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Editorial *Alert to the potential impact of Brexit*

2016 is set to be another challenging year for discrimination lawyers and trade unions alike. With the starting pistol fired in the European referendum campaign this issue of *Briefings* takes a critical look at the serious challenges the June 23rd referendum, planned legislation and case law developments pose to UK's equality rights and protections.

We report the hard-hitting message given by TUC General Secretary Frances O'Grady at the DLA's AGM of the threats to equalities, workers' rights and social justice in the UK. She gave concrete examples of how, instead of addressing the inequalities in our society, government policies are contributing to these widening gaps. A clear example of the negative impact of austerity measures is the SC judgment in *Mathieson v DWP* which concerned the withdrawal of Disability Living Allowance from parents of a severely disabled child who needed their 24/7 care even while in hospital. The SC ruled that the withdrawal of the allowance was in breach of both the child's Article 14 ECHR rights and, because of the requirement to read the ECHR in harmony with the principles of international law, his rights under Article 3 of the UN Convention on the Rights of the Child and Article 7(2) of the UN Convention on the Rights of Persons with Disabilities

It is timely then, that in her article considering how the main provisions of the UNCRPD can be used by practitioners to strengthen legal arguments in domestic discrimination cases, Catherine Casserley refers to the on-going UN inquiry into the UK. This inquiry is being conducted under the Optional Protocol to the UNCRPD, which allows the UNCRPD Committee to investigate a state party if it has received reliable evidence of *'grave and systematic violations of the Convention'.* The UK is the first country to be investigated by the UN in relation to this Convention. Investigations by the UN Committee are confidential but it is believed the inquiry will consider policies introduced by the Coalition Government since 2010 in relation to welfare and social security benefits, and in particular their compatibility with Articles 19 and 28: the rights of persons with disabilities to live independently and to enjoy an adequate standard of living.

On the major political issue of the UK's continued EU membership and the forthcoming referendum, the TUC general secretary highlighted the impact of the EU on UK workers' rights, including direct benefits such as limits on working time and the right to paid holidays for millions of workers. She underlined the fear that a future Conservative Government unfettered by European policy and the CJEU's robust defence of workers' rights, could sacrifice and further erode hard won workers' rights.

In their article considering possible legal developments and challenges for discrimination lawyers in 2016, Robin Allen QC and Sian McKinley echo this theme arguing that Brexit would surely embolden equality's enemies further. The overview of discrimination cases currently awaiting judgment underlines how far positive developments in discrimination are shaped by European jurisprudence.

With a poll of 4,000 UK voters commissioned by the TUC showing that 55% of the public would be more supportive of Britain's membership of the EU if it did more to help working people get decent pay and conditions at work, while only 23% would be more supportive if it did more to cut red tape on businesses, Frances O'Grady urged those of us who are pro-Europe to get involved in the debate: *'despite its flaws, the EU model is by far the most workable and worker friendly economic system on offer in the world today. The social model of a Europe fit for the 21st century is worth holding onto and is preferable to the privatisation and* libertarianism of the rest of the world'.

The message from our contributors is that we must make the pro-Europe case loud and clear. We don't want to wake up one morning and find that the rights we have achieved, as members of the EU, have disappeared and we have allowed ourselves to sleep walk out of Europe.

Geraldine Scullion, Editor

Please see page 35 for list of abbreviations

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Using the potential of the United Nations Convention on the Rights of Persons with Disabilities

Catherine Casserley, barrister at Cloisters specialising in discrimination, human rights and employment law, reviews the UN Convention on the Rights of Persons with Disabilities (the Convention)[1] and its interaction with UK legislation. Catherine is currently special adviser to the House of Lords Committee on the Equality Act 2010 (EA) and disability; she is acting on behalf of complainants bringing an individual complaint to the UNCRPD Committe in respect of the interim closure of the Independent Living Fund (a decision on admissibility is awaited). In this article she aims to alert readers to the most significant aspects of the Convention.

Background and overview of the Convention

As readers will be aware, the Convention was unprecedented in being negotiated in two years. In addition, it was negotiated with the involvement of disabled people themselves (recalling the *'nothing about us without us'* slogan of the disability movement); it is the first UN treaty to be signed and ratified by the EU; and the first to contain provision for continuous national oversight of its workings (e.g. provisions contained within it requiring monitoring).

Definition of disability

The Convention does not contain a specific definition of disability. However, the Preamble to the Convention acknowledges that 'disability' is an evolving concept (sub-para (e)). In addition, the Convention states that the term 'persons with disabilities' includes persons who have long-term physical, mental, intellectual or sensory impairments which, in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society (Article 1).

The recognition that 'disability' is an evolving concept acknowledges the fact that society and opinions within society are not static. Consequently, the Convention does not impose a rigid view of 'disability,' but rather assumes a dynamic approach that allows for adaptations over time and within different socio-economic settings.

The Convention's approach to disability is that of the social model of disability. It recognises that, for example, a person in a wheelchair might have difficulties taking public transport or gaining employment, not because of his/her impairment, but because there are environmental obstacles, such as inaccessible buses or staircases in the workplace, which impede his/her access.

1. Adopted by General Assembly resolution 61/106 of 13 December 2006; the UK signed the Convention on March 30, 2007; it was ratified on June 8, 2009.

General principles

The general principles in the Convention provide guidance to states and other actors on interpreting and implementing the Convention. The eight general principles are:

1. Respect for the inherent dignity, autonomy, and independence of persons, including the freedom to make one's own decisions;
2. Non-discrimination;
3. Full and effective participation and inclusion in society;
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
5. Equality of opportunity;
6. Accessibility;
7. Equality between men and women; and
8. Respect for the evolving capacities of children with disabilities and for the right of children with disabilities to preserve their identities.

Discrimination on the basis of disability

'Discrimination on the basis of disability' is defined in Article 2 as meaning any exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Reasonable accommodation

The Convention goes on to define 'reasonable accommodation' as meaning necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of

all human rights and fundamental freedoms.

The Convention, when negotiated, was not intended to give people new rights, but to ensure that disabled people enjoyed the same human rights as everyone else. This was certainly the approach to negotiation of the Convention which many of the member states took, particularly the UK government. However, the articulation of those rights, and in particular the detail in which they have been set out means that in reality the Convention is likely to make a difference to disabled people – indeed it has already been cited in cases brought under domestic legislation in the UK, as well as in the European Court of Human Rights.

Rights

The rights contained in the Convention are economic, social and cultural (which are to be achieved progressively to the maximum of available resources – Article 2(2)), and civil and political – which are immediately applicable.

The main rights are contained in Articles 5 to 30 and are as follows:

- Equality before the law without discrimination (Article 5)
- Right to life, liberty and security of the person (Articles 10 and 11)
- Equal recognition before the law and legal capacity (Article 12)
- Freedom from torture, inhuman and degrading treatment, including medical experiments (Article 15)
- Freedom from exploitation, violence and abuse (Article 16)
- Right to respect physical and mental integrity (Article 17)
- Freedom of movement and nationality (Article 18)
- Right to independent living and to being included in the community (Article 19)
- Right to mobility (Article 20)
- Freedom of expression and opinion (Article 21)
- Respect for privacy (article 22)
- Respect for home and the family (Article 23)
- Right to education (Article 24)
- Right to health (Article 25)
- Right to habilitation and rehabilitation (Article 26)
- Right to work (Article 27)
- Right to an adequate standard of living (Article 28)
- Right to participate in political and public life (Article 29)
- Right to participate in cultural life, recreation and sport (Article 30)

Each right is set out in some depth. For example, Article 19 on independent living – perhaps one of the most important rights – states as follows:

> *States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:*
>
> *(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;*
>
> *(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;*
>
> *(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.*

Reservations

The UK government currently has 3 reservations in place. This means that it does not accept to be bound by the full content of the relevant Article but has limited its applicability to the extent set out in the reservation. The reservations are in relation to the following:

- Article 18 – liberty – the reservation is to ensure that the Convention does not create new or additional rights to remain in the UK (i.e. in order to maintain its immigration controls in respect of health checks);
- Article 24 – education – to allow a child to access *'more appropriate education provision'* even if it is elsewhere i.e. maintaining special schools; and
- Article 27 – work and employment – exclusion of armed forces from the disability discrimination provisions.

Whilst there was initially a reservation in relation to Article 12 because of rules in relation to benefits – this has now been withdrawn.

Consultation and active involvement

The Convention also requires those states who have ratified it to *'closely consult and actively involve'* disabled people through their representative organisations in those provisions implementing the Convention and other decision-making processes concerning issues relating to disabled people (Article 4(3)). There are also

provisions in relation to monitoring compliance with the Convention; the designation of an independent monitoring mechanism for the Convention (in England and Wales that role is fulfilled by the Equality and Human Rights Commission, in Northern Ireland by the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, and in Scotland by the Scottish Human Rights Commission); and provisions in relation to awareness raising and fostering respect for the rights and dignity of disabled people.

The Optional Protocol

Whilst the rights contained in the Convention are not directly enforceable in the UK courts, the UK has signed the Optional Protocol to the Convention.[2] This means that individual complaints alleging a violation of rights under the Convention can be made to the Convention on the Rights of Persons with Disabilities Committee (the CRPD committee). If the CRPD committee makes a finding that the state has failed in its obligations under the Convention, it will issue a decision requiring that the violation be remedied and for the state party to provide follow up information.

The CRDP committee is also able to investigate where it has received reliable evidence of grave and serious violations of the Convention by states. These investigations are usually confidential, but in February 2016, a Parliamentary research briefing was issued by the UK Parliament which confirmed that the UK government is the subject of the first investigation by the CRPD committee for suspected violations of Articles 19 and 28 – independent living and adequate standard of living – see Commons Briefing Paper 7367, February 10, 2016.[3]

Use of the Convention

The Convention has been used as an aid to construction in a number of domestic cases, though the extent to which it can be relied upon has varied.

It first came to prominence in *Burnip v Birmingham CC and Another* [2012] EWCA Civ 629 [see Briefing 655], when Maurice LJ, interpreting Article 14 of the European Convention on Human Rights in a housing benefit case, stated:

> *If the correct legal analysis of the meaning of Article 14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants.*
>
> *It seems to me that it has the potential to illuminate our approach to both discrimination and justification.*

In *Stuart Bracking and Ors v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [see Briefings 702 & 745], a leading case on the use of the s149 EA public sector equality duty (PSED), the CA considered an appeal against a refusal to overturn the decision to close the Independent Living Fund (ILF) as having been unlawful. The CA allowed the appeal. It considered the PSED and its imposition of a heavy burden upon public authorities in its discharge, and the need to ensure that there was evidence available, if necessary, to demonstrate that discharge. It went on to find that there was not that evidence. It was insufficient to show that the Minister, merely in the circumstance of her position as a Minister for Disabled People and sketchy references in the documents before her as to the impact on ILF fund users by way of possible cuts in the care packages in some cases, to demonstrate to the court that a focused regard had been paid to the potentially very grave impact upon individuals in this group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.

The CA made specific reference to the obligations of the UK under the Convention in respect of Article 19 (independent living), stating that there was for example, no evidence that the Minister had had her attention drawn to the positive obligation to advance equality of opportunity, nor indeed (although it was not suggested that this was of itself directly a breach of the PSED) to the more specific obligations which the UK has undertaken with respect to disabled people in the Convention and which ought to inform the scope of the PSED with respect to them. In particular, Article 19 of the Convention requires states to take effective and appropriate measures to facilitate the right for disabled people to live in the community, a duty which would require, where appropriate, the promotion of independent living. There was no evidence that any of these considerations were in the mind of the Minister.

However, the Convention did not fare so well in the second challenge to the closure of the ILF. The government had consulted again on the closure.

In *R (on the application of Aspinall, formerly Bracking and Ors) v Secretary of State for Work and Pensions* [2014] EWHC 4134 [see Briefing 745] judicial review was

2. The UK signed the Optional Protocol on February 26, 2009 and ratified it on August 7, 2009

3. http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7367

sought of the decision taken by the Minister for Disabled People on March 6, 2014 to close the ILF with effect from June 30, 2015, and to transfer funding to the devolved administrations in Scotland and Wales, and to local authorities in England. The claimants were, again, severely disabled people who were users of the ILF. It was argued that the Minister had failed to comply with his obligations under the PSED again, in determining to close the fund (a different Minister this time). One of the arguments put forward by the intervener was that the Minister had a specific obligation to consider whether the UK would be in breach of its international obligations, specifically Article 19 of the Convention, in closing the ILF, and whether this would amount to regression. This was explicitly rejected by the court, with Mrs Justice Andrews stating as follows:

> *There is no general principle of 'non-regression' in international law and it is difficult to see how any positive duty of 'non-regression' can arise specifically under the UNCRPD. The provisions of Article 4 of that treaty are aspirational only, and cannot qualify the clear language of primary legislation, as Laws LJ made clear in Hainsworth. I do not accept that what was said in Hainsworth is distinguishable on the basis that the articles of the UNCRPD being relied upon in that case were interpretative only. The UNCRPD is an unincorporated treaty, and as such, interpretation of its provisions is not justiciable by the English courts: R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756, see especially Lord Brown at [65]-[66] (p.850) and Lord Bingham at [44] (p.845). Lord Bingham observed that it would be "unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding"…In my judgment it was no part of the Minister's task to consider whether his decision would put the UK in breach of its international obligations. He was merely obliged to take those obligations into account, and pay them proper attention.* [paras 37-38]

More recently, however, the SC cited the Convention with approval. In *Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone (AP)* [2015] UKSC 15 [see Briefing 747], a housing case concerning s15 EA, Lady Hale stated of the EA obligation to make reasonable adjustments that it was consistent with the obligations which the UK has now undertaken under the Convention. This defines discrimination on the basis of disability to include the *'denial of reasonable accommodation'* (Article 2). State parties are required, not only to prohibit all discrimination on the basis of disability, but 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.

Employment cases

The reference to *Hainsworth* is to the CA's decision of *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763 [see Briefing 725] where it was argued that the reasonable adjustment duty in employment extended to relatives of disabled people. This was a very difficult argument to make and was shortly rejected at all levels. The CA in dealing with the interpretive arguments resting on the Convention stated:

> *…great care needs to be taken in deploying provisions which set out broad and basic principles as determinative tools for the interpretation of a concrete measure such as Article 5 of the Directive. In my judgment the short and conclusive point is that neither the UN Convention, nor the EU Charter of Fundamental Right or the European Social Charter (which is also relied on) begins to be capable of qualifying what to my mind is the plain and inescapable meaning of Article 5 of the Directive.* [para 32]

The decision in *Hainsworth* has been appealed and the SC judgment is awaited.

The Convention has been used to positive effect in other employment cases though. It has been referred to in a number of CJEU cases to, in effect, broaden the definition of disability (see *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab; HK Danmark, acting on behalf of Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* [2013] EqLR 528, and *Kaston Kaltof* C354/13). [See Briefings 674 & 720]

Domestically, in *Mansfield v Fundraising Innovations Ltd* [2013] 1137 an ET relied on the Convention to disregard the statutory guidance on disability – specifically paragraph C2 which states that the adverse effects of two unrelated impairments should not be aggregated. The tribunal held that pursuant to the Convention one must consider all long-term medical conditions which hinder a person's participation in society and therefore it would be wrong to consider only one of the claimant's conditions. Her claim fell on the facts, however, on the basis that she could not show that she was dismissed as a consequence of her disability.

Conclusion

There is no doubt that the Convention can be used as an aid to the interpretation of the rights afforded under the Human Rights Act 1998 (HRA) and as the HRA must be considered when interpreting any legislative provision, it can be referred to when, for example, considering the interpretation of reasonable adjustment. The extent to which interpretation of its provisions is justiciable is debateable – it is arguable that *Corner House* (justiciability of Convention provisions, see above) is confined to its facts. It is important however that practitioners are familiar with the provisions of the Convention and the potential use to which they can be put.

Finally, where a provision in the Convention appears to have been breached by the state, and there is either no remedy or all mechanisms have been exhausted, an individual complaint to the CRPD committee should always be considered.

Briefing 773

2016 and crystal balls: a querulous look to the year ahead!

Cloisters' Robin Allen QC[1] and Sian McKinley[2] speculate on challenges for equality practitioners in 2016 including the impact of Britain leaving the EU (Brexit), repeal of the Human Rights Act 1998 (HRA), upcoming cases at the Supreme Court and the Court of Justice of the European Union and legislative and other administrative changes. They highlight interesting domestic developments such as gender pay gap reporting and two potential European directives addressing quotas for female board directors, and accessibility in the field of goods and services on the grounds of age, as well as disability. They conclude that we face a challenging year of hard work!

Introduction

Among the best aphorisms about predicting the future is Voltaire's comment that *'the present is pregnant with the future'*. We know much will be delivered in 2016 but as to the detail and timing we can mostly only speculate. The following is our best effort but we emphasise: neither of us is a legal midwife.

Would Brexit end equality law?

Nowhere is this more obvious than with Brexit. The European Union Referendum Act 2015, which received royal assent on December 17, 2015, enables the government to hold a referendum on whether the UK and Gibraltar should remain in the EU. The referendum which will take place on June 23, 2016 could raise many issues of interest to equality lawyers. EU directives influence UK employment law in many key areas including working time, collective redundancy consultation, discrimination, business transfers and family-friendly rights.

While the Prime Minister stage-manages public expectations about the referendum as best he can, the lack of clarity about the effect of possible changes to equality law is almost impossible to address. At the moment the most important fact is that there is no sign of any really hard thinking about how any exit might be managed. It would cause huge problems, because if a member state elects to leave the EU the Treaty provides for a two-year period of negotiation before exit takes effect by operation of law.[3] What would come out of that negotiation may be straightforward and it may be very complicated.[4] What is certain is that the negotiation would be drawn out and tendentious. So to bring the saga to an end the message is vote in; for more of the same for the next two years vote out.

Thinking deeper about this though we can see that, practically, the referendum could raise many issues of interest to employment practitioners. Many employers consider compliance with EU-derived legislation to be arduous and would be delighted to have the opportunity to repeal some of the regulatory burden, if the UK voted to leave the EU. For example, the Federation of Small Businesses in 2012 called the Working Time Directive (WTD) '*one of the most expensive EU regulations to be*

1. ra@cloisters.com

2. sm@cloisters.com

3. See Article 50 of the Treaty on European Union.

4. It would certainly involve a reconsideration of and possible amendment to the European Communities Act 1972.

implemented in the UK… [causing] huge administrative and compliance costs'.[5] Employers are therefore likely to baulk at the prospect of removing the power to opt out of the 48-hour cap on the working week, as envisaged in the EU's recent consultation on the review of the WTD.

No doubt the possibility that UK courts would no longer be bound by the case law of the CJEU might also be well-received by many employers. For example, the recent CJEU decision in *Lock v British Gas Trading Ltd*,[6] followed in the UK decision *Bear Scotland Ltd and others v Fulton and others*,[7] had significant financial implications for many UK businesses.

On the other hand, support from individuals for remaining in the EU appears to decrease if employment rights are weakened. A poll of 4,000 UK voters commissioned by the Trades Union Congress revealed that 55% of the public would be more supportive of Britain's membership of the EU if it did more to help working people get decent pay and conditions at work, while only 23% would be more supportive if it did more to cut red tape on businesses.[8]

The government has not yet set out how it plans to reform employment law in the event of a Brexit or how it would interpret existing legislation without the assistance of EU case law. Even if the UK remains in the EU, there may be an impact on employment law as a result of a change in the terms of the UK's membership.

At the time of writing David Cameron was engaged in negotiations to change the UK's membership of the EU. Changes he was seeking include greater powers to national parliaments to block EU legislation, cutting down on excessive EU regulation and restricting migrants coming to the UK from claiming certain benefits and housing until they have been resident for four years. It appears that the deal achieved at the European summit on February 19th has involved compromise on certain changes sought. The 'special status' Mr Cameron has negotiated for the UK appears to include:

- an 'emergency brake' on migrants' in-work benefits for four years when there are *'exceptional levels of migration'*. The UK will be able to operate the brake for seven years;
- child benefit for the children of EU migrants living overseas to be paid at a rate based on the cost of living in their home country – applicable immediately for new arrivals and from 2020 for the 34,000 existing claimants;
- the amending of EU treaties to state explicitly that references to the requirement to seek ever-closer union *'do not apply to the United Kingdom'*;
- the ability for the UK to enact 'an emergency safeguard' to protect the City of London, to stop UK firms being forced to relocate into Europe and to ensure British businesses do not face 'discrimination' for being outside the Eurozone.

The referendum on whether the UK should remain in the EU or leave will take place on June 23, 2016.

There is no doubt that voting out would bring an end to the development of equality law in line with the concept of Social Europe, but it seems unlikely that our equality law would be completely rolled back on Brexit. There are many examples of occasions when legal systems have divided leaving old laws as they stand without their being immediately thrown over. Yet it would be complacent to assume there will be no attack on the Equality Act 2010. At present the government seems to wish, whatever it delivers in reality, to be seen to talk a good talk in this area. However the lessons of the Red Tape review of legislation under the previous Coalition Government must not be forgotten. That led to the end of questionnaires and tribunal recommendations. Brexit would surely embolden equality's enemies further.

A British Bill of Rights?

We were promised a consultation about a British Bill of Rights in December 2015[9] but that date was then put back as the government trailed a more nuanced approach than simply an exit from the European Convention on Human Rights (ECHR) and sought to emphasise a constitutional role for the Supreme Court. Michael Gove, the Lord Chancellor, seems to have been attracted to the German model where the German Supreme Court has a constitutional role to guard the German Constitution and in that capacity has even reviewed the jurisprudence of the CJEU.[10] That has not

5. http://www.fsb.org.uk/LegacySitePath/policy/assets/final%20fsb%20top%2010%20burdens%20response.pdf

6. Case C-539/12, [2014] 3 CMLR. 53 [2014] ICR 813

7. [2015] 1 CMLR 40; [2015] ICR 221; [2015] IRLR 15.

8 http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations-law-and-regulation/united-kingdom-employment-rights-may-influence-outcome-of-eu-membership-referendum

9. http://www.independent.co.uk/news/uk/politics/the-tory-plan-to-scrap-the-human-rights-act-just-moved-one-step-closer-10491173.html

10. Solange II (1984) Case 345/82, [1987] 3 CMLR 225

11. http://www.thetimes.co.uk/tto/news/politics/article4682249.ece?CMP=OTH-gnws-standard-2016_02_03

received universal approval.[11]

In any event, Scottish First Minister Nicola Sturgeon has vowed to block the repeal of the HRA. In addition to the political ramifications for the political parties, withdrawal would have potential consequences on the devolution settlements in Scotland, Wales and Northern Ireland. The Acts of Parliament devolving power to the Scottish Parliament, and the Welsh Assembly presuppose Britain's membership of the ECHR.

The situation is even more difficult in Northern Ireland. The Good Friday Agreement guaranteed that the British government would ensure *'incorporation into Northern Ireland law'* of the ECHR, with direct access to the courts, and remedies for breach of the ECHR, including power for the courts to overrule NI Assembly legislation on grounds of inconsistency. This commitment was made through the passing of the HRA.

In any event, as has been explained more than once, it would be next to pointless to repeal the HRA while we remain a member of the EU because of the European Charter of Fundamental Rights. Indeed we know now that this Charter is possibly even more significant in the area of equality law than the ECHR: *Benkharbouche and Janah v Embassy of the Republic of Sudan and Other*[12] [see Briefing 751].

Supreme Court cases

An area where there is no political uncertainty though plenty of legal caution is SC jurisprudence. Here we are awaiting the outcome of *Hainsworth v MOD* [see Briefing 725] in which the SC heard argument in July 2015. This appeal raised the question: can a reasonable adjustments claim be advanced by an employee who is not herself disabled, but is associated with someone who is disabled, in circumstances where the adjustment sought would enable the associated person to undergo training/education? This is an important and interesting extension of the *Coleman v Attridge*[13] line of authority, and will also have points of contact with *CHEZ Razpredelenie Bulgaria*[14] [see Briefing 762].

For the future we know that on April 20, 2016 *Taiwo v Olaigbe* together with *Onu v Akwiwu* are due to be heard by the SC [see Briefing 714]. The two cases concern the question whether workers from Nigeria who were trafficked to the UK to work as domestic servants suffered direct or indirect race discrimination because of their status as vulnerable domestic migrant workers.

Two months later on June 15, 2016 the SC will hear the argument in *First Group v Paulley* [see Briefing 738]. The issue raised in this appeal is, in summary, whether there was a breach of the duty to make reasonable adjustments under s20(3)a EA when a bus company had a policy of requesting, but not compelling, non-wheelchair users to vacate the wheelchair space on its buses.

Two other very important cases are waiting in the wings. Permission to appeal has been granted but as yet there is no hearing date in *Home Office (UK Border Agency) v Essop and Ors* [see Briefing 752]. Meanwhile an application for permission to appeal to the SC in *Naeem v Secretary of State for Justice* is pending [see Briefing 778 in this edition]. It is to be hoped it will be granted and that two cases will be heard together so that the court can review on a full basis the proper approach to indirect discrimination.

Outstanding Supreme Court permission to appeal applications

There are several other more recent outstanding applications for permission to appeal to the SC from judgments of the CA concerning equality law issues. Two conjoined applications from an appeal heard by the CA last year are currently before the SC for consideration. These are *O'Brien v MOJ* [see Briefing 675] (concerning the extent to which part-time judges can require service before the Part-Time Workers Directive came into force to be brought into account in calculating their pensions), and *Walker v Innospec & Ors* raising similar questions about the survivorship pension entitlements of a gay couple under the Equal Treatment Directive.

Perhaps most importantly for all employment lawyers, permission to appeal to the SC is also being sought in the ET fees litigation but as yet there is no decision on the application.[15]

Legislative and other possible administrative changes

We should start by reminding readers of the government's Prevent strategy[16] aimed at helping educational and other establishments prevent people being drawn into terrorism. It seems likely that sooner or later the application of this strategy will give rise to

12. [2015] EWCA Civ 33, [2015] HRLR 3, [2015] IRLR 301

13. [2008] All ER (EC) 1105, [2008] IRLR 722, [2008] ICR 1128

14. Case C-83/14; EU:C:2015:480, ECLI:EU:C:2015:480; [2016] 1 CMLR. 14; [2015] All ER (EC) 1083; [2015] IRLR 746

15. Unison, R (On the Application Of) v The Lord Chancellor [2015] EWCA Civ 935 [2016] ICR 1, [2015] WLR(D) 370, [2015] IRLR 911.

16. https://www.gov.uk/government/publications/preventing-extremism-in-schools-and-childrens-services

some litigation. It is already asserted that it is sowing mistrust and fear in the Muslim community.[17] Though no doubt it will be argued that it is a necessary action to help draw some important lines on public safety. The Birmingham Trojan Horse litigation is perhaps an example of the kinds of problem that will be tackled again this year.[18]

Mandatory gender pay gap reporting

The Think, Act, Report scheme[19] was introduced by the Coalition Government to encourage gender pay reporting on a voluntary basis. However, despite more than 200 companies signing up to the scheme, in August 2014 it was reported that only four companies had actively published their gender pay gap information through the scheme.[20] This is due to change.

S147 of the Small Business, Enterprise and Employment Act 2015 (SBEEA) requires the government to make regulations under s78 EA, imposing a duty on employers with at least 250 employees to publish information about their gender pay gap.

The government launched a consultation on the implementation of the gender pay gap reporting duty in July 14, 2015. Key questions addressed the type of pay data employers will be required to publish, when the pay data should be published, and the date for implementation.

On February 12, 2016 the government published draft regulations for final consultation[21] [see *Briefings* Notes and news on page 33]. The most remarkable feature of this draft is the statement that the government does not intend to impose any civil penalties for failing to publish the relevant pay data. It says it is merely intending to monitor compliance; so it must be doubtful as to whether those employers who don't want to publish this information properly will do so. The lack of an enforcement mechanism will make it much easier to give partial information and to assert that there are particular difficulties with publishing the kind of key information that might lead to individuals taking action to enforce their rights.

The government strategy on mandatory gender pay reporting is interesting. It seems set on shaming employers into action. Mandatory gender pay gap reporting will increase administrative costs for employers and could expose them to negative publicity as well as the prospect of equal pay and sex discrimination claims once the figures are released. It may also increase staffing costs if employers discover that they have been underpaying women as a result of this exercise.

Quotas of women on company boards

On November 14, 2012, the European Commission published a proposal for a directive which set a minimum objective of at least 40% of non-executive directors in listed companies to be women by 2020 (by 2018 in the case of public undertakings).[22] This proposed directive is intended to achieve gender equality in economic decision-making. Companies with a lower share of women among non-executive directors would be required to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions. As is too often the case with much EU legislation this proposal has been progressing more slowly than might be hoped. On December 2, 2015, the European Parliament held a debate on women on company boards and urged the Council of Ministers to agree a position but the Council failed to reach an agreement on the proposal on December 7, 2015. It remains however as a priority in the Commission's work programme for 2016.[23]

European Accessibility Act

Perhaps more promising is the European Commission proposal[24] made on December 2, 2015, for a draft Directive 2015/0278 described as the European Accessibility Act (EAA), which would introduce a duty to ensure that certain products and services were accessible for all regardless of age or disability. This obligation would not arise if, by ensuring accessibility, there would be a significant change to the product/service or it would create a disproportionate burden. In this way, the proposed obligation contained in the EAA mirrors the duty of reasonable accommodation imposed on employers by Article 5 of the Equal Treatment Directive 2000/78/EC which has

17. http://www.theguardian.com/uk-news/2016/feb/03/prevent-strategy-sowing-mistrust-fear-muslim-communities

18. http://www.birminghammail.co.uk/news/midlands-news/trojan-horse-linked-school-employment-10744285

19. https://www.gov.uk/government/publications/think-act-report-framework

20. http://www.theguardian.com/money/2014/aug/12/gender-pay-gap-coalition-scheme

21. https://www.gov.uk/government/consultations/mandatory-gender-pay-gap-reporting

22. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012PC0614

23. http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573927/EPRS_BRI(2016)573927_EN.pdf

24. http://europa.eu/rapid/press-release_IP-15-6147_en.htm

been implemented domestically by the duty to make reasonable adjustments contained in s20 EA. Accordingly, the EAA is radical in that it proposes an extension of the duty to make reasonable adjustments into the sphere of goods, facilities and services and to extend the duty beyond disabled people to include the grounds of age.

Upcoming CJEU judgments

Predicting the timing of CJEU judgments is notoriously difficult but there are some key ones to look out for in 2016. Four cases should be noted in particular:

1. *Achbita v G4S Secure Solutions NV C-157/15* – Is it direct discrimination on grounds of religion to prohibit the wearing of an Islamic headscarf where the employer has a policy prohibiting employees from wearing outward signs of political, philosophical or religious beliefs at work? This application was lodged on April 3, 2015.
2. *Bougnaoui v Micropole Univers C-188/15* – Where a client does not want a consultant to wear an Islamic headscarf does the need to adopt a 'neutral appearance' amount to a genuine occupational requirement of the job? The application was lodged on April 24, 2015.
3. *Daouidi v Bootes Plus SL C-395/15* – Is it direct disability discrimination to dismiss an employee merely because he was subject to temporary incapacity of uncertain duration by reason of an accident at work? The application was lodged on July 22, 2015.
4. *Parris v Trinity College, Dublin C-443/15* – Is it direct discrimination on grounds of sexual orientation if an occupational pension scheme only pays survivors' benefits to civil partners if they entered into a civil partnership before the member's 60th birthday, but the national legislation permitting civil partnerships did not come into force until after the member's 60th birthday? The application was lodged on August 13, 2015.

Conclusion

Keep reading DLA *Briefings* as it brings more news of all these developments. It seems like a year of hard labour for us all!

Briefing 774

TUC General Secretary's inspiring address at DLA's AGM

The DLA was delighted to welcome Frances O'Grady, the first female TUC General Secretary, as its guest speaker at its AGM on February 3, 2016. Catherine Rayner, DLA chair, sums up her inspirational talk which addressed the government's attack on workers' rights and its proposals for controversial legislation – areas on which the DLA will focus in the year ahead. Frances spoke passionately about the challenges we face – the impact of austerity, the significant reduction in access to justice as a result of cuts to advice agencies, reduction in the scope and availability of legal aid, and the introduction of fees in the ET. She also highlighted threats to workers' rights, to equality rights and to human rights posed by the Trade Union Bill and a possible exit from Europe.

Real inequality across our society

The starting point of Frances' talk was the real inequality across our society. Whilst the Prime Minister had lambasted universities for not doing enough to combat race discrimination, TUC research demonstrates an on-going sustained pay gap between black university graduates and their white counterparts which is simply not being addressed. The government has chosen not to look at the problem of discrimination in the context of the workforce as a whole, preferring to make specific and targeted criticisms. It has refused to look at inequality in the context of class, declining to introduce into law those sections of the Equality Act 2010 dealing with socio economic factors.

She made the point that whilst the Prime Minister may talk positively on equalities, in practice, the government is not willing to deal with the discriminatory consequences of its own policies, even where legal challenges lead to clear findings that their impact is unfair and discriminatory. Austerity measures are hitting women hardest, just as the bedroom tax is hitting disabled people and their carers the hardest. The government is not only failing to deal

with the discrimination flowing from its policies, but in continuing with them it moves further towards a less fair and less equal society.

The EU debate

Frances considered the focus on migrants in the debate on the EU and the referendum. She pointed out that, at the moment, the debate is dominated by politicians wanting to blame migrants for problems in the workplace rather than blaming the bosses who exploit them. She drew the comparison between the contribution made by migrant workers to our economy, with that of Google – which had negotiated an effective tax rate of just 3%, something the Chancellor had trumpeted as 'a major success'. She also pointed out that as a group, migrant workers are less likely than other UK workers to use the health service, whilst being far more likely to work in it.

She urged people who are pro-Europe to get involved in the debate and stand up for Europe. Her talk really underlined a fact well understood by discrimination lawyers and employment lawyers alike; many of the rights which matter the most to UK workers derive from Europe and, without Europe, would not have been implemented at all.

For example, she pointed to the Working Time Directive (WTD) which alone benefited 6 million workers in the UK with limits on working time, additionally ensuring that at least 2 million workers received paid holiday as of right for the first time ever. She suggested that without Europe, governments would have no incentive to introduce or even seek to retain these measures, or indeed others such as the right to maternity and paternity leave, agency workers' rights, rights for part-time employees, or the right to equal pay.

She reminded the audience that David Cameron wanted to use an attack on the WTD agreements and agency workers' rights as the basis for renegotiating the relationship suggesting that his willingness to sacrifice workers' rights now is perhaps indicative of how any future Conservative Government would act if not constrained by the EU. Could we expect a Conservative Government unfettered by Europe to cap compensation in discrimination cases for example? As lawyers we are aware that the CJEU is often more robust on equality issues that the UK government, and it is this aspect of social Europe that makes the difference for working people, she said.

Alternatives to the EU model?

Whilst Frances considered that the EU in its present form is far from perfect, she did ask what the other alternatives might be? She suggested that despite its flaws, the EU model is by far the most workable and worker friendly economic system on offer in the world today. The social model of a Europe fit for the 21st century is worth holding onto and is preferable to the privatisation and libertarianism of the rest of the world. Without Europe, the real concern would be that the UK would be drawn into the expanding free market economy of the type in existence in the US, with its out of control free markets which have led to ever wider gaps between rich and poor. Other undesirable options might be economies such as those in Russia or China.

Immigration Bill

On the issue of migration Frances echoed some of the concerns expressed by the DLA in its briefing to the House of Lords on the Immigration Bill. She pointed out again the dangers of an Immigration Bill which will make scapegoats of immigrants by restricting work and criminalising undocumented workers. It is a real concern that measures such as the right of the state to seize wages will increase the likelihood of discrimination in jobs and in housing; such measures will increase the likelihood of exploitation of migrants, with workers being even less willing than now to report exploitation or abuse, for fear of losing work, housing and the ability to support one's family. A new move to place additional duties on local authorities to only employ people in front-facing roles who speak English, without making any changes to reverse cuts to resources for teaching English as a second language, is both cynical and politically motivated.

Employment Tribunal fees

Echoing arguments made by the DLA and other employment law organisations over and again against the continuation of fees in ETs, Frances noted the massive drop in numbers of claims of discrimination in the ET following the introduction of fees and the fact that there has not been any obvious comparable reduction in incidences of discrimination. Access to justice and the ability to defend the legal rights of working people is of paramount importance. She drew a parallel between the cost of an average ET claim being £1000 compared to the cost to an

employer of information blacklisting an employee – the amount which employers were found to have paid to be able to receive information about a worker's union activities, often leading to victimisation, was only £2.

Trade Union Bill

The last issue which Frances addressed was the controversial Trade Union Bill. This has understandably dominated the agenda of the TUC. The Bill, if passed into law, will make it harder to stand up for rights by attacking the right to strike. Banning check off voluntary arrangements in the public sector, by which union fees are automatically deducted from wages, is not justifiable. It is a system that works for bicycle clubs and Christmas clubs but not, apparently, for unions.

Frances stated that the Bill is not just an attack on the freedom of association; it is an attack on civil liberties and is an issue for all concerned about workers' rights. At a time when there have been allegations of collusion between blacklisting employers and the police and security services there is a real need to oppose unwarranted state interference with trade union membership information. Of course, Frances reminded us, the right to strike is always exercised as a last resort but without it too much power would be placed in the hands of employers.

And of course, an attack on trade union members has implications for equality because of the position of black and minority ethnic people and women in the workplace. Trade unions work to protect those who are vulnerable at work; in recent years, the membership of trade unions has levelled out, with over 50% of members now being women. The new trade union member to be seen on the picket line is not a male worker from heavy industry, but a female worker from the care sector, the health sector or the fire service. It is for this reason that the *New Statesman* has described the legislation as sexist.

Frances told us that TUC is launching a ♥ UNIONS campaign to support the argument that collective rights are important in making sure that workers are treated equally, to ensure that discrimination in all forms is challenged and that prejudice is tacked in order to move towards a fairer society. If the Bill becomes law it will be far harder to settle disputes. Even Conservative MP David M Davis has said that aspects of the Bill were more fitting to Franco's Spain than a modern democracy like the UK. We have to defeat it and if we cannot, we need to make real changes to it.

Following her excellent talk, Frances answered questions from the audience and there was lively debate about a number of issues raised. The talk was truly inspiring for the year ahead. The DLA is very grateful to Frances for taking the time to speak at our AGM.

Briefing 775

French state prohibits employees from wearing religious dress at work

Ebrahimian v France (application no. 64846/11) European Court of Human Rights; November 26, 2015

The question of how far a state employer is entitled to insist on secular dress for employees in the workplace is one which produces varied answers depending on the legislative provisions relied upon and the state jurisdiction they fall under.

In Briefing 768, November 2015, Sophie Garner explained the decision of an EAT[1] where religious dress (a jilbab) was considered as a potential health and safety hazard and the Equality Act 2010 (EA) came into play as a protection against race discrimination. The EAT upheld the right of the employer to proscribe a standard of dress on health and safety grounds, but the claimant was not prevented from wearing her jilbab altogether.

In *Ebrahimian*, the ECtHR supports the French states ban on religious dress at work for public officials, explaining that the state must be allowed to insist on religious neutrality amongst its employees, in order to ensure equality of service provision. This coupled with the margin of appreciation allowed to states over the application of the ECHR, forms the basis of the justification for an interference with a fundamental individual freedom.

1. *Begum v Pedagogy Auras UK Ltd t/a Barley Lane Montesorri Day Nursery* UKEAT/0309/13/RN, May 22, 2015

Facts

Christiane Ebrahimian (CE) is a French Muslim who brought a claim first in the French national courts and then before the ECtHR, arguing that her fundamental right to freedom of religious expression had been violated by the insistence that she stop wearing her headscarf at work, and her dismissal when she refused to do so. The French state defended its right to insist on the removal of religious dress or signifiers in the workplace, relying on the constitutional principle of Laïcité[2] or secularism.

CE worked as a social worker in the psychiatric wing of a public hospital. She had worn her Muslim dress at interview and throughout her employment. Complaints from patients and others, about her dress, although not about her behaviour or work performance, apparently prompted the action by the employer to instruct her to remove her religious dress. CE argued that there was no legal basis for banning her from wearing her religious dress at work and that it was a breach of her Article 9 ECHR right to freedom of thought, conscience and religion and thus began her journey through the courts.

National courts

The French national courts found in favour of the employer, on the basis of the French state principle of Laïcité and following earlier judgments in favour of the French state supporting the state ban on religious dress in education, both for teachers and pupils, on grounds of:

- equality of provision,
- effectiveness of teaching and learning, and
- as a step to limit risk of radicalisation.

European Court of Human Rights

The ECtHR also found in favour of the French state in a majority judgment, with Judge De Gaetano dissenting.

The reasoning of the majority of the ECtHR is based upon the wide margin of appreciation given to member states and its own previous judgments on the matter. Having accepted that the principles of secularism and state neutrality could be relied upon by a member state to justify the interference with a fundamental freedom, such as the right to manifest faith through the wearing of religious dress in the context of education, the court had no difficulty in extending the principle to public sector employment in general.

The ECtHR considered that the state was justified in requiring the principle of secularity through a ban on all religious dress, in order to ensure that there was equality in the provision of health services in a public hospital. The court found that the attitude of an officer or employee, arguably a representative of the state, as expressed through dress could be said to reflect on the hospital and that the ban on religious dress was proportionate to, given the wide margin of appreciation allowed to the state, the aim of ensuring that patients were in no doubt of the impartiality of employees (paras 64- 65).

Comment

The case is of particular interest because it arguably represents an extension of the right of the state to interfere with an individual's manifestation of their faith through religious dress in the workplace. Whilst the judgment is specific to the French state and relies heavily on the particular emphasis placed by the French constitution on the state's secular nature and, by association, all those who work for it, it does indicate that the ECtHR is willing to construe very widely the state's margin of appreciation over such matters.

This is a significant extension of what amounts to a blanket ban, and critically, the judgment is reached without any very clear critique or analysis of why the ban was proportionate in this case. There was for example no suggestion that there was any criticism of CE's behaviour, and this was noted by the court. There was no evidence that there was a perceived or proven risk of any proselytising, or risk of radicalisation of patients or staff, both concerns that had been present in the education cases. This must be of some concern.

Even if there is good reason for not allowing the wearing of religious dress in public sector workplaces in France, the ECtHR should surely be ensuring that this is proven before them, and that the proportionality test of justification for interfering with a fundamental right is undertaken with great care in every case where there is an extension of a state power, such as in this case.

Judge De Gaetano's dissenting judgment

These concerns are set out in the short dissenting judgment of De Gaetano as follows:

> *… there has been a violation of Article 9. The thrust of the judgment is to the effect that the abstract principle of laïcité or secularism of the state requires a blanket*

2. Laïcité is the absence of religious involvement in government affairs, especially the prohibition of religious influence in the determination of state policies; it is the absence of government involvement in religious affairs, especially the prohibition of government influence in the determination of religion.

prohibition on the wearing by a public official at work of any symbol denoting his or her religious belief. That abstract principle becomes in and of itself a 'pressing social need' to justify the interference with a fundamental human right. The attempt to hedge the case and to limit its purport to the specific facts applicable to the applicant is, as pointed out by Judge O'Leary, very weak and at times contradictory. The judgment proceeds from and rests on the false (and, I would add, very dangerous) premise, reflected in paragraph 64, that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation – even though quite often, from the very name of the official displayed on the desk or elsewhere, one can be reasonably certain of the religious affiliation of that official.

Moreover, it would also seem that what is prohibited under French law with regard to public officials is the subjective manifestation of one's religious belief and not the objective wearing of a particular piece of clothing or other symbol. A woman may wear a headscarf not to manifest a religious belief, or any belief for that matter, but for a variety of other reasons. The same can be said of a man wearing a full beard, or a person wearing a cross with a necklace. Requiring a public official to 'disclose' whether that item of clothing is a manifestation or otherwise of his or her religious belief does not sit well with the purported benefits enjoyed by public officials as mentioned in paragraph 66 of the judgment.

While states have a wide margin of appreciation as to the conditions of service of public officials, that margin is not without limits. A principle of constitutional law or a constitutional 'tradition' may easily end up by being deified, thereby undermining every value underpinning the Convention. This judgment comes dangerously close to doing exactly that.

A central facet of this decision is that the issue arose in France. The French code places great weight on the necessity of maintaining secularity in all aspects of public life and argues that whilst the imposition of a restriction on the individual may interfere with their ECHR rights, this a matter within the state's margin of appreciation under the Convention and is for good reason.

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Briefing 776

Rare example of judicial activism and use of the HRA to secure equality for vulnerable people

Cameron Mathieson, a deceased child (by his father Craig Mathieson) (Appellant) v Secretary of State for Work and Pensions (Respondent) [2015] UKSC 47; July 8, 2015

Facts

The appellant, Cameron Mathieson (CM), had part of his bowel removed when he was born in June 2007. He also was diagnosed with Cystic Fibrosis, Duchenne Muscular Dystrophy, a clotting disorder, and deep vein thrombosis in one leg. His ability to communicate was limited. Being severely disabled with complex medical needs CM required considerable care, including: chest physiotherapy twice a day, administration of medication, feeding by nasogastric tube and, changing of stoma or colostomy bags. In order to care for CM at home, his parents had to give up their business and spend their personal savings. His father learned Makaton, a language programme using signs and symbols to communicate.

At the relevant time, CM was entitled to Disability Living Allowance (DLvA) at the highest rate for care under s72 of the Social Security Contributions and Benefits Act 1992; and the higher rate for mobility under s73. CM's care eligibility arose from his severe disabilities requiring both *'frequent attention ... in connection with his bodily functions'* throughout the day and at night *'prolonged or repeated attention in connection with his bodily functions'.* (s72(1)(b-c))

In July 2010 CM was admitted to hospital with chronic bowel obstruction symptoms where he remained until August 2011. Cameron died on October 12, 2012. When in hospital CM's parents continued to play a pivotal and integral role in his care. One of the two was resident at the hospital at all times. They continued to be his primary caregivers, providing much of the day-to-day care they had provided when he had been at

home. The additional cost to the Mathiesons of providing such ongoing care in that period amounted to approximately £8,000.

The law

Regulations 8 & 10(2) of the Social Security (Disability Living Allowance) Regulations 1991 (the 1991 Regulations) remove entitlement to the DLvA care component for a child maintained free of charge when undergoing medical or other treatment as an inpatient in an NHS hospital for more than 84 days; CM's DLvA entitlement was suspended from October 6, 2010. This had a severe impact on the family's finances forcing them to borrow money to provide their son with the care he needed. The loss of DLvA to the Mathiesons was around £7,000.

Mr Mathieson on behalf of his child challenged this decision unsuccessfully in the First-tier tribunal (Social Security and Child Support), the Upper Tribunal (Administrative Appeals Chamber) and the CA. In July 2014 the SC granted leave to appeal.

Human Rights Act argument

To succeed in a discrimination claim under the HRA one must establish that the alleged interference with rights falls within the scope or ambit of a substantive ECHR provision, and that the identified interference is discriminatory breaching Article 14. The Secretary of State conceded that the provision of DLvA fell within the scope of Article 1 of Protocol 1 (peaceful enjoyment of one's possesions). The appellant contended that CM's protected personal characteristic or 'status' for the purposes of Article 14 was that he was 'severely disabled' and that the comparator was a severely disabled child who was not in need of lengthy in-patient hospital treatment. The respondent's defence was that all disabled children's disability-related needs are met free of charge by the NHS while they are in hospital and therefore the continued payment of DLvA constituted an overlapping of benefits or 'double counting' and its removal after 84 days was justified.

Supreme Court

Judgment in the appellant's favour was given by Lord Mance and Lord Wilson, the latter giving the judgment of the court. The SC considered whether CM had a personal characteristic or status attracting the protection of Article 14 ECHR. Outlining the relevant line of jurisprudence, Lord Wilson placed particular reliance upon the case of *R (RJM) v Secretary of State for Work and Pensions* (Equality and Human Rights Commission intervening) [2009] AC 311, and notably Lord Walker's reasoning therein. He concluded as follows:

> *Decisions both in our courts and in the Court of Human Right[s] therefore combine to lead me to the confident conclusion that, as a severely disabled child in need of lengthy in-patient hospital treatment, Cameron had a status falling within the grounds of discrimination prohibited by article 14. Disability is a prohibited ground: Burnip v Birmingham City Council [2103] PTSR 117. Why should discrimination (if such it be) between disabled persons with different needs engage article 14 any less than discrimination between a disabled person and an able-bodied person? Whether, as in Cameron's case, the person is born disabled or whether he becomes disabled, his disability is or becomes innate* …(para 23)

The SC found that CM's status as a severely disabled child requiring hospital care engaged Article 14. It then considered whether the removal of the benefit when CM was in hospital constituted discrimination or was justifiable.

Justification

There were 6 aspects to the SC's reasoning on justification:

1. **No 'discrimination' if differential treatment justified**
   For the purposes of domestic law, the fact that the appellant had been treated differently than a valid comparator did not amount to a finding of discrimination that could be justified; the justification defence must be considered before any finding of discrimination can be made *'for justification will negative the existence of discrimination at all'*. (para 24)
2. **The relevant test in state benefit cases**
   Lord Wilson endorsed the SC's approach to 'justification' in the field of state benefits in the case of *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545, i.e. that the court should carefully scrutinise whether the rule was manifestly without reasonable foundation.
3. **The appellant's evidence of the impact of the rule on families**
   The appellant relied upon reports produced by two charities – Contact a Family and the Children's Trust Tadworth – namely *Stop the Disability Living Allowance Takeaway* (2010), and a follow up report *Stop the Disability Living Allowance Takeaway Survey Report: fairness for families when their child is in hospital* (2013). These reports demonstrated that in

most cases families provided as much or more care for disabled children when they went into hospital and that DLvA removal significantly impacted on families of children receiving in-patient hospital care. The respondent failed to lead rebuttal evidence. Whilst the CA afforded little weight to the charities' publications, the SC took an entirely different approach stating:

> *The Secretary of State has adduced no evidence in response to the charities' two reports. The court must bear in mind that, although both charities are highly reputable, they have launched a campaign and that the purpose of the reports is to support it. The court must therefore look critically at the reports but it has nothing to set against them. The survey's conclusion that 99% of parents provide no lesser level of care when their child is in hospital and that 93% of them suffer an increase in costs demonstrates: (a) that the case of Mr and Mrs Mathieson is not a hard case, unreflective of the position of most parents in their situation; (b) that the personal and financial demands made on the substantial majority of parents who help to care for their disabled children in hospital are, to put it at its lowest, no less than when they care for them at home.* (para 36)

4. **Breach of international law**

Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) enshrines the *'best interests of the child'* as a primary consideration in legal decision-making concerning children. The UN Committee on the Rights of the Child analysed the child's best interests in terms of a three-fold concept:

- The child's substantive right to have his or her best interests assessed as a primary consideration in decision-making;
- That in circumstances where a legal provision is open to a number of potential interpretations, the decision-maker should adopt the interpretation most favourable to the child;
- A rule of procedure that decisions on a child should include evaluation of the possible positive or negative impact of those decisions on the person concerned.

Lord Wilson noted that such an analysis would apply equally to the best interests of a disabled child for the purposes of Article 7(2) of the Convention on the Rights of Persons with Disabilities (UNCRPD). The SC found the Secretary of State's failure to evaluate the possible impact of the 1991 Regulations on disabled children amounted to a breach of international law, i.e. Article 3 UNCRC and Article 7(2) UNCRPD.

5. **Relevance of an international law breach to a challenge under the Human Rights Act?**

Lord Wilson recalled the European Court of Human Right's decision in *Neulinger v Switzerland* [2010] 54 EHRR 1087 that *'the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law'.* (para 131)

He relied on the decision of *R (JS and others) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* [2015] 1 WLR 1449 [see Briefing 764] which established that an international covenant might inform the interpretation of a parasitic right conferred by Article 14. He further distinguished between the present case involving a difference of treatment visited directly on children and *JS* where the Court held that the UNCRC was not relevant to the Article 14 justification of a difference of treatment visited on women which indirectly impacted on children.

6. **Latitude accorded to specialist tribunals**

Finally the SC considered how higher courts should approach decisions made by specialist tribunals on matters within their expertise. The higher court's starting point should be that the special tribunal had probably made a correct decision. Whilst acknowledging that the Upper Tribunal is likely to have particular insight into the existence or otherwise of justification for a social security provision, Lord Wilson concluded that it had erred in law when it failed to focus on whether CM's disability-related needs continued to exist when in hospital; and, whether his parents continued to meet his care requirements to a substantial extent when he was there.

Conclusion

The SC concluded that the removal of benefits constituted differential treatment of the appellant being a severely disabled child requiring lengthy in-patient hospital treatment, when compared to a severely disabled child without such requirements; the Secretary of State had failed to justify such differential treatment, with the result that CM had been subjected to discrimination under Article 14 ECHR in conjunction with Article 1 Protocol 1.

The respondent had failed to rebut the evidence adduced by the appellant which demonstrated that the NHS was not taking care of CM's needs when he was an in-patient. The respondent's failure to evaluate the potential negative impact of the rule underpinning the

776 removal of DLvA benefit constituted a breach of international law. The breach of international law was relevant to the application of Article 14 ECHR – i.e. the disharmony militating against justification.

The SC concluded that the First-tier Tribunal should have allowed the appeal against the impugned decision of the Secretary of State setting it aside and substituting a decision that the appellant was entitled to continued payment of DLvA with effect from October 6, 2010 until his discharge from hospital when payment was reinstated.

Comment

In stark contrast to the deference shown by the CA and the Upper Tribunal to the respondent, the SC judgment provides a striking and rare example of judicial activism involving the use of the HRA to secure equality for vulnerable people in the face of the arbitrary application of social security legislation.

The SC rejected the respondent's contention that hospitalisation transformed a parental primary care-giving role to an ancilliary one whereby care was provided by NHS staff rather than those who cared for the patient at home. Giving considerable weight to the survey evidence of the campaigning charities Contact a Family and the Children's Trust Tadbury, it accepted that the appellant's evidence exposed the discriminatory effect of the application of the legislation in cases such as this.

On justification, the decision further illuminates the correlation between the nature of the status (i.e. whether it is a core or intrinsic characteristic such as gender or congenital disability or a more peripheral characteristic such as political opinion or homelessness), and the prospects of the state justifying differential treatment: i.e. the more 'core' or innate the status (as in the present case) the more difficult it will be to justify differential treatment.

Finally the SC demonstrates that a state's breach of an international convention can impact on the question of justification under Article 14 ECHR. By reason of the requirement to read the ECHR in harmony with the principles of international law, breach of a relevant international convention (in this case Article 3 UNCRC and Article 7(2) UNCRPD) was a relevant factor militating in favour of a discrimination finding.

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777 Briefing 777

CA clarifies correct comparator in reasonable adjustment case

Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; December 10, 2015

Implications for practitioners

S20 of the Equality Act 2010 (EA) provides for a right to reasonable adjustments *'where a provision, criterion or practice …puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.'* In *Royal Bank of Scotland v Ashton* [2011] ICR 632 [see Briefing 604], the EAT had held that the correct comparison for these purposes was with a non-disabled person who was like the claimant in all respects other than his or her disability: so in the particular case, for the duty to be engaged, the disabled employee would have had to be at a disadvantage compared to a non-disabled employee who had had a similar amount of sick-leave.

Ashton was a judgment so perplexingly illogical that employment practitioners and judges ever since have had a tendency – erratically at least – to pretend not to have noticed it. That was just as well, because taken seriously and applied consistently it would have had the effect that the duty to make reasonable adjustments could never be engaged. If an employee whose disability means that she takes more sickness absence than most of her colleagues is to be compared with an employee who, though not disabled, takes the same amount of sick leave, it must follow that the dyslexic employee is to be compared with the employee whose reading comprehension is poor because of below-average IQ, and the guide dog owner with a hypothetical able-bodied colleague who chooses to bring a dog to work.

In *Griffiths* the CA has cleared up the mess. The *'persons who are not disabled'* with whom the claimant was to be compared were those who were less likely to

suffer periods of sickness absence and therefore less likely to incur sanctions or risk losing their jobs as a result.

Facts

G had worked for the Department for Work & Pensions (DWP) for over 30 years as an administrator when she became ill in 2011 with post viral fatigue and fibromyalgia, and took 62 days' sick leave. The DWP sought occupational health (OH) advice, but issued a 'written improvement warning' before receiving it.

The OH report when it was provided indicated that G was disabled. G raised a grievance and asked the DWP to make two adjustments to mitigate the effects of attendance management on her. She said they should disregard the period of disability-related absence that had caused the warning (and revoke the warning); and increase the number of days' absence that would trigger future action. The DWP refused, and G complained to an ET of disability discrimination in the form of a failure to make the adjustments she had sought.

Employment Tribunal and the Employment Appeal Tribunal

The majority of the ET referred to *Ashton*, and held that the policy – or its application of the policy to her – had not put G at a substantial disadvantage compared to a person who was not disabled. The ET had not spelled out that this must be a comparison with an able-bodied person who had suffered a similar level of sickness absence to the claimant's; but the EAT, agreeing, did so:

> *[T]he cases show that the proper comparator in Ms Griffiths' case is a non-disabled person absent for sickness reasons for the same amount of time but not for disability-related sickness. If a claimant is treated at least as well as such comparators s/he cannot be at a disadvantage let alone a 'substantial' disadvantage.* (para 33)

The majority of the ET held in the alternative that even if the duty was engaged, neither of the proposed adjustments was reasonable, and the EAT upheld that alternative conclusion too.

Court of Appeal

Elias LJ gave the only reasoned judgment in the CA. The appeal was dismissed on the ground that the ET was entitled to find that the proposed adjustments were not steps that the employer could reasonably be expected to take. However, the judgment reverses the conclusion of the ET and the EAT that the duty to make reasonable adjustments was not engaged.

The respondent had contended that the authority of the House of Lords (HL) in *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399 [see Briefing 497] meant that the s20 EA comparison must be with a non-disabled employee whose circumstances were – other than the disability – the same as the claimant's; so, here, someone who was not disabled but had had the same amount of sickness absence. Since the policy allowed for adjustments in relation to disability-related absences, if anything it conferred an advantage rather than a disadvantage on a disabled employee.

Elias LJ made short work of this: the language of s20 was different from the language of s24 of the Disability Discrimination Act 1995 (the provision considered in *Malcolm*); and the proposed analysis would have required the CA to hold that *Malcolm* implicitly overruled the earlier decision of the HL in *Archibald v Fife Council* [2004] ICR 954. It was no answer to a complaint of failure to make reasonable adjustments to say that the same rules applied to all: the whole purpose of the s20 duty was to require positive steps to be taken for the benefit of disabled employees disadvantaged by common rules.

Comment

There's something for everyone in Elias LJ's wide-ranging judgment. For human resource professionals, there is at paragraph 76 the humane and obvious – but far too often overlooked – practical point that the language of warnings and sanctions has no place in absence management. Employers are entitled to have their employees attend work and do the work for which they are paid, and can lawfully and reasonably dismiss when illness makes that impossible; but illness is not culpable, and sick employees should not be made to feel that they are being punished for their poor attendance.

Practising employment lawyers can breathe a sigh of relief: we are spared further struggles to make sense of *Ashton*. There is also guidance at paragraph 47 on the correct formulation of the provision, criterion or practice (PCP):

> *In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions.*

That provides a helpful off-the-peg PCP for attendance management cases. Better still would have been the observation that the PCP is for the claimant to choose. The duty is engaged if the claimant can identify a PCP

777 that puts him at the requisite substantial disadvantage; the fact that the employer can come up with a differently formulated PCP that also expresses what it does, and doesn't put the claimant at a disadvantage, is no answer to that.

Finally, for those who take an academic interest in discrimination law, there is much food for thought in Elias LJ's discussion of the relationship between s20 and other forms of disability discrimination at paragraphs 22-27; and in his (perhaps unduly respectful) discussion of the reasoning in *Malcolm* at paragraphs 49 to 58.

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778 Briefing 778

Disparity alone did not constitute indirect discrimination

Naeem v Secretary of State for Justice [2015] EWCA Civ 1264; December 9, 2015

Facts

Prison Service employees are assigned to 'pay bands' on an incremental scale. Subject to satisfactory performance, employees can expect to move up the scale and receive increased pay, year-by-year.

Mr Naeem (N), an Imam, started employment as a full-time chaplain at HMP Bullingdon in 2004. He entered 'Chaplaincy Payband 1' (the higher of two pay bands used for prison chaplains) at the lowest point.

The Prison Service had only begun to employ Muslim chaplains in 2002, due to a limited need for their services before then. Prior to 2002 Muslim chaplains (N included) had been engaged on a sessional basis. Given the emphasis placed on length of service by the Prison Service's pay system, Christian chaplains were more likely than their Muslim colleagues to be higher up the pay scale and, on average, received greater pay.

N brought ET claims of indirect religious and race discrimination based on the Prison Service's pay system, though it was accepted by both parties that the race discrimination claim could not succeed if the religious discrimination claim did not.

Employment Tribunal

The ET rejected N's claims. It held that, while he had established prima facie indirect discrimination, the Prison Service had objectively justified the length of service pay criterion (by showing it to be a proportionate means of achieving a legitimate aim). The ET accepted that it was *'wholly legitimate to seek to retain and reward those who have served loyally as Chaplains over time and built up associated experience and knowledge'*, and *'obviously proportionate to meet that aim by increasing salary in measured increments as service accumulates, since salary is the most potent and measurable of a reward for service…'*

Importantly, the ET held that there was no discriminatory reason why no Muslim chaplains were employed before 2002: it was attributable to a limited need for their services.

N appealed to the EAT on the issue of objective justification. The Prison Service cross-appealed, asserting that the ET had failed to identify the correct comparator group when considering whether Muslim chaplains were placed at a particular disadvantage.

Employment Appeal Tribunal

The EAT upheld the Prison Service's cross-appeal, finding that there was no prima facie indirect discrimination. It held that the ET had erred by including Christian chaplains employed before 2002 in the comparator group, stating that:

> *The PCP… could only properly be tested… by limiting the pool to those persons employed since 2002, from which point forward Muslim chaplains and Christian chaplains had been on a level playing field.*

Focusing on s23 of the Equality Act 2010 (EA), it held that there was a material difference in the circumstances of those chaplains employed before 2002 and stressed the need for a like-for-like comparison. It found that N had been treated in exactly the same way as any chaplain, of whatever race or religion, appointed at the same time as him.

Interestingly, the EAT went on to say that it would not have upheld the ET's findings regarding objective justification.

Court of Appeal

The CA dismissed N's appeal, reaching the same conclusion as the EAT, but taking a different approach.

Giving the lead judgment, Underhill LJ accepted N's argument that it was necessary to consider the impact of the length of service pay criterion on the actual population to which it was applied. However, he held that where this analysis revealed a disparity in pay between Muslim and Christian chaplains it did not necessarily follow that Muslim chaplains were put *'at a particular disadvantage'* within the meaning of s19(2)(b) EA. Rather, it was open to the Prison Service to *'go behind the bare fact that Muslim and Christian chaplains have different lengths of service and seek to establish why this was so'*. According to Underhill LJ, it could not properly be said that the use of the length of service pay criterion put Muslim chaplains at a particular disadvantage. He stated that:

> *In my view the only material cause of the disparity… is the (on average) more recent start-dates of the Muslim chaplains. But that does not reflect any characteristic peculiar to them as Muslims: rather, it reflects the fact that there was no need for their services (as employees) at any earlier date.*

Underhill LJ drew on cases decided under the Equal Pay Act 1970 (particularly *Armstrong v Newcastle upon Tyne NHS Hospitals Trust* [2005] EWCA Civ 1608 and *Gibson v Sheffield City Council* [2010] EWCA Civ 63) in support of the proposition that an employer can defend an indirect discrimination claim by showing that an apparent disparity is the result of non-discriminatory factors. Applying *Gibson*, he held that there could be no difference in approach between an equal pay case and a claim under the EA.

Underhill LJ went on to consider and apply the recent decision of the CA in *Home Office (UK Border Agency) v Essop and others* [2015] EWCA Civ 609 [see Briefing 752] where it held that:

> *In indirect discrimination claims, there is also a necessary 'reason why' question but it is of a different nature. It does not go to the employer's motive or intention, whether conscious or unconscious. It is as to why the PCP disadvantages the group sharing the protected characteristic.*

Whilst acknowledging that it had reached the right conclusion, Underhill LJ did not consider that, in focusing on s23 EA, the EAT had taken the 'best route' to it. He held that the EAT's approach *'tends to bring in an elaborate jurisprudence about "pools" which attached to the predecessor provisions of the pre-2010 legislation in the context of arguments about statistical analysis'*.

Summarising his judgment, Underhill LJ stated that:

> *I believe that the ET's explicit conclusion that the average shorter length of service of Muslim chaplains was not the result of any discriminatory practice on the part of the Prison Service means that they were not put at a particular disadvantage...*

Comment

Following the decisions in this case and *Essop*, it could be argued that an additional component has been added to the indirect discrimination test which, in some cases, may make it harder to establish a prima facie case. However, Underhill LJ made it clear that *Essop* should not be taken to suggest that the burden of proving the reason for apparent disparity will always remain with the claimant, and this point was reinforced by Lewison LJ in his concurring judgment.

Underhill LJ rejected the issues considered by the CJEU in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] IRLR 746 [see Briefing 762] as having no application to the circumstances of *Naeem*. However, in *CHEZ*, the CJEU examined the nature of indirect discrimination, stating that:

> *Indirect discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that particularly persons possessing that characteristic are put at a disadvantage…*

Arguably, the combined effect of *Essop* and *Naeem* is to shift the formulation of indirect discrimination under the EA closer to that of direct discrimination. Perhaps unsurprisingly, leave has been granted for an appeal to the Supreme Court in *Essop* and it is understood that permission has been sought in *Naeem*.

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Unfavourable treatment because of something arising in consequence of disability – understanding the reverse burden of proof

Pnaiser v (1) NHS England (2) Coventry City Council UKEAT/0137/15/LA; December 4, 2015

Introduction

This case concerned the withdrawal of a job offer following a negative telephone reference. The central issue was whether significant periods of absence from work, arising from disability, were a factor in the negative reference.

The EAT held that although the ET had made sound findings of facts, it had misapplied the law to those facts. In particular: following *Hall v Chief Constable of West Yorkshire Police* UKEAT/0057/15/LA it was not necessary to determine if the reason for the treatment arose from the consequence of disability; if it could be inferred that it was a reason, it was then for the respondent to prove that it was not a reason that had any effect.

Implications for practitioners

This case sets out the necessary steps in a claim under s15 of the Equality Act 2010 (EA). The EAT demonstrates the correct application of the reverse burden overcoming both the difficulties presented by the relevant evidence being in the control (and indeed the mind) of the respondent and the norm for contested cases that alternative and believable reasons, without that evidence, can be easy for a tribunal to swallow.

In addition the examination of the law in this case also clearly identifies the utility of an s15 claim. Direct discrimination claims (s13) look at causation and indirect claims (s19) look at the outcome of an apparently neutral provision, criterion or practice (PCP). Both types require a comparator.

The key difference in s15 claims is that there is neither a requirement for a comparator or for the respondent to know that the 'something' that causes the unfavourable treatment arises in consequence of disability (paras 31(g) and (h)). That is worth some reflection. All that is required is a knowledge of the facts of the disability. In other words, that the individual experiences a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out day-to-day activities. This does not require knowledge of a precise diagnosis (para 69). It places the burden on employers and service providers to find out – ignorance is not an excuse.

Facts

Ms Pnaiser (P) was employed by the NHS Coventry Primary Care Trust (a predecessor organisation to Coventry City Council) (the Council). She was disabled within the meaning of the EA and as a result had significant absences over at least two years. Having been made redundant by the Council she was offered and accepted, subject to satisfactory references, a new position with NHS England (1st R).

P's line manager, Ms Tennant (T), emailed the reference to the 1st R and offered to discuss the matter further. The 1st R rang T who said that P had had significant amounts of time off work and indicated that she may not be suited to a role with more responsibility. She implied that P's sickness absences had adversely affected her performance and that she might struggle to cope with pressure.

Following this discussion, the 1st R withdrew P's job offer.

Employment Tribunal

P brought claims of unlawful disability discrimination against both the 1st R and the Council alleging:

1. that the withdrawal of the job offer by the 1st R was unfavourable treatment, done because of something arising in consequence of her disability; and that the 1st R knew or ought to have known of the disability. (No justification argument was advanced by the 1st R.)
2. that the giving of a negative reference which led to the withdrawal of the job offer was unfavourable treatment, given as a consequence of the absences which arose in consequence of P's disability. It was conceded that the Council (and T) knew that P was disabled at the time T gave the reference

The ET dismissed the claim on the basis that P had failed to establish a *prima facie* case such as would shift the burden of proof to either respondent.

Employment Appeal Tribunal

S15 of the EA provides as follows:

(1) A person (A) discriminates against a disabled person (B) if :

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

The EAT usefully set out the steps in an s15 claim.

The steps

1. The first requirement is to determine if there was unfavourable treatment. This is an objective test and does not require any comparator.
2. The second is what caused the impugned treatment or what was the reason for it. The focus at this stage is on the reason in the mind of the respondent. An examination of the respondent's conscious or unconscious thought processes is likely to be required.
3. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
4. Motives are irrelevant. It is emphatically not the case that discriminatory intent is required before the reverse burden applies.
5. The tribunal must determine whether the reason is something arising in consequence of the claimant's disability; there may be more than one relevant consequence of the disability to be considered. This involves an objective question and does not depend on the respondent's thought processes.
6. The knowledge required is solely of the disability; the respondent is not required to have knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

The EAT noted:

It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

Once an impugned cause can be inferred the burden shifts to the respondent to disprove it.

The reverse burden of proof

S136 EA means that P only had to establish that there were facts from which an inference of discrimination could be drawn (a prima facie case). In this case P's sickness absence had been one of the key factors in the negative reference given by T and that as P's absences were almost exclusively disability related, then discrimination arising from a disability had been made out.

The EAT stated that the fact that T had not intended to discriminate was not relevant. What the tribunal should have asked itself was whether the fact that T gave a negative reference (which she denied) in a conversation where she mentioned P's significant absence, and her knowledge of and concerns about P's history of significant absences were together sufficient to raise a *prima facie* case that absence was (consciously or unconsciously) a reason in T's mind for giving the negative reference, so that the burden shifted.

As the disability related absence appeared to be at the heart of the negative reference, the burden of proof then fell on each respondent to show respectively, that in no sense was the negative reference or withdrawal of the offer because of the disability related absence. It was for the Council to show that disability had played no part in T's decision to indicate that P might not be suitable for the role and/or for the 1st R to show that it hadn't been part of the rationale behind the withdrawal of the job offer.

The ET had potentially erred by (a) seeking a singular reason (a misreading of 'because of') and also by applying a hurdle that was too stringent in establishing the prima facie case. The EAT substituted a finding of unlawful discrimination against both respondents.

Comment

With an increasing numbers of litigants in person and consideration being given to a new court for employment and discrimination on the basis that the ETs are the source of discrimination expertise, it is worrying that tribunals are still getting both the plurality of causation and the reverse burden wrong. Neither is new law. It is an unnecessary burden on the disabled claimant to identify the errors of law and have to appeal at all.

Peter Kumar
DLA executive committee member

Instruction not to speak Russian at work was not direct discrimination or harassment

Kelly v Covance Laboratories Limited UKEAT/0186/15/LA; October 15, 2015

Facts

Covance Laboratories Ltd employed Ms Kelly (K) as an analyst. Since the company's work occasionally involved animal testing it was concerned by the possibility of violent protests organised by animal rights activists. It was also worried that activists might attempt to infiltrate the company as employees.

K fell under such suspicion, in part because she spoke on her mobile in Russian. Her line manager instructed her speak only English at work. K objected, saying that two Ukrainian colleagues were allowed to speak Russian. Instructions were then issued to them that they should not speak Russian either.

At her two month probationary appraisal K was put on a formal capability process. She raised a grievance about her line manager, including complaints of race discrimination. This grievance was dismissed and K invited to a disciplinary hearing. Before this process was completed she resigned and brought a claim for race discrimination.

Employment Tribunal

The ET concluded that there had not been direct discrimination. This was because K's line manager would have issued the same instruction to any employee speaking a language other than English in similar circumstances.

The tribunal also considered whether the instruction was unlawful harassment; it found that it had been unwanted conduct, but that it was not related to K's race and it did not have the effect of violating her dignity or creating a hostile environment for her.

Employment Appeal Tribunal

The EAT upheld the ET. An instruction not to speak a particular language – or any other language than English – could, in principle, be an act of direct discrimination or harassment.

But the ET's factual findings that the same instruction had been applied to the proposed actual comparators and that anyone else in the same circumstances would have been treated the same way was fatal to the direct discrimination claim.

In relation to the harassment, the EAT again upheld the ET, concluding that once the respondent's explanation had been accepted they had been right to conclude that the instruction had not related to K's race.

Comment

Although primarily turning on its particular facts as found by the ET, this case raises interesting questions about how harassment claims work.

The EAT's conclusion that the employer's genuine and understandable motive meant that their instruction did not relate to K's race appears hard to sustain. A non-discriminatory motive might mean that their action did not have the *purpose* of violating K's dignity or creating a hostile environment. It should not, however, inevitably mean that it was not conduct related to her race. Or that, on the right facts, it had not had those effects.

Michael Reed
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Employment Tribunal procedure: use of interpreters

Hak v St Christopher's Fellowship UKEAT/0446/14; November 17, 2015

Implications for practitioners

This case serves as a stark reminder to litigants who believe that the tribunal process is informal and accommodating only to find out that it is far more legalistic and complex than they could have imagined. There are many troubling aspects of this case which practitioners need to be aware of to ensure it is confined to its facts.

Facts

Mr Hak (H), a Cambodian whose native language is Khmer, brought claims for unfair dismissal and race discrimination against his employer St Christopher's Fellowship (SCF). SCF had dismissed H for alleged misconduct. H contended that his dismissal was both unfair and unlawful race discrimination. In advance of a preliminary hearing (PH) to consider whether his claims should be struck out, H requested the services of an interpreter, but no interpreter was available. At the start of the PH, the judge confirmed that no interpreters were available and asked H if he was happy to proceed. H indicated that he was. Having heard evidence from H about the nature of his claim, and following his cross-examination, the ET concluded in light of his evidence and the available documentation that his claims had no reasonable prospect of success and struck them out.

Employment Appeal Tribunal

On appeal H argued, amongst other things, that the failure to adjourn the PH to enable a Khmer interpreter to be found constituted a material procedural irregularity. Relying on the overriding objectives and Article 6 ECHR rights, H contended that fairness required there to be a reasonable opportunity for him to advance his case and engage with the case against him, and that by failing to provide a Khmer interpreter, he was denied that right.

The issue for the EAT was whether it was wrong in law to proceed with a hearing in light of a claimant's previously expressed desire to have an interpreter because of his difficulties with the English language.

The Honourable Mr Justice Langstaff President identified three scenarios:

1. Where the litigant's command of English is poor, such that through a lack of knowledge of the language a litigant simply cannot give the account which they would wish to the ET:

   In such a case, the ET must take all reasonable steps, including funding, to secure the services of an interpreter, and it is insufficient to offer the litigant the choice of whether to proceed on that day or to wait until a later date when an interpreter might be found. (para 39)

2. Where the litigant has such a well-demonstrated ability to speak, write or read English, that the ET may conclude that an interpreter is simply unnecessary:

   The EAT gives a stark warning, in any case, concerning a person whose mother tongue may well not be English; the ET should think long and hard before drawing this conclusion (para 40).

3. Where the litigant has some command of English language rather than lacking it altogether but wishes to be assisted by an interpreter:

   Here, the ET must make an assessment of the litigant's need in the context of achieving justice based on all available information. It must bear in mind its duty to ensure fairness, by providing equality of arms as near as may reasonably be achieved (para 41).

Langstaff P noted:

> *All will depend upon the court's assessment, in the light of the available evidence, of the standard of understanding and expression, particularly oral where a hearing is to be oral, but written where it is to be written, carefully bearing in mind that easy understanding of the written word may not be reflective of an easy ability with the spoken word. Spoken and written language are different; written documentation can be studied away from the pressures of court, whereas oral expression often calls for immediate comprehension and response, under pressures which are unfamiliar even for those who speak no other language than that of the ET concerned* (para 41).

While Langstaff P was reluctant to give any prescriptive guidance to ETs, he said a useful test for ETs to consider while making such an assessment is to ask *'whether the litigant's command of language is sufficient to enable him to give the best account to the ET which he would wish to give relating to matters in dispute'* (para 45). In other

words, an employment judge (EJ) must be satisfied that the litigant's understanding of the issue to be determined is sufficient for the choice to be real.

The EAT dismissed H's appeal holding, on the facts, there had been no material unfairness nor procedural irregularity. Langstaff P was satisfied on the facts that, giving a choice of proceeding, or alternatively waiting until an interpreter could be found, provided a reasonable opportunity for litigants to have an interpreter if they wished. The EAT was satisfied that the alternate options were put to H in simple language. Of particular interest was the fact that H had:

- lived in the UK for 17 years and since 2004 had not had speaking contact with others whose language was Khmer;
- demonstrated facility with written language, and had had to satisfy his employer that he had sufficient command of English when he commenced employment.

Langstaff P accepted that H's facility with language, whilst not adequate to enable him to deal easily with legal concepts, appeared to the EJ to be ample to cope with the question whether he was happy to proceed. Accordingly, he found that the discomfort which was most clearly apparent was not the expression of H's understanding of the facts upon which he relied, but how best to respond to the invitation to say how, on those facts, he hoped to make out his legal claim.

As for H's appeal about the substantive decision to strike out his claims for unfair dismissal and race discrimination, SCF had dismissed H for making unsubstantiated allegations of a serious nature and using racially stereotypical phrases to describe a group of co-workers. He referred to this group as the *'United Kingdom of Jamaicans'* and made other derogatory race specific remarks. He also blamed a group of black Jamaicans for bullying and intimidating employees and suggested that one of the group sexually harassed a female co-worker. H contended that SCF treated his Afro-Caribbean colleagues more favourably, and his dismissal constituted direct race discrimination. The EAT noted that H did not identify facts from which unlawful discrimination could be inferred, and accordingly, held that the EJ was entitled to conclude that the race discrimination case had no reasonable prospect of success.

Comment

There are many troubling aspects to this case. Firstly, Langstaff P was rightly concerned about the absence of any evidence from the SCF at the PH. Yet, the burden of showing what was the reason for dismissal lay on SCF. The purpose of calling H to give evidence was not so much to deal with the facts which, he asserted, gave rise to his claim, but for him to give evidence as to what his claim was. Ordinarily, this would be dealt with by way of submissions as to what fell within the scope of the pleaded case.

Secondly, the EAT noted an imbalance of treatment whereby H was required to explain his case under oath, was subjected to cross-examination and had to explain what his case was under hostile questioning, yet he was not afforded the opportunity to ask questions under oath of his employer so that SCF could explain the nature of its response. Unfortunately, no ground of appeal was raised in respect of this failure to ensure a level playing field, and the EAT did not consider there to be any direct relationship between it and the procedural irregularity alleged as the central ground of appeal (para 51).

Thirdly, as a basic premise, it must be right that if a litigant in person requests an interpreter because they do not have a good command of the English language, then surely it must be in the interests of justice to provide one. Requiring EJs to conduct assessments into a litigant's understanding is likely to be fraught with difficulty. The question: *'would you like to proceed?'* can only be properly understood if one knows the full implications and consequences of what is to follow. His ability to understand and respond to hostile questioning about his case is bound to be made more difficult by his lack of understanding of English. The process adopted in the present case fails to appreciate how an individual comes to understand how and whether they have been discriminated against on racial grounds. To a layperson, discrimination is something that is felt. These feelings usually flow from a series of negative acts or omissions which are readily identifiable. The challenge for litigants in person is to convey those feelings to a third party within the parameters of the legislative framework that the ET or EJ understands. That's why we have skilled lawyers. To require a litigant to do that when English is not their first language is inherently unfair.

In reaching its decisions, it seems that the ET and EAT rightly or wrongly took a dim view of the substantive merits of the case.

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Unfair dismissal – age discrimination

Bethnal Green and Shoreditch Education Trust v Dippenaar UKEAT/0064/15/JOJ & UKEAT/0114/15/JOJ; October 21, 2016

Facts

Ms Dippenaar (D) was employed by Bethnal Green Academy as a PE teacher, and had 13 years' experience. Until 2012 her teaching had been consistently highly rated. When a new Head of Faculty was appointed in 2012, D's teaching assessments started to become negative. In May 2013, aged 36, D resigned claiming constructive dismissal and indirect age discrimination.

A newly qualified PE teacher would earn around half D's salary when she resigned.

Employment Tribunal

The ET found D to have been unfairly dismissed, and also upheld the age discrimination claim, on the basis of indirect discrimination. The tribunal found that D was managed out of her employment because she was more expensive to employ than a new recruit, given her considerable experience. In effect, the Trust had conducted an unjustified capability process.

The tribunal found the evidence given on behalf of the Trust to be hostile, dismissive, verging on the vindictive, and in part, dishonest. It also found that there was no credible explanation why D had been treated in the way she had apart from the fact that a potential replacement would have been much cheaper to employ. The tribunal identified the practice as *'replacing more experienced teachers with less experienced teachers'.*

The judgment looked at statistics regarding leavers and starters, and the proportions of each category that were over or under age 36.

The Trust appealed on the grounds that the ET did not clearly establish that a practice existed, and without this information it could not apply the burden of proof provisions. The Trust also appealed against the unfair dismissal finding.

In terms of remedy, the Trust appealed against the decision to uplift damages by 25% for failure to comply with the ACAS Code, and D cross-appealed that the awards had not been grossed up.

Employment Appeal Tribunal

The EAT, the Honourable Mr Justice Langstaff presiding, upheld the appeal against the age discrimination judgment. The appeal against the unfair dismissal judgment, as well as the appeal and cross-appeal on the remedy points, were dismissed.

The EAT was clear that the ET had identified a practice, but had not asked itself whether this was applied to other teachers who shared her characteristic (that is, did the school try to replace other experienced teachers over 36?). The tribunal also did not make findings about the reasons why D had suffered the disadvantage.

In relation to the requirement for a *'provision, criterion or practice'* (PCP), the EAT held that a 'practice' was unique in that it requires conduct to be repeated, whereas a provision or criterion can be established even if there is isolated conduct. It went on to hold that there was no direct evidence of anyone other than D being dismissed because of their experience, and that the statistics produced were not relied upon by the tribunal to show a practice existed.

The EAT was also critical of the ET's failings to identify the findings of facts which led it to be able to shift the burden of proof; and the failure to ask whether persons of D's age group were put at a particular disadvantage compared to those in a younger group.

Analysis

The EAT's decision is partly a result of an ET being swept along in an apparent fervour to find against the Trust, but also shows the dangers of imprecision in indirect discrimination claims. The Trust acting unjustifiably was, essentially, enough for the unfair dismissal claim to succeed, but such general propositions will not assist in an indirect discrimination claim.

D could have undoubtedly assisted the tribunal by ensuring there was enough material to make the findings necessary, and being explicit about what the statistical evidence was being asked to show. The case also shows the importance of not relying solely on the claimant's circumstances: the EAT holds that it would be circular – *'the treatment of the claimant in her individual circumstances cannot be used to show that others in identical circumstances were or would be subject to a similar and particular disadvantage'.* This could have been resolved

782 by colleagues giving evidence about other dismissals, or D talking about older teachers being dismissed (something which the statistics showed had happened at the Trust in previous years).

Practical considerations

In indirect cases, a PCP must always be set out in the claim form, and *Dippenaar* is a reminder that there is no disadvantage in saying that there is a PCP generally, rather than trying to set out which individual element (provision, criterion or practice) it may be.

The other lesson to be learnt is that the claimant's witness evidence needs to cover the situation of individuals who share the claimant's protected characteristic, and the disadvantage they faced as a result of the PCP.

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Can a company claim for discrimination?

EAD Solicitors & Ors v Abrams UKEAT/0054/15/DM; June 5, 2015

The scope of the Equality Act 2010 (EA) and the ability of an incorporated body to claim for discrimination was the question considered in *EAD & Ors v Abrams.* President HHJ Langstaff's judgment that a company can bring a claim for discrimination because of its association with a person who has a protected characteristic is a welcome clarification of the law.

Facts

Mr Abrams (A) had been a member of EAD LLP (R). He left and established a company which provided legal services. The company became a member of the LLP. The arrangement worked well until A reached retirement age. He wanted to continue working, but R decided it did not wish to continue to use him and terminated the agreement with the company. A claimed age discrimination, arguing that the decision to cease to use his company was because the services would be provided by him, and his age was the cause of the refusal.

The jurisdictional objection made by R was a simple one i.e. the EA applies only to individuals with protected characteristics, and not to corporate entities. A company cannot have a protected characteristic, and thus R could not be said to have discriminated against it.

The ET disagreed and R appealed to the EAT.

Employment Appeal Tribunal

R made the same argument before the EAT: a company or body corporate does not possess the protected characteristics upon which the EA is based; to allow a company to bring a claim would create a new class of discrimination.

Although the key question of whether the real reason, or cause of the decision to terminate was the fact of A's age has yet to be determined, both the ET and the EAT considered the question of jurisdiction as a preliminary matter, on the basis that this could be the case.

The EAT considered in some detail the wording of the legislation governing LLPs and the wording of the EA, noting that s13 ss1 EA makes it unlawful for an organisation to discriminate against another *because of a protected characteristic.* Looking at this wording in the context of the EA as a whole, the EAT considered that there was nothing in the drafting to rule out the proposition made by A that his company had been discriminated against and should be able to be a party to the action.

In a pithy judgement Langstaff P stated that R's argument simply misses the point. The EA does not deal with individuals on the *basis* of their protected characteristics but rather it identifies discrimination as being detrimental treatment *caused* by the protected characteristic or related to it.

He pointed out that: *'Detrimental treatment can be given to any person, whether that person is natural or legal. There is no reason to restrict the class of those who can suffer a detriment if what is being complained of, and that which the statute seeks to avoid, is a detriment being suffered because of an individual's protected characteristic.'*

He also rejected the suggestion that this reading of the EA leads to a new class of discrimination being created. Whilst it is more common that complaints of

discrimination are made by individuals and is unusual for a company to be the complainant in relation to detriment, it is not new territory.

Langstaff P ruled that the discrimination being complained of would be within the protection of the EA because it was linked to the protected characteristic of an individual who was working for or associated with the company. This reading of the EA ensures that detrimental treatment of an individual by reason of a protected characteristic will be actionable even if the action or decision at issue is taken against the company.

The EAT held that A was entitled to bring a complaint of direct discrimination before an ET and that there is nothing in the EA that supports an argument that to do so would be contrary to parliament's intention; such a claim is entirely consistent with European treaties and directives.

Comment

With the increase in self-employment, and company structures used to provide services, whether through private initiatives, community interest groups or voluntary organisations, the application of this ruling may be wide reaching. In his conclusion Langstaff P set out some interesting potential applications of the EA read in this way:

> *Examples might be a company being shunned commercially because it is seen to employ a Jewish or ethnic workforce; a company that loses a contract or suffers a detriment because of pursing an avowedly Roman Catholic ethic; one that suffered treatment because of its financial support for the Conservative Party or, say, for Islamic education; or one that was deliberately not favoured because it offered employment opportunities to those who had specific disabilities that were unattractive to some would-be contractors or because, let us suppose, of the openly gay stance of a chief executive. These examples may not necessarily be brought within Chapter 5, but all are examples of the way in which one person, natural or legal, may suffer because of the protected characteristic of another when public policy tends to the view that that is no proper basis for any such treatment.*

This is no doubt an issue to which future articles and case notes will return. We await developments with interest.

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Disability discrimination – public sector equality duty

R (application of Mrs Janice Hawke & Mr Jeremy Hawke) v Secretary of State for Justice [2015] EWHC 3599 (Admin); December 3, 2015

Facts

Both claimants are in their 50s. They have been married for many years and have two adult children. Their home is at Bude in Cornwall. While awaiting trial, Mr H was held on remand in HMP Exeter, which is the nearest local prison to Bude. In October 2013 Mr H was convicted after a trial of very grave sexual offending.

The Prison Service categorise prisoners from A to D to reflect the likelihood of the prisoner escaping or absconding, and the risk of harm to the public if he were to escape or abscond. After his conviction, Mr H was categorised as B; namely, a *'prisoner for whom the very highest conditions of security are not necessary, but for whom escape must be made very difficult'.* The categorisation of the prisoner was not challenged.

The Prison Service subdivides category B prisons into local, or essentially short-term, and training, or essentially long-term, prisons. Mr H was required to be detained in a category B long-term prison and was therefore transferred to HMP Isle of Wight, the closest category B long-term prison. HMP Exeter is a category B local prison.

Mrs H has suffered for several years from fibromyalgia. This is a long-term illness, which causes severe and continuous pain all over the body, as well as swelling of the joints and stiffness of the joints and muscles. She said (without challenge by the Secretary of State) that it is a very painful and debilitating illness, and that the pain is particularly severe when she stays in the same position for long periods of time, as, for instance, when travelling in a car.

Mrs H found it so extremely painful to visit her

husband that she was no longer going to do so and the purpose of the judicial review claim was that he should be transferred to HMP Exeter. The claim was that the Secretary of State had breached the Equality Act 2010 by failing to make reasonable adjustments, and had also breached the public sector equality duty (PSED).

High Court

Mr Justice Holman held that although the duty to make reasonable adjustments was present, the proposed adjustment was not reasonable. The Secretary of State's evidence that it was 'simply impracticable' to transfer prisoners to a local prison on a long-term basis was 'compelling'.

Mr Justice Holman further considered that no regard had been given to the PSED when making the decision to place Mr H in HMP Isle of Wight, noting however that *'neither claimant has suffered any loss as a result, since even if the Secretary of State for Justice or his staff or officials had fully and duly discharged their duties under that section, the outcome would have been, and will still be, the same'.*

Mr Justice Holman had considered making a declaration to this effect when attention was drawn to the new sections 31(2A) and (2B) of the Senior Courts Act 1981 as inserted by the Criminal Justice and Courts Act 2015 (CJCA):

> *31(2A) The High Court*
> *(a) must refuse to grant relief on an application for judicial review, and*
> *(b) may not make an award under subsection (4) [which relates to damages] on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.*
> *(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.*

Having considered this new section Mr Justice Holman concluded that this case did not give rise to an 'exceptional public interest' and he did not have power to make the declaration that he had intended, saying:

> *I am not satisfied on the facts and in the circumstances of this case that the Secretary of State for Justice or his officials o[r] staff have given the positive due regard which section 149 of the Equality Act 2010 requires, and on the facts and in the circumstances of this case, there has been a failure by the Secretary of State for Justice to discharge his duties under that section. I intend those words to represent 'a declaratory judgment' of the kind contemplated by Blake J in paragraphs 58 and 61 of his judgment in Logan. I am confident that the Secretary of State for Justice or appropriately senior officials will consider and take heed of what I have said.*

Prior to this he did consider when an exceptional public interest might arise:

> *If even after a "declaratory judgment" a public authority persisted in failing to discharge its public sector equality duty under section 149, then there may come a time when, on proof of that failure, a claimant may be able successfully to persuade the court that enough is enough and that the exceptional public interest under subsection (2B) has become engaged. Alternatively (without in any way deciding the point), it may be that if a body such as the Equality Commission, which has very express responsibilities in this field, reached a considered decision that a public authority was in such continuing breach of the public sector equality duty that it was necessary to obtain a formal declaration from the court, then such a body may be able to persuade the court that the exception in subsection (2B) is engaged, even though, by the nature of the body, it would not be able to show that the outcome for it would have been substantially different.*

Analysis

This case is another blow for the effectiveness of the PSED, although the judgment also contains a route around s31(2A) CJCA 2015; namely, that repeated failures of the duty will result in a declaration. While it is disappointing that the duty only really gains any teeth if it is breached 'persistently' (and there is no guidance about whether this simply means more than twice, or whether there would be some other threshold) there is a crumb of comfort in that the High Court recognised that to deny any possibility of a declaration would allow the PSED to be breached with impunity. *Hawke* shows that the PSED is still something all public authorities should be reminded of in appropriate cases.

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Harsh evidence tests for legal aid for victims of domestic violence are unlawful

On February 18, 2016 the CA ruled that government changes to legal aid for domestic violence victims are unlawful. In *R (Rights of Women) v Secretary of State for Justice* [2016] EWCA Civ 91 the CA held that the procedural regulations which prescribed the type and timeframe of supporting evidence required by women in order to obtain legal aid were unlawful because the effect of them was to exclude many women who ought to be eligible for legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The challenge was brought by the Public Law Project on behalf of Rights of Women (ROW). The regulation which was challenged specifies the types of supporting evidence of domestic violence which must be provided in support of an application for legal aid under LASPO. ROW took issue in particular with the requirement that the supporting evidence must be less than 24 months old. This, they argued, excluded many women, including those who had had a non-molestation order, or those who had a former partner recently released from prison; they argued this was contrary to the purpose of the enabling legislation in s12 LASPO and was thus ultra vires the statute.

The CA agreed stating that: *'Legal aid is one of the hallmarks of a civilised society. Domestic violence is a blot on any civilised society but is regrettably prevalent. It is therefore no surprise that in an age of austerity, when significant reductions in the availability of legal aid are being made by Parliament, legal aid is preserved for victims of domestic violence who seek protective court orders or who are parties to family law proceedings against the perpetrator of the violence. The main reason for that preservation … is that they will be intimidated and disadvantaged in legal proceedings, if they are forced to represent themselves against and perhaps be cross-examined by the perpetrator of the violence.'*

The CA found that there was no obvious correlation between the passage of a short period of time and the harm to the victim of domestic violence disappearing or even significantly diminishing. There was no justification for the exclusion of some instances of domestic violence or the lack of any opportunity for victims of domestic violence to explain why it would be unjust to apply the time limit to their particular case. The '24 month rule' operated in a completely arbitrary manner.

Emma Scott, ROW Director, said: *'For nearly three years we know that the strict evidence requirements for legal aid have cut too many women off from the very family law remedies that could keep them and their children safe. Today's judgment is important recognition of women's real life experiences of domestic violence and means that more women affected by violence will have access to advice and representation in the family courts. The CA has accepted our arguments that the fear of a perpetrator does not disappear after 2 years and recognised that forms of violence such as financial abuse are almost impossible for women to evidence. We look forward to working with the Ministry of Justice on amendments to the regulations to ensure that women affected by all forms of domestic violence are able to get legal aid.'*

Call for open discussion on counter-radicalisation measures in schools

Following negative comments in the Daily Telegraph accusing it of *'colluding in undermining the Prevent strategy'*, the National Union of Teachers called for rational debate in order to ensure the best possible system is in place to protect young people and society.[1] The Institute of Race Relations (IRR) supported this call when it published its paper *Prevent and the Children's Rights Convention* on January 28, 2016.

S26 of the Counter-Terrorism and Security Act 2015 has imposed on specified authorities including local authorities, schools, nurseries and social services departments a duty to *'have due regard in the exercise of their functions to the need to prevent people from being drawn into terrorism'.*

The IRR has tested the new duty against key articles in the United Nations Children's Rights Convention (UNCRC). Its analysis is based on some 15 cases of concern already reported in the media or to professional bodies. These cases raise issues under UNCRC Articles 2, 8, 30 (non-discrimination), Articles 3, 19 (best interests of the child, protection of welfare, protection from physical or mental violence), Articles 13-15 (freedom of thought, expression and association), Article 29 (right to education), Articles 5 & 18 (parental and community rights).

The IRR found that the new Prevent duty imposed on schools has:

- created fear in children and parents;
- stifled free expression;
- harmed children's healthy development;
- fuelled discrimination against Muslim children and their communities.

'Discussion on the effectiveness of the Prevent duty, of its proportionality and its unintended consequences, should be welcomed by all those concerned about security, and concerned about children' said the IRR.[2]

1. http://wembleymatters.blogspot.co.uk/2016/01/nut-our-prevent-concerns-are-raised-to.html, January 25, 2016

2. http://www.irr.org.uk/news/an-open-discussion-about-counter-radicalisation-measures-in-schools-should-be-welcomed/

the Traveller Movement

TM can offer training and expertise in GRT culture and experiences to its panel members. If you would like further information or wish to register your interest in joining the panel, please telephone **Radmila Vujnovic** on **020 7607 2002** or email her at **radmila@travellermovment.org.uk.** Please visit **www.travellermovement.org.uk** for information on TM and its work.

Traveller Movement (TM) is a London based national charity working to raise the capacity and social inclusion of the Gypsy, Roma and Traveller (GRT) communities in Britain.
TM is establishing an Equality and Social Justice Unit to advance GRT rights. It wishes to set up a pro bono panel of practitioners interested in undertaking legal work in relation to discrimination and human rights abuses, particularly in the field of education and the provision of services. Pro bono is legal work undertaken by practitioners voluntarily and without payment or at a reduced fee. TM envisages a number of ways practitioners can contribute their expertise on a pro bono basis to assist disadvantaged and vulnerable GRT communities. Pro bono opportunities include:

- providing representation in litigation before courts and tribunals;
- providing advice and information to TM staff and/or members of the GRT community;
- conducting preliminary research;
- providing initial opinions for TM;
- delivering legal training to GRT community representatives.

Mandatory gender pay gap reporting

On February 12, 2016 the government issued draft regulations on mandatory gender pay gap reporting. The regulations are open for consultation until March 11, 2016. The DLA gave evidence on the issue to the Women and Equalities committee in January 2016 and will be responding to the consultation.

The regulations, which will apply to any business employing at least 250 employees, are intended to come into force on October 1, 2016; they include the following key points:

- pay will include basic pay, bonus pay, paid leave and maternity pay, shift and area allowances, and other pay such as car allowances and on call and standby pay;
- pay will not include overtime pay, expenses, benefits in kind, redundancy pay, arrears of pay or tax credits;
- employers will have a period of about 18 months following the introduction of regulations to publish the required information;
- employers will be required to publish both the mean and the median gender pay gaps;
- employers will need to publish the difference between mean bonuses paid to men and women, only including those who actually received bonuses in the calculation; in addition employers will be required to publish the proportion of employers who receive bonus pay;
- information will be published on a searchable UK website that is accessible to employees and the public; the information will be retained online for three years in order to show progress.

The government intends that employers who do not comply will be 'named and shamed'; it will review whether civil or criminal penalties for non-compliance should be introduced in due course. The regulations are available at https://www.gov.uk/government/consultations/mandatory-gender-pay-gap-reporting.

House of Commons Women and Equalities Committee report on transgender equality

The Women and Equalities Committee published the report of its inquiry into transgender equality on January 14, 2016. Noting that the government's 2011 *Advancing Transgender Equality Action Plan*[1] remains largely unimplemented, the committee recommended that the government should agree a new strategy. In particular it recommended:

- proper implementation of the transgender equality action plan across government;
- updating the Gender Recognition Act 2004 in line with the principle of gender self-declaration;
- updating the definition in the EA to cover gender identity;
- amending the genuine occupational requirements and/or the single-sex/separate services provisions in the EA to ensure that a person with a gender recognition certificate is not discriminated against;
- a comprehensive review and reform of NHS services for trans people, which need to be moved away from the mental health designation;
- bringing hate crime provisions into line with those on race and sex and ensuring police have mandatory transphobic hate crime training;
- that the Ministry of Justice consult with the trans community to develop the government's new hate crime action plan
- permitting teenagers aged 16 and 17 years of age, with appropriate support, to apply for gender recognition on the basis of self-declaration;
- reviewing public policy on recording names and genders, including giving consideration to the removal of gender from passports;
- that the government commit to the Yogyakarta Principles and Resolution 2048 of the Parliamentary Assembly of the Council of Europe.

The full report can be found at http://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pd

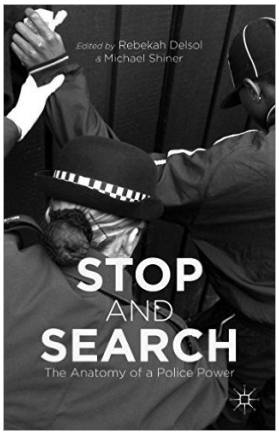
[With thanks to Christl Hughes, Gender Identity Research and Education Society, and Paul Roberts OBE of the LGBT Consortium]

1. https://www.gov.uk/government/publications/transgender-action-plan

Stop and search: the anatomy of a police power

Edited by Rebekah Delsol and Michael Shiner, Palgrave Macmillan, 2015, pp248 £65 ISBN 978-1-137-33609-5

Stop and search is the most widely known and contentious of police powers. Its disproportionate use on people of BME origin has been a source of tension between communities and the police for decades. The Metropolitan Police described it as *'a powerful tool in the fight against crime'*. Yet, only 9% of stop and search activities in 2011/12 led to an arrest.[1]



Stop and search: the anatomy of a police power provides a critical analysis of the use, impact and efficacy of the stop and search power, through a collection of evidence-based papers by leading experts. It includes the exceptional powers to stop and search without reasonable suspicion and a separate chapter on counter-terrorism policing, which has produced its own set of problems.

Racial disproportionality is a common theme in the papers but it would be wrong to say this is the only concern of the book. To understand the causes of racial disproportionality, the authors have de-constructed the power. What we get is a detailed examination of its component parts: its political influences and legislative basis; individual officer decision-making; compliance; measuring effectiveness and the real cost to public trust and confidence. Ultimately, this book is about the future of modern policing.

Discrimination law practitioners may find the chapter on individual decision-making of particular and relevant interest. It's been a long held view that racist decision-making by individual officers accounts for racial disparities in stop and search figures. However, the analysis of the research material shows there is little evidence to support this, largely because there are multiple factors involved making it difficult to isolate race as the determining one. This may explain why there have been few legal challenges under the discrimination legislation.

The chapter concludes that stereotypes might influence operational decisions on where to target stop and search, such as deprived areas and those with ethnic minority communities; we should also note that the make-up of the 'available street population' is affected by socio-economic factors such as unemployment and school exclusion.

This tells us is that racial disproportionality may have its roots elsewhere and at much earlier stages of the process, perhaps making the focus on individual police decisions a narrow one and litigation more of a challenge.

How we enforce compliance and punish misuse is explored in the chapter on regulation and reform, which I think challenges us to rethink our approach to compliance. The author observes that while the Police and Criminal Evidence Act 1984 lacks an effective enforcement mechanism, a more adversarial approach such as in the US, is likely to be seen as hostile. He proposes 'responsive regulation' a structured model using a range of measures: persuasion, restorative justice, through to civil and criminal penalties. This is an appealing model, with potential for more community involvement.

The book also provides a new perspective on public trust and confidence. It suggests the misuse of the power may actually promote social exclusion and increase crime. Simply put, if ethnic minority communities are targeted, then they start to feel undervalued and lose any sense of belonging they might have. They turn inward and start to police themselves. This discussion is worthy of more attention, especially in the light of debates around integration, an issue under the spotlight again. Ethnic minority and Muslim communities are constantly under pressure to do more to integrate, such as speaking English, but governments seldom ask whether it is the behaviour of public bodies which leads to segregation.

It's the effectiveness of stop and search which lies at the heart of this book. The overall conclusion is that it

1. HMIC (2013) Stop and search powers: are the police using them effectively?

doesn't work, although there has been little research on effectiveness. The book contends that public trust and confidence are an important part of measuring effectiveness. Based on available evidence, the negative impact on public trust and confidence outweighs any benefits to be gained. There are other more cost effective measures, which can help to reduce crime and boost public confidence, such as improving street lighting or demolishing abandoned buildings.

When we take a step back from the individual papers we get a birds-eye view of how stop and search has been used over decades. What is striking is how it's been used for social control, rather than crime detection and prevention. This is always worrying but more so in the context of immigration and counter terrorism policies. The book concludes with a look at the future of stop and search. It observes that immigration and policing are becoming closely intertwined and this presents greater challenges from a transnational approach to crime, as countries increasingly share intelligence and co-operate on immigration and counter terrorism. Who gets stopped and searched has potential to become an even more controversial and divisive issue.

This is an insightful and stimulating book, packed with research material and evidence. It should, hopefully, generate a wider debate about the future of policing.

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Abbreviations

AC	Appeal Cases
ACAS	Advisory, Conciliation and Arbitration Service
AGM	Annual General Meeting
BME	Black and Minority Ethnic
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CJCA	Criminal Justice and Courts Act 2015
CMLR	Common Market Law Reports
DLA	Discrimination Law Association
DLvA	Disability Living Allowance
DWP	Department of Work and Pensions
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EJ	Employment Judge
EqLR	Equality Law Reports
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HL	House of Lords
HRA	Human Rights Act 1998
HRLR	Human Rights Law Reports
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
IRR	Institute of Race Relations
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LGBT	Lesbian, gay, bisexual, transgender
LJ	Lord Justice
LLP	Legal liability partnership
NHS	National Health Service
OBE	Order of the British Empire
OH	Occupational health
PCP	Provision, criterion or practice
PH	Preliminary hearing
PSED	Public sector equality duty
QC	Queen's Counsel
SC	Supreme Court
TUC	Trades Union Congress
UKSC	United Kingdom Supreme Court
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
WLR	Weekly Law Reports
WTD	Working Time Directive

Briefings