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Editorial

Clear warning of threats to equality rights

If one message is clear from Rachel Crasnow QC's description of the processes required to disentangle the UK from the EU's legal framework, it is that there are no guarantees for the protection for workers' rights post-Brexit. The repeal of the European Communities Act 1972 will remove the EU's guaranteed protection of minimum workers' and equality rights. In the future, these rights will depend wholly on domestic law.

While rights which have entered into effect through primary legislation such as the Equality Act 2010 can only be modified through new primary legislation, those which have come into effect via secondary legislation (such as rights for part-time or agency workers, or to parental leave, as well as health and safety regulations contained in the Working Time Regulations) could be amended or altered, for better or worse, without the need for primary legislation.

Once we leave the EU, parliament and the Executive will legislate for the new protection and rights regime. The government's preferred Brexit route is via the Great Repeal Bill. The DLA will ensure that representations are made on behalf of members through consultation processes, but bearing in mind the government's equivocal stance on EU-derived employment rights and previous governmental approaches to 'red tape', we cannot predict what rights will be included or omitted during the legislative processes. Rachel highlights areas which may be particularly vulnerable to revision such as capping compensation for discrimination or amending family-friendly rights like maternity or shared parental leave.

The DLA has urged the government to ensure that these rights are supported and retained in their current form. Whilst many of the existing rights are far from perfect, DLA will continue to make representations for retentions and improvement of current protections from discrimination rather than their attrition.

In its response to the Women and Equalities Committee's inquiry on ensuring strong equalities legislation after EU exit, the DLA urged the government *'to make a binding commitment as part of the treaty negotiations to respect and enshrine the legal protections and provisions which are directly and indirectly associated with equality, discrimination, or the protection of workers or their health whilst at work, into UK primary legislation… signing Protocol 12 of the European Convention would be an important first step'*.[1] The DLA is also concerned about future EU developments around, for example, associative pregnancy discrimination and carers' rights, which may not benefit UK workers. One way forward would be a 'binding agreement' that developments in EU equality law and workers' rights which arise following Brexit will be applied in the UK, and will have status in the interpretation of UK statutes. This could be done either by recognising the fundamental importance of equality laws which could not be repealed without a weighted majority in parliament; or via a commitment from all the political parties to maintain protection.

Not all news from the CJEU is good however and there are some disappointing and difficult judgments and issues reported in Briefings. These include the CJEU's rejection of Mr Parry's sexual orientation and age discrimination claim following his employer's refusal to pay a survivor's pension to his gay civil partner. The SC's approach in the unsuccessful challenges to the SSWP's 'bedroom tax' benefit reductions for under-occupied social housing is also disappointing. The accepted *'manifestly without reasonable foundation'* test permits the government great latitude in justifying discriminatory laws in relation to state benefits. The interim report of the Bach Commission on *'The crisis in the justice system in England and Wales'* highlights, among other critical issues, that public legal education and legal advice services are inadequate and disjointed, and the cuts to not-for-profit legal advice centres have reduced access to justice. The government's review of the introduction of fees in the ET acknowledges a significant fall in ET claims, including workplace discrimination claims, and acknowledges evidence that the requirement to pay a fee has discouraged some people from bringing a formal ET claim. It does not however propose to reduce fees.

It is of vital importance that we continue to engage with politicians and the trade unions in the debate on not only protecting existing equality and workers' rights but developing new rights and maintaining access to justice. As the TUC has said *'UK workers should also not pay the price of voting to leave the EU in terms of reduced rights at work. The EU has played a central role in protecting working people from exploitation, combating discrimination and promoting good employment practices.'* [2]

The EHRC has expressed its interest in engaging with DLA members on identifying potential leading cases which will break new ground and develop equality rights. The Commission has had a good response to its initiative to provide funding for front line advice and representation for disability discrimination claims, particularly for employment related matters, and it is now focusing on attracting cases involving discrimination in access to services or education.

Equality and human rights activists must inform their political representatives of the issues and seize all opportunities to contribute to debates and collaborative working in the fight to combat discrimination and maintain and develop the tools which enable us to do so.

Geraldine Scullion
Editor

1. http://www.discriminationlaw.org.uk/system/files/WEC+call+for+evidence+re+equalities+post-Brexit+-+DLA+response.pdf

2. See page 6, TUC's *Working people must not pay the price for the vote to Leave; A national action plan to protect the economy, jobs and workers' rights;* June 2016

Please see page 35 for list of abbreviations

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'How scared should we be?' Discrimination law and Brexit – a long gaze into the crystal ball

Equality and discrimination rights practitioners who work daily with EU law, have no choice but to be acutely aware of the potential impact of Brexit on UK workers. Rachel Crasnow QC, Cloisters, explores the legal framework we have now, what may change and how we can protect rights in the future. She examines alternative models which could protect workers' rights outside the EU and sets out the mechanics of change, noting how the influence and interpretative value of CJEU case law might diminish. Equality rights are particularly susceptible to erosion. She concludes that as no guarantees have been given that our current workplace protections will not be weakened, practitioners must stay alert to changes and actively contribute to debates on new frameworks for protection.

How are EU workers' rights guaranteed at present?

The European Communities Act 1972 (ECA) subjects national laws to overriding EU law in three ways. First, s2(1) gives direct legal effect to EU laws and remedies by stipulating that *'all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties'* are to be given legal effect without further UK parliamentary enactment.

Second, s2(4) ECA renders EU law supreme over national law by providing that *'any enactment passed or to be passed … shall be construed and have effect subject to the foregoing provisions of this section'.*

Third, the combination of ss2(2) and 2(4) allows the Executive to make secondary legislation which itself counts as if it were primary legislation, even to the extent of amending other enacted or future primary legislation, so long as the secondary legislation is necessary to attain a result required by EU law (*Oakley Inc. v Animal Ltd* [2005] EWHC 210 Ch).

In addition to those sections of the ECA, EU law has supremacy over UK law as a result of the Court of Justice of the European Union (CJEU) case law. In *Marleasing SA v La Comercial Internacional de Alimentación SA*, Case C-106/89, the CJEU provided that UK courts are under a duty to interpret national law in accordance with the wording and purpose of community law, including directives not yet implemented in the member state.

Employment and equality rights in the UK which derived from EU law are therefore currently protected by the ECA, while principles of CJEU case law stop conflicting national law trumping such rights. Once the ECA itself is repealed, parliament and the Executive will be able to remove, or legislate contrary to, workers' and equality rights which are currently guaranteed by EU Treaties, directives and regulations and which comprise a minimum 'floor' under which the UK cannot sink.

How could workers' rights be guaranteed outside the EU?

EEA/EFTA Membership

If the UK joins the European Economic Area (EEA) as a member of the European Free Trade Association (EFTA), it will be obliged to adhere to EU law on social policy, including on workers' rights and equality law. The EEA includes the 28 EU nations plus Iceland, Lichtenstein and Norway.

EEA law is effective through the EEA agreement, the protocols of which transpose EU law on social rights into the EEA. By joining the EEA, the UK would agree to introduce statutory provisions to the effect that EEA rules prevail in the case of a conflict with 'other' provisions. However, EU employment legislation would not be supreme over national law in the same way as it is presently.

EEA members are subject to the EFTA court, the decisions of which closely follow CJEU case law. Thus, UK courts could still find themselves under pressure to interpret employment law in accordance with CJEU decisions although the judgments of the EFTA court are advisory only,[1] providing the UK with greater scope to manoeuvre around EU employment rights.

Non-EEA membership: EFTA or a bespoke bilateral agreement

If the UK is neither a member of the EEA nor the EU, it will be under no obligation to adhere to EU law on employment (or any other) matter.

1. Article 34 EEA Agreement

The UK could opt for a 'Swiss' model: EFTA membership without EEA membership, or a new agreement model with the EU.

Switzerland has a series of interlinked bilateral agreements with the EU which permit its access to the single market. The UK could try to enter into similar bilateral agreements which incorporate an obligation to give effect to EU social law, including EU employment and equality rights.

Through domestic legislation: the Great Repeal Bill

This is the government's declared way forward. The Prime Minister stated in her speech to the Tory Party conference that:

> *As we repeal the European Communities Act, we will convert the 'acquis' – that is, the body of existing EU law – into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses.*

The *'body of existing EU law'* is not defined further, so it is unclear whether such a body would include CJEU case law, nor what the cut-off date would be for new EU laws to make it into the Great Repeal Bill. Also, if the acquis will be subject to international agreements, treaties and trade deals, it is not certain that important protections for employees, which are a burden for employers, will not be loped off whichever body of EU law is incorporated into a Great Repeal Bill as part of any trade agreement.

So whilst the aim of the Bill is to repeal the ECA and to incorporate existing EU law into domestic law, this tells us little about how the current and future political landscape will shape the detail of such legislation.

The fate of EU-derived rights

The government's indications about what will happen to EU-derived employment law post-Brexit have been equivocal.

On one hand, the Prime Minister stated in her speech to the 2016 Tory Party conference that: *'existing workers' legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister'.*

David Davis, Secretary of State for Exiting the EU said to the House of Commons on September 5, 2016 that *'as for employment rights, a large component of the people who voted to leave the EU could be characterised as the British industrial working class. It is no part of my brief to undermine their rights – full stop'*.[2]

Recently the government stated in its response to a House of Commons committee report on pregnancy discrimination: *'This Government is clear that withdrawal from the EU will not lead to a diminution of employment rights. This Government will not roll back on the rights that British people are entitled to in the workplace, which are currently granted by EU law.'* [3]

On the other hand, Priti Patel MP (then Minister for Employment) reportedly said earlier in 2016: *'If we could just halve the burdens of the EU social and employment legislation we could deliver a £4.3bn boost to our economy and 60,000 new jobs'*.[4]

A private member's bill 'Workers' Rights (Maintenance of EU Standards)' had its second reading on February 24th; however, at the time of writing the government had not indicated whether it would support it.

It is worth noting that in October 2016 Grant Shapps MP, former cabinet minister and Conservative Party chairman, called for there to be a five-year sunset clause in the Great Repeal Bill so that any EU-derived rights would automatically expire in five years, thereby potentially allowing key protections to be swept away by future parliaments.[5] So there are concerns that the Bill would be used to weaken or repeal legislation that protects workplace rights along with that which protects the environment or health and safety.

The mechanics of change

Primary legislation

Rights bestowed by primary legislation will require modification by new acts of parliament. So, the prohibitions on discrimination provided by the Equality Act 2010 (EA), and rights to various types of pay or to written terms of employment under the Employment Rights Act 1996 (ERA), will require modification through new primary legislation.

Secondary legislation

Secondary legislation made under acts other than the ECA can be changed by other secondary legislation. Some examples are:

2. Hansard, September 5, 2016, Volume 614, column 50

3. See page 9: https://www.gov.uk/government/publications/pregnancy-and-maternity-discrimination-response-to-the-select-committee-report

4. http://www.voteleavetakecontrol.org/priti_patel_speech_at_the_spring_conference_of_the_association_of_licensed_multiple_retailers.html.

5. https://www.politicshome.com/news/europe/eu-policy-agenda/brexit/news/80146/grant-shapps-lead-tory-backbench-charge-theresa-mays-

- the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (made under Employment Rights Act 1999)
- the Maternity and Parental Leave Regulations 1999 (made under the ERA 1996)
- the Agency Workers Regulations 2010, and
- the Working Time Regulations 1998.

Secondary legislation made under the ECA will cease to have effect when the ECA is repealed, unless such secondary legislation is 'saved' by provisions in primary legislation.

CJEU case law

CJEU judgments have historically broadened UK employment rights by means of a purposive construction of legislation. The first question is how the UK government will approach such pre-Brexit judgments. If parliament legislates to save the whole corpus of EU law, including the decisions of the CJEU up to the point of Brexit, **pre-Brexit** employment rights will continue to be interpreted by courts in light of pre-Brexit CJEU judgments, the obligation to do so being set out in primary legislation.

Parliament may legislate to retain pre-Brexit EU legislation only and not the case law. In that case, CJEU judgments would only be persuasive authority on how to interpret pre-Brexit EU rights; however, courts would be able to decide issues contrary to such interpretations. If parliament went a step further and did not save **pre-Brexit** EU employment legislation, then CJEU jurisprudence is unlikely to remain persuasive (save in relation to retained legislation).

The second question is what happens to post-Brexit CJEU judgments. If the UK joins the EEA as an EFTA member, it will be subject to the EFTA court's 'mirroring' of CJEU decisions, but to a lesser degree than at present as set out above.

The Vote Leave campaign, and its predecessors, have long been highly critical of the status of CJEU decisions over UK courts. For example, one Vote Leave leaflet in the referendum campaign claimed:

> *EU law overrules UK law. This stops the British public from being able to vote out the politicians who make our laws. EU judges have already overruled British laws on issues like counter-terrorism powers, immigration, VAT and prisoner voting. Even the Government's proposed new deal can be overturned after the referendum: it is not legally binding.*[6]

With that attitude in mind, it is unlikely that the CJEU will be afforded a particularly protected status with regard to the interpretation of UK employment law, not least because it is the overriding nature of CJEU decisions which has historically been troubling to Eurosceptics.

The disappearance of EU law interpretative tools, such as the need to provide an effective remedy for a breach of EU law[7] and adhering to a purposive interpretative obligation,[8] would risk the emergence of a legal world out of kilter with the modern workplace.

Removing the current status of CJEU judgments could affect any of the following aspects of UK discrimination law, should pre-Brexit domestic employment legislation be retained:

Case	Act	Effect of removal
Dekker C-177/88	EA	Discrimination on grounds of pregnancy may not also necessarily be on grounds of sex.
Tele Danmark A/S v Handels C-109/00	EA	Employers may not have to assume the risk of the economic and organisational consequences of the pregnancy of employees.
Chez Razpredelenie Bulgaria C-83/14	EA	The concept of direct discrimination by association may be narrowed again and may not apply to claims of indirect discrimination as well as those of direct discrimination.
Webb v EMO C-32/93	EA	It may be permitted to compare the situation of a pregnant woman who by virtue of pregnancy is unable to carry out her role with that of a 'sick' man.
Enderby Frenchay HA C-127/92	Equal Pay Act 1970	Where statistics show an appreciable difference in pay between men and women doing jobs of equal value, the burden may no longer pass to the employer to objectively justify the disparity.

6. http://www.bbc.co.uk/news/uk-politics-eu-referendum-36014941

7. A general requirement of EU law specifically enshrined in Article 17(1) of that Directive as well as Article 19 Treaty of the EU and Article 47 of the EU Charter

8. Enshrined in decisions like *Marleasing* [1990] ECR I-4135, [1992] 1 CMLR 305

It should be noted there are many cases pending at the CJEU the outcome of which would be highly relevant to UK workers, but where a judgment will only be forthcoming after Article 50 is triggered or after the UK officially leaves the EU.

A relevant example is *Porras Guisado* C-103/16 – a Spanish reference about the circumstances in which a pregnant woman can be selected for redundancy, looking at alternative work and the nature of collective rights. The judgment is not expected until 2018. That judgment ought to be applicable in the UK then, but would its significance simply disappear a year later?

Equality rights susceptible to change post-Brexit

The government's previous approach to employment rights and red tape means that a sceptical eye is needed when considering the impact of Brexit on such rights.

Compensation for discrimination

Comments in the Coalition Government's Consultation Paper *'Charging Fees in Employment Tribunals'* (2011) suggested that the government could well cap the limit on compensation for discrimination in the absence of the CJEU decision in *Marshall No (2)*.[9] That case sets out the principle that EU states must make sure that financial compensation is adequate to achieve equality. The combination of capping and existing tribunal fees is likely to weaken the utility of discrimination law as an effective remedy and a deterrent against future detriment; if the cost to bring a case to court is high but the return is minimal, clients may well be more reticent to take the costs risk of litigating.

Rights to accrued annual leave

UK employees could also lose the EU derived ability to take the annual leave accrued during sick leave and maternity leave outside those periods.[10]

Maternity and pregnancy rights – including future reform

Many commentators have written that as UK maternity leave rights exceed the minimum required under EU law, it is unlikely that a post-Brexit government would repeal family-friendly legislation. This view is somewhat short-sighted as it is the likely absence of EU interpretative provisions and jurisprudence which will curb the future development of all kinds of still-needed law reform.

The various potential future family-friendly developments which rely upon EU law and seem unlikely post-Brexit include:

1. Associative pregnancy discrimination

There is a need to provide fathers who suffer detriment on account of their pregnant partners' associative pregnancy discrimination rights.

The case of *Kulikaoskas v Macduff Shellfish & Watt* [2011] ICR 48 attempted to rely upon *Coleman* but floundered at the EAT on a number of bases, including that the decision in *Coleman* had been based on the Framework Directive and not on the Pregnant Workers Directive and the recast Equal Treatment Directive, which underlie the protection afforded to pregnant women.

The EAT sitting in Scotland said the issue (under the Sex Discrimination Act rather than the EA) was *acte clair*. The Court of Session did refer the case which settled before it reached the CJEU. Rather than seek to refer other similar cases thus far, UK tribunals have dealt with the issue by preferring to find a remedy via sex discrimination: see *Gyenes v The Star Hotel ET* 4112392/12 (unreported) where such a comparator surprisingly succeeded but would probably have been overturned had the case gone to the EAT.

2. Extending the scope of shared parental leave

On the shared parental leave (SPL) front, more than a *de minimis* take-up of such leave will only occur via case-law or legislation which:

- ensures enhanced shared parental pay in workplaces where enhanced maternity pay exists
- relaxes or removes current eligibility criteria for SPL, such as allowing the partners of non-working mothers 'standalone rights' with which to gain access to SPL[11]
- provides the right to SPL to all workers, including casual, agency and sessional staff – which would enhance the objectives of the legislation which mirror those of the Parental Leave Directive, including enabling men and women to reconcile their occupational and family obligations
- minimises or removes current qualifying service periods on access to SPL and unpaid parental leave – which impacts in particular on working mothers with young children, and instead making these a 'day one' right

9. C-271/91, [1993] ECR 1-4367 [1994] QB 126

10. See *Merino Gomez v Continental Industrias del Caucho SA* (C342/01) [2004] E.C.R. I-2605 and *Stringer v Revenue and Customs Commissioners* (C-520/06) [2009] All E.R. (EC) 906.

11.This development would require reliance upon the CJEU decisions in *Roca Alvarez v Sesa Start España ETT SA* (C-104/09), [2011] All ER (EC) 253 and *Maïstrellis v Ypourgos Dikaiosynis* (Case C-222/14) [2015] IRLR 944 where a father was found to be entitled to paid parental leave although his wife did not work or exercise any profession.

- extends the number of adults who can share in the SPL regime.

It is proposed that from 2018, working grandparents will be able to opt into the SPL regime. But why should a parent have to drop out in order for a grandparent to opt in? Sadly the impact of grandparents' leave would probably be that fathers opt out of childcare, leaving mothers and grandmothers to carry on with the traditional roles which the legislation sought to modernise.

So whilst it may be unlikely that significant *existing* maternity and paternity provisions would be cut to below the minimum European standards, the force of valuable interpretative arguments might be lost where there was any lack of clarity, particularly in the fields of the burden of proof, comparators and discrimination by association or perception.

It must be remembered that parental leave rights impose financial burdens on business. It would be naïve to assume that a government, seeking deregulation and cutting red tape,[12] would not consider amending the provisions protecting against pregnancy and childbirth discrimination, perhaps reverting to a law requiring proof of less favourable treatment.

Ill pregnant women, or parents whose parental leave is a cost their employers would rather avoid, or indeed fathers who want to share in early years childcare, are likely losers in a post-Brexit world.

3. Carers' rights

The UK will lag behind EU in the arena of workplace rights if it does not choose voluntarily to legislate to incorporate future EU directives, such as the draft Carer's Leave Directive. In November 2015 the European Commission launched a consultation relating to a new directive which would provide a statutory basis for carers to continue to work and still be there for their families. Statutory carers' leave would increase the low employment rates for those (predominantly women) in this field and narrow the considerable gender pay gap for older women by allowing them to combine work with caring duties. There is no suggestion of when a final version of the proposed directive will be agreed. However two years after the triggering of Article 50 there will be no requirement upon parliament to transpose any such directive.

Concrete steps

In the face of a lack of information about any change to workers' rights employment advisors should make sure that they keep up to date with trade negotiations and the Great Repeal Bill, in order to ensure that clients are not adversely affected by delaying or bringing forward employment rights and discrimination claims.

Importantly we must contribute to consultations by providing case studies and specific evidence to help create a body of evidence to demonstrate the need to retain hard won rights and extend equality law further. Two examples of such current inquiries are:

- the Taylor review on modern employment practices – particularly relevant to employee versus worker entitlements[13]
- the Fawcett Society's Sex Discrimination Law Review – launched amid fears that Brexit will *'turn the clock back'* on women's rights.[14]

Employing EU workers and mobility

Those advising in the pre-Brexit commercial world need to be clear to clients of the risk of potential constructive dismissal claims through **compelling** relocations to EU countries, or their clients risking nationality discrimination claims by **insisting** EU employees apply for registration certificates (or permanent residency documents[15]). Employers must also avoid recruiting UK citizens over EU nationals on the grounds that it is unclear whether EU nationals will be allowed to stay in the UK once Brexit happens; such treatment would constitute discrimination on grounds of race or nationality.

Concluding thoughts

Despite recent government platitudes, the fact remains that disentangled from EU law obligations, directives relating to social rights would be domestically irrelevant. You could look at them, but could not require a domestic court to interpret national law using them. Practitioners must stay alert and renew their focus on access to justice and awareness of rights: no guarantees have been given that our current workplace protections will not be weakened at the time of exiting the EU.[16]

12. See for example the 2011 Employment Law Review.

13. https://www.gov.uk/government/groups/employment-practices-in-the-modern-economy

14. http://www.fawcettsociety.org.uk/2017/01/sex-discrimination-law-review/

15. https://www.gov.uk/eea-registration-certificate/overview

16. Thanks to Tom Gillie of Cloisters for assistance with earlier drafts of this paper.

Dress codes for a secular, egalitarian and multicultural society

With the House of Common's Petitions Committee and Women and Equalities Committee releasing a report on January 25th on high heels and workplace dress codes and the CJEU considering opposing opinions on the issue of religious head wear at work, Susan L. Belgrave, barrister, 7BR Chambers, reviews the issues and outlines important developments in the law. Noting that most workers are unwilling to rock the boat for fear of losing their job, she emphasises that it is important for employees to be aware of their rights and for managers to appreciate that while they are entitled to expect their staff to be professionally turned out, overly prescriptive rules may be discriminatory.

Introduction

The last several months have seen a flurry of increasingly outraged headlines, whether they relate to companies requiring women to wear high heels or make-up, prescribing how Muslim women dress at work or prescribing the type of hairstyle that an employee should wear. Whether it be the complaints of Nicola Thorp in respect of being required to wear high heels or the ban on the burkini by some French seaside towns last summer, this topic has never been more contentious. Many organisations have dress codes which can seem outmoded or stereotypical.

Workplace dress codes

No one disputes the right of an employer to impose a dress code on its staff. There are many valid reasons for an employer to do so: health and safety, security, branding and ensuring a level of professional appearance among staff at all times. In research produced on behalf of ACAS *'Dress codes and appearance at work: body supplements, body modification and aesthetic labour'* (2016) the authors listed a number of reasons for employers to set dress codes:

- protect workers' health and safety
- accentuate, or mask, hierarchical divisions at work
- limit offensive/inappropriate workplace attitudes and behaviours
- distinguish and make employee groups identifiable to external clients
- help manage customer perceptions and relations
- suppress individuality and encourage conformity
- build organisational identity
- communicate professional/role identity
- deliver on equality and diversity initiatives
- comply with legal regulations.

Employers as diverse as the NHS hospital trusts, police forces, Fire Brigade, railways and airline companies all have well recognised and very familiar uniform policies. The working public accepts and often appreciates a distinctive uniform which allows for easy identification and branding. Difficulties can occur in relation to these types of uniform but lack of flexibility can make those with a strict uniform policy more reluctant to introduce changes. Equally, a more fluid dress code can create great difficulties where there is greater scope for manager discretion and individual interpretation by the employee.

Legal considerations

A dress code can infringe the Equality Act 2010 (EA) and arguably provisions of the Human Rights Act 1988 (HRA) or the European Convention on Human Rights (ECHR). There are two principle ways in which an employee can challenge a particular dress code: either that it constitutes direct discrimination i.e. less favourable treatment because of a particular protected characteristic or that it amounts to indirect discrimination. In the latter case, the employee needs to show that while it is a neutral provision, it has a disparate impact on certain persons sharing a particular protected characteristic and that infringement cannot be justified as it is not proportionate.

Challenges to dress codes have been made on the grounds of direct sex discrimination, religious discrimination and race discrimination. In certain circumstances it is possible to foresee a situation where a dress code may adversely affect a member of staff because of their disability, their sexual orientation or indeed because they are undergoing or have undergone gender re-assignment. In short, employers should seek to review their policies periodically to ensure that they have kept abreast of changes in legislation as well as cultural and societal norms.

Issues of sex discrimination

Different but comparable treatment for men and women

Employers are, of course, allowed to prescribe that employees wear uniforms and comply with health and

safety standards for work attire. The difficulty arises where an employer has no specific dress code or has a dress code which, while ostensibly neutral e.g. 'smart attire', 'professional', is interpreted by the employer to stipulate particular, exacting standards of dress which may be deemed outmoded or sexist. It may be legitimate to require a man to wear a tie or jacket to work. But is it legitimate to require a woman to wear skirts only, heels above a certain height or make-up? This requirement is based on a stereotype of what may be deemed professional or in some cases the employer may wish a female employee to look 'sexy' to attract customers.

Historically courts and tribunals have allowed employers to adopt different dress codes for men and women and have held that as long as they are enforced in an even handed way, have concluded that there is no less favourable treatment. Thus in *Smith v Safeway plc* [1996] IRLR 456, CA the claimant was dismissed from his employment as an assistant on the Safeway delicatessen counter because his hair, which he wore in a ponytail, breached the employer's rules for male staff, which stipulated that hair must be tidy and not below collar length. His claim failed as the tribunal decided that Safeway could legitimately require him not to wear a ponytail although a woman could wear such a hairstyle. The CA held that where a dress code enforced a common standard of smartness and conventional standards even-handedly then it could not be considered that either sex was treated less favourably.

Similarly in *Department for Work and Pensions v Thompson* [2004] IRLR 348, EAT; in this case the DWP required its job-centre staff to dress in a professional, business-like way. This meant that male staff were required to wear a collar and tie. A claim that this requirement was discriminatory also failed.

The tribunals' approach to what is an acceptable requirement for a manager to impose on a female member of staff currently suggests that stereotypical assumptions about clothing and appearance will be seen as acceptable.

Petitions Committee & Women and Equalities Committee report

The House of Common's Committes' report *'High heels and workplace dress codes'*[1] notes that many employers have adopted dress codes requiring women to not simply look smart or professional but which also specify that they should wear high heels or full face make-up, skirts and sheer tights. One woman complained that over the Christmas period female staff were told to undo the top button of their shirts to look more attractive to male customers. Being forced to wear high heels, and sometimes vertiginous ones, is not only uncomfortable but also can cause damage to women's feet as detailed quite graphically in the report. Women reported frequently requiring medical attention. Such instructions can be seen as humiliating and, in essence, require a woman to emphasise her sexual attractiveness to sell her employer's wares. The report concluded that employers are not taking issues of health and safety into account when devising their dress codes so while it determined that the law was clear, it was not working in practice.

The difficulty is of course that while the principles of what constitutes direct discrimination are now well settled, the way in which the law has been applied by tribunals has been quite conservative and there are few cases to help clarify the issues. It would now be a brave judge who concluded that wearing high heels was a perfectly reasonable part of dress code. It is not obvious, however, that requiring a woman to wear make-up or a man to not wear an earring would be viewed as discriminatory. While social attitudes are changing, the law, arguably, lags behind.

Issues in relation to other protected characteristics

Of course it is not simply the case that a particular provision of a dress code can amount to sex discrimination only. One can easily see that a requirement to wear high heels could make working life difficult for a woman with certain physical disabilities e.g. back pain, arthritis etc. Similarly, some accommodation might need to be made for a person undergoing gender re-assignment.

A particular difficulty which can arise for Black members of staff is a restriction on the type of hairstyle that they can wear. Natural hair styles such as cornrows, braids, twists and Afros can be disapproved of by employers who have culturally myopic ideas of what may be acceptable in a workplace. Harrods department store is not the only one to require a Black woman to straighten her hair on the basis that a natural hairstyle was not professional.[2] This can surely amount to sex discrimination because most Black men will wear natural hair to work so the refusal to allow a Black woman to wear her hair in a natural hairstyle would amount to less favourable treatment. It surely would no longer be said that straightened hair is a convention for all women. It

1. https://www.publications.parliament.uk/pa/cm201617/cmselect/cmpetitions/291/29102.htm; January 25, 2017

2. Reported in *The Independent*, January 27, 2017

is a cultural issue as well. A company which allows a White woman to wear her hair in a natural hairstyle but does not permit a Black woman the same freedom of expression may be considered to be discriminating on racial grounds. The idea that a Black woman's natural hair is not 'professional' is deeply offensive. It may of course be entirely appropriate, depending on the job, to ask for natural hair to be worn in a style that is tied back or neat.

Although not employment related it is worth bearing in mind the case of *G v St Gregory's Catholic School* (2011) where the CA concluded that it was indirectly discriminatory on racial grounds to forbid an Afro-Caribbean schoolboy from wearing cornrows where there was a small but significant group within the Afro-Caribbean community who believed that it would be wrong for him to cut his hair. A policy which requires a woman to chemically straighten her hair or wear a 'weave' because her natural hairstyle is deemed 'unprofessional' or 'unacceptable' is likely to be indirectly discriminatory and may well be directly discriminatory. It is also based on a stereotype. Black men are not required to straighten their hair for employment. The idea that a woman should have long hair irrespective of the nature and type of her hair – a European idea – should surely now be deemed less favourable treatment. A White woman with short natural hair would not be subjected to such a detriment.

Protection from religious discrimination

The situation is equally complex and fraught when one considers how to deal with individuals who may wish to wear certain items or clothing because of its religious significance. As a protected characteristic under the EA, *'religion and belief'* is problematic because of the breadth of the concept and the neutrality of the law as to the relative value of various belief systems. Each of the major religions claims a certain exclusivity but living in a plural society we accept them all as equally valid and worthy of respect. This is vividly illustrated in two cases which are currently before the CJEU, as set out below.

The issues which arise do not relate to the Islamic faith alone; as Advocate General Sharpston has pointed out, the wearing of religious apparel is not limited to one specific religion or to one specific gender:

> *In some cases there are what may be termed absolute rules, although these will not necessarily apply to all adherents of the faith in question or in all circumstances. In other cases, there may be one or more styles of apparel available to adherents, who may choose to wear them either permanently or at times and or places they consider appropriate.*

The courts and tribunals have grappled with Christian crosses, Sikh turbans, Muslim women wearing veils or Jewish men wearing the kippah or skullcap.

Domestic case law re religious dress codes

In the UK the courts and tribunals have tended to look at matters on a case-by-case basis. While religious attire may be appropriate in certain workplaces there are others where the employer successfully raised a health and safety defence. In the case of *Azmi v Kirklees MBC* [2007] UKEAT 009/07 an argument of direct discrimination failed where a claimant was not allowed to wear a niqab to work in a school as students benefited from seeing the face of the person teaching them. A more recent case *Begum v Pedagogy Auras Ltd* UKEAT/0309/13, see Briefing 768, showed the careful analysis which is needed in these cases. A claimant failed in a claim for indirect discrimination against a nursery when asked to wear a shorter jilbab. The nursery allowed staff to wear jilbabs to their ankles but expressed concerns that a longer garment could present a tripping hazard for staff and the young children in their care. It was noted that 25% of the nursery staff comprised Muslim women and the measure adopted by the employer was not disproportionate.

ECHR and CJEU

Such issues may also engage rights under the ECHR namely the rights to freedom of expression and freedom of religion. Such cases are brought against the state and consequently there is a justification defence as well as particular consideration given to political and cultural sensitivities. Prior to the ECHR decision in the joined cases of *Eweida, Ladele, McFarlane* (2013) see Briefing 663, the ECHR took a hard line in relation to those trying to prove religious discrimination in the workplace on the basis that no-one was forced to work for any employer and could change jobs if they saw fit.

In several cases the court has taken a more robust approach supportive of strong and long-standing secularism policies: *SAS v France* (2014), *Dahlab v Switzerland* (2001), *Sahin v Turkey* (2005) and *Ebrahimian v France* (2015). France and Turkey, for instance, have both insisted on secularism in public sector jobs. However, the ruling in *Eweida* requires a more nuanced approach similar to that currently adopted in the UK courts. This will include an examination of the workplace in question, the nature of the restriction imposed and the reasons for it as well as whether there is a way in which the employer could

accommodate the religious sensitivities of the worker concerned. We should bear in mind that over time it is commonplace in the UK to see policemen and judges wearing turbans without any diminution of their authority. In the cases involving Christians who wish to wear a cross, the desire for neutrality in the workplace (as argued by British Airways) can be tempered by modest adjustments to uniforms to accommodate religious sensitivities (as was done for other religions). This contrasts with the case of *McFarlane* where a nurse was not allowed to wear a cross while on duty because of the health and safety risk it posed when she was working with young children or elderly patients.

Recent opinions of the Advocates General of the CJEU

The CJEU case law in this area is also evolving and similarly has to grapple with the complexities of the different jurisdictions and national sensibilities. For instance, Italy being a deeply Catholic country and, at the other end, France being avowedly secular. The courts must also take into account the needs of business, where it may be a reasonable requirement to ask employees to limit the manifestation of their religion in the workplace.

In *Achbita v G4S Secure Solutions NV C-157/15* the Advocate General (AG) had to consider the requirement that a Muslim woman not wear a headscarf at work. The employee in question had abided by this restriction for some three years before returning from a bout of sick leave and stating that she intended in the future to wear a headscarf at work. AG Kokott advised that the court should reject the claim noting that unlike earlier British Airways dress policy, all religions were treated equally by G4S and the dress code did not make allowance for any religious attire at all in the workplace. The claim for direct discrimination was deemed to be very weak. The AG gave primacy to religious neutrality in a multicultural society as a legitimate aim as it ensures respect for all religions while not supporting or encouraging the promotion of any particular faith. The AG was no doubt influenced by the fact that the claimant had previously worked at G4S for several years without wearing a headscarf. She posited that unlike skin colour or sex, religion was not innate and could be left at the door of the workplace.

This contrasts with the stronger reasoning of AG Sharpston in *Bougnaoui v Micropole SA* (C-188/15) where the claimant, an engineer, had been dismissed for wearing a hijab when a customer complained that she has worn the hijab on site at their premises and asked that she not do so again. The matter was referred to the CJEU on the question of whether a prohibition on wearing a headscarf might be viewed as a genuine occupational requirement. The judge noted wryly that wearing a headscarf did not prevent her from performing her job as an engineer and indeed the letter of dismissal spoke particularly of her professional competence.

The AG considered that the claimant's dismissal from her post as an engineer amounted to direct religious discrimination. She also considered that the employer's policy could not be deemed proportionate if one applied the relevant provisions for indirect discrimination. Equally important she rejected the idea that a person's religion was not an intrinsic part of their make-up. In a thorough analysis of the key principles, AG Sharpston noted that while proselytising was unacceptable in the workplace, employers need to respect the individual's right to expression of cultural and religious freedom. For many, religion is as intrinsic to their being as the colour of their skin and making that kind of distinction between protected characteristics was a false dichotomy. AG Sharpston noted that *'two protected rights – the right to hold and manifest one's religion and the freedom to carry on a business – are potentially in conflict with one another. An accommodation must be found so that the two can coexist in a harmonious and balanced way'.* She noted that while an employer buys a worker's time, he does not buy his soul. Her conclusion on the need for proportionality is a fitting conclusion to any analysis of this tricky subject:

> *It seems to me that in the vast majority of cases it will be possible, on the basis of a sensible discussion between the employer and the employee, to reach an accommodation that reconciles adequately the competing rights of the employee to manifest his or her religion and the employer to conduct his business. Occasionally, however, that may not be possible. In the last resort, the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions. Here, I draw attention to the insidiousness of the argument, 'but we need to do X because otherwise our customers won't like it'. Where the customer's attitude may itself be indicative of prejudice based on one of the 'prohibited factors', such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice.*

The CJEU is due to give a ruling on these two cases shortly.

Isaac looks to DLA for potential cases

David Isaac, who became chair of the Equality and Human Rights Commission (EHRC) in May 2016, addressed the Discrimination Law Association's AGM in February. David agreed to speak at the meeting knowing that his audience, while sharing many of the EHRC's broad aims, would not be blandly uncritical. DLA committee member Katya Hosking reports:

The EHRC was created in 2007 to replace the Disability Rights Commission, the Equal Opportunities Commission and the Commission for Racial Equality (often called the 'legacy' commissions). According to the Arts and Humanities Research Council's 2011 policy paper, the EHRC:

> *… came into being … amidst vocal opposition from across the political spectrum to the Human Rights Act, the increasing influence of human rights legislation emanating from Strasbourg and the legislative project that would eventually become the Equality Act 2010. The transition from the three legacy commissions it replaced was difficult, but recently the EHRC has begun to take strides towards finding its distinctive institutional voice on the national stage. However, it continues to be buffeted by powerful political crosswinds, and it has remained largely peripheral to mainstream debate.*[1]

Since its creation the EHRC has also been hit by spending cuts: its overall budget for 2015/16 was £21.9m, down from just over £60m in 2008/9. During the same period the number of people working for the Commission went from approximately 500 to approximately 200. In that context, it is perhaps unsurprising that it has faced criticism from friends as well as enemies.

David acknowledged, first, that there is often confusion about the role of the EHRC. As a '*non-departmental public body*' created by statute, it is publicly funded but must be independent of government to maintain its status as a United Nations national human rights institution. It has unique powers, he said, to drive change and hold government to account in service of its principal aim, which is to make Britain fairer.

However, it is not a lobbying organisation, although many people – and non-governmental organisations – appear to think it is. Instead, David emphasised the EHRC's role in undertaking research and analysis in order to be an expert voice, the first port of call of public bodies and businesses seeking information or advice on equality or human rights. It also has unique powers to undertake investigations as well as intervene in legal cases to address discrimination.

David acknowledged frankly that the DLA probably doesn't think the EHRC is using its powers effectively enough. His view is that while it has been effective it has perhaps not been assertive enough, and he is keen that it should become a more muscular regulator. For instance, he intends that it should do more investigations: he believes the one carried out into the Metropolitan Police over the last two years has led to positive outcomes, though it was painful at times. He encouraged DLA members to suggest new areas for investigation.

David also thinks the EHRC should be initiating or intervening in cases more often; he referred to *FirstGroup Plc v Paulley* [2017] UKSC 4 [see Briefing 817] – about the availability of spaces for wheelchair users on buses – as an example of its support for establishing important legal precedents. The EHRC has therefore been running a pilot project to fund pre-action work and legal proceedings in first instance disability discrimination cases which, if successful, may be extended to other protected characteristics. Again, he encouraged DLA members to tell the EHRC about potential cases.

Finally, the EHRC is concerned that the UK's exit from the EU may lead to reduced protection for equality and human rights. It has opposed calls for a British Bill of Rights and made clear its view that the UK must remain a signatory to the European Convention on Human Rights.

David opened by saying that he has long been an admirer of the DLA's work and was keen to hear from DLA members. I am sure, therefore, that he will expect and want us to continue our vigilance in holding the EHRC to account as well as to offer support wherever we are able.

1. Pengam, Thomas *'The Equality and Human Rights Commission: Challenges and Opportunities'* Arts and Humanities Research Council 2011, available at http://www.ahrc.ac.uk/documents/project-reports-and-reviews/ahrc-public-policy-series/the-equality-and-human-rights-commission-challenges-and-opportunities/

Dispiriting example of a failure in protection

David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, and Department of Education and Skills;
CJEU (First Chamber) C-443/15, November 24, 2016

Discrimination and equality law is ever evolving and hard won rights of certain groups take time to be universally accepted. The rights of same-sex couples to enter into a legally recognised relationship and benefit from rights to a survivor's pension for example have taken years to pass into law. However once legislative rights are implemented the expectation is that injustice arising from the inequalities will end. The CJEU's judgment in *Parris* is therefore a dispiriting example of a failure in protection.

Facts

Professor Parris (P) was entitled to a pension as a result of his tenure at Trinity College Dublin. The scheme provided for a survivor's pension payable on death of the pension beneficiary to their spouse or civil partner. However, the survivor's pension was subject to the condition that the marriage or civil partnership giving rise to the survivor's claim had taken place before the pension beneficiary, in this case P, had reached the age of 60.

This posed two insurmountable problems for P. Firstly, civil partnership was first recognised in Ireland following adoption of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act (the CP Act) on July 19, 2010 which entered into force on January 1, 2011.

Same-sex marriage was not recognised until the referendum of 2015 and the amendment of Irish law on November 16, 2015.

Secondly, and as a direct result P, who was born in 1946, was not and never would be able to satisfy the criteria of being under 60 at the time of his legal union. He was already too old by the time the legal recognition which would allow his partner to benefit, came into law.

P and his partner had entered into a civil partnership in the UK in 2009 when P was 63; his UK civil partnership was recognised in Irish law on January 12, 2011 following the making of the necessary ministerial order.

S99 of the CP Act provides that a *'benefit under a pension scheme that is provided for the spouse of a person is deemed to provide equally for the civil partner of a person'.* However, as the CP Act excluded the retrospective recognition of civil partnerships registered in another country, this did not help P.

P requested that his partner be granted a survivor's pension in order to avoid potential discrimination under the Equal Treatment Directive 2000/78 (the Directive) on grounds of either or both sexual orientation and age. He argued that but for him being an older gay man, his partner would have benefited from a survivor's pension, because he would have married or contracted a civil partnership before the age of 60. It was only the chronology of the legal developments which prevented the benefit being paid.

CJEU

The domestic courts declined to pay the benefit and the matter was referred to the CJEU for a determination of whether there was any discrimination on either grounds of age or sexual orientation, or on the combined grounds of age and sexual orientation.

The question for the court was whether or not the conditions in the CP Act, which applied to all potential beneficiaries, amounted to discrimination on grounds of sexual orientation, age or a combination of the two.

Direct sexual orientation discrimination

The CJEU noted that the Directive and Irish domestic law provides that no one should be treated less favourably than a comparator in the payment of such benefits since different less favourable treatment on grounds of a protected characteristic would be direct discrimination. So was there less favourable treatment and if so why?

Since a person married to someone of the opposite sex was subject to the same condition on age, the CJEU found that the cause of the refusal of the grant of a survivor's pension was not sexual orientation, but the fact that P could not satisfy that condition. The CJEU said this was not therefore direct discrimination.

Indirect sexual orientation discrimination

The CJEU then considered whether or not there was unlawful indirect discrimination on grounds of sexual orientation, on the basis of a condition which has an adverse impact on a specific group sharing the protected characteristic of homosexuality. It concluded that there was not. In doing so it considered both domestic and EU jurisprudence on the implementation of sexual orientation discrimination and age discrimination, in particular the various exemptions and exceptions allowed to member states in the implementation of the Directive.

The Pensions Act 1990 (the 1990 Act) had been amended in 2004 in order to give effect in Irish national law to the provisions of the Directive concerning the principle of equal treatment in occupational benefit schemes. However, the 1990 Act contains a number of exceptions to the principle of equal treatment in respect of survivor's benefits.

The CJEU considered s72 of the 1990 Act, which provides that it shall not be a breach of the principle of equal treatment to fix an age for admissions to a scheme or for receipt of benefits as long as any such age fixing does not result in gender discrimination.

Section 72 also provides as follows:

(3) *It shall not constitute a breach of the principle of equal pension treatment on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member's widow or widower provided that it does not result in a breach of the said principle on the gender ground.*

(4) *In this section any reference to the fixing of age or ages for entitlement to benefits includes a reference to the fixing of retirement age or ages for entitlement to benefits.*

Whilst the CJEU concluded that there was a condition which had an adverse impact on homosexual workers born before 1951, because of the chronology of the legal enactments, they would never be able to satisfy the condition of entering into a legally recognised civil partnership before the age of 60.

However, Recital 22 of the Directive provides that the obligation to ensure equal treatment on the protected grounds, including sexual orientation, is without prejudice to the member states' own domestic law on marital status. This meant that whilst member states had to ensure that there was no discrimination on grounds of sexual orientation, there was no obligation to extend that equal treatment to the right to marry or enter into a civil partnership. Whilst Ireland did subsequently recognise both forms of partnership, there was nothing unlawful in the fact that Ireland had not done so at an earlier date, and thus, reasoned the CJEU, the disadvantage which flowed from that state of affairs could not be unlawful discrimination under the Directive. If the state could lawfully exclude the recognition of gay partnerships, its failure to subsequently ensure equality in access to benefits flowing from those partnerships must also be lawful.

The CJEU concluded that the condition which was being applied and which caused disadvantage was the national law and not sexual orientation. Where the law permitted different treatment at the time, there was no indirect discrimination on grounds of P's sexual orientation

Analysis

This is a difficult conclusion. The court's analysis did not focus on the lawfulness or justifiability of the condition which caused the disproportionate disadvantage, i.e. the condition that a civil partnership is entered into before the age of 60. The CJEU focused on the legal policy of not recognising civil partnership until 2011, and rightly find that to be lawful. However, that policy was only a problem for P and his partner because of the additional age condition.

Whilst the law did not recognise civil partnerships until 2011, it does so now. P has entered into a civil partnership. The condition of doing so before reaching the age of 60 is not one which is alleged to result from the national law, or be necessary or proportionate to the achieving of some legitimate objective. The only reason why P is not able to ensure that his partner benefits from a survivor's pension, when a married straight colleague of the same age could do so, is that he was too old to satisfy what appears to be an arbitrary age limit on a pre-condition for access to a benefit. At no point did the CJEU question why the additional condition was necessary or whether it was justified.

Age discrimination

P further alleged that the condition was unlawful discrimination on grounds of age. Again, the CJEU disagreed. The CJEU considered firstly that the legislative measures in force in 2004 were legitimate and permissible under EU law.

Under the heading *'Justification of differences of treatment on grounds of age'*, Article 6(2) of the Directive provides:

Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security

schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

The provisions allow for an age limit on a person, or a group of workers such as those who become disabled and unable to work being able to draw a pension or join a pension scheme for example. That is different from limiting or denying the entitlement of a group of workers to a benefit at all. The first is legitimate and specifically allowed for under the Directive; the second is not.

Did the condition in question in this case *fix an age limit for access to a benefit*? On the face of it, it did not. What it does do is place an age requirement on the pre-condition of being in a legally recognised partnership. No age limit was placed on entitlement to a survivor's pension, being the benefit in question, since the benefit can be payable to any one of any age, if they are a surviving civil partner or spouse of a person who was receiving the pension. The age condition is placed upon a qualifying condition for the benefit.

The CJEU however found that the age condition is one placed on access to a benefit, and as such falls within the exception to the provisions and thus was not unlawful age discrimination.

Comment

The reality of this case is that the reason why P's partner does not qualify for the benefit is that P is an older homosexual man who could not comply with apparently neutral provisions, because the changes in the law came too late in his life. The cause of the detriment is both age and sexual orientation together, but as the CJEU find in their final determination on the case, the combined adverse impact of age and sexual orientation is not unlawful under the Directive.

This judgment is an example of the difficulties of combined or intersectional discrimination. On the face of it, P has been denied a benefit, which a married person of a different age would receive, and the cause is his age and sexual orientation. Whilst in the future gay workers will be able to ensure their partners receive a survivor's pension, the refusal of P's claim because of his chronological misfortune appears unjust, even if it is technically lawful.

Catherine Rayner
Barrister, 7 BR

Briefing 817

Groundbreaking reasonable adjustments decision on public transport provision

FirstGroup Plc v Paulley [2017] UKSC 4; January 18, 2017

Introduction

In January this year the SC handed down its decision in the *Paulley* case. It was the first time that the SC considered the services provisions of the Equality Act 2010 (EA) in the context of disability discrimination – and what many considered to be the particularly difficult issue of who has priority over the space which is ostensibly allocated to wheelchair users on buses.

The court's decision, whilst not exactly a model of clarity, provides some useful guidance for service providers as to what they may be expected to do in such situations. Whilst not going as far as disability transport campaigners would have hoped in securing the space for wheelchair users, the decision nevertheless represents progress in its acknowledgment of the imposition of a significant duty to make adjustments in advance of disabled people using a service and of the need to do more than simply request that someone move from a space provided with the prime objective of affording opportunities for disabled people to travel.

Facts

On February 24, 2012, Doug Paulley (P), a wheelchair user, attempted to board the 9.40 bus from Wetherby to Leeds so that he could catch a train. The single wheelchair space was occupied by a pushchair in which was a baby. The bus driver asked the owner to move but

did nothing more when she refused. P was unable to travel on that bus, so missed his train.

County Court

P was successful at first instance in his discrimination claim because of the failure by the bus company to make reasonable adjustments. The claim was predicated on a variety of adjustments being made so as to result in a culture shift for all concerned. The recorder took what might be described as a progressive approach to the duty and its impact when he found in favour of P. He pointed out that D's practice of *'first come, first serve'*, or its stated policy of giving the wheelchair user priority over other passengers for use of the wheelchair space, did not give the wheelchair user sufficient protection as it allowed the non-wheelchair user to refuse to move.

Two passages in his judgment, on which much attention was focused at the subsequent appeal hearings, were indicative of his approach.

The first stated as follows:

> *What was required was a clear practice/policy which not only paid lip service to the giving of priority to the wheelchair user but actually enforced such priority. To that extent the most comprehensive adjustment alleged by the Claimant was that it should be made clear to other passengers that the wheelchair space is for wheelchair users and that they will be required to vacate the space if needed. Once such a practice was put into effect with a proper system of notices, warnings and, if necessary, advertising then the culture will have changed and no non-disabled passenger who wished to occupy the space could be under any illusion that if there was competition for such a space with a wheelchair user, then they would either have to vacate the space by, for example, folding a buggy and sitting elsewhere, or by leaving the bus and taking the next bus available. The extent to which the adoption of such a policy would also require an insistence that pushchairs be folded or that passengers should be asked to fold their buggies before boarding the bus or that drivers should be trained to enable them to better persuade passengers to move from the wheelchair area would be a matter of degree. The most effective adjustment, which would remove the disadvantage occasioned by the competition for the wheelchair space, would require a change in the first come, first served/request approach.*[para 10]

And, at paragraph 21:

> *In my judgment there is little doubt that had the practice suggested by the Claimant been in force on 24th February 2012 then Mr Paulley would have been able to travel rather than having to leave the bus and wait until the next bus was due to leave the Wetherby bus station. The practice suggested by the Claimant, namely that the system of priority given to wheelchair users should be enforced as a matter not of request, to any non-disabled user of the wheelchair space, but of requirement is, to my mind, a reasonable one. It could be incorporated into their conditions of carriage so that any non-disabled non-wheelchair using passenger could be obliged to leave the wheelchair space if requested to do so because a wheelchair user needed to use it; just as there are conditions of carriage which forbid smoking, making a nuisance or other "anti-social" behaviour on the pain of being asked to leave the bus then a refusal to accede to a requirement to vacate the space could have similar consequences. In my view, once the system had been advertised and in place there would be unlikely to be caused any disruption or confrontation as all passengers would know where they were. Although such a policy might inconvenience a mother with a buggy that, I am afraid, is a consequence of the protection which Parliament has chosen to give to disabled wheelchair users and not to non-disabled mothers with buggies…*

The recorder, however, declined to award injunctive relief at that time and adjourned the relief application for six months, saying:

> *I do this for one simple reason. I expect FirstGroup PLC to take on board the lessons to be learned from this judgment and to adapt its practices, in whichever way it considers appropriate, having regard to the obligation to meet its responsibilities under the Equality Act 2010 and commercial considerations. I believe that the Defendant is, in the first instance, the best person to decide how to put the lessons to be learned into practice.* [para 25]

Court of Appeal

FirstGroup PLC (D), appointing a new legal team, appealed on a number of grounds, including that the recorder had gone too far in holding that it would be a reasonable adjustment to require anyone occupying the wheelchair space to vacate that space should a wheelchair user require it. The appeal was resisted on the basis of upholding the recorder's judgment. The CA upheld the appeal and P appealed to the SC.

Supreme Court

There was just one issue for the SC to determine: was D in breach of the EA. The court was unanimous in finding that D had breached the EA in that it had not done enough to secure the wheelchair space for wheelchair

users i.e. in making reasonable adjustments for disabled people. The court held, however, that the recorder had gone too far in determining that it would be a reasonable step to have a policy which required the removal of anyone occupying the wheelchair space unreasonably (the minority judgments were not in agreement that the recorder had gone as far as determining this – see below).

Further, the majority could not conclude that the mother would have moved had the adjustments which it determined should have been made had been in place, and so declined to uphold the damages award.

So far as the nature of the steps to be taken were concerned, the majority held that it was not enough for D, as it contended, to instruct its drivers simply to request non-wheelchair users to vacate the space and do nothing further if the request was rejected. Lord Neuberger, President, described D's existing policy as 'pallid'. [para 68]

Where a passenger is being unreasonable, drivers should consider stopping the bus for a few minutes *'with a view to pressurising or shaming the recalcitrant non wheelchair user to move'.* [Neuberger, para 66-67]

Whilst there may be difficulty in securing reasonable adjustments in the face of competing demands this was not a reason for not putting it into practice according to Lord Toulson:

> *I am not aware of a legal principle which prevents a service provider from adopting a requirement just because securing compliance with it will or may depend on moral pressure .... The concept of 'reasonable adjustments' … is intensely practical. Much human behaviour is governed by expectation and convention rather than legal enforcement.* [para 83]

Minority judgments

The minority judgments approached the situation very differently. Lady Hale's statement echoed that of the recorder when she said that *'service providers owe positive duties towards disabled people, including wheelchair users, which they do not owe to other members of the travelling public, including parents travelling with small children in baby buggies or other people travelling with bulky luggage'* [para 100]. Lord Clarke concurred with her.

Lord Kerr would not accept without supporting evidence that a stipulation that a passenger was required to move would lead to confrontation or delay.

Both Lord Clarke and Lady Hale also thought that disruption and confrontation would be unlikely had passengers been made aware of who had priority. Lady Hale and Lord Kerr were in agreement that a notice should require those occupying the wheelchair space who are not wheelchair users to move from the space.

Lady Hale, Lord Kerr and Lord Clarke agreed that if the woman with a buggy cannot fold her buggy, then she should get off – or be required to get off the bus. They also agreed that damages should be paid to P.

What next?

So what are the practical implications of the judgment?

It would be a mistake to say that the judgment in this case does not represent progress. Whilst there was no finding of discrimination (hence no damages), there was a unanimous finding of breach of the EA. D had not done enough. In different circumstances – or indeed if there had been express findings of fact – there could have been a finding of discrimination, with the damages and, perhaps more importantly in non-employment cases, injunctive relief that can flow from such a finding.

The decision re-affirms the importance of the duty to make reasonable adjustments for disabled people, a duty which is not afforded to those with other protected characteristics, and which provides disabled people with extra protection in the legislation. It requires employers, landlords, and those providing services and education to make positive changes so that disabled people can access life on the same basis as those without disabilities. There needs to be cultural change so that priority for wheelchair users means just that.

In respect of the duty to make reasonable adjustments and disabled people more generally the court said:

> *The 2010 Equality Act accorded what Lady Hale has called an "extra right…consistent with the obligations which the United Kingdom has now undertaken under the United Nations Convention on the Rights of Persons with Disabilities" – Aster Communities Ltd (formerly Housing Homes Ltd) v Akerman-Livingstone (Equality and Human Rights Commission intervening) [2015] AC 1399.* [Lord Neuberger, para 47]

On appropriate facts, there could be an absolute rule that a space allocated to wheelchair users is only to be used by wheelchair users [similar to, for example, disabled parking; toilets for wheelchair users; etc.]

There have already been more cases reported and it is likely that we will see greater numbers of cases litigated in this area. However, without a change in the qualified one-way costs shifting regime, the question of costs remains a significant barrier to those disabled people seeking to enforce their rights under the EA.

Catherine Casserley
Cloisters Chambers

Disability and sex discrimination: 'bedroom tax' benefit reductions for under-occupation of social housing

R (on the application of Carmichael and Rourke) (formerly known as MA and others); R (on the application of Daly and others) (formerly known as MA and others); R (on the application of A) and R (on the application of Rutherford and another) v SSWP; [2016] UKSC 58; November 9, 2016

Facts

The claimants in this case are divided into three groups: persons with disabilities; persons living with dependent family members who have disabilities; and persons living in specially adapted 'sanctuary scheme' homes for women at severe risk of domestic violence. They are all tenants of registered social landlords and have been in receipt of housing benefit (HB), a means tested benefit. The claimants had their HB reduced because, pursuant to criteria under Regulation B13 (the bedroom criteria), which were inserted into the Housing Benefit Regulations 2006 by the Housing Benefit (Amendment) Regulations 2012 and which alter the basis upon which HB is calculated, they were living in houses with more bedrooms than the number of residents. Regulation 2(2) of the Discretionary Financial Assistance Regulations 2001, provides for a discretionary housing payments (DHP) scheme which allows local authorities to make up some or all of the financial shortfall in individual cases. However, only some of the claimants had the shortfall covered by a DHP.

High Court: *MA & Others*

Ten claimants brought a judicial review in 2013 challenging Regulation B13. They alleged discrimination against people with disabilities under Article 14 of the European Convention on Human Rights read in conjunction with Article 1 of the First Protocol and a breach of the Secretary of State for Work and Pension's (SSWP) public sector equality duty (PSED) under s149 of the Equality Act 2010 (EA).

The High Court (HC) noted that Regulation B13 meant that people with disabilities could have their HB capped without their different needs being taken into account. In deciding whether this was unjustified, the test to be applied was whether the discrimination was manifestly without reasonable foundation. The HC noted the existence of the DHP scheme. It held that the discriminatory effects of the decision had been properly considered and there was no breach of the PSED. Accordingly, the claims were rejected.

Court of Appeal: *MA & Others*

The claimants appealed. The CA upheld the HC decision ruling that considered alone, Regulation B13 was plainly discriminatory but that it should be read together with the DHP scheme. Also applying the *'manifestly without reasonable foundation'* test, the CA found that the state's approach was objectively and reasonably justified. The CA also agreed that there had been no breach of the PSED.

One of the claimants, Mrs Carmichael, challenged the difference in treatment between adults with disabilities who cannot share a room with their partner, and children with disabilities who cannot share a room. Under Regulation B13, the former would have their HB capped while the latter would not. The CA decided that the differential treatment was justified, stating that children required additional protection in light of the *'best interests of the child'* test.

High Court: *Rutherford & Others; A v DWP* (heard separately)

The claimants in *Rutherford & Others* were Mr and Mrs Rutherford and their grandchild Warren, a child with a severe mental and physical disability who requires the help of overnight carers. The claimant in *A* is a victim of domestic violence. Her house has been specially adapted for her safety under the sanctuary scheme and she receives specialist support. The claimants in both cases challenged the reduction in their HB due to the application of the bedroom criteria. In both cases, the HC followed the CA in *MA* and ruled that the DHP scheme provided suitable assurance of present and future payment. In *A*, it also found that the SSWP had satisfied the PSED because the DHP scheme was

sufficient to address any HB deficit on a discretionary basis.

Court of Appeal: *Rutherford & Others; A v DWP* (heard together)

As the SC appeal in *MA* was pending, the CA limited itself to considering whether, applying the CA decision in *MA*, Regulation B13 discriminated against the claimants without justification. Both appeals were allowed. As A fell within a narrow and easily defined group (those within sanctuary schemes in need of an extra room), the CA was obliged to follow the CA case of *Burnip v Birmingham City Council* [2012] EWCA Civ 629, see Briefing 655, finding that the SSWP discriminated against A by providing for her by way of DHPs. However, the CA upheld the HC's decision that the PSED had not been breached.

Regarding the Rutherfords, the CA decided that the *'best interests of the child'* test, cited in the CA's decision in *MA*, applied in this case, and the failure to make provision for carers of children with disabilities in Regulation B13 could not be justified.

Supreme Court

The SC was unanimous on the application of disability discrimination. Of the remaining claimants from *MA* (Mrs Carmichael, Mr Rourke, Mr Drage, JD and Mr Daly), all, except for Mrs Carmichael, had their appeals dismissed. The CA's decision in the Rutherfords' case was upheld. However, by a 5-2 majority, the SC accepted the state's appeal to the CA's decision in A's sex discrimination claim and rejected her cross-appeal regarding the PSED.

Disability discrimination

The SC found that it was correct to apply the *'manifestly without reasonable foundation'* test and considered whether the lower courts had misapplied it. The court found that it was reasonable for the government to structure the HB scheme in partial reliance on DHPs because Regulation B13 did not impact on all persons with disabilities uniformly and not every individual would be affected by the cap. Accordingly, it was not necessary to create a blanket exception for all persons with disabilities.

However, the SC held that in some cases there was a transparent medical need for an extra bedroom. It found no reasonable justification for treating the cases of *Rutherford* and *Carmichael* differently from those of *Burnip* and *Gorry* (joined with *Burnip*) respectively, which had been previously found to be discriminatory by the courts. The SC also noted an *'ironic and inexplicable inconsistency'* in the difference in the state's approach to the cases of *Carmichael* and *Rutherford*. Accordingly, Mrs Carmichael's appeal succeeded and the SSWP's appeal in respect of the Rutherfords was dismissed.

The remaining claimants from *MA* were deemed not to have an objective need for the number of bedrooms in their properties, despite the fact that there were indirect connections between the use of the rooms and the residents' disabilities. The SC ruled that it was not unreasonable for their situations to be considered on an individual basis under the DHP scheme, and therefore these claimants had not suffered unlawful disability discrimination.

Sex discrimination

The judgment of the majority found that there was no automatic correlation between being in a sanctuary scheme and having a need for an extra bedroom. The DHP scheme was intended to take account of strong personal or social reasons for wanting to stay in a property. It had not been established that Regulation B13 would deprive A of a safe haven, so the SSWP had not taken an unlawful approach to protecting A from gender-based violence. The likely number of people affected was not a critical factor in itself for the decision. A's appeal was dismissed.

Public sector equality duty

The SC agreed with the lower courts that the SSWP had had a focused awareness of his duties under s149 EA and the potential impact of the HB policy on persons with disabilities and women. It therefore decided that the PSED had not been breached.

Lady Hale's and Lord Carnwath's dissenting judgments

Lady Hale gave the dissenting judgment in respect of A's case. She noted that A's need was not to have a specific amount of space but to remain in the property and so was substantially different from the disability cases with which it was heard.

The state has a positive duty to provide effective protection for vulnerable people against ill-treatment and abuse, including to provide a safe haven for victims at risk of serious violence. The house she had been provided with met this obligation. A had to be treated differently.

The short-term, temporary and conditional nature of DHPs and the additional burdens of the scheme for individuals caused unjustifiable fear and anxiety for domestic violence victims and meant they were not an adequate way of the state meeting its obligations. It would not be difficult to draft an exception to Regulation B13 to cater for persons protected under the sanctuary scheme.

Further, the PSED had been breached because there had been no consideration of victims of gender-based violence in the SSWP's assessment of Regulation B13's impact on gender.

Comment

The SC decision in relation to Mrs Carmichael and the Rutherfords is to be welcomed; it erases an arbitrary distinction between the needs of adults and children with disabilities. However, the judgment falls short in other areas.

At the heart of the analysis, the SC followed a long line of previous jurisprudence in determining that it should not hold the state to a higher threshold than *'manifestly without reasonable foundation'*. As a result, the state continues to have significant latitude in justifying discriminatory laws in the area of state benefits. While unsurprising, this is disappointing. It remains highly problematic to hold the state to such a low standard on matters involving fundamental rights, such as that of non-discrimination.

Applying this test, the SC found that discretionary payments made under the DHP scheme are a justifiable solution for the HB shortfalls caused by Regulation B13. Yet Henderson J described the scheme as follows in the case of *Burnip*:

> *The payments were purely discretionary in nature; their duration was unpredictable; they were payable from a capped fund; and their amount, if they were paid at all, could not be relied upon to cover even the difference between the one and two bedroom rates of [local housing allowances], and still less the full amount of the shortfall.*

Reliance upon DHPs creates a risk of inconsistent application and discriminatory effect. It also leaves individuals facing additional bureaucracy and on-going uncertainty. This has a particularly damaging impact on some. For women such as A, for example, for whom security and stability are paramount concerns, the lack of certainty surrounding the DHP scheme exacerbates a traumatic situation. Lady Hale's dissenting judgment made important points.

The scheme also has an adverse impact on other persons with compelling reasons for remaining in the same property, such as persons with disabilities who live in specially adapted accommodation. In effect, the SSWP penalises those persons for settling in the accommodation that the state had offered them without first ensuring that alternative accommodation which meets their needs is available. The scheme also adversely impacts on those for whom the very act of being relocated may seriously exacerbate their illness.

Finally, it remains to be seen how *'transparent medical need'* will be interpreted in practice. One of the appellants, Mr Drage, has an obsessive compulsive disorder which is characterised by the excessive hoarding of papers within his flat. Mr Drage's case was rejected; the court found that although his hoarding of papers is connected to his mental illness, it does not evidence a need for three bedrooms. Given this decision, there is at least a concern that the interpretation of *'transparent medical need'* in cases of mental disability will be particularly subject to arbitrariness due to a lack of nuanced understanding of individual needs in such cases.

The SC justices must not substitute their view for that of the Executive; however, it would not have been beyond the SC's competence to conduct a more rigorous scrutiny of the DHP scheme in their analysis of whether the discrimination caused by Regulation B13 was justifiable.

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Refusal to supply a cake supportive of same-sex marriage constitutes direct discrimination

Gareth Lee v Colin McArthur, Karen McArthur and Ashers Baking Company Limited [2016] NICA 19; October 24, 2016

Facts

This case appealed a county court judgment that found the appellant, Ashers Baking Company (AB), had directly discriminated against the respondent, Gareth Lee (GL), on the grounds of sexual orientation in the provision of goods and services contrary to the Equality Act (Sexual Orientation) Regulations (NI) 2006 (the 2006 Regulations); and on the grounds of religious belief and political opinion, contrary to the Fair Employment and Treatment (NI) Order 1998 (the 1998 Order).

GL is a gay man, who was an activist for lesbian, gay, bisexual and transgender (LGBT) rights with Queerspace, an organisation campaigning to legalise same-sex marriage in Northern Ireland. He placed an order with AB for a cake with a picture of Bert and Ernie (the organisation's logo) and the caption *'support gay marriage'*. AB subsequently cancelled the order because the cake's message conflicted with its owners' Christian beliefs, which oppose gay marriage.

County Court

The reasoning of the county court judge can be summarised as follows:

1. The correct comparator for the sexual orientation claim was a heterosexual customer ordering a cake with a slogan, such as *'support heterosexual marriage'*
2. AB had cancelled the order due to its disagreement with and opposition to same-sex marriage by reason of its owners' religious beliefs
3. GL had been disadvantaged because he had wanted a cake with the slogan *'support gay marriage'* and his order had been cancelled because of that slogan
4. GL also had suffered political opinion discrimination because his support for 'same-sex marriage' was a political opinion
5. GL had suffered religious discrimination because of AB's religious beliefs
6. Finally, the judge found that the Human Rights Act 1998 (HRA) provided no escape route for AB as although Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) of the European Convention on Human Rights (ECHR) were engaged, the anti-discrimination legislation was proportionate and necessary in a democratic society.

Court of Appeal

The appeal was based on two main grounds.

The first took issue with the lower court's interpretation and application of direct discrimination legislation. AB contended that the correct comparator was a heterosexual person ordering the same cake, and given that it would have refused to bake such a cake for a heterosexual, there had been no less favourable treatment. It further argued that a court should not take into account the political and religious beliefs of the alleged discriminator – rather the focus should be on the characteristics of GL, the alleged victim.

The second main ground of appeal was based on a *'freedom of commercial speech'* argument. AB contended that a commercial enterprise like the appellants' could not have been required to provide goods or services offending its owners' conscience. Relying on the HRA, AB maintained that the refusal to bake the cake had been a manifestation of freedom of religion under Articles 9 and 10 ECHR; and AB therefore should not have been required to produce and sell a product causing such offence.

Direct discrimination:

1. The CA recalled Lord Nicholl's observation in *Shamoon v Chief Constable* [2003] UKHL that legislation on direct discrimination essentially contained a single question: did the claimant on the prescribed ground receive less favourable treatment than others? (Also known as 'the why question').
2. The CA further drew on the definition of direct discrimination articulated by Advocate General Jacobs in *Schnorbus v Land Hessen* [2000] ECR 1, where he stated: *'[sex] discrimination is direct where the difference in treatment is based on a criterion which is either explicitly sex or necessarily linked to a characteristic indissociable from sex'.*
3. The CA paid close attention to the case of *Bull v Hall* [2013] UKSC 73; see Briefings 626 & 697, wherein

Christian hotel proprietors refused double bedroom accommodation to a gay couple. In the lead judgment, Lady Hale relied upon the case of *Bressol v Gouvernement de la Communite Franciase* [2010] UKSC 73, in which Advocate General Sharpston identified the occurrence of direct discrimination where the advantage enjoyed by some persons and disadvantage suffered by other persons was created by the application of a prohibited characteristic [para 19]. She found that the marriage criterion applied by the hotel proprietors was indissociable or indistinguishable from sexual orientation because persons of heterosexual orientation can marry and persons of homosexual orientation could not.

4. The CA also relied upon the principle of associative direct discrimination, whereby a person can suffer unlawful discrimination on protected grounds without actually having the protected characteristic. It relied on the case of *English v Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421; see Briefing 491, wherein Mr English was subjected to unlawful homophobic discrimination despite the fact that he was not gay, and his work colleagues did not believe him to be gay.
5. The Lord Chief Justice concluded:

   The benefit from the message or slogan on the cake could only accrue to gay or bisexual people. The appellants would not have objected to a cake carrying the message "Support Heterosexual Marriage" or indeed "Support Marriage". We accept it was the use of the word "Gay" in the context of the message which prevented the order from being fulfilled. The reason that the order was cancelled was that the appellants would not provide a cake with a message supporting a right to marry for those of a particular sexual orientation. That was the answer to the 'reason why question' that Shamoon said should be asked. There was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community. Accordingly this was direct discrimination. [para 58]

Human rights and forced commercial speech

The CA considered the implications of the HRA and in particular Articles 9 and 10 ECHR. It examined whether it should interpret the domestic legislation in a manner that either 'reads down' a more compatible meaning with the ECHR, or disapplies the domestic legislative provisions on incompatibility grounds. The CA also considered how to strike an appropriate balance between prohibition of discrimination in the provision of goods and services and the protection of the freedoms of belief, conscience and religion.

The CA found the legislation had a legitimate aim, namely the promotion of pluralism, a factor integral to democracy. The focus of its inquiry was on the proportionality of the means employed to secure this objective. In answering this question, the court drew on the SC's reasoning in *Bull v Hall* when it held that: (a) allowing businesses to selectively provide services on the basis of religious belief would create the potential for arbitrary abuse of the gay community; (b) the legislation provided for the resolution of conflicts in Regulation 16, indicating the legislator's intent when striking a balance between consumer rights and religious belief; and, (c) the business could alter the terms of the business (the offer), to avoid offence to its beliefs and/or discrimination.

AB strongly argued that a business could not be required to provide products which offended fundamental beliefs of the proprietor. It relied upon a Canadian case *Brockie v Ontario Human Rights Commission* [2002] 22 DLR (4th) 174, where on religious grounds a printer refused to print letterheads for a company representing gays and lesbians. The printer lost the case and was ordered to provide the printing service that he provided to others.

In a nuanced decision, the Ontario Divisional (Appellate) Court upheld the lower court decision, which related to past conduct. It also added a rider that for the future, separate consideration had to be given to any requirement conveying a message proselytising and promoting the gay lesbian lifestyle, which ridiculed an individual's religious beliefs. It reasoned that when the argument advanced rested on the nature of the product wanted by a customer, a business then may lawfully refuse to provide it, if such provision conflicted with core beliefs of those operating that business.

In ABs case, the CA carefully distinguished *Brockie* on the law and the facts. Its conclusion on proportionality stated:

The essence of the complaint under [Article 9] is the requirement to provide a message with which the appellants disagreed because of their deeply held religious beliefs. In the commercial sphere that is what the absence of direct discrimination can require, depending upon the offer. For the hoteliers in Bull v Hall the relevant Regulations similarly required them to provide a double

bed to a couple in a civil partnership despite their strongly held religious beliefs. The proportionality assessment in this case points firmly to the conclusion that the 2006 Regulations should be interpreted in accordance with their natural meaning. The structure of the Regulations, the need to protect against arbitrary discrimination, the ability to alter the offer and the lack of any association of the appellants with the message all point that way. [paras 71-72]

The Attorney General's constitutional argument

The Attorney General for NI (AG) contended that the discrimination provisions that GL relied on required AB to enunciate or produce a theologically loaded political statement which it found objectionable, making those provisions invalid by virtue of s17 of the Northern Ireland Constitution Act 1973 (as regards the 1998 Order) and s24 of the Northern Ireland Act 1998 (as regards the 2006 Regulations). In essence the AG argued that the anti-discrimination legislation, as interpreted by the lower court, discriminated against AB.

The CA rejected this argument.

Neither the 1998 Order nor the 2006 Regulations treat the appellants less favourably. The legislation prohibits the provision of discriminatory services on the ground of sexual orientation. The appellants are caught by the legislation because they are providing such discriminatory services. Anyone who applies a religious aspect or a political aspect to the provision of services may be caught by equality legislation, not because the legislation treats their religious belief or political opinion less favourably but because that person seeks to distinguish, on a basis that is prohibited, between those who will receive their service and those who will not. The answer is not to have the legislation changed and thereby remove the equality protection concerned. The answer is for the supplier of services to cease distinguishing, on prohibited grounds, between those who may or may not receive the service. Thus the supplier may provide the particular service to all or to none but not to a selection of customers based on prohibited grounds. In the present case the appellants might elect not to provide a service that involves any religious or political message. What they may not do is provide a service that only reflects their own political or religious belief in relation to sexual orientation. [para 100]

Comment

This decision has been the subject of controversy. Some say the CA got the comparator wrong: that the correct comparator was a heterosexual person who wants a cake baked with a gay message who would have been treated in the same manner. The decision has also been criticised as too oppressive of the rights of others, for example, of businesses whose owners object on conscience grounds to supplying products such as a cake supportive of same-sex marriage. Politicians in Northern Ireland have mooted amending the legislation to include a 'conscience clause'.

For discrimination lawyers, the arguments around the correct comparator and the 'why question' are nothing new; these have been scrutinised by the SC in cases such as in *R (E) v Governing Body of JFS* [2010] 2 AC 728, see Briefing 555, and *Bull v Hall* [2013] UKSC 73. As Lord Kerr stated in *Bull v Hall*:

Their sexual orientation may not have been the factor operating in the minds of Mr and Mrs Bull … but that is irrelevant. As Lord Phillips of Worth Matravers PSC said in R (E) v Governing Body of JFS [2010] 2 AC 728, para 20, "Whether there has been discrimination on the ground of sex or race depends on whether sex or race was the criterion applied [in James v Eastleigh Borough Council [1990] 2 AC 751] as the basis for discrimination. The motive for discriminating according to that criterion is not relevant." Mr and Mrs Bull cannot avoid the charge of discrimination on the ground of sexual orientation by saying it was not their intention to treat Mr Preddy and Mr Hall less favourably because they were gay men. It is because they are gay men (and, moreover, gay men who must in law be treated as if they were married but who cannot together enter the married state which Mr and Mrs Bull consider is the only acceptable form of marriage) that they were in fact treated less favourably.

In *English v Thomas Sanderson Blinds Ltd*, Lawrence Collins LJ clearly articulates the correct approach in his judgment at paragraphs 44-49. The 'why question' is answered by an *'objective characterisation of the conduct':*

If one were to ask the question whether the repeated and offensive use of the word "faggot" in the circumstances of this case was conduct "upon the grounds of sexual orientation" the answer should be in the affirmative irrespective of the actual sexual orientation of the claimant or the perception of his sexual orientation by his tormentors. If the conduct is "on the grounds of sexual orientation" it is plainly irrelevant whether the claimant is actually of a particular orientation.

819 *Balancing equality rights*

The other main criticism is that the CA did not appropriately balance equality rights on the one hand, and freedom of conscience and expression on the other. Instead it imposed oppressive and unjust requirements on operators in the commercial sphere. Detractors have illustrated the ramifications of the decision by referencing multifarious scenarios in which businesses run by people of faith will be required to supply 'unpalatable' products, for example a Muslim printer refusing a contract requiring the printing of cartoons of the Prophet Mohammed. Veteran gay rights campaigner Peter Tatchell commented that:

> *This verdict is a defeat for freedom of expression. As well as meaning that Ashers can be legally forced to aid the promotion of same-sex marriage, it also implies that gay bakers could be forced by law to decorate cakes with homophobic slogans.*[1]

On the facts in this case, the CA's straightforward answer is that Articles 9 and 10 do not take precedence, because in the commercial sphere a business cannot discriminate on the basis of religious belief. The discriminator's religious belief did not provide immunity from prevailing equality legislation. However, a different outcome can be anticipated where the speech in question would be deemed unacceptable in a democratic society.

Conclusion

Northern Ireland is the only part of the UK in which same-sex marriage is still not legal. In 2015, despite the Northern Ireland Assembly voting in favour of the introduction of same-sex marriage, the Democratic Unionist Party used an Assembly mechanism to prevent the bill from passing into law. It is particularly within its Northern Ireland context that the CA's decision is both a sound and an important application of equality legislation.

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1. See comment on the Peter Tatchell Foundation website, October 24, 2016: http://www.petertatchellfoundation.org/ashers-gay-cake-verdict-is-defeat-for-freedom-of-expression

820 Briefing 820

Is gender segregation in mixed-sex schools inherently discriminatory?

Interim Executive Board of X School v Her Majesty's Chief Inspector of Education, Children's Services and Skills [2016] EWHC 2813 (Admin), November 8, 2016

Implications for practitioners

The English courts have been called upon for the first time to consider whether the segregation of pupils by gender in mixed-sex schools in and of itself amounts to discrimination. Jay J held that it does not. To those of us practising in discrimination law, who will be familiar with the seminal American civil rights case of *Brown v Board of Education* [1954] 347 US 483 in which the US Supreme Court put an end to racial segregation in schools by declaring that the doctrine of *'separate but equal'* had no place in the public school system because *'separate educational facilities are inherently unequal'*, the decision may seem instinctively surprising. The decision, however, turned very much on the evidence before the court, which was that there was no difference in the nature or quality of the education being provided to either sex, and nor was there evidence that the segregation was imposed on the basis of a presumed superiority of one sex over the other.

Facts

The claimant (C) is a voluntary-aided faith school which adopts a Muslim ethos. Its pupils are aged between four and 16 and, although a mixed school, boys and girls are completely segregated not only in lessons but also during breaks, clubs, activities, school trips and social functions from year five onwards. This is approved of by parents, though there was evidence before the court that at least some students disliked the fact that they did not have the opportunity to mix with peers of the opposite sex, and were concerned about their ability to interact with the opposite gender when they left school. There was no evidence that the girls received an education that was different from or inferior to the boys, or vice-versa.

The defendant (D), acting through Ofsted, carried out an inspection of the school and placed the school in special measures. It sought to publish a report in which it alleged that the practice of segregation was discriminatory. C obtained an injunction preventing the publication of the report and sought judicial review of D's decision on a number of grounds, although the principal issue in the judgment and of concern to practitioners was whether D was correct to say that gender-segregation, without more, falls foul of the Equality Act 2010 (EA).

The arguments

D claimed that the segregation of students amounted to direct discrimination contrary to s13 EA, which is prohibited in schools by s85 EA, save for where express exceptions apply, such as in the admission's policies of single-sex schools and in the context of sporting activities. Direct discrimination occurs where there is less favourable treatment of a person or persons because of a protected characteristic. D argued that although boys and girls were ostensibly treated equally, segregation itself was less favourable treatment because:

1. both boys and girls are denied the opportunity to choose to socialise with the opposite gender; this loss of a choice of companions and the loss of opportunity to learn to socialise confidently with the opposite gender constitutes less favourable treatment
2. the loss of opportunity imposes a particular detriment on girls because the female sex is the group with the minority of power in society
3. the very fact of segregation constitutes less favourable treatment of girls because it cannot be separated from *'deep-seated cultural and historical perspectives as to the inferiority of the female sex and therefore serves to perpetuate a clear message of that status'* [para 86]. D relied on *Brown v Board of Education* to advance that line of argument.

C argued that, absent any finding of differential treatment between the sexes, the restriction of interaction with the opposite sex amounts to equal treatment and is therefore *'the very definition of what discrimination is not'* [para 94]. It further submitted that the American line of authority was of no assistance as that could not be divorced from the particular circumstances of racial discrimination in the US in the 1950s, and in any event the unlawfulness of racial segregation is expressly stated in s13(5) EA, whereas the EA is silent in respect of segregation on the basis of other protected characteristics. Parliament had therefore taken the opportunity to highlight racial segregation as a special case.

High Court decision

Jay J was willing to accept that the loss of opportunity to associate with the opposite gender was capable of amounting to a denial of a benefit or facility and therefore could potentially amount to a detriment. He also accepted that it was clear that the segregation in this case was because of the protected characteristic of gender. The fact that the decision to segregate was motivated by religious belief was irrelevant (*R (E) v Governing Body of JFS* [2010] 2 AC 728; see Briefing 555).

But Jay J went on to say that the key question was '*is one sex being treated less favourably than the other?'* and concluded that they were not. The denial of the same opportunities to both groups, the boys and the girls, '*has equal value and impact, and is of the equivalent nature and character… On this analysis it cannot be said, in my judgment, that one sex is being treated less favourably than the other…there is symmetry between both contingents on either side of the line'* [paras 125-7].

Jay J considered that assistance could not be drawn from hypothetical comparisons with segregation on the basis of other protected characteristics, such as segregation of Muslims and Hindus who were otherwise apparently treated equally. He was willing to accept that this would amount to an *'egregious case of religious discrimination. The inference must be in any given case that the more powerful group was imposing its will on the weaker, with correlative express or implied disadvantages'* [para 130]. However, he did not find that to be the case on the instant facts. He observed that C's decision to segregate pupils was in an entirely different context to the racial discrimination that occurred in the US and South Africa, where there was a plain and obvious link between the mores and attitudes of those exercising majority power in society and the means which were customarily deployed in the field of education to impose a racist ideology. The segregation of pupils by sex in this school, however, was not a *'reflection of the mores and attitudes of wider society; it is only capable of being seen as a reflection of the mores, attitudes, cultures and practices of the faith groups who have been permitted to do it'* [para 142]. He said he would be slow to conclude that segregation in this Islamic school generated a feeling of inferiority as to the status of the female gender in the community, and D had not advanced a case that the school did segregate the sexes because they regarded the female gender as inferior.

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Comment

This is a case of obvious public importance. Although the judge held that segregation without more was not less favourable treatment, it plainly is capable of being so if the effect of that segregation is to disadvantage one group, or if the reasons for the segregation are based on an assumption of superiority of one group over another.

D has been granted permission to appeal and it therefore remains to be seen if Jay J's decision will hold. Certainly, there are a number of points that could be made. First, the judge observed that although he had seen no evidence that the segregation of pupils by sex was disadvantageous, he had *'little doubt'* that educational experts would have much to say on the topic. He simply had not heard them *'within the four corners of this litigation'* [para 133].

Second, Jay J's decision turns on the fact that he identified the girl pupils as a comparator for the boy pupils and vice-versa. Having rejected C's submission that the court should *'not get too hung up on the question of comparator'* [para 102], he did not simply ask the question, what was the reason for the treatment and is that a legitimate basis for different treatment?

Third, it is clear that Jay J was willing to accept that segregation of Muslims and Hindus would be unacceptable because of the inescapable inference that the reason for the segregation would be the more powerful group wishing to maintain its position. Jay J was also willing to take judicial notice of the fact that women continue to be the group with minority power in society. It is therefore curious that the reason for the adoption of segregation was not given closer scrutiny. No rationale for the treatment was offered aside from vague references to religious belief.

Finally, the judgment did not grapple with the issue of whether the school may have been in breach of its s149 EA duty not only to advance equality of opportunity, but also to foster good relations between those who have and do not have particular protected characteristics. It is difficult to see how a policy of complete segregation could advance this goal. Whether this is an issue the Court of Appeal will grapple with remains to be seen. Watch this space.

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The requirement for medical evidence in employment tribunal cases

Hampshire County Council v Wyatt UKEAT/0013/16; October 13, 2016

Implications for practitioners

In *Wyatt*, the EAT held that it was not an absolute requirement for expert medical evidence to be obtained before an ET could award compensation for depression in a disability discrimination case. Nor was there such a requirement in an unfair dismissal case in order to assess future loss of earnings.

Where questions of causation are in dispute, expert medical evidence is still advisable however, assuming that the cost of obtaining it is proportionate to the potential value of that aspect of the claim. Similarly, it is advisable where the 'divisibility' of the injury is in issue (i.e. where the injury is potentially caused by lawful or unlawful acts and if so, whether some apportionment should take place). The EAT warned *'there is a real risk that failure to produce such medical evidence might lead to a lower award or to no award being made'*.

Facts

The claimant (W) worked as a carer for Hampshire County Council (H) for about 40 years and for about 20 years at the same care home. She was diagnosed as dyslexic in 2008. Following serious allegations about her method of working, W was suspended on May 23, 2013; this triggered her depressive illness.

In June 2013 W's suspension was lifted but she was too ill to attend the disciplinary investigation. H's occupational health reports concluded that she was unfit to attend a disciplinary meeting or return to work in the months that followed.

H discontinued the disciplinary procedure at a meeting in December 2013. H intended to rely instead on a performance procedure looking at issues of capability rather than conduct but that was not communicated to W who consequently suffered further

unnecessary stress. Eventually, in January 2014 W was told that the safeguarding investigation would be closed and the matter dealt with on an informal basis.

W was still unable to return to work and was called to meetings to address her absence in March and April 2014. She was dismissed at the April meeting with 12 week's notice.

Following an unsuccessful appeal, W lodged claims for unlawful disability discrimination, relying on alleged failures to make reasonable adjustments, indirect disability discrimination, discrimination arising from disability, victimisation and unfair dismissal.

Employment Tribunal

The ET upheld W's unfair dismissal and unlawful discrimination complaints. It found that:

1. although W's suspension itself was not discriminatory, H had discriminated by failing to explain matters sufficiently carefully and slowly at the suspension meeting to enable W to understand what was happening – W thought she was going to lose her job because of her dyslexia
2. H failed to explain to W that it was dealing with her under the capability procedure rather than the disciplinary procedure
3. H had failed to offer redeployment when relationships soured between W and her colleagues
4. not dismissing W would have been a reasonable adjustment in the circumstances
5. the dismissal was related to W's disability, namely depression and was not a proportionate means of achieving a legitimate aim; the dismissal was also unfair
6. the failure to deal adequately or at all with W's disciplinary and grievance matters over a protracted period of time was an act of victimisation.

As to remedy, the ET held that there was no failure to mitigate and W's inability to find alternative work might reasonably be expected to continue for nine months beyond the hearing. It awarded compensation for future loss of earnings on that basis.

The ET made a global award in respect of all of the unlawful discrimination findings and awarded £15,000 for injury to feelings. Whilst the tribunal acknowledged that the case was *'somewhat unusual in that no medical report had been prepared specifically for the evaluation, as it usually would'*, it was able to determine, principally on the basis of W's evidence, the severity and likely duration of her condition. The tribunal concluded that W had suffered a moderately severe depressive illness as a consequence of her unlawful treatment by H and awarded an additional £10,000 for personal injury.

Employment Appeal Tribunal

H appealed in relation to the awards for both personal injury and for pecuniary loss flowing from unfair dismissal. The grounds of appeal included that the award was perverse and manifestly excessive in circumstances where no expert medical evidence to establish causation and/or severity and/or prognosis of W's depressive condition was adduced. H argued that properly directed, the only possible conclusion the tribunal could reach without medical evidence was that there should be no award for personal injury separate from the award for injury to feelings. The assessment that W suffered moderately severe mental health difficulties was also challenged, as was the amount awarded for future loss.

On the question as to whether W's injury was divisible, the EAT concluded:

> *Where a respondent establishes or the evidence shows that the psychiatric injury had one or more separate material causes in addition to the respondent's unlawful act or breach of duty, then, provided the resultant harm suffered by the claimant is truly divisible, a tribunal assessing compensation will have to conduct an analysis to estimate and award compensation for that part of the harm only for which the respondent is responsible. The objective in a case where the harm or injury is truly divisible is to identify the harm for which the respondent is responsible and award compensation for that harm and avoid awarding compensation for any harm that would have occurred in any event as a result of some separate material cause. Where notwithstanding the fact that there are competing causes for an injury the injury is indivisible, a respondent whose act was the proximate cause of the injury is required to compensate for the whole of that injury.* [para 25]

Referring to the case of *Olayemi v Athena Medical Centre and Another* [2016] UK EAT/0140/15, the EAT held that whether or not any particular harm, state of health or injury is divisible or indivisible is a question of fact. It continued:

> *Medical evidence in particular, is likely to assist in identifying whether (i) all the injury or harm suffered by a claimant can be attributed to the unlawful conduct and (ii) that injury or harm is divisible. It may assist in determining the extent to which any treatment a claimant has undergone has been successful. It may also assist in dealing with questions of prognosis.*

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> ….. *We consider that in cases* ***where there are issues as to the cause or divisibility of psychiatric or psychological harm suffered by a claimant, it is advisable for medical evidence to be obtained. Moreover, there is a real risk that failure to produce such medical evidence might lead to a lower award or to no award being made.***
>
> ***However, we do not accept the Respondent's argument that medical evidence is an absolute requirement or that an award cannot be made in the absence of expert medical evidence in every such case bar those of low-value without error of law. We would be concerned to see such a principle established, bearing in mind in particular the financial cost involved in obtaining expert medical evidence.*** [paras 28-29] (emphasis added)

W was helped by the fact that there was some medical evidence in the form of six occupational health reports. Taken together with oral evidence from W and her brother-in-law, that evidence entitled the ET to conclude that W was somebody who even at the date of the remedy hearing was simply not able to cope; she had suffered a depressive illness that continued up to that point; and that her injury was not divisible. In the absence of any evidence or argument to the contrary, H was liable for the full extent of the injury.

The EAT rejected the argument that the ET fell into error by characterising W's personal injury as 'moderately severe' rather than 'moderate', holding that the guidelines provided by the judicial college, *'helpful as they indeed are, are guidelines and not tramlines'.* Further:

> *On its own we consider that the award of £10,000 is on the low side. However, we are satisfied that is because the Tribunal also made an award for injury to feelings and was conscious of the potential for overlap and double recovery.*

As to the future loss award for unfair dismissal, the EAT rejected the argument that no assessment of future working prospects of a claimant should be made without medical evidence, save only in low-level award cases where proportionality might drive parties and tribunals to address this point without medical evidence. Tribunals are expected *'to deal with compensation for unfair dismissal in a rough and ready way';* deciding what is just and equitable *'involves an inevitable degree of speculation'*; and *'common sense comes into play … Provided a tribunal takes account of all relevant evidence as to the realistic prospects of an individual's chances of obtaining alternative employment in the future having regard to the vagaries of life, it will apply the law correctly'* [para 42].

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Discrimination arising from disability – what has to be justified?

Buchanan v Commissioner of Police of the Metropolis UKEAT/0112/16/RN; [2016] IRLR 918; September 30, 2016

Facts

On assignment to the Diplomatic Support Group, the claimant, B, a trained police motorcyclist, had a serious motorcycle accident when responding to an emergency call in December 2012. The brakes on his motorcycle had failed. He recovered from his physical injuries but developed post-traumatic stress disorder. Its seriousness was such that he had never been able to return to work. He was medically retired after the ET hearing.

Eight months after the accident, the Commissioner of Police of the Metropolis (R) began taking steps under its Unsatisfactory Performance Procedure (UPP). At that point R knew, or could reasonably have been expected to know, B was a disabled person for the purposes of the Equality Act 2010 (EA).

The UPP covers the range of capability matters, from illness to shortfalls in performing the work, as well as to absenteeism and error. It is derived from the Police (Performance) Regulations 2012 which make no express provision relating to disability. However, the areas of discretion within the UPP give scope to accommodate disability.

In B's case things moved quite rapidly. R gave him dates to return to work that he would be unable to

comply with. R was fully aware of that because of the medical advice it had been given. As the ET commented, B was being taken through the process because he had time off work. He remained seriously ill and was anxious and distressed by the process. His manager was aware of this.

Employment Tribunal

B complained that R's decisions to instigate and continue with the informal management action process and the formal UPP process were unfavourable treatment because of something arising in consequence of his disability, contrary to s15 EA. He argued that these decisions could not be objectively justified.

B did not attack the UPP scheme itself, only that each decision taken under it was not a proportionate means of achieving a legitimate aim.

The minority decision agreed that R had to justify the actual treatment of B and that R had not made out the defence. The minority member found that the process was driven by a mechanistic desire to push on through the formal procedures.

The majority rejected B's submission, finding that what required justification and what had been justified was R's overall UPP procedure.

Employment Appeal Tribunal

On B's appeal to the EAT, HH Judge David Richardson approached the issue from the words of s15(2)(b) EA. That is the starting-point: the putative discriminator A must show that 'the treatment' of B is a proportionate means of achieving a legitimate aim. The focus is on 'the treatment', so the ET must first identify the act or omission which constitutes the unfavourable treatment. It must then ask whether that act or omission is a proportionate means of achieving a legitimate aim.

The ET had relied on *Seldon v Clarkson Wright & Jakes* [2012] IRLR 590, see Briefing 636. In that case the SC had accepted that the requirement to retire at the age of 65 from partnership in the solicitor's firm, although less favourable treatment because of age, was justified. The general rule was found in the firm's partnership deed.

The treatment in *Seldon* was the direct result of applying a general rule. In that type of case it was the policy or general rule itself that had to be justified.

However, B's case was different. It turned on a series of individual discretionary steps: the procedure itself allowed *'for a series of responses to individual circumstances'*. The steps B complained about were not mandatory under the UPP. As such, the EAT ruled that:

> *It is therefore impossible to assess whether such a step was a proportionate means of achieving a legitimate aim simply by asking whether the [2012] Regulations or the respondent's policies were justified. The ET was required by s15(2) to look at the treatment itself and ask whether the treatment was proportionate.*

The EAT also distinguished the other authority on which R and the ET had relied. In *Crime Reduction Initiatives v Lawrence* UKEAT/0319/13, the EAT had said that '*purely procedural questions are irrelevant to dealing with justification*'. However, the treatment at issue in *Lawrence* was dismissal, while the procedural point was a minor error not itself the subject of a claim of detriment. In all other respects, the dismissal for capability in *Lawrence* was found to be justified. The proportionality of the dismissal did not depend on whether there had been a procedural error.

The discretionary nature of the acts complained about also meant that the defence of statutory authority found in s191 and Sch 22 EA could not apply.

The EAT remitted the case to the same ET to hear argument and consider afresh the issues raised by s15(2).

Comment

Most attendance and capability policies allow employers to respond to individual circumstances. If there is any discretionary element in the act complained about, it is that treatment that needs to be justified.

In contrast, if the treatment is entirely mandatory, it is the policy, or in indirect discrimination and reasonable adjustment cases, the provision, criterion or practice, that must be justified.

Some policies have a mix of mandatory and discretionary aspects. For example, as the EAT point out in *Buchanan*, a UPP decision-maker has wide powers to adjourn or postpone matters at each stage. The content of an improvement notice must be individually compiled.

It is thus important to be clear about what treatment is at issue and how to describe it. Many cases are likely to be straightforward. But some may turn on how the treatment has been described. In all cases, start with the wording of the statutory provision at issue.

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A union's vicarious liability for harassment and direct sex discrimination

Unite the Union v Nailard UKEAT/0300/15/BA; September 27, 2016

Implications for practitioners

This case may have ramifications beyond the union context for categorising the work of voluntary undertakings as a relationship of principal and agent pursuant to s109(2) Equality Act 2010 (EA). Claims for vicarious liability under this section preclude the principal (Unite in this case) from relying on the defence in s109(4), namely that the employer took all reasonable steps to prevent the employee from doing the discriminatory act.

The case may also be useful for practitioners with claims against those investigating a grievance. If the investigator fails to adopt the correct approach to dealing with the complaint and their actions/inactions are motivated by discrimination or siding with the perpetrator, they may be guilty of unlawful discrimination or harassment.

The three main issues in this case were:

1. the nature of Unite's vicarious liability
2. the mind-set of the decision-maker required to prove the claimant's allegations of a) direct sex discrimination and b) harassment
3. whether words 'related to' a protected characteristic in the definition of harassment could extend to a third party.

Facts

Miss Nailard (N) was employed by Unite the Union, as a full-time regional officer responsible for union members at London Heathrow Airport. She lodged a grievance with Unite alleging that two locally elected workplace officers of the union (the elected officers) had sexually harassed her during meetings. The elected officers worked full-time as union officials but continued to be employed and paid by Heathrow Airport.

A senior union officer carried out an investigation into the complaint and, with two other senior officers (the paid officers), offered N a transfer to a different area to protect her from the harassment of the elected officers.

N resigned and claimed constructive dismissal, sexual harassment against the elected officers, as well as claims of harassment and direct sex discrimination against the paid officers in relation to the inadequacy of Unite's response to her complaints.

Employment Tribunal

The ET found that the elected officers had sexually harassed N. It further held Unite vicariously liable either under ss109(1) or 109(2) EA.

S109 EA Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A (a) from doing that thing, or (b) from doing anything of that description.

First, the ET found that Unite was the employer of the elected officers under s109(1). It applied the extended definition of employment in s83(2)(a) *'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'* to Unite's rule book which it held to constitute the employees' contract.

Second, in the alternative, by categorising the elected officers as agents acting on behalf of the union, Unite was liable as a principal under s109(2).

The ET also found that the paid officers acted contrary to s26 EA; their handling of the grievance and transfer decision amounted to unwanted conduct which had the effect of violating N's dignity and creating a hostile and intimidating environment which was related to her sex because it concerned complaints of sexual harassment.

Following s212(1) EA, the tribunal's finding of sexual harassment meant that it was precluded from making a finding of sex discrimination, although it added that it otherwise would have made such a finding [para 12].

Unite appealed against all of the above findings, save for the claims of constructive dismissal and harassment by the elected officers, which the ET found had been made out.

Employment Appeal Tribunal

Unite's grounds of appeal were that the ET had erred in law in deciding that:

1. the elected officers were employees of Unite
2. or, in the alternative, the union was responsible as principal
3. the paid officers were themselves liable for acts of harassment and
4. the paid officers had discriminated against N because of her sex.

The EAT held that Unite was not vicariously liable for the acts of the elected officers under s109(1), but they were liable under s109(2).

In order to satisfy the s109(1) test the elected officers would have to be in employment under a contract *'personally to do any work'* within the definition of s83(2)(a). The elected officers' contract, based on Unite's rule book, did not require them to undertake work personally for the purpose of s83(2)(a); it did not remunerate them, did not afford them independence in how they carried out their duties, nor place them in a position of subordination vis-a-vis the union [paras 32 -39].

The EAT however did find the elected officers to be agents of Unite. This meant they were acting within the scope of Unite's authority when speaking at meetings, for the purposes of s109(2). Thus, Unite was vicariously liable as principal for their acts.

The EAT then considered whether the actions of the paid officers constituted direct discrimination or harassment.

First, on direct discrimination, if the reason for the differential treatment was not inherent in the act itself, was it because of a protected characteristic? To answer this question, the tribunal had to focus on the mental processes of the decision-maker and decide whether the protected characteristic was part of the reason for the act and whether it was less favourable, following *Reynolds v CLFIS (UK) Ltd and ors* [2015] EWCA Civ 439; [2015] ICR 1010; see Briefing 749.

In this case, N's transfer following her complaint was not necessarily connected to her protected characteristic; it could not be established that the paid officers were motivated by N's sex to make the decision because they were tainted by the actions of the elected officers. The 'taint' was derived from the behaviour of the elected officers and not from the decision-maker. As a result, the issue of motivation would be remitted to the ET for further consideration [paras 82-89].

Second, with regards to the definition of harassment, the question was whether the words 'related to' in s26 required the tribunal to focus on the conduct of the individual concerned and to ask whether the motivation for their action was associated with the protected characteristic. In addressing appeal grounds 3 and 4, the EAT held that the correct approach was to focus on conduct and motivation of the decision-maker concerned, and not that of a third party.

As for direct discrimination, the EAT held this was the correct test.

> *It is not enough that an individual has failed to deal with sexual harassment by a third party unless there is something about his own conduct which is related to sex.* [para 100]

The ET had applied the wrong approach in believing that because the claimant's complaints related to her sex, the inaction of the paid officers must also be related to her sex. As a result of the failure of the tribunal to properly reason why the investigators had failed to act, it was appropriate for the EAT to remit the matter to the ET to decide on the motivation of the investigating paid officers.

Comment

This case demonstrates that the correct test for direct discrimination and harassment by investigators of a complaint is whether the motivation for their decision or inaction is associated with the protected characteristic. Applying *Conteh v Parking Partners* (2011) ICR 341, the EAT distinguished inaction as a result of incompetence from silently taking sides with the perpetrator, the latter potentially being related to the protected characteristic. For claimants, the above findings may present a more stringent evidential hurdle to establish liability for inaction of investigators as it may be difficult to prove that the inaction was motivated by taking sides and discrimination.

This case may be more helpful for claimants where the nature of the relationship between the perpetrators and organisation is one of agent and principal because the organisation is precluded from benefiting from the defence under s109(4). By extension, the fact that the acts were contrary to the union policy did not limit the union's liability. A principal cannot avoid responsibility for acts done with his/her authority merely by stating to his/her agent that they *'must not do anything illegal [… or] against equality law'*; this merely spelled out the obvious [para 58]. The principal's disapproval of the discriminatory act did not prevent or limit their vicarious liability for the sexual harassment and discrimination committed by the agents.

The fact that the principal would disapprove of the discriminatory act did not prevent the agent's acts being treated as done by the principal and Unite was vicariously liable pursuant to s109(3).

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Victimisation – mixed motives and the 'reason why'

Lambert v The Secretary of State for the Home Department, UKEAT/0074/16, September 28, 2016

Implications for practitioners

Practitioners need to be alive to employers' attempts to rely on the decision in *Martin v Devonshires Solicitors* [2011] ICR 352 EAT; see Briefing 608.

This case highlights the difficulties that claimants face when bringing victimisation under s27 of the Equality Act 2010 (EA). To succeed in the claim of victimisation the claimant must show that s/he was subjected to a detriment because s/he did a protected act or because the employer believed s/he had done or might do a protected act. If the asserted detrimental treatment is due to another reason, then the claim must fail.

Facts

Ms Lambert (L) worked for Home Office (HO) as a presenting officer, presenting cases on behalf of the HO to the First-Tier Immigration Tribunal. L submitted complaints on March 14 and 16, 2012 stating that any refusal by the HO of her request, for childcare reasons, to work at the Angel Square offices would be race and sex discrimination. In her email of March 14, 2012 L threatened to bring proceedings. L's request was refused.

In the summer of 2012 L's then line manager, Ms Crowe, was finding L difficult to manage. Thus, Mr Nickell (N) was appointed to investigate the allegations against L and produce a report, which he did on February 15, 2013. N's report referred to L's threatened ET proceedings.

Mr Ferguson (F) had taken over from Ms Crowe as L's manager with effect from September 5, 2012, and held a misconduct meeting with L on May 1, 2013. F concluded that she had bullied and harassed colleagues, and sent intimidating emails. Thus, L received a final written warning, to remain live for 12 months. L's appeal against the final written warning was dismissed on January 15, 2014.

Employment Tribunal

L brought complaints of direct race and sex discrimination and victimisation relying on the following detriments in support of her claims:

- rejection of L's request to allow her to work at Angel Square on March 28, 2012 (that request was later accepted on July 5th)
- refusal of L's request for annual leave during the first week of June 2012
- bringing disciplinary proceedings and imposing a final written warning for 12 months (victimisation).

The ET rejected L's claims of discrimination and victimisation. As for victimisation, the ET held that the reason that L had been subjected to a disciplinary process and given a final written warning was not because of her complaint of discrimination but because of her 'wilful unmanageability'.

Employment Appeal Tribunal

Appealing the ET's decision to dismiss her claim for unlawful victimisation, L argued that the ET misapplied the law regarding victimisation and/or failed to give adequate reasons.

As for misapplying the law, L argued that the ET failed to recognise that in a complaint of victimisation the employer may act with mixed motives. L argued the ET wrongly characterised the question as a binary one believing it was faced with an either/or choice – either the reason for the disciplinary process was the protected act/s relied on or it was L's perceived unmanageability – thereby excluding the possibility that both reasons formed a part of the HO's conscious or subconscious motivation.

As to the failure to give adequate reasons, L argued that considering the many references to the threatened ET proceedings contained in N's investigation report, it was incumbent on the ET to explain why it rejected her case that the protected acts had a significant influence on the course of the disciplinary investigation.

The EAT, in dismissing L's appeal held that where the reason for the detrimental treatment complained of is an innocent one and not the protected act or acts relied on, the victimisation claim will fail (*Martin v Devonshires* applied). The ET found that the sole reason for the disciplinary proceedings was L's 'perceived unmanageability', and that this was therefore not a case concerning 'mixed motives'.

The EAT also held that the ET had sufficiently explained the 'reason why' L had been subjected to disciplinary proceedings.

Comment

It is important in victimisation cases for the claimant to show that the 'reason why' they were subjected to a detriment is the protected act rather than some other reason. Easier said than done. Employers often advance a benign explanation such as the employee's 'wilful unmanageability' or 'personality clash'. It is important that one looks behind the proffered explanation, as the difficulty in managing may be a symptom of discriminatory conduct.

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The fluency duty: speaking in tongues?

Chris Milsom, barrister, Cloister Chambers, describes the new 'fluency duty' which came into effect on November 21, 2016.

S77 Immigration Act 2016 requires public authorities to ensure that each person working for a public authority in a customer-facing role speaks fluent English. The scope of coverage for the so-called fluency duty is vast, encompassing communication *'with patients in hospitals, with students in schools or with members of the public receiving local authority services'*. It covers the workforce in the widest terms from long-serving employees to short-term agency workers. 'Customer-facing' employees are defined as those who *'as a regular and intrinsic part of their role are required to speak to members of the public'* whether face-to-face or by telephone. The position of those with mobility clauses in their contracts or those employers who place a firm emphasis on customer-handling irrespective of roles is ill-defined.

The fluency duty has since been accompanied by a Ministerial Code of Practice. The Code suggests that where fluency is an issue, steps which can be taken include, as a last resort, dismissal.

The Code envisages a 'flexible' standard on what standard of fluency is required *'to enable effective performance. … A person should be able to choose the right kind of vocabulary for the situation at hand without a great deal of hesitation. They should listen to the member of the public and understand their needs. They should tailor their approach to each conversation appropriate to the member of the public'*. Unlike immigration checks which are binary in nature (e.g. *'does this person have the right to work or not?'*), the qualitative assessments at stake here are something of a moveable feast where different employers may adopt different approaches. Uncertainty is inherent.

The equality implications are obvious. The potential impact on those with disabilities or those who are non-British is obvious. Neither the Code nor the impact assessment adequately address the argument that the legislation itself falls foul of the Equality Act 2010 (EA) s149 PSED and in particular the requirement to foster good relations. Facilitating access to work is a prime means both of achieving cohesion and improving linguistic fluency. Work is a means of participation: barring that participation merely perpetuates the disunity.

In the context of race discrimination, the assessment accepts *'the additional risk that, as a result of the fluency duty, some public authorities would be minded to favour applicants of British origin in recruitment, as more likely to have the requisite level of fluency in spoken English (or Welsh in Wales) for the role'*. Yet no solutions are provided.

The proposed wording of a job specification – *'the ability to converse with ease in English'* necessitates a high standard, the most convenient means of compliance being the preferred recruitment of British workers. It is difficult to see how the Code's proposed wording can be distinguished from paragraph 6.49 of the EHRC Code on Employment:

> *A construction company employs a high number of Polish workers on one of its sites. The project manager of the site is also Polish and finds it more practical to speak Polish when giving instructions to those workers. However, the company should not advertise vacancies as being only open to Polish-speaking workers as the requirement is unlikely to be justified and could amount to indirect race discrimination.*

This is particularly so where other employers in the same field of activity may take a more light-touch approach and where long-serving employees are at the face of heightened scrutiny in the absence of any previous reported concerns.

In the arena of disability discrimination, no consideration is given to the whole host of impairments which may impede an employee from conversing *'without a great deal of hesitation'* or 'with ease'. The scope for s15 EA claims in particular – where no comparator is required – is palpable.

Of equal concern is the requirement on public authorities to devise a procedure which can redress alleged breaches of the fluency duty from members of the public. The public must be notified of such a procedure: the procedure should also explain that complaints as to *'accent, dialect, manner or tone of communication, origin or nationality'* are not legitimate complaints. A record must be kept of all complaints although this data need not be published. Employers are likely also to face serious dilemmas where complaints are made by members of the public which cannot be rejected outright and yet have undertones of discrimination to them. Whilst the third party harassment provisions in the EA were repealed, authorities have nonetheless established that an employer may impliedly adopt the harassment of others if no meaningful action is taken to prevent it: *Conteh v Parking Partners Ltd* [2011] ICR 341.

It may be – given the absence of any sanctions within the Immigration Act 2016 for non-compliance – that the fluency duty is mere symbolism. Conversely, where employers embark upon a sea-change from their current practices, litigation is inherently likely. Time will tell.

Transitional provisions in judicial pension reform not objectively justified

In *McCloud and others & Mostyn and others v Lord Chancellor and others* (Case Nos 2201483/2015 & Others, 2202075/2015 & Others) the ET has ruled that the discriminatory effect of transitional provisions attached to reforms of the judicial pension scheme could not be objectively justified.

Claims were brought by over 200 judges at various levels against the government for unlawful direct age and indirect race and sex discrimination in relation to the transitional provisions of a new judicial pension scheme introduced in April 2015. The pension scheme was replaced by the New Judicial Pension Scheme (NJPS), which provides for substantially less favourable benefits and is also subject to a less favourable tax regime.

The transitional provisions protected those judges closest to retirement, on the basis that they would have less time to prepare for the financial effects of the reforms. Those who would reach normal retirement age under the scheme before April 2022 were given full protection, meaning that they could continue to accrue rights under the old scheme; those who would reach retirement age between April 2022 and September 2025 received tapered protection, meaning that they could remain members of the old scheme for a limited period; and all other members transferred immediately to the NJPS in April 2015. It was not disputed that the provisions gave rise to direct age discrimination and indirect sex and race discrimination but it was argued that it is objectively justified. The government's stated aim was to have consistency across public sector reform in protecting those closest to retirement from the full effects of the reform, as they had less time to prepare.

In a judgment dated January 13, 2017 the London Central Employment Tribunal held that the scheme was not objectively justified. The tribunal held that the changes to the pension scheme, which were unilaterally imposed on the younger judges, were discriminatory on grounds of age. This was rejected by the tribunal as being a legitimate aim, as *'an aim which amounts to an intention to treat one group more favourably and another less favourably, solely by reference to the age of those in the groups, cannot…be legitimate'* [para 95]. It was held that the reforms went beyond what was necessary to achieve consistency across the public sector or protect those closest to retirement.

The tribunal also found that the reforms had an indirect discriminatory impact, as the most recently appointed (and younger) judges include a greater proportion of female judges and judges of BAME origin. Again, the discrimination here could not be justified. The government has indicated it will appeal the decision.

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The crisis in the justice system in England and Wales; The Bach Commission on access to justice

The Bach Commission, in connection with the Fabian Society, published its interim report on access to justice in November 2016.[1] The aim of the Commission is to propose a redesign of our justice system by identifying current shortcomings, improving standards of access and encouraging technological innovation. Particular features of the justice system identified as undermining its ability to provide justice for all include:

1. Fewer people can access financial support for a legal case.
2. Exceptional case funding has failed to deliver for those in need – between October 2013 and June 2015 only 8 children and 28 young adults were granted legal aid under the scheme. This figure is far below government's expectations.
3. Public legal education and legal advice are inadequate and disjointed; the cuts to not-for-profit legal advice centres (3,226 centres in 2005 down to 1,462 by 2015) reduce the services for preventative advice and therefore access to justice.
4. High court and tribunal fees are preventing people pursuing legal claims.
5. Bureaucracy in the Legal Aid Agency (LAA) is costly and time-consuming. The cost case management system and the civil legal aid telephone service appear to be dysfunctional. The latter constitutes a preliminary hurdle to face-to-face advice on special education needs, mortgage possession and discrimination matters.
6. Out-of-date technologies keep the justice system wedded to the past.

The Commission plans to develop proposals to:

- establish a minimum standard for access to justice in Britain
- reform legal aid by considering the reform or replacement of the LAA
- transform legal education for the public
- increase the availability of legal advice
- increase technological innovation.

1. http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf

Gender pay gap

The Women and Equalities Committee has criticised the government for failing to act on its recommendations on tackling the structural causes of wage inequality. The Committee published the government's response to its March 2016 report on February 21, 2017. Calling the government's response to the report's 17 recommendations 'deeply disappointing', Committee chair Maria Miller MP said: *'Without effectively tackling the key issues of flexible working, sharing unpaid caring responsibilities, and supporting women aged over 40 back into the workforce, the gender pay gap will not be eliminated.'* The government acknowledged that more needs to be done and referred to the Gender Pay Gap Regulations which require employers with 250 or more employees to publish their gender pay and gender bonus gap information.

Gender Pay Gap Regulations

On December 6, 2016, the final draft of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 were published. The regulations will come into force on April 6, 2017, subject to parliamentary approval.

The regulations apply to 'relevant employers', which are private and voluntary sector organisations with 250 or more employees on April 5th each year. A 'relevant employee' falls within the wider definition of employee under s83 of the Equality Act 2010 which includes zero hours' workers, apprentices and partners in limited liability partnerships. Agency workers will be included in any reporting by the agency with which they have a contract of employment.

By April each year, employers will be required to publish the following on their company website: the

- median and mean gender pay gap figures for pay
- median and mean gender pay gap figures for bonuses
- percentage proportion of men and women receiving a bonus, and the
- number of men and women in each pay quartile.

The regulations provide detailed instructions on how the figures should be calculated.

The first report is due in April 2018. The report must remain on the employer's website for three years and it must also be uploaded to a government website, which is under development. There is currently no requirement in the regulations to publish any accompanying narrative or commentary.

The regulations are currently silent on enforcement. However the explanatory memorandum states that a failure to comply will constitute an unlawful act falling within the existing enforcement powers of the Equality and Human Rights Commission.

The regulations are available on www.legislation.gov.uk/ukdsi/2017/9780111152010.

Abbreviations

AC	Appeal Cases	ECR	European Court Reports	J	Judge
ACAS	Advisory, Conciliation and Arbitration Service	EEA	European Economic Area	LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
BAME	Black, Asian and Minority Ethnic	EFTA	European Free Trade Association	LGBT	Lesbian, gay, bisexual and transgender
CA	Court of Appeal	EHRC	Equality and Human Rights Commission	LJ	Lord Justice
CJEU	Court of Justice of the European Union	ERA	Employment Rights Act 1996	LLP	Legal liability partnership
CMLR	Common Market Law Report	ET	Employment Tribunal	NHS	National Health Service
DHP	Discretionary housing payment	EU	European Union	PSED	Public sector equality duty
DLA	Discrimination Law Association	EWCA	England and Wales Court of Appeal	QC	Queen's Counsel
DLR	Dominion Law Reports	EWHC	England and Wales High Court	SC	Supreme Court
EA	Equality Act 2010	HB	Housing Benefit	SPL	Shared parental leave
EAT	Employment Appeal Tribunal	HC	High Court	SSWP	Secretary of State for Work and Pensions
ECA	European Communities Act 1972	HHJ	His/Her Honour Judge	UKSC	United Kingdom Supreme Court
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950	HRA	Human Rights Act 1998	WLR	Weekly Law Reports
		ICR	Industrial Case Reports		
		IRLR	Industrial Relations Law Report		

Briefings