to comply with its statutory duties in the allocation and management of the housing stock available to it.

However, the substantive right to equal treatment protected by the EA is different from and extra to the Article 8 right: it applies to private as well as public landlords; it prohibits discriminatory treatment, for example, by evicting a black person where a white person would not be evicted; and it grants additional rights to disabled people to reasonable adjustments to meet their particular needs.

UN Convention on the Rights of Persons with Disabilities

This is consistent with the obligations which the UK has now undertaken under the UN Convention on the Rights of Persons with Disabilities (UNCRPD). This defines discrimination on the basis of disability to include the *'denial of reasonable accommodation'* (Article 2). State parties are required to prohibit all discrimination on the basis of disability, and also *'In order to promote equality and eliminate discrimination, [to] take all appropriate steps to ensure that reasonable accommodation is provided'* (Article 5(2) and (3)). By 'reasonable accommodation' is meant adjustment to meet the particular needs of a disabled person.

It cannot be taken for granted that the aim of vindicating the landlord's property rights will almost invariably make an eviction proportionate: the protection afforded by s35(1)(b) EA is plainly stronger than that given by Article 8 [31, 55-58]. The burden will be on the landlord to show that there were no less drastic means available and that the effect on the occupier was outweighed by the advantages [34]. Summary disposal may still be appropriate, but not in cases where a claim is genuinely disputed on grounds that appear to be substantial, where disclosure or expert evidence might be required [36, 60].

In AL's case, the judge misdirected himself and adopted the wrong approach. He should have undertaken the proportionality assessment in relation to each defence, and he wrongly regarded this exercise as the same for the discrimination defence as for the Article 8 defence.

The SC stated however that there was no point in allowing the appeal and remitting it to the county court. The notice to quit that had since been served by the freeholder of the building meant that the respondent was in breach of its legal obligations and left the freeholder unable to proceed with the proposed sale.

Comment

The case is important not only for housing practitioners, who will need to consider whether their client has a s15 defence (and who should also consider the reasonable adjustment provisions) but also because it emphasises again, the different approach to be taken to disability discrimination provisions. This is particularly important in light of some of the more problematic employment decisions (e.g. *Griffiths v Secretary of State for Work and Pensions* UKEAT/0372/13/JOJ) which do not appear to have taken into account this difference of approach. It also highlights the importance of the UNCRPD to litigation.

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748 Briefing 748

Benefit cap – indirect sex discrimination – best interests of the child – justifying discrimination – applicability of child rights

R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions [2015] UKSC 16; March 18, 2015

In the latest judgment dealing with challenges to welfare reforms on the grounds of discrimination, it is clear that the Supreme Court justices are far from united on the issue. By the slimmest of majorities, in a case in which the dissenting judgments are particularly compelling, the SC dismissed the appellants' arguments that the benefit cap's indirect discrimination against lone mothers could not be justified.[1]

Facts

The appellants in the case are a non-working lone mother and youngest child from each of two families

affected by the introduction of the 'benefit cap' under the Welfare Reform Act 2012 as implemented in accordance with the Benefit Cap (Housing Benefit) Regulations 2012 (the Regulations). The cap meant that the mothers were entitled to lower benefit payments than before with significant detrimental knock-on impacts on the families' circumstances.

Divisional Court

In November 2013, the DC considered and rejected arguments that challenged the legality of the Regulations implementing the cap. Specifically, among other things, while the cap indirectly discriminated against women as the majority of those affected, the DC did not accept that it was *'manifestly unfair or disproportionate'* and so accepted that this could be justified.

Court of Appeal

The appellants argued that the Regulations breached their rights under Article 1 of the First Protocol (A1P1) and Article 8 read with Article 14 of the European Convention on Human Rights (ECHR) because their rights as women not to be subjected to discrimination in respect of their possessions (benefits) and family life had been infringed. In February 2014, the appellants' appeal to the CA was unanimously dismissed – the CA agreeing with the DC that the cap '*plainly does have a reasonable foundation*'.

Supreme Court

On further appeal, the appellants were again unsuccessful but by the narrowest of margins, in a 3-2 majority. The five justices issued five separate judgments. The SC justices broadly agreed that:

- The case that the cap has a discriminatory effect on victims of domestic violence had not been made out and/or added nothing further to the analysis.
- A1P1 ECHR applies and the government must administer benefits in a manner which does not contravene the right to non-discrimination under Article 14 – these rights being protected in domestic law by virtue of the Human Rights Act 1998.
- The cap has a discriminatory impact upon women, who are the majority of those affected and so it must be justified as a proportionate means of achieving a legitimate aim.
- In introducing the cap, the government was pursuing legitimate aims – at the very least the aim of discouraging benefit dependence and encouraging work (some justices also considered it legitimate to want to reduce welfare spending).

The key areas of disagreement for the SC related to (i) how to determine whether the cap was a proportionate means of achieving the government's legitimate aims and (ii) the conclusion to be drawn from this consideration. It is noteworthy that much of the discussion related to the applicability of Article 3(1) of the UN Convention on the Rights of the Child (UNCRC) and, in particular, its relevance to the consideration of justification under the ECHR.

Relevance of Article 3(1) of the UNCRC

Article 3(1) of the UNCRC provides that '*in all actions concerning children…the best interests of the child shall be a primary consideration*'.

The majority of justices held that the UNCRC was not directly enforceable in its own right in relation to the matter in question. Lord Reed stated that it was not appropriate for the court to decide whether the executive had correctly understood an unincorporated treaty provision.

Lords Hughes and Carnworth took a different approach. Lord Hughes stated that, in any event, he found no breach of Article 3(1). Lord Carnworth set out his view that, if Article 3(1) were directly applicable law, the government's introduction of the cap would have breached the provision. However, it was not so applicable so he could only *'hope'* that the government would address his Article 3(1) findings when reviewing the cap scheme.

Lord Kerr disagreed with the majority and considered that Article 3(1) was directly enforceable and, as primacy had not been given to the rights of children when introducing the measures, it had been breached.

The SC unanimously held that ECHR rights can be interpreted in light of international treaties including the UNCRC where those treaties are relevant. The three majority justices held that, as the impact of the cap on single fathers who care for children was the same as that on single mothers who do the same, the conclusion that the cap is incompatible with the UNCRC would have no bearing on whether the cap could be justified under Article 14 ECHR. Lord Hughes stated that the case law of the European Court of Human Rights on the application of international treaties, including *Demir v Turkey* (2008) 48 EHRR 1272, did not mean that *'the UNCRC becomes relevant to every ECHR question which arises, simply because children are as a matter of fact affected…'*

Lord Carnworth felt that *X v Austria* (2013) 57

748 EHRR 405 and *Burnip v Birmingham City Council* [2012] EWCA Civ 629 (see Briefing 655) demonstrated that the UNCRC can be a significant consideration in Article 14 cases, but that it was not connected to the consideration on the present facts.

Lady Hale and Lord Kerr disagreed. Lady Hale, agreeing with an approach Maurice Kay LJ had endorsed in *Burnip*, held that the SC's approach to both discrimination and justification may be illuminated by reference to international treaties to which the UK is a party, including the UNCRC.

Justification of discrimination

In dismissing the appeal, Lord Reed stated that certain matters *'are by their nature more suitable for determination by government or parliament than by the courts'* and social and economic policy was one such area. He noted the level of consideration given to the issues by government and parliament in introducing the cap and that no parties had suggested an alternative option *'which would have avoided the differential impact without compromising the achievement of the government's legitimate aims'*. In so doing, Lord Reed applied a test of *'manifestly without reasonable foundation'* to determine whether the cap could be justified.

Lady Hale, with whom Lord Kerr concurred, took the view that *'whatever the margin of appreciation'* that applied in a given case –

> *the Strasbourg court would look with particular care at the justification put forward for any measure which places the UK in breach of its international obligations under another treaty to which we are a party.*

Further, *X v Austria* 'clearly' indicates that the best interests of the child/children affected are to be a primary consideration when determining justification under Article 14. It could not be in the best interests of the children affected by the cap to deprive them of the means of having adequate food, clothing, warmth and housing and so the appeal should be allowed.

Comment

It is concerning that a measure, which a majority of the SC has found to fall short of the UK's obligations under Article 3(1) of the UNCRC, remains lawfully in force, continuing to affect the best interests of some socio-economically marginalised children on the basis solely of the particular circumstances of their parents. As a human rights practitioner, the majority's analysis of the interplay between the UNCRC and the discrimination justification under Article 14 and its failure to adopt the compelling approach of Lady Hale on this matter is particularly disappointing. However, the narrow split of the SC on this issue will no doubt leave practitioners looking at other ways to push the door open.

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1. All commentary is the author's own and cannot be taken to be the views of the Equal Rights Trust.

749 Briefing 749

Shielding the decision-maker

CLFIS (UK) Ltd v Dr Mary Reynolds OBE [2015] EWCA Civ 439; April 30, 2015

Facts

At the time her position was terminated Dr Reynolds (Dr R) was aged 73 and described as *'the doyenne of medical underwriting in the insurance business in the UK'*. She had worked for Canada Life for 42 years, the first 24 as an employee, culminating in her role as its Chief Medical Officer (CMO), and latterly under a consultancy agreement with CLFIS(UK) Ltd, a company in the Canada Life Group. However, her methods of working were not seen as ideal: in particular she worked remotely, had not attended the office for at least 5 years, with limited input into staff training and development. Nor did she communicate by e-mail or give written advice; she lacked IT skills: her preference was to dictate advice over the phone.

The UK General Manager, Mr Gilmour (G), decided to terminate her consultancy agreement. He had understood deficiencies seen in her performance meant she was not delivering the CMO service the group needed and could no longer be lead CMO. Although no

recommendation to end her services was put to him directly, he formed the view this was necessary from a presentation given by two senior members of staff, M and N. Following the presentation, G had discussions with M, N and with the Executive Director in charge of human resources. Those discussions made it clear that ideally, given the position, it would be preferable if there could be a complete change.

Instead of tackling the difficulty head on, G decided there was no obligation to give Dr R the chance to improve as she was self-employed. He also believed she would not have changed and would have filibustered. One factor in his belief, which the tribunal accepted was genuine, was his belief that Dr R was the sole carer for her disabled sister and so would not be able to attend the Bristol office. To try to shuffle-off some of the blame, he told Dr R, untruthfully, his decision was because of pressure from the Financial Services Authority to provide for 'succession planning'.

Employment Tribunal

The ET dismissed Dr R's claim that the termination of her consultancy agreement was direct age discrimination. The ET heard evidence from G. As M was ill and unable to attend, his witness statement was read. N had not been called. The tribunal was satisfied the burden of proof had shifted to Canada Life to show a non-discriminatory explanation for its decision. It pointed to the high regard in which Dr R's work had been held; the *'covert and underhand'* way G had dealt with the termination of her contract; and to the references G made to her age and to succession planning. Additionally, the ET was concerned about the possibility that not engaging with her on the need for change showed a stereotypical assumption that, as an older person, she would be unable to adapt.

The ET found the decision to terminate was taken solely by G; the others were not parties to the decision. It accepted Canada Life's explanation that it had been dissatisfied with Dr R's performance and did not believe she was capable of change. The tribunal found G had made no assumptions about Dr R: his view of her capacity to change was based on his knowledge of her. The tribunal accepted that was a genuine view and had nothing to do with her age.

Employment Appeal Tribunal

Mr Justice Singh held that the ET had been wrong to focus only on G and disregard the involvement of the other individuals. He held that an act, not in itself discriminatory, could become so by discriminatory motivation: where a prohibited ground had a significant influence on the outcome, it might be said that discrimination had been made out, even if the person making the actual decision had not acted for that reason. As Canada Life had to show the dismissal was in no sense whatsoever on the ground of age, it was necessary for the tribunal to go on to consider the mental processes of others in the company whose views had had a significant influence on the decision to terminate the claimant's appointment.

Court of Appeal

Canada Life appealed. The CA found the ET's finding of fact that G had taken the decision on his own was *'unassailable'*. It also found that Dr R had not relied on the motivation of others at the ET, so could not do so on appeal. It restored the ET's decision.

Giving the CA judgment, Underhill LJ observed that had the decision been made jointly, the tribunal would have had to be concerned with the motivation of all those responsible *'since a discriminatory motivation on the part of any of them would be sufficient to taint the decision'.* However, supplying tainted information or opinions then used by a decision-maker does not turn the others into parties to that decision: there was no error in considering only the decision-maker's motivation and the EAT was wrong to allow the appeal on that basis. The composite approach to deal with 'tainted information' was *'unacceptable in principle'*: it would be *'quite unjust'* for a decision-maker to be liable to a claimant where he personally was innocent of any discriminatory motivation.

The CA held acts had to be considered separately: liability can attach to an employer only where an individual employee or agent for whose act it is responsible has done an act which satisfies the definition of discrimination. The individual employee who did the act complained of must have been motivated by the protected characteristic (here age). Someone else's motivation could not render the act in question discriminatory. Furthermore, the fact there was a *prima facie* case that G was influenced by Dr R's age could not in itself mean there was a *prima facie* case that anyone else was.

The correct approach in a 'tainted information' case was to treat the conduct of the person supplying the information as a separate act. Loss could flow from that act to the dismissal, provided dismissal was not too remote, so losses caused by the dismissal could be claimed.

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The CA noted there was a difference between claims of discrimination and of unfair dismissal: even if discriminatory reasoning does not figure in a joint decision, if earlier stages in the process had involved manipulation or tainting because of inadmissible motivation, in unfair dismissal cases, that malign motivation could at the later dismissal stage be attributed to the employer, see *Co-operative Group v Baddeley* [2014] EWCA Civ 658.

Implications for practitioners

- An employer can only be liable if it is responsible for the act of an employee or agent who had personally done a discriminatory act;
- It is the decision-maker's own reasons for doing the act complained of that count;
- Unknowingly being provided with 'tainted information' is not enough;
- Motivation from a discriminator doing an earlier act cannot be transferred to the final decision-maker;
- Instead, a claim should be brought against the discriminator in relation to the earlier act;
- As this may raise time limit problems, claim (or amend) as soon as practicable after identifying the need to do so;
- If successful, claim for the losses, including dismissal, arising as a consequence of the discriminator's actions;
- In discrimination cases with more than one decision-maker, a discriminatory motivation by one of them may contaminate their joint decision.

Comment

As noted, time limits are likely to be more of a problem in a 'tainted information' case. Claims are usually prompted by a sense of injustice which is most likely to arise at the time of an overt act, such as dismissal. That may occur well after the acts of 'tainted information' of which the claimant may also be unaware. Unless tribunals find it is just and equitable to extend time, the result will be injustice.

Practitioners should also note that proving discrimination in joint decision cases may not always be easy. The taint arguably must bear upon the reason for the actual decision. If after close scrutiny, the discriminatory motivation by one joint decision-maker has no bearing on the reasons for the resulting decision, how can it be said the decision is made *'because of'* the protected characteristic? A sense of glee is insufficient: as Elias J observed in *ASLEF v Brady* [2006] IRLR 576, *'there is indeed a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason.'*

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Briefing 750

Discrimination law unable to confront systemic inequality and disadvantage

Isobel Coll v Secretary of State for Justice [2015] EWCA Civ 328 4077; March 31, 2015

Introduction

This was an appeal by one of two women serving indeterminate prison sentences who had challenged the failure of the Secretary of State for Justice (SSJ) to make adequate provision for approved premises to accommodate women released from prison on licence. Approved premises (APs) (also known as probation hostels) are *'a criminal justice facility where offenders reside for the purposes of assessment, supervision and management, in the interests of protecting the public, reducing reoffending and promoting rehabilitation.'* Securing a place is often a condition of release on licence for medium to high-risk offenders, and although far fewer women than men fall into this risk category, it can be harder for them to be suitably placed. In the High Court Justice Cranston rejected the women's claims of direct and indirect sex discrimination but upheld the claim that the SSJ was in breach of the public sector (gender) equality duty, which was not cross-appealed (*Griffiths v Secretary of State for Justice*) [2013] EHWC 4077 (Admin)(see Briefing 703).

Facts

The appellant Ms Coll (C) is serving a mandatory life sentence for murder and is resident in HMP Askham Grange. Her release is subject to Parole Board recommendation and is not imminent. APs are

supposed to facilitate a managed return to an individual's home probation areas. But a placement close to home is rarely achievable for women prisoners because there are only 6 APs for women across England and Wales compared to 94 APs for men. The nearest women's APs to London are in Bedford and Reading. On release therefore, C faces a significant likelihood of being in an AP many miles from home and family, to the detriment of her rehabilitation and reintegration into the community. However, as her own situation was not presently in issue, the remedy sought in this appeal was a declaration to the effect that *'the current lack of provision of probation service approved premises for women offenders in England and Wales results in direct and indirect discrimination.'*

High Court

C (together with Ms Griffiths) brought claims of direct and indirect sex discrimination (in exercise of a public function under s29 Equality Act 2010 (EA)) and breach of the public sector equality duty (s149 EA) against the SSJ. The Equality and Human Rights Commission intervened in the judicial review proceedings in the High Court, focusing on the Ministry of Justice's obligations under s149. Cranston J rejected the sex discrimination claims but found that the SSJ had not complied with the public sector equality duty and ordered that he must do so. This was not appealed by the SSJ. C appealed the sex discrimination decision.

Court of Appeal

The CA judgment in large part confirms the High Court decision, although not all the reasoning. Elias LJ took the view that C was unlikely to be released into an AP, and she could not demonstrate she had personally (yet) suffered discrimination; the respondent did not dispute her standing and the application was not dismissed on this basis. However, the CA did not accept that either direct or indirect discrimination had been established, and found that if it were, the SSJ would be able to justify it.

Elias LJ rejected the SSJ's argument that the allocation of APs does not constitute *'subjecting the prisoners to treatment within the meaning of s13 (EA)'*, agreeing with the High Court on this point. He also rejected the SSJ's contention that the position of women and men in relation to APs was not comparable (because e.g. their risk assessments are not the same) within the meaning of s23 EA. Rather he found the reason a woman may be placed further from home is not because she is female, but because of the location and circumstances of individuals and facilities. An individual man may find himself placed far from home and he would not have a valid sex discrimination claim. In rejecting the direct discrimination claim, Elias LJ found the flaw to be that *'it is not legitimate in a case of direct discrimination to focus on the application of the policy in particular contexts.'*

Elias LJ accepted *'that many women, she (the appellant) being one, may reasonably consider that being accommodated close to home, with the advantages that brings, is a benefit which in practice is far more readily available to men than to women.'* (para 31) However, he said that in considering the discrimination argument it is important to understand why the current arrangements disadvantaged women, which he attributed to the combined effect of three interlinking factors – i) male and female prisoners were placed in different single sex institutions; ii) there were overwhelmingly more men than women in prison so there is higher demand from men for APs and iii) the policy was to place prisoners close to home where this could be done. The second factor is a matter of fact; the other two are matters of policy about which there was no dispute. The complaint was therefore essentially that the SSJ should have taken positive steps to mitigate the disadvantage resulting from the difference in need for APs between men and women (e.g. by providing more premises for women or locating premises differently).

In considering the indirect discrimination claim Elias LJ found that really *'what the appellant is complaining about is not the disparate impact which the application of a common policy or practice has created. Rather it is the failure to adopt a further and distinct policy to deal with the particular problem faced by women alone resulting from the small number of APs available to them.'* (para 59)

Reflecting on the fact that women prisoners are in a different position from men because they are relatively so few, he briefly considered the possible application of Article 8 European Convention of Human Rights (right to family life) combined with Article 14 (discrimination) but observed that *'even if some such claim could be advanced the test of proportionality in such cases is very broad and confers a very wide margin of appreciation to the state.'* (para 59-60)

Dinah Rose QC for the appellant was critical of the High Court's finding on justification for discrimination and pointed out that the test is more rigorous than the human rights proportionality test, as confirmed in the recent SC decision on disability discrimination.[1] However, Elias LJ found that justification was *'in principle sustainable'* and involved factors other than

financial savings and scarce resources (which alone cannot justify discrimination under the EA) but that the exercise was not relevant as, *'In my judgment the Equality Act does not bite on this complaint.'*

In any event the declaration sought would not have been granted as it would do no more than tell the SSJ that he had to comply with the public sector equality duty and he had already been told this by the High Court.

Finally, Elias LJ dismissed the cross appeal on costs, the High Court having awarded the claimants below 60% of their costs. The SSJ complained that no finding had been made as to who was the successful party in that court and argued that not enough credit had been given to the SSJ for their work in successfully resisting the discrimination claims. Elias LJ found no error in Cranston J's approach in the High Court, nor in his implicit recognition that the claimants had won on an important issue (breach of the public sector duty). The apportionment was not *'outside the legitimate range open to the judge.'*

Comment

The judgment demonstrates how toothless a tiger discrimination law can be when seeking to confront systemic inequality and disadvantage. The reasoning seems at times circular and reflects limited understanding of women's treatment and prospects in a male dominated criminal justice system, of which many independent reviews have been highly critical. The fact that women are only 5% of the prison population and an even smaller proportion of violent offenders is not an excuse for failing to meet their needs. Actually it makes it harder to accept that their needs remain unmet. Furthermore, a finding that there has been a breach of the public sector equality duty should make it harder for a discriminator to show justification.[2]

The judgment quotes from a joint Criminal Justice Inspectorate report relied on in her submissions by Dinah Rose QC for the appellant which found that *'the main element of discrimination against female prisoners and by extension against female hostel residents was the distance between their family and community and where they were located during the custodial and licensed supervision elements of their sentences.'* Elias LJ did not dispute this but in his view *'the appellant cannot … complain that the Secretary of State is failing to maximise the chances of women being effectively rehabilitated.'* He made it clear that he considered the High Court's finding of breach of the public sector equality duty to be the correct response to the problem identified. He noted that an express purpose of this appeal was to *'put pressure on the Secretary of State to carry out his duty to conduct the equality assessment.'* It is worth revisiting Cranston J's unchallenged summary of what this requires:

> *assessing whether there is disadvantage, how significant it is, and what steps might be taken to mitigate it … taking the opportunity to see whether more might be done for women having regard to their particular circumstances. Nothing even approaching this has been done.*

The lack of APs for women was recently identified as a significant gap in criminal justice provision in a report based on information gathered by 139 Soroptimist clubs in the UK. The report *Transforming Lives: reducing women's imprisonment*, recommended that *'A national review of approved premises for women should be undertaken urgently, with ring-fenced funding available to plug gaps identified.'*[3]

In its Report on Women Offenders: Follow-up[4] published shortly before the General Election, the Justice Committee reviewed developments and welcomed positive steps that were being taken to improve provision for women offenders. However, the Committee confirmed its view that *'an estate consisting principally of small custodial units is best suited to women in custody. This should be the long term aim of the government when it has been successful in reducing the women's prison population.'*

Efforts should now focus on ensuring government action to comply with the High Court's ruling on the public sector equality duty. This could be a pioneering exercise, building on the reconfiguration of the women's secure estate already underway, scrutinising developments in Scotland where the Holyrood Government is investing in more community-based interventions for women, and taking into account the now extensive body of research and policy analysis on *'what works for women offenders'*, including evidence of the positive rehabilitative outcomes achieved by Adelaide House approved premises for women in Liverpool.[5]

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1. *Akerman-Livingstone v Aster Communities Ltd* (formerly Flourish Homes Ltd) [2015] UKSC 15. [See Briefing 747 in this edition]

2. *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293

3. Prison Reform Trust, London December 2014, page 38

4. House of Common's Justice Committee Thirteenth Report of Session 2014-15, see para 23

5. Justice Data Lab Statistics, Ministry of Justice, February 2014.

Embassy workers have employment rights, even when contracts negotiated outside the UK

Benkharbouche v Embassy of Sudan, Janah v Libya [2015] EWCA Civ 33; [2015] IRLR 301; February 5, 2015

Implications for practitioners

State immunity cannot be invoked to deny embassy workers their employment rights within the UK, even if their contracts were negotiated at a time when they were living abroad.

Facts

Ms Benkharbouche, a Moroccan national, was employed as a cook at the Sudanese embassy in London. Ms Janah, a Moroccan national who had lived in the UK since 2005, was employed as a domestic worker in the Libyan embassy in London. Both were dismissed and brought various claims against their employers including for unfair dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998, race discrimination and harassment.

Both embassies claimed state immunity under the State Immunity Act 1978 (SIA). S1 SIA confers a general immunity from jurisdiction on states. By ss3 and 4, a state does not enjoy immunity in respect of proceedings relating to certain commercial transactions and contracts to be performed in the UK and contracts of employment *'where the contract was made in the United Kingdom or the work is to be wholly or partly performed there'*, unless (under s4(2)(b) SIA) at the time when the contract was made the individual was neither a national of the UK nor 'habitually resident' there. Moreover by s16(1) SIA, s4 does not apply to proceedings concerning the employment of the members of a diplomatic mission or of a consulate (as defined by the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968).

The decision

The ET dismissed all the claims on the basis of the plea of immunity. The appeals were joined and heard by Langstaff P in the EAT; he allowed both appeals. The cases were then heard together by the CA.

Court of Appeal

It was common ground that the SIA on its face appeared to grant procedural immunity. The issues on the appeal were, rather, (i) whether the claims engaged Article 6 ECHR (the right of access to a court), (ii) if so, whether the statutory provisions could be interpreted in a manner consistent with Article 6, and (iii) if not, whether the statutory provisions could be set aside.

The CA reviewed the domestic and Strasbourg authorities relating to state immunity and Article 6 and concluded that they differed in their approach. The Strasbourg cases establish that the right of access to a court is not absolute, but may be subject to limitations. However to be lawful these limitations must not only pursue a legitimate aim but also be proportionate.

The CA then considered whether an immunity of the breadth of s16(1)(a) SIA was required by international law and concluded, by reference to various international conventions, that it was not.

It also reviewed the approaches different countries have taken to the question of state immunity and concluded that the preponderance of state practice is such that, whatever the position may have been in 1978, the position contended for by Libya and the Secretary of State (invoking the immunity of s16(1)(a)) can no longer be regarded as within the range of tenable views of what is required by international law. It therefore fell outside the margin of appreciation which Article 6 affords in that regard to member states. On that basis the CA held that in its application to the claimants' claims s16(1)(a) SIA was incompatible with Article 6.

For similar reasons the CA also concluded in Ms Janah's case that there is no rule of international law which requires the grant of immunity in the circumstances identified in s 4(2) SIA. In addition it held that s4(2) SIA is discriminatory on grounds of nationality and so infringed Article 14 together with Article 6 ECHR.

Langstaff P had adopted a similar reasoning in relation to s16(1)(a) SIA but did not have the power to make a declaration of incompatibility pursuant to s4(2) Human Rights Act 1998. The CA did make such a declaration, to the effect that s16(1)(a) SIA, in its application to the claims brought by these claimants, infringed Article 6 ECHR and that s4(2)(b) SIA, in its application to the claims brought by these claimants, infringed Articles 6 and 14 ECHR.

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Comment

Benkharbouche is obviously of assistance to all those who work in embassies as it confirms that they can indeed access employment law protections within the UK even if their contracts are negotiated when they are living abroad.

More widely it is being welcomed by anti-trafficking campaigners as establishing the important principle that those whose contracts of employment are determined overseas can also access employment rights, including protection from discrimination, within the UK.

Benkharbouche also fits within a wider legal narrative in which employment law has helped advance the rights of trafficking victims. *Allen v Hounga* [2014] UKSC 47; (see Briefing 724) for example – the only trafficking case to reach the SC – was an employment discrimination case. Ms Hounga (H) had been recognised as a victim of trafficking from Nigeria. Following ill treatment by her employer, she brought various employment-related claims, including one of race discrimination. It was argued that the illegality of H's entry into the UK and her employment barred her claim. The SC disagreed and held that such an approach would run strikingly contrary to the prominent strain of current public policy against trafficking and in favour of the protection of victims.

It is notable, though, that on the same day as *Benkharbouche*, a less favourable judgment was handed down in *Reyes v Al-Malki & Secretary of State for Foreign & Commonwealth Affairs* [2015] EWCA Civ 32. In that case, the court adopted a technical interpretation of a domestic worker's contract of employment with a serving diplomat and found that entering into the contract was not a commercial activity exercised outside diplomatic official functions and therefore within the exception to diplomatic immunity in Article 31(1)(c) of the Vienna Convention on Diplomatic Relations 1961. The court rejected the arguments that such an interpretation impeded access to justice and failed to compensate these victims of trafficking despite the seriousness of their allegations. It is understood that permission to appeal to the SC is being sought.

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752 Briefing 752

Claimants must show the reason for the disadvantage in indirect discrimination

Home Office (UK Border Agency) v Essop [2015] EWCA Civ 609; June 22, 2015

Facts

In the Civil Service, all candidates for promotion to Higher Executive Officer grade must pass a generic Core Skills Assessment (CSA). Mr Essop's (E) case was that this requirement indirectly discriminated against black and minority ethnic (BME) candidates and/or older candidates.

It was assumed for the pre-hearing review that there was a statistically significant difference between the success rates of BME/older candidates and those of younger/non-BME candidates; although not all older/BME candidates failed, they were at greater risk of failing. It was also assumed that these failure rates could not be explained by particular personal factors specific to any individual claimants.

Law

Under s19 of the Equality Act 2010 (EA), indirect discrimination arises where an apparently neutral provision, criterion or practice (PCP) puts people who share a protected characteristic at a group-based disadvantage. A claimant therefore has to show that the PCP applied by the respondent:

- puts persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it (s19(2)(b)), and
- puts the claimant at that disadvantage (s19(2)(c)).

If he succeeds, the burden shifts to the respondent to show that the PCP is justified.

The question in *Essop* concerned the meaning of the s19(2)(c) requirement that E show he was put *'at that disadvantage'*.

Employment Tribunal

At a pre-hearing review, the employment judge held that s19(2)(c) requires a claimant to identify the reason why the PCP disadvantages members of a group and show that his own disadvantage had the same cause as the group disadvantage. According to the judge, *'…the mere fact of failure of the CSA test… is not determinative of whether the claimant has been put at that disadvantage'* (para 14). Any other approach would allow individuals to benefit 'fortuitously' from their membership of a disadvantaged group.

E appealed, arguing that the ET had interpreted s19(2)(c) incorrectly and created an unnecessary additional hurdle for claimants.

Employment Appeal Tribunal

The EAT overturned the ET decision. (See Briefing 730). It held that the wording of the statute does not require a claimant to show the ***reason*** why he suffered the disadvantage, merely the ***fact*** that he suffered the group-based disadvantage. According to the EAT, the judge's finding that *'…the mere fact of failure of the CSA test… is not determinative of whether the claimant has been put at that disadvantage'* was therefore incorrect. The particular disadvantage was failing the test, and E suffered precisely that disadvantage.

Even if s19 EA could be read as imposing the additional hurdle, however, the EAT rejected that reading as inconsistent with the purpose of the provisions. It held that the function of indirect discrimination provisions is to tackle disparate impact, which may be the result of *'disguised'* discrimination or of processes whose disparate impact is as yet unexplained. In that case, it will be impossible for a claimant to identify the reason for the disadvantage, and *'…[t]o make liability conditional upon their being able to do so is thus to remove any legal constraint upon it, and to permit the disproportionate effect to continue…'* (para 28)

Court of Appeal

The CA overturned the EAT decision. It held that, under s19(2)(c), a claimant who is a member of a disadvantaged group must show that the reason for his individual disadvantage is the same as the reason for the group disadvantage. Importantly, however, it also confirmed that the burden of proof provisions under s136 apply to s19(2)(c).

The Court of Appeal's reasons

The CA rejected the suggestion that statistical evidence under s19(2)(b) of the group disadvantage could automatically suffice as proof under s19(2)(c) that the individual claimant suffered the same disadvantage.

It pointed out that a woman claiming indirect discrimination must show why a PCP requiring full-time work disadvantages women as a group – for instance, because of caring responsibilities – and must show that she is disadvantaged ***because of her caring responsibilities.*** Otherwise, a claimant whose disadvantage is unrelated to the group disadvantage – for instance, because she wishes to play golf – could succeed *'on the coat-tails'* of claimants who face a genuine group disadvantage. In the present case, the *'coat-tailer'* might be someone who was late for the CSA and failed because he did not finish the questions.

The CA therefore held that, having first established group disadvantage under s19(2)(b), a claimant must then show under s19(2)(c) that he was personally disadvantaged by the PCP in the same way as the group as a whole.

Comment

The effect of this judgment may not be as far from the effect of the EAT judgment as first appears.

First, although the claimant must show the reason for the group disadvantage, it appears the reason may be 'read off' the statistical evidence. According to the CA, *'…it is conceptually impossible to prove a group disadvantage… without also showing **why** the claimed disadvantage is said to arise. Group disadvantage cannot be proved in the abstract.'* (para 59) Since it accepted that statistical evidence alone might in principle be sufficient to prove group disadvantage for the purposes of s19(2)(b) – that is, the statistical evidence is not merely abstract – it follows that statistical evidence alone might be in principle be sufficient to identify the reason.

The CA summarised the 'reason' offered by the claimants: that the statistics show the group to be disadvantaged because its members are disproportionately more likely to fail the CSA than are the comparators. So identifying the 'reason' may not require picking out a causal mechanism.

Secondly, the CA accepted that – where neither side can identify precisely why the relevant groups are disadvantaged – a claimant might submit the same

752 statistical evidence in support of s19(2)(c). In those circumstances, it held that:

> *it will in principle be open to a claimant to… submit to the ET that the [statistical] report proves facts from which,* ***in the absence of any other explanation****, the ET could decide that (subject to objective justification) the discrimination case is proved.* (para 64, emphasis in the original)

That is, statistical evidence may in principle be sufficient to shift the burden of proof to the respondent to show that the individual disadvantage arose for a different reason.

Taking these two points together, it might be argued that the CA's principal concern was to establish that s19(2)(c) requires a separate stage, at which point the respondent has an opportunity to challenge 'coat-tailers'. However, the emphasis on claimants identifying the reason for their own disadvantage shifts attention to treatment rather than outcomes and risks reinstating an impossible additional hurdle.

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753 Briefing 753

Whistleblowing and the public interest

Chesterton Global Ltd & Neal Verman v Nurmohamed UKEAT/0335/14/DM; April 8, 2015

Introduction

This is the first case since the commencement of the Enterprise and Regulatory Reform Act 2013 (the 2013 Act) that has addressed the proper meaning of when a whistleblowing complaint is capable of being *'in the public interest'* as per the requirement of s17 as inserted into s43B(1) of the Employment Rights Act 1996.

Facts

Mr Nurmohamed (N) was employed as the sales director in the Mayfair office of estate agents Chesterton Global Ltd (CG). He blew the whistle to his manager, the area director, on two occasions as well as to CG's human resources director, Neal Verman, following the introduction of a new commission structure which he believed misstated actual costs and liabilities for the benefit of shareholders.

N stated that he believed the company was deliberately misstating £2 - £3million of actual costs and liabilities through the entire office and department network which affected the earnings of up to 100 senior managers, including himself. He was deeply unhappy about this and believed that it amounted to a breach of a legal obligation towards the senior managers.

Employment Tribunal

N brought claims of unfair dismissal, automatic unfair dismissal and victimisation on the grounds that he had blown the whistle. The ET unanimously upheld his claims; it is note worthy that N's claim for unfair dismissal was conceded by the respondents prior to the hearing.

The ET found that N made three protected disclosures in the reasonable belief that they were made in the interests of 100 senior managers and that this was a sufficient group of the public to amount to be a matter in the public interest.

In reaching this decision, the ET found that the discloser had to show that when they made their disclosure, they had within their contemplation others who would be affected by the issue they were disclosing. The ET decided that the test for whether a disclosure was protected and in the public interest was subjective, and the disclosure did not have to be in the public interest per se. The ET found that although N was most concerned about the impact on his own income, he did also have other 100 senior managers in mind and that this was a sufficient 'section' of the public to satisfy the requirement.

Employment Appeal Tribunal

The respondents appealed the ET findings that CG had subjected N to detriments on the grounds that he had made protected disclosures. The appeals were brought on the following grounds:

1. whether or not N had a reasonable belief that he was making a protected disclosure; and
2. whether the protected disclosure was made in the public interest.

The EAT dismissed the appeal. The first ground was dismissed upon withdrawal by the appellants.

In reaching its decision, the EAT confirmed that so long as the discloser had within his contemplation other

people affected and he had a reasonable belief that the issue he was disclosing was in the public interest, then this would constitute a protected disclosure. The EAT also confirmed that a 'section' of the public was sufficient, rather than the public as a whole; in doing so it paid close attention to the original intention of the s17 amendment and the Committee debates on the issue. No guidelines were set for what would constitute a section, or whether there were minimum requirements to classify a group as a section of the public. The EAT was mindful of not setting a number-specific rule.

Implications for practitioners

Practitioners will note the following important points arising from this judgment:

- that a discloser has within their contemplation the effect the issue they are disclosing over has on other people.
- that the discloser has a reasonable belief that the issue they are disclosing over is within the public interest. It is not necessary to show that the disclosure is per se in the public interest.
- that the introduction of s17 of the 2013 Act was solely to reverse the effect of *Parkins v Sodexho Ltd* UKEAT/1239/00; [2002] IRLR 109; the words 'in the public interest' were introduced to do no more than prevent a person from relying upon a breach of their own contract of employment to constitute a disclosure where that breach does not affect others and has no wider public interest implications.
- there is nothing to stop a disclosure of a breach of contract from constituting a protected disclosure where that breach may be wide reaching, be repeated or have potential to be repeated against others or have public interest implications.

Final comment

HHJ Supperstone's judgment is clear, succinct and easily followed. He made significant references to the relevant passages of the Committee debate during the passage of the 2013 Act when he explored the intentions of parliament. It did however seem relevant, as it was often repeated in his judgment, that 100 other employees of the same level as N were being affected by the content of the disclosures. It is therefore questionable if the outcome could have been different if far less people were affected.

Practitioners should ensure individuals are carefully advised on the framing of contemporaneous disclosures which have wider implications if they subsequently want to seek whistleblowing protection.

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Briefing 754

Restricted reporting order

EF & NP v AB & Ors [2015] UKEAT 0525/13/2503; March 25, 2015

Facts

AB brought a tribunal claim for, among other things, unfair constructive dismissal, whistleblowing, harassment and sex discrimination against EF, an individual respondent. EF was the Group Chief Executive Officer responsible for a company where AB was the managing director. AB's claims included 'lurid allegations' of sexual harassment and abuse by EF and his wife NP, who was not named as a respondent, over a period from 2001 to 2011. The allegations included situations where explicit photographs of NP were circulated by AB and there were threats by AB to escalate matters *'to the next level via all different media available'*.

The claims were dismissed after a three-week hearing in March 2013. The employment judge concluded that *'the claimant's motivation in bringing the proceedings and continuing with them was not to bring before the tribunal a legitimate claim for compensation but as a part of his campaign of revenge against [EF] and to blackmail the corporate respondents into paying him a very large sum of money to which he had no legitimate claim at all. Having regard to the evidence that has been presented throughout the case, from the initial reading of the statements presented as the claimant's evidence-in-chief to the end, it has been clear that the claim was wholly devoid of any merit whatsoever'*.

Separate High Court proceedings for injunctions were also commenced by EF against AB and stayed awaiting the outcome of the tribunal proceedings.

Employment Tribunal

Although there was a restricted reporting order (RRO) covering EF and NP for the duration of the litigation, the ET decided that this should not be made permanent. In reaching this decision, it relied on the fact that the 500 or so employees of the company of which EF was the Group CEO were entitled to know why working under AB was 'extremely unpleasant'. The ET held that scrutiny of AB's company by EF was 'slack', and that the employees were entitled to know why other employees of the group were better managed than AB's company. Another reason relied upon was that EF had engaged in risky activities with AB, an employee.

The ET also failed to extend to the RRO for NP, as it said that she knew that explicit photos would be exchanged between AB and EF, and that the ET had not heard evidence from her.

Employment Appeal Tribunal

The EAT allowed EF and NP's appeal against the ET's decision not to make the RRO permanent. The Honourable Mrs Justice Slade sitting alone, held that both the factors the ET had taken into account were irrelevant.

The EAT held that there was only a tenuous link between the public interest in disclosing EF's name, and the effect of AB on the employees he managed. The judgment was not about how EF ran the group. Although there were some findings about how the whistleblowing complaint was dealt with, the matters in the judgment most likely to attract attention were the sexual allegations. Even if there was a public interest in the running of the group, employees would already know whether they had been badly treated by AB, as well as knowing who was responsible for this in terms of the company structure.

As for EF engaging in risky activities with AB, who was an employee, he still had a reasonable expectation of privacy in engaging in sexual activity in private. That expectation was not diminished by the fact EF was a fellow employee.

As for NP, Slade J held that the ET had failed to consider NP's rights to privacy separately to those of her husband, and that it could not conflate those two separate interests simply because it had not heard evidence from NP. The ET had also failed to take into account the fact that NP had a child, whose privacy interest would also be affected.

Slade J also considered that the ET had failed to take into account two relevant considerations. One was that EF had been motivated in his actions as part of a campaign of revenge and blackmail against AB. Another relevant factor was that High Court proceedings had been started and injunctions had been granted. If the RRO were not extended, then those injunctions and the privacy proceedings would have no effect.

Slade J accordingly extended the RRO permanently, without remitting the case to the ET.

Analysis

In any RRO application it is going to be relevant to balance out the competing ECHR interests; in this case, between the right to privacy, and the interest in public reporting and public justice. Although the ET said it gave little weight to *'the general human interest in sex and money involving relatively rich people'*, the fact that the tribunal mentioned it at all showed that it was in danger of confusing what was in the public interest with what the public are interested in.

The other important factor brought out by the EAT decision was that it will not suffice to look for the public interest in the case as a whole, but it is the rather more specific issue of what the public interest is in not extending the RRO. The ET hearing was in public, and the judgment was given in full, albeit with parties and witnesses anonymised. In addition, there was no unlawful conduct or egregious wrongdoing by either EF or NP. These reasons meant that open justice was bound to count for less when placed in the scales with the privacy rights of EF and NP in engaging in sexual activity in private.

Practical implications

While the allegations in EF's case may be far from routine, it is common for cases involving sexual harassment to involve requests for anonymity or a RRO. Practitioners making such applications should bear in mind the need to emphasise the claimant's Article 8 right to privacy, while at the same time acknowledging why these rights are sufficiently important to outweigh the principle of open justice.

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Philosophical belief discrimination

Henderson v GMB [2015] UKEAT/0073/14/DM, UKEAT/0075/14/DM & UKEAT/0314/14/DM; March 13, 2015

Facts

Mr Henderson (H) was employed by the GMB Union as a regional organising officer. He is an advocate of *'left-wing democratic socialism'* and (separate from his role at the GMB) was a member of his local Labour Party, until he was suspended from it in or around July 2012.

H was dismissed for gross misconduct in December 2012 on the basis that he (i) challenged the authority of line management and the regional secretary; and (ii) made serious allegations of collusion between the GMB and the Labour Party in respect of his suspension from the Labour Party.

Employment Tribunal

H brought various claims in the ET asserting, amongst other things, that he had suffered direct discrimination and harassment on the basis of his *'left-wing democratic socialist beliefs'*. His direct discrimination and harassment claims succeeded.

In relation to direct discrimination, the ET held that, although the principal reason for H's dismissal was his conduct, a substantial part of the GMB's reasoning behind dismissing him was his philosophical belief, which was therefore an effective cause of his dismissal.

With regards to harassment, the ET held that three incidents amounted to unwanted conduct related to H's philosophical beliefs and had the purpose of creating an intimidating, hostile or humiliating environment for him.

One of these incidents took place in November 2011 after H was tasked by the GMB with organising a picket line outside the House of Commons. H wrote a 'day of action letter' and publicised the picket line to the media stating that Labour MPs were expected not to cross it. The matter was raised subsequently in the House of Commons during Prime Minister's Questions causing the then Labour Leader, Mr Ed Miliband, some political discomfort. Shortly thereafter, somebody from Mr Miliband's office contacted the GMB's General Secretary, Mr Paul Kenny, to voice their displeasure at the publicity that H had courted about Labour MPs not crossing the picket line. Mr Kenny then telephoned H and shouted at him saying that the 'day of action letter' that he had written was *'over the top'* and too left-wing.

Employment Appeal Tribunal

Both parties appealed to the EAT. Simler J upheld the GMB's appeal, overturning the ET's decision and holding that there was no direct discrimination or harassment on the facts.

In relation to direct discrimination, Simler J held that there was no evidence that H's political beliefs operated in the minds of the individuals responsible for his dismissal. She stated that:

> *The problem with the [ET's] conclusion [that a substantial cause of H's dismissal was his protected belief] is the absence of any findings of fact or evidential basis to support it. The [ET] made unsupported legal and factual assumptions about disputed questions of less favourable treatment on protected belief grounds. There is no analysis of the factors relevant to that conclusion and the evidential basis for reaching the conclusion is nowhere identified.*

In reaching this decision, Simler J suggested that the ET may have fallen into the trap identified by the EAT in *London Borough of Islington v Ladele* [2009] IRLR 154 (see Briefings 556 & 663) of *'confusing the respondent's reasons for treating the claimant as it did with his reasons for acting as he did.'*

Simler J also discussed the use of comparators. Whilst highlighting the difficulty in constructing the correct hypothetical comparator in a case such as this, she held that the ET's use of a comparator who had committed no misconduct was *'legally flawed and meaningless.'*

As to harassment Simler J held, amongst other things, that there was nothing in two of the three incidents that related to H's protected beliefs. With regards to one of these incidents, the ET's findings suggested that the perpetrator took *'a reasonable and appropriate approach'* whilst, with regards to the other, the ET's finding that the perpetrator behaved unreasonably did not *'afford a proper basis for an inference that his behaviour had anything to do with [H's] protected beliefs.'*

In relation to the picketing incident (discussed above), Simler J held that there was a direct link with H's protected beliefs in the comment that he was being 'too left-wing'. However, she emphasised the need to take context into account when considering whether an act constitutes unlawful harassment. She held that the

context of the telephone call between Mr Kenny and H was the high profile political difficulties that H's actions were perceived to have caused to Mr Miliband and:

> *That context potentially explained both why [Mr] Kenny acted as he did and why the exchange with [H] was heated, but is neither considered nor addressed in the [ET's] conclusion that [Mr] Kenny's purpose was to create an intimidating, hostile or humiliating environment for [H].*

Simler J held that it was not open to the ET to conclude that any of the three incidents amounted to unlawful harassment. She described them as *'trivial'* and cited the CA's judgment in *Land Registry v Grant* [2011] ICR 1390 (see Briefing 614) where Elias LJ warned against cheapening the significance of words including 'intimidating', 'hostile' and 'humiliating' as *'they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'*

She went on to describe the telephone call between Mr Kenny and H as an 'incident' and not an 'environment' and stated that:

> *although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so… To conclude that the telephone conversation…was an act of unlawful harassment is to trivialise the language of the statute.*

Implications for practitioners

The EAT's judgment provides useful guidance to practitioners on the approach to be taken in relation to direct discrimination claims, particularly in circumstances where an employer's decision to dismiss an employee is alleged to be tainted by discrimination. Additionally, it stresses the need for practitioners to have regard to context and the concept of seriousness inherent in the statutory definition (which excludes trivial acts) when considering whether conduct amounts to unlawful harassment.

However, more significantly, the judgment makes an important point about the nature of protection afforded to philosophical beliefs by the Equality Act 2010 (EA). Simler J stated that:

> *The law does not accord special protection for one category of belief and less protection for another. All qualifying beliefs are equally protected. Philosophical beliefs may be just as fundamental or integral to a person's individuality and daily life as are religious beliefs.*

The ET accepted that left-wing democratic socialism is a protected belief for the purposes of the EA and this finding was not challenged on appeal. An interesting point raised by the GMB, but left undecided by Simler J, was whether a distinction can be drawn between treatment because of a person's belief and treatment because of their manifestation of that belief.

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Briefing 756

EAT highlights the strict requirements of early conciliation

Cranwell v Cullen UKEATPAS/0046/14/SM; March 20, 2015; *Sterling v United Learning Trust* UKEAT/0439/14/DM; February 18, 2015

Summary

In these cases the EAT refused to waive the strict requirements of the ACAS early conciliation (EC), pointing out that there is limited discretion to allow exceptions.

Overview

Before lodging a claim with the tribunal, the claimant must, within the time limit for bringing a claim, provide to ACAS prescribed information in the prescribed manner unless one of the five exceptions apply (s18A Employment Tribunals Act 1996)(ETA). At the end of the conciliation period, ACAS will send the claimant a form with a unique early conciliation number. This number must be included in the ET1 to show that the claimant has been through the EC process.

The law

S18A ETA sets out the EC procedure that must be followed by a prospective claimant before they can institute relevant proceedings.

The tribunal's powers to reject a claim are set out in

Rules 10-12, Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

Rule 10(1):

> *The Tribunal shall reject a claim if:*
> *(c) it does not contain all of the following information*
> *(i) an early conciliation number;*
> *(ii) confirmation that the claim does not institute any relevant proceedings; or*
> *(iii) confirmation that one of the early conciliation exemptions applies.*

Rule 12(2):

> *The claim, or part of it, shall be rejected if the judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).*

Rule 12(1)(d) describes such a claim as:

> *… one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply.*

Rule 6 allows a tribunal to take such action as it considers just where a party has not complied with one of the Rules including waiving or varying a requirement.

Cranwell v Cullen

In this case Ms Cranwell (C) sought to bring a claim against her employer which included allegations of assault. She did not file the prescribed information with ACAS. In her ET1 she ticked the box saying that her claim was exempt from EC. Her reasoning for not contacting ACAS was that a dialogue with someone who was subject to a court order not to contact her was unconscionable.

C's claim was dismissed because she had not contacted ACAS before bringing her claim so had not complied with the requirements in s18A ETA and Rule 10. The EAT held there was no exemption to Rule 10.

Employment Appeal Tribunal

On appeal, the EAT clearly had every sympathy for the claimant but found that the rule relating to contacting ACAS was a strict requirement and that the overriding objective and Rule 6 could not defeat the mandatory provision in Rules 10 and 12, holding that:

> *The discretion was to allow the tribunal to relieve parties of their mistakes – it could not exercise it to allow itself to act in a way that was contrary to the rules.*

The tribunal's obligation under Rule 12(2) is prescribed and therefore must be adhered to.

Sterling v United Learning Trust

In this case Ms Sterling (S) sent her ET1 form with the ET fee and an application for remission, four days before the deadline. The form was rejected because of an incorrect ACAS certification number. The rejection was sent to the wrong address. By the time S received the rejection, she was out of time to lodge her claim.

It was not clear from S whether the number had been entered incorrectly on the ET1 or on the fee remission form. After hearing her evidence, the judge concluded that she had entered it incorrectly on the ET1. She lodged the ET1 again as soon as she received the rejection but after the deadline had passed.

The ET held that it was obliged by Rule 10(1)(c)(i) of the Rules to reject the claim because she had incorrectly entered the EC number on the ET1. The ET also considered whether it had been reasonably practicable for the claim to have been submitted in time and concluded that the reason for the claim being submitted out of time was the failure to enter the correct ACAS code (as opposed to the sending of the ET1 to the address). This meant it was reasonably practicable to lodge it in time.

Employment Appeal Tribunal

The EAT upheld that decision stating that it was a reasonable conclusion by the judge given the facts. Justice Langstaff stated:

> *Where the rule requires an early conciliation number to be set out, it is implicit that that number is an accurate number. The tribunal had found it was not. Once that appeared to be the case, the tribunal was obliged to reject it [under Rule 10], and that rejection would stand, subject only to reconsideration, which here was not asked for.*

Final comment

Langstaff J's judgments will probably not be the last word on these requirements. The claimant in *Sterling* was not properly represented at the original hearing. Her representative failed to make an application for a reconsideration of the original rejection (despite being offered that option by the ET judge) and both judges implied that had such an application been sought, then the outcome could have been different. In *Cranwell*, there was an absolute failure to contact ACAS but again it was suggested by Langstaff J that if a claim were to be resubmitted by a claimant in similar circumstances, a judge may look sympathetically at an out of time application.

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Tips for action

Tips for action when a claim is rejected:

1. apply for a reconsideration of the original rejection;
2. resubmit the claim as soon as possible and make an application for it to be accepted out of time;
3. keep copies, dates and times of all documents submitted (including ET1s and fee remission forms);
4. expressly ask the tribunal to exercise its powers under Rule 6.

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757 Briefing 757

Freedom of conscience cannot mean freedom to discriminate

Lee v Ashers Baking Co Ltd and Ors Belfast County Court; May 19, 2015

Facts

Mr Lee (L) is a gay man who supports the proposals to legislate in Northern Ireland to permit same sex marriage. He is associated with an organisation called Queerspace. He planned to attend a private event on May 17, 2014 to mark the end of Northern Ireland Anti-Homophobia Week. He decided to take a cake to the event.

L was an Ashers Baking (AB) customer and, noting its service to ice cakes to the customer's design, he ordered a cake with the words 'Support Gay Marriage' accompanied by Sesame Street character pictures of Bert & Ernie. While the order was initially taken and accepted by one of the company's directors, she subsequently informed L that his order could not be honoured as AB was a 'Christian bakery'. L received a refund and ordered his cake elsewhere.

AB is a limited company set up solely for profit and commercial purposes.

Belfast County Court

L claimed discrimination on grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations (NI) 2006 (the 2006 Regulations) and discrimination on grounds of religious belief and political opinion contrary to the Fair Employment and Treatment Order 1998 (FETO). His claim, which was supported by the Equality Commission for Northern Ireland, was against both AB and its directors.

Judgment

The court held that both sets of defendants had directly discriminated against L on all grounds claimed.

Sexual orientation

Presiding District Judge Brownlie found that the defendants did have the knowledge or perception that L was gay and that they must have known that he supported gay marriage and associated with others who supported gay marriage. She held that L's order was cancelled as the defendants were opposed to same sex marriage because they believed it was sinful and that this was their genuinely held religious belief. She found that same sex marriage is inextricably linked to sexual relations between same sex couples. The judge stated:

> *The defendants are not a religious organisation: they are conducting a business for profit and, notwithstanding their genuine religious beliefs, there are no exemptions available under the 2006 Regulations which apply to this case and the legislature, after appropriate consultation and consideration, had determined what the law should be.*

Religious belief/political opinion

The judge found that the defendants disagreed with the religious belief and political opinion held by L with regard to same sex marriage. Finding that an opinion regarding a change in the law in Northern Ireland to permit same sex marriage was a political opinion, she held that the holding and/or manifestation of an opinion are so inter linked it is illogical to suggest that they can be separated, as argued by the defendants. In addition, she found that the defendants were not being asked to support, promote or endorse any political viewpoint. The defendants were simply being required to ice a cake in accordance with their advertised service.

The court affirmed the position under the law: that the right of people to hold religious beliefs is protected,

as is the right to manifest them, but they cannot do so in the commercial sphere in a way which is contrary to the rights of others.

Articles 9 & 10 ECHR

The judge held that the extent to which the 2006 Regulations and/or FETO limit the manifestation of the defendants' religious beliefs and freedom of expression was necessary in a democratic society and was a proportionate means of achieving the legitimate aim which was the protection of L's rights and freedoms. She stated that *'to do otherwise would be to allow a religious belief to dictate what the law is'.*

Implications for practitioners

Discrimination law practitioners have pondered what appeared to be a legal tight rope challenge. Tensions between protected grounds of discrimination and between discrimination legislation and human rights legislation introduced a complex scrutiny of UK and international jurisprudence.

For practitioners, the case raised questions such as: is equality law as currently drafted compatible with the ECHR? Is the legislation proportionate? Is there a balance between rights for all clients? These were important and challenging questions.

After three days in the Belfast County Court, Judge Brownlie decided that in a pluralistic, democratic society the answer to all these questions was yes.

Comment

While the decision raises issues of public importance it did not expand or change the law. It confirmed the legal position that businesses operating in the commercial sphere for profit cannot refuse services to customers on any of the grounds covered by anti-discrimination law. In other words, freedom of conscience cannot mean freedom to discriminate. It also confirmed the position that discrimination legislation in Northern Ireland is drafted broadly to include discrimination by association and is not confined to the protected characteristic of the claimant.

The court has agreed to state a case for the NI Court of Appeal and notwithstanding, the government's decision not to include a 'conscience' clause to the 2006 legislation, the debate around its inclusion continue. The fact remains that the scope of anti-discrimination law remains the same today as on the day before the judgment.

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Equality Commission for Northern Ireland

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Discrimination in the provision of goods and services

Traveller Movement & Others v JD Wetherspoon plc, Central London County Court; May 5, 2015

Facts

The Traveller Movement (TM) provides services and support to members of the Gypsy, Traveller and Roma community. The case concerned race discrimination against a group of its delegates attending its annual conference in 2011 who were refused entry to the nearby Coronet public house. TM, a company limited by guarantee with charitable status, and 18 individual claimants brought claims under Part III of the Equality Act 2010 (EA), s29 in respect of being refused entry.

The case concerns events which occurred on the Holloway Road in the late afternoon of November 17, 2011. TM occupied offices in the Resource Centre on the Holloway Road and had used its conference facilities to hold its annual conferences every autumn since 2007. These take place during the daytime ending usually by about 4.30pm. A key theme of the conference was to address *'the challenges Gypsies and Travellers face in the aftermath of the Dale Farm eviction'.* The Dale Farm evictions were the subject of wide spread media coverage. An advert for TM's conference stating: *'The future for Britain's Irish Travellers in the aftermath of the Dale Farm eviction will be explored at the annual Irish Traveller Movement in Britain conference next week'* appeared in the Irish Times on November 12, 2011.

JD Wetherspoon plc (D) owned and operated the Coronet public house next door to the Resource Centre. Given its close proximity it became a tradition amongst delegates attending the annual conference to have post conference drinks in D's public house. Until 2011 there

had been no problems with TM's delegates attending the Coronet.

In 2005, two years before TM moved into the Resource Centre, there had been public order difficulties after an 'Anarchist Book Fair'. The previous manager of the Coronet's record of the difficulties stated that police had been called after a significant number of 'anarchists' started playing music inside the public house. They were eventually ejected having caused considerable disturbance resulting in a number of people having to seek medical and hospital treatment.

The Coronet is relatively close to the Emirates Stadium and since 2008 D had used Secure Frontline Services Limited (SFS) to provide door and internal security on match days to control jubilant football fans. Ordinarily, away fans would not be allowed in on match days.

SFS were in charge of security in 2011 when about 150 delegates were attending the conference, some 50 or so of whom were of Irish Traveller or Romani Gypsy origin. SFS on the instructions of D's manager sought to exclude any large group of delegates attending from the Resource Centre irrespective of their demeanour or behaviour.

County Court

TM alleged that D was vicariously liable for the acts of its agents SFS in refusing its delegates entry contrary to s13 and s26 EA. Seven of the claimant's were of Irish Traveller or Romani Gypsy ethnic origin and brought claims for direct race discrimination and harassment. The remaining claimants brought claims for direct discrimination alleging less favourable treatment not because of their race but due to their association with other delegates of Irish Traveller and Romani Gypsy ethnic origin.

Issues in dispute

- Whether TM was 'another person' for the purposes of ss13(1) and 26 (1) EA;
- Whether each claimant was treated less favourably by D than it treats or would treat others;
- Whether each claimant was subjected to harassment within the meaning of s26 EA.

D sought to argue that there was a 'no large group' policy. D's witness suggested a 'large group' comprised of more than 4 or 6 people and was a matter of discretion for the head door supervisor. This policy did not apply to groups of regular customers who could be allowed in even if there were more than four in a group.

HHJ Hand QC rejected D's evidence and found as a fact, amongst other things, that:

- whilst there was a 'home supporter only policy' on Emirates Stadium match days, there was neither a general nor a specific 'large group's policy' in force on November 17, 2011 [36];
- D's manager made an assumption that those in attendance at TM's conference were liable to indulge in public disorder;
- the premise on which that assumption was founded was that persons guilty of disorderly conduct at the Dale Farm eviction might have been in attendance at TM's conference and might engage in disorderly conduct or that other delegates at the conference might also engage in disorderly conduct [30];
- in turn, that assumption involves the further assumption that Irish Travellers and Romani Gypsies are, by nature, prone to engage in public disorder [31];
- sometime between November 15 and 17, 2011 D's manager devised an ad hoc policy of excluding from entry to the Coronet large groups of people who had been in attendance at the conference;
- the reason given for exclusion was that the group had been at TM's conference [152].

HHJ Hand QC noted that when one of the TM's delegates, a Police Inspector, questioned the reasons for refusal, he showed the doorman his warrant card. At which point the doorman said that the group could go inside the Coronet so long as the Police Inspector could 'vouch' for them and *'keep an eye on them.*' The judge was satisfied that whether or not D's manager was influenced by the 2005 event following the Anarchist Book Fair, the manager concluded that TM's conference was a source of potential disorder because he thought those in attendance were likely to engage in disorder.

As to the question of whether a TM was a person for the purposes of s13 EA, the court held that as a matter of textual interpretation there was no reason why a corporation could not bring a claim [128-9]. The judge accepted the submission that the combined effect of s5 and schedule 1 of the Interpretation Act 1978 is that the definition of the person includes a corporation.

The court also upheld the seven individual claims for direct race discrimination because the pub made stereotypical assumptions that Irish Travellers and Romani Gypsies were likely to cause disorder [149]. The Travellers' and Gypsies' companions also succeeded in their claims for associative direct discrimination, as they were refused entry because they were with the Travellers

and Gypsies. There was no evidence before the court that any Irish Travellers or Romani Gypsies had been involved in the disturbance created by visitors to the Anarchist Book Fair in 2005 and there had been no other incidents at the Coronet. Accordingly, their complaints for direct discrimination succeeded and each successful claimant, save for TM, was awarded £3,000 for injury to feelings. In so far as TM was concerned the judge did not rule out the possibility of a corporation being awarded compensatory damages but held that a case was not made out on the facts.

All claims for harassment were dismissed.

Implications for practitioners

This is a relatively straightforward application of the law to the facts. The court rejected the notion that a 'no large group policy' was in operation and avoided unnecessary comparisons as identified by Lord Nicholls in *Shamoon* [2003] UKHL 11 because the reason for refusing access to the Coronet was inextricably linked to the stereotypical assumptions that Irish Travellers or Romani Gypsies cause disorder wherever they go. Interestingly the court held that TM was a person for the purposes of s13 EA. We will have to see whether this point is to be appealed.

This case is a timely reminder of how easy it is for individuals to make stereotypical assumptions about certain groups. Given the tone and nature of the current debate around immigration coupled with the Immigration Act 2014 placing new restrictions on illegal immigrants accessing private rented accommodation, I fear we will see more of this type of behaviour. The danger with this type of legislation is that it is easier for landlords to make such stereotypical assumptions about anyone who looks 'foreign', rather than undertake checks. Fifty years on from the first Race Relations Act some might say this is a sad reminder of the *'no blacks, no dogs, no Irish'* attitude that once prevailed.

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Barrister, 1 MCB Chambers

Discrimination Law Association

DLA's annual conference: Equality rights – where next?

The theme of this year's DLA conference will be *'Equality rights – where next?'* We look forward to welcoming Dr Brian Doyle, President of the Employment Tribunals (England and Wales) as our keynote speaker. Judge Doyle will be joined by a full programme of great speakers to celebrate the achievements and address the challenges of discrimination law and practice in 2015. A panel of inspiring speakers in the morning will be followed in the afternoon by the ever popular practitioner break-out sessions, and a thought provoking debate on the challenges of the future will conclude the afternoon. Once again we are grateful to the generosity of Baker & McKenzie for hosting the conference.

The conference will take place on **Monday October 26, 2015** at the offices of Baker & McKenzie, 100 New Bridge Street, London EC4V 6JA. Contact the DLA administrator Chris Atkinson for information on booking your place: info@discriminationlaw.org.uk.

General Election 2015 voting patterns

Razia Karim, discrimination law consultant and member of the DLA executive committee, explores the General Election voting patterns as described in two reports analysing trends by age, gender, ethnicity and faith.

There is no official monitoring data on the voting patterns of groups sharing a protected characteristic but two recently published reports by Ipsos MORI and British Future provide some interesting insight into how different groups voted. Perhaps not surprisingly, the reports also confirm the need for more action to be taken to improve participation in the electoral process by young voters, BME voters and the lower socio-economic groups.

Ipsos MORI

The Ipsos MORI report '*How Britain Voted in 2015*'[1] is an estimate of how groups voted based on aggregated data from election polls and other surveys carried out during the election period. It looks at voting patterns according to age, gender, ethnicity, social class and housing tenure. According to the data, the Conservative Party held up across most groups, whereas Labour only had a clear lead over the Conservatives among 18-34 year olds, voters in social class DE,[2] among private and social renters, and BME voters. UKIP took third place amongst most groups.

Some key findings from the Ipsos MORI report are:

Turnout

The voter turnout was 66%. Voter turnout remains lower among the working class, renters and BME voters (56% compared with 68% of white voters). Those in the 18-24 year old group are almost half as likely to vote as those aged 65+ (43% compared with 78%).

Age

The highest turnout of voters was in the 65+ age group (a 78% turnout). Of this group, 47% voted Conservative and 23% voted Labour, which represents a fall in votes for Labour to 1 in 4. UKIP was the third popular party for this age group. The sharpest fall in support for the Liberal Democrats was in the under 34 age group and among private renters.

Gender

The biggest swing to Labour was amongst women aged 18 to 24. Of this group 41% supported Labour. By contrast, there was a small swing to Conservatives among women aged 55 and over. Of this group 45% supported the Conservatives.

Both men and women vote Conservative in relatively equal proportion although women are slightly more likely to vote Labour. UKIP took third place among both men and women voters.

Ethnicity

The data shows that both Conservatives and Labour increased their vote share among BME voters, but remained unchanged among white voters. 23% of BME voters supported Conservatives and 65% supported Labour. Only 2% of BME voters said they would support UKIP.

British Future

The British Future research report, *'General Election 2015 and the ethnic minority vote in Britain'*[3] examined voting patterns among BME voters. The report is based on a post-election survey conducted by Survation on a sample size of 2067 voters and is the largest survey of ethnic minority attitudes to be published around the 2015 election.

Some key findings from the British Future report are:

Voter turnout

1 in 10 votes in the General Election were cast by ethnic minority voters, just under 3 million in total, up from 2.5 million (8.5%) in 2010.

Vote by ethnic background

52% of BME voters supported Labour and 33% supported the Conservatives. The Liberal Democrats and the Green Party each attracted 5% of the BME vote. 2% of BME voters supported UKIP.

Labour had a strong lead with black voters (67%), and mixed race voters (49%) while the Conservatives won as high a vote share from British Asians (50%) as they did with white British voters.

Ethnic minority vote by faith background

There were also differences amongst the faith groups:

Christians:	Labour 56%	Conservatives 31%
Muslims:	Labour 64%	Conservatives 25%
Hindus:	Labour 41%	Conservatives 49%
Sikhs:	Labour 41%	Conservatives 49%

The report concludes that the results are encouraging for the Conservatives, showing that the party is closing the gap on Labour with ethnic minority voters, particularly British Asians and those in the south of England. Whilst the author's caution that this is only a snapshot and there is now greater scrutiny of polls since the election, the report points out that the results echo trends identified in surveys before the election, showing Conservative advances and a decline in support for Labour among ethnic minority voters.

Sunder Katwala, director of British Future, said: '*This research shows that ethnic minority votes are more 'up for grabs' than ever before.'*

There is no published research on the voting patterns of disabled or LGB&T voters.

1. https://www.ipsos-mori.com/researchpublications/researcharchive/3575/How-Britain-voted-in-2015.aspx?view=wide May 22, 2015. The report covers Great Britain but the published breakdown does not show the Scottish National Party share of votes among these groups.

2. Semi skilled and unskilled workers & casual workers, pensioners and others who depend on the welfare state.

3. http://www.britishfuture.org/wp-content/uploads/2015/05/ethnicminorityvote2015.pdf

Westminster parliamentary committees

New Women and Equalities Select Committee

This new committee was appointed by the House of Commons on June 3, 2015 to examine the expenditure, administration and policy of the Government Equalities Office. This followed a letter in the Guardian in which NGO leaders called for '*a new women and equalities select committee [to be] created so that our new MPs have a place where they can prioritise the assessment of whether government and others are doing their best to ensure equality for all'.* Maria Miller MP will chair the Committee; the other members will be nominated by the House in the coming weeks.

Disability Committee appointed by House of Lords

The House of Lords has confirmed the appointment of an ad hoc committee *'to consider and report on the impact on people with disabilities of the Equality Act 2010.'* The Committee will publish its call for evidence in due course, stating the specific areas which the committee will investigate. Baroness Deech will chair the Committee which is required to report to the House by March 23, 2016.

Upcoming consultations

The government is consulting on how to implement s78 EA which requires larger employers to publish pay information to show whether or not there are differences in the pay of their male and female employees. A consultation document is likely to be published before the recess with an 8-week consultation period. This will lead to the publication of draft regulations.

The Office for National Statistics (ONS) has launched a 12-week public consultation asking users for their views on the topics that the 2021 Census in England and Wales might include. The next census will be in 2021 and as part of the census research programme, the ONS wants to determine the information that users want and need from the 2021 Census questionnaire in England and Wales, and which data will in future be needed for policy, business, and administrative purposes within the public and private sectors. The consultation runs from June 4, 2015 to August 27, 2015. Of particular interest is the addition of questions on sexual orientation which has caused controversy in the past.

Next Westminster parliamentary session

There are a number of bills announced in the Queen's Speech that DLA members will be interested in: they include:

- **European Union Referendum Bill** – to provide for an in/out referendum on Britain's EU membership that will have to be held by the end of 2017. The franchise will be the same as for the General Election, plus members of the House of Lords and Commonwealth citizens in Gibraltar.
- **Proposal for a Bill of Rights** – it appears that finding a quick agreement within the Conservative party over how to abolish the Human Rights Act has not been possible, so even a post-election promise to produce a draft bill within 100 days appears to have been dropped. Instead, a period of consultation is now promised.
- **Immigration Bill** – this will create a new enforcement agency to tackle the worst cases of exploitation as well as creating an offence of illegal working and enabling wages to be seized as the proceeds of crime.
- **Full Employment and Welfare Benefits Bill** – this reduces the household benefit cap from £26,000 to £23,000; introduces a two-year freeze on the majority of working-age benefits, including unemployment benefit, child benefit and tax credits, from 2016-17; and removes automatic entitlement to housing support for 18 to 21 year-olds. The bill will in effect break the link between the benefits cap and median earnings.
- **Housing Bill** – extends the right-to-buy scheme to 1.3 million housing association tenants in England. The Tories will also require councils to sell the most valuable homes from their remaining stock. The proceeds would, they promise, be used to build replacement affordable homes on a one-for-one basis. This promise will need to be closely watched in view of the chronic lack of building by local authorities and housing associations in recent years.
- **Childcare Bill** – The extension of free childcare will have a more limited impact than perhaps many parents realise, because it will only be open to families where 'all' parents work. Details of how many hours they need to work to qualify for the additional 15 hours will be crucial. The policy could also be complicated where parents are separated. Funding will be controversial: childcare providers and local authorities, which manage the scheme, are already unhappy that they are underfunded.
- **Trade Unions Bill** – this bill will create more hurdles for public sector workers to jump over before they can call a strike. First, more than 50% of a union's members must vote in order for the ballot to be valid, and second, at least 40% of those entitled to vote must be in favour of the strike. There is to be a new time limit on the ballot for industrial action and a promise to tackle intimidation of non-striking workers, without specifying how this would be done. The bill would also force trade union members to opt in if they want to pay a political levy in a move that could hit the funding of the Labour party.
- **Enterprise Bill** – an attempt to fulfil a Conservative manifesto promise to reduce regulation on small businesses, this bill would cap redundancy pay to public sector workers and establish a small business conciliation service to handle business-to-business disputes (over things such as late payments) without involving the courts.
- **Draft Public Services Ombudsman Bill** – this will merge the existing parliamentary and health service ombudsman with the local government and potentially the housing ombudsmen's offices.
- **English votes for English laws** – the promise of English votes for English laws (known as EVEL) will be implemented through changes to the standing orders of the House of Commons rather than a new bill.

'Right to rent' – landlords' immigration checks

Since December 1, 2014, there has been a pilot in the West Midlands of the 'right to rent' scheme, under the Immigration Act 2014. Before the pilot began the Home Office issued two Codes of Practice, one setting out the penalties private landlords or their agents could expect if they accepted as tenants or lodgers any person without a right to reside in the UK. The second Code of Practice, responding to concerns expressed by DLA and others, is intended to help landlords avoid race discrimination when they try to avoid these penalties.

The Home Office has undertaken and commissioned a range of research projects in order to evaluate how the pilot scheme is working and whether it should in the same form or with modifications, be implemented in other parts of the country. The Joint Council for the Welfare of Immigrants has been carrying out a survey of NGOs in the West Midlands to learn more about tenants' experiences and any discrimination they may have experienced.

In his speech on immigration on May 21, 2015, Prime Minister David Cameron said, *'For the first time we've had landlords checking whether their tenants are here legally. The Liberal Democrats only wanted us to run a pilot on that one. But now we've got a majority, we will roll it out nationwide...'*

On June 22nd the Immigration Minister James Brokenshire MP wrote to a number of landlord organisations indicating that he is likely to decide on a national roll-out of the 'right to rent' scheme in the next few weeks. While he states that his decision will be 'informed' by the evaluation of research findings, it is expected that he will also need to take into account the Prime Minister's statement and the Conservative Party election manifesto which included a commitment to *'Implement the requirement for all landlords to check the immigration status of their tenants'.* There is no public commitment to take fully into account any issues raised in the evaluation, for example if there is evidence of some landlords treating ethnic minority prospective tenants less favourably than others.

Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service	ET1	Employment Tribunal claim form	PCP	Provision, criterion or practice
AP	Approved premises	EU	European Union	PSED	Public sector equality duty
BME	Black and minority ethnic	EWCA	England and Wales Court of Appeal	QC	Queen's Counsel
CA	Court of Appeal	EWHC	England and Wales High Court	SC	Supreme Court
CBI	Confederation of British Industry	HHJ	His/Her Honour Justice	UKSC	United Kingdom Supreme Court
DLA	Discrimination Law Association	HMP	Her Majesty's Prison	UKIP	United Kingdom Independence Party
EA	Equality Act 2010	ICR	Industrial Case Reports	UKUT (IAC)	Upper Tribunal (Immigration and Asylum Chamber)
EAT	Employment Appeal Tribunal	ILF	Independent Living Fund	UNCRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights	IRLR	Industrial Relations Law Report	UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
EHRC	Equality and Human Rights Commission	LGB&T	Lesbian, gay, bisexual and transgender	WLR	Weekly Law Reports
EHRR	European Human Rights Reports	LJ	Lord Justice		
EqLR	Equality Law Reports	LLP	Legal liability partnership		
ET	Employment Tribunal	MoJ	Ministry of Justice		
		P	President (of the EAT)		

Briefings