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Editorial *Uniting to challenge economic inequality*

Right wing economists, world leaders and human rights activists alike share concerns about the impact of rising economic inequality in the UK. For example, the IMF has expressed concern not only about the economic implications of rising income inequality but also about its '*pernicious social and political effects, (including questions about the consistency of extreme inequality with democratic governance)'*.[1] The UK government's own Social Mobility and Child Poverty Commission states that, despite progress on many fronts, *'radical action is required to stop Britain becoming a permanently divided country as low income families begin to be affected by welfare cuts and earnings continue to fall in real terms'.*

The Commission's October 2014 report – *State of the Nation 2014: Social Mobility and Child Poverty in Great Britain* – warns that 2010 – 2020 is set to be the first decade with a rise in absolute poverty since records began in the early 1960s.

Timely indeed was the DLA's annual conference which brought together lawyers, academics, trade unionists, equality officers, advice workers and activists to consider how economic inequality intersects with discrimination. Discrimination, one speaker concluded, cannot be eliminated without also addressing economic inequality if we are to have a fair society where one's colour, gender, disabled status etc. is not determinative of our economic status. However UK discrimination law in its present form is unable to have any significant impact on economic inequalities.

The connection between poverty and discriminatory treatment was vividly illustrated by Stephanie Harrison QC who described the impact of the UK's system of immigration control which *'discriminates against and disproportionately adversely affects those from poorer background and with lower incomes'.* Too many aspects of the immigration control system are based upon economic distinction and differentiation. She cited the requirement that to sponsor a non-EEA partner to enter the UK, the partner in the UK must have access to a minimum income of £18,600 per annum – a figure which excludes a significant number of full-time workers and disproportionately impacts on young people, women, those on the minimum wage, and those working in poorly paid sectors such as healthcare, manual and service sectors.[2] Individuals, such as asylum seekers with outstanding applications for leave to remain in the UK, who are denied the right to work, exist on subsistence hand-outs significantly below the level of mainstream benefits.

In legal challenges to policy decisions based on economic considerations, the courts have allowed the state a wide margin of appreciation and have been reluctant to interfere, holding that the allocation of scarce resources is a legitimate aim in matters of economic and social policy and the resultant impact and hardships can be justified.

The role of persuading judges of the harsh reality of the lives of people subject to immigration control or other inequalities was a theme which was echoed by other conference speakers. Civil society activists must ensure that they have at their fingertips arguments which shatter myths used to vilify immigrants, migrant workers, disabled workers and those dependent on social welfare so that not only the reality of their positive contribution to economic and social life but the impact of social and economic policies on the quality of their lives, is made clear at every opportunity.

As the law offers limited avenues for challenging decision-making affecting socio-economic rights we also need to think creatively about other avenues such as how a monitoring duty on employers in relation to social class or particular university attended might be implemented or result in positive change. We should marshal our arguments on how the implementation of a stronger, clearer and enforceable public sector duty on reducing the inequalities of outcome which result from socio-economic disadvantage, going beyond what was envisaged in s1 EA, would work in practice

In the past, change has been led by powerful social movements. Today, change will come when we work together to demand a society which is not divided by poverty, class and access to social, educational and housing opportunities, where the dead-end of low paid, insecure jobs inhibits the potential of all of us to contribute to a fair and just society where discrimination and economic inequality are eliminated.

Geraldine Scullion, Editor

1. http://blog-imfdirect.imf.org/2014/02/26/treating-inequality-with-redistribution-is-the-cure-worse-than-the-disease/

2. See Migrants' Rights Network *The family migration income threshold: Pricing UK workers out of a family life*, June 2014

Please see page 35 for list of abbreviations

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Thank you Caroline (March 7,1959 - July 19, 2014)

Catherine Casserley and Barbara Cohen bring together some of the many ways in which Caroline Gooding made a positive impact on the lives and learning and work of disability rights campaigners, lawyers and others.

Baroness Jane Campbell said of Caroline Gooding: *'I met Caroline in the early 90s during the height of the campaign for anti-discrimination legislation. I was immediately struck by her intelligent legal analysis of our situation and what needed to be done practically to make our case. If this wasn't impressive enough, she was also a true fellow freedom fighter, prepared to sit in the road alongside all radical disabled activists and wave a placard. Not many can combine the personal, political and professional in one being – Caroline could. She was as comfortable round a high level board table as she was wearing a Rights Now T-shirt shouting for equality alongside the grassroots disability movement. I learnt from her during my early political years and can only hope to emulate her in some way as I navigate the political terrain in parliament. She was my friend and legislative mentor. A great loss on every level.'*

When Caroline died in July 2014, she left behind a legacy that sees the UK with some of the strongest disability discrimination legislation in the world. But unless you had worked with her you wouldn't have known how much she had achieved because her modesty equalled her skills as a lawyer and a legal policy adviser. Her death was greeted with shock and distress not simply for the loss to disability rights but also because she was such a good friend, mentor and human being. This article takes a look at some of the work that she did as well as some of the personal recollections of members of the DLA and other organisations.

Caroline had a stroke in her early 20s, which left her with reduced manual dexterity. Whilst she rarely wrote anything down this wasn't really due to her disability – she didn't need to, as her powers of recall were astonishing. After studying at Cambridge she qualified as a solicitor. But it was her time at Berkeley, the birthplace of the independent living movement, and where she studied the Americans with Disabilities Act, which ignited her passion for disability rights and led to her pioneering book *Disabling Laws Enabling Acts: Disability Rights in Britain and America.* She was instrumental in the passing of the Disability Discrimination Act 1995 (DDA).

While the DDA made it unlawful to discriminate against a disabled person for a reason relating to their disability or to fail to make reasonable adjustments, it did not, unlike the Race Relations Act 1976 and the Sex Discrimination Act 1975, establish a statutory equality body with enforcement powers. So, with others, in 1997 Caroline set up the Disability Discrimination Act Representation and Advice Project, known as DDA RAP, secured funding and was its first director. DDA RAP selected DDA cases which she and other discrimination lawyers took on a pro bono basis.

In 1999 parliament passed the Disability Rights Commission Act, and it was at the Disability Rights Commission (DRC) that Caroline really used her skills to most effect.

Caroline worked at the DRC as Special Adviser and Director of Legislative Change from 2000 to its end in 2008. She oversaw the implementation of the DDA, the drafting of the statutory codes of practice, with what has been described by those who worked on them as 'tortuous' negotiations with civil servants – all with her humour, determination and insight. Those codes of practice proved critical to the interpretation of the law – in a way that no other codes of practice have in the equality field. And in addition she shaped the law through her advice on what cases the DRC should back and how they should be run.

Together with her colleague, Catherine Casserley, Caroline drafted a bill in 2004 which was a precursor to the 2005 DDA incorporating the disability equality duty, which Caroline went on to shape, and more codes of practice followed. Perhaps her finest achievement at the DRC was the strategy that she drew up and delivered for the implementation of the disability equality duty – the obligation under the DDA 2005 for public authorities to take disability into account in everything that they do. This was done with so little time left for the DRC to run – yet she had a vision about how it could change the lives of disabled people and she set about putting that into practice. She led an ambitious strategy that saw all public authorities contacted about their disability equality schemes, disability organisations invited to learning sessions about how to use the duties and lawyers also encouraged in their use of it in

litigation. And that has paid off enormously. It has been used to great effect so often over the past 8 years.

Caroline's work went beyond the UK, such was the acknowledgement of her expertise. She was one of those rare lawyers who had a unique combination of skills, as Baroness Campbell's quote attests - the ability to look at the policy implications of a legal case and so how it could make a difference to the largest number of people, how to make an incredibly complex law accessible to lawyers and non-lawyers alike; and the ability to know when and how much to compromise when negotiating with government and civil servants, and so to get the best possible result. As one former colleague, Richard Excell put it, *'she didn't let her realism make her give up on what idealism demanded and she didn't let her idealism stop her recognising what was realistic.'*

Post the DRC Caroline continued to use her legal policy skills and that unstoppable energy to great effect, working on the drafting of what became the Equality Act 2010 – which saw some incredible additions for disability rights which were the result of some hard slog which we had to have with the civil servants and others. She also worked on the subsequent codes of practice for the Equality and Human Rights Commission and other national and international projects. It was of great benefit to the DLA when Caroline was elected to the Executive Committee in 2010 and she continued as a vital member; in the current year she was a vice chair. Her clear analysis of the equality implications of a policy or situation sharpened our collective thinking. Often with relatively few words she identified both the problem and the equality solution to worrying government proposals. She identified priority issues for the DLA's work and challenging themes for our conferences and other events.

Caroline's work as a consultant, advising large and small organisations on their compliance with the DDA, especially the disability equality duty, followed the same approach: clear analysis of what needed to be put right and thoughtful presentation of solutions, always mindful of the internal dynamics, mechanisms and resources for change of the organisation concerned.

Caroline was always open to something new. For example, she used the opportunity of a holiday in China with her partner Anne to meet again Chinese academic lawyers she had met on behalf of the DLA when they were on a study tour in London. During their short meeting Caroline gained fresh insight into China's laws and policies, in particular those affecting women's equality rights.

But not only did she possess all these skills. She shared them. She was never slow to give others an opportunity – influenced no doubt by her socialist principles. So many people have said that they owe their career path to Caroline – she influenced them either directly, or indirectly. And she was fun – there was nothing po faced about her.

We could go on but there is simply too much to mention. Caroline has left such a legacy, not only in the legislation but also in the number of people who have learnt from her. Just a few of the quotes about her:

'She was such a remarkable person, so knowledgeable and wise, and so generous in her support for so many of us. Caroline made a remarkable contribution.'
Dame Phillippa Russell, former DRC Commissioner and now Chair, Standing Commission on Carers

'I wasn't sure whether she ever realised what a phenomenon she was – not that she would have cared a hoot anyway.'
Nick O'Brien former Director of Legal Services, DRC

'Caroline was a marvellous woman and certainly contributed very early in my awareness of disability law to my understanding of the social model of disability.'
Helen Mountfield QC

'It was her inspirational ideas and challenges to the status quo, however, which are becoming enshrined in the growing confidence belonging and increasingly public face of disability activism.' Dancing Giraffe, Accessible Information for Disabled People

'Like everyone who has ever had the privilege of working with Caroline, I have gained from her knowledge and wisdom and her total commitment to equality and justice, and I have enjoyed her good friendship and support – all of which I now appreciate more than ever and greatly miss.'
Barbara Cohen

'Since her death I have been contacted by so many people who have said what a massive influence she had on them – many who would not have or do the jobs that they do if it wasn't for her. She will leave a huge hole not only in my life, personally but in the field of equality and human rights. She is simply irreplaceable. But her legacy will live on, in those in the legal field and in the laws that she helped to shape – every day when I look at the Equality Act, and the codes of practice, I see her hand.'
Catherine Casserley

Questions for consideration on obesity and disability

Catherine Rayner, barrister, 7 Bedford Row, considers the recent case law of the EAT and the CJEU on obesity as a disability, drawing on the guidance and judgments of the courts on how to determine whether the claimant is disabled within the meaning of the Equality Act 2010 (EA).

With recent NHS estimates that 1 in 4 adults in the UK are obese and at risk of developing associated health problems including bowel and breast cancer, stroke and type 2 diabetes, concerns have been raised about the impact of the health of obese workers in the workplace. A key question is whether or not an obese worker will automatically be a disabled worker, and thus be entitled to reasonable adjustments at work if a policy, criteria or practice places them at a substantial disadvantage.

The question is one which has been considered by the president of the EAT in *Walker v Sita* UKEAT/0097/12/KN and which is due for consideration by the Court of Justice of the European Union (CJEU), following the delivery of the opinion of the Advocate General (AG) in July this year. The discussion of the issue in both courts, together with recent discussions of the meaning of disability generally within Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Directive), provide useful practical advice and assistance to advisers and practitioners on the approach to be taken when determining whether or not a person is disabled; these discussions also raise some interesting questions about the scope of the definition of disability for the future.

The impact of obesity will vary between individuals, and the question which has been raised by obese claimants before the courts is whether or not the condition is one which automatically leads to any obese worker being defined as disabled. The consequence of an automatic classification would be to protect many workers from discriminatory dismissal and entitle them to reasonable adjustments where required under the EA, without them having to go through a lengthy and uncertain process of argument about the nature and impact of the condition on them before being able to access rights and protections.

What types of condition are disabilities?

What types of condition are disabilities and how have the courts addressed this question nationally and at European level?

This question has led to close scrutiny by the courts of both the definition of disability for the purposes of the EA and the Directive and the legal tests which determine whether or not a person is disabled.

Disability under the EA

As all disability discrimination advisors and practitioners know, disability discrimination is unique in requiring the claimant to prove (other than in direct discrimination or harassment claims) that they have the protected characteristic before they can argue that the cause of their adverse treatment is disability. To do this, the claimant must satisfy the statutory definition in s6 EA which states that:

> *S6(1) A person (P) has a disability if —*
> *(a) P has a physical or mental impairment, and*
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

The claimant must prove the existence of a mental or physical impairment and that the impairment has an effect on their ability to carry out day-to-day activities which is both long term, meaning that it has lasted or is likely to last for at least 12 months, or the rest of the person's life where less than 12 months, and substantial.

In deciding whether or not a person is disabled, the opinion of a doctor or specialist occupational health practitioner (OH) may be helpful, but only if they are asked to comment on the impact that the impairment has upon the person on a day-to-day basis and/or the length of the impact. Medical statements about the cause of the illness and its medical effects are not necessarily going to help either the claimant or the claimant's employer decide whether there is an EA disability.

In *Gallop v Newport City Council* [2014] IRLR 211 [see Briefing 698] the CA gave guidance to employers pointing out that since it is the employer who will have to decide whether or not they agree that their employee is disabled, they must ensure that the OH has been asked questions pertinent to the issue of the impact that the impairment will have, so that they can decide

whether the test is satisfied or not.

A decision that a person is not disabled, if based on flawed and ill-founded advice, will mean that the employer knew or ought to have known of a disability and will be liable for any discrimination.

This does not mean that medical evidence of a particular illness or condition will not be helpful in some cases and even decisive in others, but it does underline the legal fact that the test under the EA for disability is a functional test, meaning that it focuses on the impact and effect of the impairment, and not primarily a medical one.

From a practical perspective this means that claimant advisers must ensure that where the question of disability arises, anyone considering whether or not the impairment is a disability in law must look at the statutory test and consider whether there is an impairment and what effect it has upon the claimant's abilities. Advisers should be alert to the employer just focusing on the medical labels or nature of the condition itself.

Walker v Sita Information Networking Computing Ltd

The reason that this focus on function is so important is highlighted by the case of *Walker v Sita Information Networking Computing Ltd* [see Briefing 679] in which the ET had to consider whether a man who weighed 21.5 stones, and in addition suffered from numerous physical and mental symptoms, satisfied the definition of disability.

Mr Walker had argued that he was disabled within the meaning of the EA, but his employers disagreed, arguing that there was no recognisable pathological or mental cause for his symptoms and that therefore there was no disability. The ET agreed with the employers, but the EAT overturned the judgment, finding that on the evidence the only conclusion open to the ET was that Mr Walker was disabled. The ET had focused on the wrong question and had erred in law.

Whilst the statutory test for disability requires a person to prove that they have a mental or physical impairment, which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities, there is no requirement under the present legislation for the impairment to be a defined or named medical condition. The focus is on the effect and limitations on a person's abilities, not on the medical cause of those limitations.

The Honourable Mr Justice Langstaff (President) pointed out that:

> *The purpose of the definition of disability is not to confine an impairment to that which can be shown to be given a medical label which is either a recognised physical or mental condition: it is, rather, to describe the nature of the impairment.*

As set out above, in any case where disability is in issue, the first thing that the ET must do is consider whether or not there is an impairment. Mr Walker suffered from a mix of physical and mental impairments including chronic fatigue syndrome, bowel and stomach problems, knee problems, and anxiety and depression. In addition he suffered from significant cognitive difficulties.

Justice Langstaff determined that there clearly was an impairment, if not several impairments. Having reached this conclusion, it was not then necessary to examine what caused the impairments and the ET had taken the wrong approach in doing so.

Once it is established that impairment exists, the court is required to look at the effect that the impairment has on the individual. Is the effect on their ability to carry out day-to-day activities substantial and is it long-term?

The lack of any named condition may have some evidential importance if it is being suggested that the claimant is not in fact ill, and the symptoms suffered are not genuine, but otherwise, the focus must be on the effect and not the cause of the impairments.

However, the EAT in Mr Walker's case considered a further question – is obesity an impairment which would automatically lead to an obese person being considered to have a disability?

The EAT found that obesity will not always be an impairment. Whilst the court accepted that the fact of obesity may make it more likely that a person is disabled, its judgment is that obesity does not render a person disabled of itself. The determination of that question will always depend on the particular effect of obesity on the claimant. Every claimant will be different and not all obese individuals will suffer debilitating effects.

Disability under European law

Whilst the *Walker* judgment gives clear guidance on the questions which must be asked and answered to satisfy the test under the EA, the question of whether or not obesity might be considered a disability in every case under European law still has to be adjudicated. In July 2014 AG Jaaskinen gave his opinion in the case of *Karston Kaltof v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund* Case C-354/13 which raised the same question that *Walker* raised,

although in different circumstances.

On the basis of this opinion, which is explained below, it is anticipated that the CJEU will reject the proposition and find that obesity, like many other conditions or impairments, can result in a disability; whether it does result in a disability will depend on the effect which it has on the individual in any given case. The reasoning of the AG in reaching his conclusions is similar to that of the EAT President in *Walker*.

However, there are some important differences in the judgment and thinking of the AG on the wider question of the definition of disability under European law. These differences, which are based on earlier CJEU judgments, suggest that there is a growing divergence between the definition of disability in the UK under the EA and the evolving and arguably wider definition of disability under the EU directives.

The starting point for determining the definition of disability for the purposes of European law, is firstly the wording of the Directive, secondly the provisions of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and thirdly the reasoning and determination of the CJEU in disability discrimination cases.

Whilst the Directive establishes the principle of non-discrimination against disabled people, it does not define disability, although it refers to the need for reasonable accommodation to be made. Therefore the definition has developed from the case law of the CJEU.

CJEU case law on disability

The first CJEU statement on disability came in *Chacón Navas v Eurest Colectividades SA*, C-13/05 [2006] IRLR 706 ECJ. In that case, the court was asked to consider what distinction, if any, existed between any form of sickness affecting a person in the workplace, and the concept of disability within the Directive. Was there a difference and if so what was it? The CJEU responded that there is a distinction between the two, and that disability within the Directive had a particular and distinct meaning.

The court held that the concept of disability referred to a *'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.* It also stated that in addition, it must be probable that the impairment would last for a long time.

Considering the question of an illness of any description, the CJEU stated that a worker could have a disability within the protection of the Directive *'if a curable or incurable illness entails a limitation corresponding with this definition...'* The requirements in that case would be that such an illness is medically diagnosed and the limitation is a long-term one.

The court rejected the idea that the concept of disability was limited in any way by reference to the cause of the impairment, and accepted that it was not only impairments present from birth for example, but that illness, if sufficiently serious, could also lead to there being a disability. The CJEU held that it *'would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability'.*

Whilst this statement of the law uses concepts familiar to the UK practitioner, the differences are the reference to the hindering of professional life, rather than day-to-day activities, and the reference to illness being long-term, but with no further definition and an additional requirement that, where the disability takes the form of an illness, that the illness is additionally medically diagnosed. As seen in *Walker*, this last aspect is given a different treatment by the UK courts.

Following on from *Chacon Navas*, the CJEU was asked to consider the question of the definition of disability again in the case of *HK Danmark*, acting on behalf of *Ring v Dansk Almennyttigt Boligselskab* and in the case of *HK Danmark, acting on behalf of Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display a/s*, cases C-335/11 and C-337/11; [2013] IRLR 571, [see Briefing 674].

These cases posed a number of questions about disability, but again the question of the meaning of disability for the purposes of the Directive was central. The CJEU was asked to consider the simple question, when is there a disability within the meaning of the Directive and how is this to be distinguished from the concept of sickness?

The preliminary reference asked – will all or any physical or mental impairments which mean that a worker cannot carry out his work for a period of time, or any diagnosed incurable illnesses or permanent reduction in function which does not need special aids but means a person cannot work full-time – fall within the definition of disability?

The cases concerned two women of different employers, both of whom had become ill with various symptoms, including in Ring's case serious back pain and neck pains, and in Werge's case, problems with fatigue, dizziness and hypersensitivity to noise. In both cases the women could no longer work full-time

although part-time work would have been possible. The referral to the CJEU arose out of a need to determine whether a disabled person was entitled to an adjustment to working hours within the Directive, amongst other matters.

Both women had been dismissed under Danish provisions which allowed for termination of employment with a shortened notice period after a certain period of sickness absence.

Impact of the United Nations Convention on the Rights of Persons with Disabilities

The first important change since *Chacon Navas* noted by the court, was that the European Union had, in the interim, ratified the UNCRPD and was therefore bound by the terms and definitions within that Convention when interpreting EU directives.

Article 1 of the UNCRPD states that *'people with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'*

The Convention also notes that the concept is an evolving one. The EU definition cannot fall short of that in the UNCRPD, and of course, the UK, a member state, cannot define disability in a more restrictive manner than the EU for the purposes of the EA. The CJEU determined that:

> *Having regard to the considerations set out in paragraphs 28-32 above, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.*

The CJEU comments that since the need for special adaptations and aids is a consequence of the establishment of the disability, the need for an aid forms no part of the definition of the concept. It could not be said that a person was not disabled because they did not require special aids. Further, the CJEU find that it is not necessary for a person to be totally excluded from work in order for them to be disabled, and that *'barriers to participation which are only partial will be sufficient.'*

Twofold distinction

The distinction between the UK definition of disability in the EA and the evolving European definition is twofold.

Firstly there is a difference in the activities which are to be looked at when considering whether a person's impairment has the substantial adverse effect. The focus in the UNCRPD is on *participation in society*, whilst the CJEU refers to *professional life* and the EA to *day-to-day activities*.

Secondly, there is arguably a difference between the severity of the impact required to satisfy the definition of disability. The UNCRPD refers to *full and effective participation* in society being hindered. Whilst the CJEU refers to hindrance of *full and effective participation* in professional life, the EA refers to an impairment having a *substantial* effect.

S212(2) of the EA specifies that 'substantial' means *'more than minor or trivial'*; The 2010 Statutory Guidance states that:

> *The requirement that an adverse effect be substantial reflects the general understanding of "disability" as a limitation going beyond the normal differences in ability which may exist among people. A "substantial" effect is more than would be produced by the sort of physical or mental conditions experienced by many people which have only minor effects. A "substantial" effect is one which is more than "minor" or "trivial".*

The difference between the wordings is itself minor, but it may be useful for advisers to note and point out this difference in any case where it is suggested by a respondent that the impairment is not serious enough to satisfy the definition. A number of cases in recent years have turned on the distinction, often to the disadvantage of the claimants.

Kaston Kaltoft

Which brings us to the point raised in the most recent referral raising obesity. In *Kaston Kaltoft* the CJEU is again asked to look at the question of whether or not obesity is a disability within the meaning of the Directive.

Kaltoft worked for the Municipality of Billund for 15 years as a child-minder; on being dismissed, he claimed that his obesity was one of the causes of the termination of his employment. He argued that his obesity meant that he was automatically a disabled person within the meaning of the Directive and the case was referred to the CJEU for a preliminary ruling on several questions, including whether or not obesity would always amount to a disability as a self-standing ground of discrimination, and secondly, whether obesity is included within the notion of disability in the Directive.

In AG Jaaskinen's opinion, delivered in July 2014,

there is no self-standing ground of unlawful discrimination on grounds of obesity, but that in certain cases, the severity of the obesity may amount to a disability under the Directive. The reasoning of the AG is along similar lines to that of the President of the EAT in *Walker* above.

The AG considers that the case law of the EU, like the pertinent EU legislation, has adopted, a social and not a (purely) medical model of disability. This follows the approach of the UNCRPD.

Secondly he notes that the ability to carry out work does not exclude disability, since there can be long-term physical, mental or psychological impairments that make carrying out that job or participation in professional life objectively more difficult and demanding whilst not making it necessarily impossible. He refers for example to impairments which severely affect mobility or significantly impair the senses such as eye-sight or hearing. The AG goes on to state that:

> *The notion of 'disability' for the purposes of Directive 2000/78 must be understood as referring to limitations which result, in particular, from (i) long-term (ii) physical, mental or psychological impairments (iii) which in interaction with various barriers (iv) may hinder (v) the full and effective participation of the person in professional life (vi) on an equal basis with other workers.*
>
> *The Court has further held that the expression 'persons with disabilities' in Article 5 of Directive 2000/78 must be interpreted as encompassing all persons having a disability corresponding with this definition.*

Turning to the specific question of obesity, he considers that the classification of obesity as an illness by the World Health Organisation is not as such sufficient to render it a disability for the purposes of the Directive. This is so because illnesses as such are not encapsulated by the Directive. It is only if the illness has the requisite effect, that it becomes a disability.

The AG does state that in cases where the condition of obesity has *'reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UN Convention, plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails…* then it can be considered to be a disability within the Directive.

Further he points out that the concept of disability under the Directive is objective and does not depend on whether it is 'self-inflicted' in the sense that the person has done something to cause his or her injury or illness. His opinion is common sense and accords with UK legislation. Any other interpretation would mean that not only would physical disabilities resulting from conscious and negligent risk-taking in traffic or in sports be excluded from 'disability' in the sense of Article 1 of the Directive, but that illnesses and conditions which resulted from poor life choices, or failures to take medical advice, and this may in some cases be argued by respondents to include obesity and some mental illness, may be excluded.

The AG also comments on the question of severity of the impairment and its effect, stating that:

> *the concept of disability must be understood as referring to a hindrance to the exercise of professional activity, not only to the impossibility of exercising such activity.*

Conclusion

The *Kaston Kaltoft* case is due to be listed before the CJEU in the near future. It is anticipated that the CJEU will agree with the AG's opinion to the extent that it is probable that obesity will be considered as one of many illnesses and impairments that can be the basis of a disability. This will depend upon how the illness affects the ability of the individual to participate in professional life, and where there is a restriction on participation, the person will be disabled and protected from discrimination.

However, since the definition of disability is accepted to be an evolving one, the CJEU may well have further useful guidance on how it is to be defined and who will come within it, For example, the AG in *Ring* noted that:

> *There is nothing in the wording of Directive 2000/78 to indicate that its scope of application is limited to a certain degree of severity of disability. Since, however, this issue has been neither raised by the referring court nor discussed by the parties to the proceedings, it does not need to be definitively resolved here.*

It may be that this is a question which the courts will consider in the future.

The unfairness of a level playing field

Binder Bansel, employment partner at Pattinson & Brewer, examines the practical and legal issues in claims for indirect discrimination, as well as some of the points arising from recent cases in which his firm acted for the claimants.

General point

It is generally recognised that discrimination arises not only from the failure to treat individuals equally, but also in cases where individuals with material differences (protected characteristics) are treated alike – the latter concept being recognised in the form of proscribed indirect discrimination and other strands of discrimination such as a failure to make reasonable adjustments in disability cases. This well established principle pre-dated the Equality Act 2010 (EA) and was the subject of further modification by the EA.

The principle of indirect discrimination is summarised in a number of cases. See for example Lady Hale in *Governing Body of JFS and others* [2010] IRLR 136 [see Briefing 555]:

> *Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origin …*

In a similar vein, Lady Hale in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 [see Briefing 639] remarked:

> *The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic … The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified.*

Readers will be aware that under the EA the indirect discrimination provisions cover the protected characteristics of age, disability, gender re-assignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. S19 EA consolidates the definition of indirect discrimination (and its variations) from previous legislation. The key changes are:

- replacing the previous *'requirement or condition'* with the application of a provision, criterion or practice (PCP)
- replacing 'disparate impact' with 'particular disadvantage'
- it is no longer necessary to show that a person who shares the complainant's protected characteristic *'could not comply'* with the PCP
- justification now requires the PCP to amount to a proportionate means of achieving a legitimate aim

A key distinction between direct and indirect discrimination is the ability to justify the latter. With the exception of direct age discrimination, other strands of direct discrimination are not subject to the same defence.

Indirect discrimination can be intentional or unintentional. See *Enderby v Frenchay Health Authority* [1993] IRLR 591. It is now possible to seek a remedy for unintentional indirect discrimination provided it can be shown that there was the application of a PCP.

Provision, criterion or practice

The EA provides no definition of provision, criterion or practice. It is reasonably clear that this definition should be construed as widely as possible to ensure that discriminatory practices are eliminated. It is also clear that a PCP is much wider than the original formulation of a *'requirement or condition'*. See for example *British Airways Plc v Starmer* [2005] IRLR 862 where the EAT held that a PCP could cover both informal and formal practices of an employer including discretionary management decisions which might relate only to the claimant. Further, the requirement for the application of a PCP is not a cumulative definition; the application of either a provision and/or criterion and/practice will suffice.

A number of cases centred on the issue of working arrangements whether full or part-time and the requirement for particular working. See for example *London Underground Ltd v Edwards* (No2) [1998] IRLR 364 and the issue as to whether the requirement to work full-time can amount to a PCP. The more difficult analysis is determining who should be in the pool for comparison. Does this include the entire workforce in the UK, the EU or the particular employer? Alternatively, might it be established simply within the claimant's workplace or among those working in the same role as the claimant?

The precise formulation of the PCP could be vital as

to the effect that it might have in the case. For example, consider the PCP of an employer's ban on the wearing of visible signs of religious affiliation. This could amount to a PCP in a number of ways including a ban on employees wearing:

- jewellery or
- religious symbols in the workplace.

In determining any particular disadvantage, the former PCP would require evidence of the religious affiliation of employees who wear jewellery. The latter would require a determination of the religious convictions of those wearing non-religious jewellery.

The pools for comparison would clearly be markedly different. The above issues were considered most recently in *Eweida & others v United Kingdom* [2013] IRLR 231 [see Briefing 663]. Ultimately, the key issue was whether the manifestation of any such belief was intimately linked to the religion/belief in question.

In some cases, the claimant's case might involve the application of alternative PCPs, or the combination of PCPs. See for example *MoD v De Bique* [2010] IRLR 471 where the disadvantage suffered by the claimant arose from the MoD's requirement that serving officers should be both available for deployment 24/7 and the MoD's immigration rules incorporated in their employment policies, as a consequence of which the claimant's half sister could not come to the UK to assist the claimant with her childcare responsibilities. The comparison would need to assess those who are able to comply with both limbs of the combined PCP.

A PCP in most cases will have been applied to the claimant, in others it is the possibility of it being applied which might cause the particular disadvantage – the comparison then being with those who do not share the protected characteristic in question. Obvious examples would include any physical requirement which, due to physiological differences between the sexes, would place women at a particular disadvantage when compared to men. In such a case a female claimant would need to show that this was applied to her, if not actually to others. See *British Airways v Starmer* above.

Choice of pool

A pool for comparison will, to a large degree, be determined by the formulation of the PCP. The pool should not consider people who have no interest in the possible advantage or disadvantage in question. Instead the pool should be most suitable to test the particular discrimination (as formulated in the PCP) complained of. See for example *Somerset County Council v Pike* [2009] EWCA Civ 808, where the claimant who had retired and then returned to school on a part-time basis complained that the additional service was not pensionable. Had the claimant returned full-time her post would have been pensionable. The court's view was that the correct pool was the consideration of the treatment of retired teachers who had returned to work (whether full or part-time).

This should be contrasted with the situation where the condition or requirement has the effect of making it impossible for anybody to gain access to the particular benefit of advantage. See *British Medical Association v Chaudhary* [2007] IRLR 800 CA. Mr Chaudhary complained of the BMA's refusal to support him in a claim of race discrimination. The BMA's rule was that no such claims were supported. The court's view was that where the claimant was subject to a condition or requirement, which made it impossible for any individual to take a benefit or advantage, there would be no claim for indirect discrimination.

Evidence of disadvantage

The original formulation of indirect discrimination required consideration of the proportion of those who could not comply, although this was not a consideration of absolute numbers or ratio. See for example *Seymour-Smith v Perez* [1997] IRLR 315. Even under the traditional definition of indirect discrimination there was support for the need to do away with statistical analysis. See *Chief Constable of Avon & Somerset Constabulary v Chew* [2001] AER 10 September EAT.

It is now reasonably clear that there is no strict requirement to adduce statistical evidence, although such evidence might assist in certain cases. It is still clear that the claimant will need to adduce some evidence of the disadvantage to the class of persons (to which the claimant belongs) with the protected characteristic in question. Failure to do so would result in the claim failing due to the burden of proof under s136 EA, on the basis that the claimant would not have proven the facts on which the tribunal could, apart from the provision, conclude in the absence of adequate explanation that the respondent had committed an unlawful act of discrimination.

The CA assessed the standard of evidence of disadvantage in *Nelson v Carillion Services Ltd* [2003] IRLR 428:

> *Unless and until the complainant establishes that the condition in question has had a disproportionate adverse impact upon his/her sex, the Tribunal could not in my*

judgment, even without explanation from the employer, conclude that he/she has been unlawfully discriminated against …

More recently in *Essop v UK Border Agency* UKEAT/0408/13 [see Briefing 730 in this edition], the EAT considered a claim for indirect race discrimination. The claimants alleged that BME candidates over the age of 35 were less likely than a non-BME and younger candidate to pass the civil service's core skills assessment necessary to achieve promotion at a certain level. The EAT emphasised that it was not for the claimants to show the reason for their individual treatment, the establishment of group disadvantage would suffice. Indeed it was not necessary for BME candidates to show why they had failed. S23 EA requires an assessment of the circumstances that are not materially different, in this case any group disadvantage due to race.

See also *Homer* above. In order to succeed it must be the PCP complained of by reason of the protected characteristic which causes the particular disadvantage. Mr Homer complained that the requirement for a degree in order to achieve the highest pay band was indirectly discriminatory on the grounds of age. At the age of 61 he would be unable to obtain a degree before retiring at 65. The CA held that there was no particular disadvantage on the premise that Mr Homer had been treated precisely the same as everyone else. The reason he could not benefit was because his working life was limited. On appeal, the SC took the view that the Age Regulations and the EA were intended to do away with the complexities as to who could or could not comply. Mr Homer had to show that there was a particular disadvantage when compared with other people who did not share the characteristic, in this case age or age group.

It would appear that the current state of the law is that a claimant needs to establish group disadvantage on one or more of the protected characteristics, but not that it causes a particular disadvantage to the claimant alone.

Disadvantage?

The case law on what constitutes a detriment for direct discrimination is of some assistance in establishing whether there is a disadvantage in an indirect discrimination claim. For example, changes in working conditions, change in job duties and other variations may be enough to constitute a detriment provided the complaint has reasonable grounds for such a belief. This is reiterated by the well-established principles of detriment as considered by the House of Lords in *Shamoon v Chief Constable of RUC* [2003] UKHL 11. Indeed, a justified grievance on the part of the claimant could amount to disadvantage for this purpose. See also paragraph 4.9 of the EHRC Code of Practice on Employment:

Disadvantage is not defined by the Act. It could include denial of an opportunity or choice, deterrent, rejection or exclusion … Disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise).

Justification

See *Allonby v Accrington & Rossendale College* [2001] IRLR 364 where the CA held that:

Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the College's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

Using the previous definition of justification, it is apparent that the test throughout required a careful balancing exercise to be conducted. The test for justification is an objective one and does not equate to the band of reasonable responses approach applied in cases of unfair dismissal. This was made clear in *Hardy & Hansons Plc v Lax* [2005] IRLR 726. While this is again a pre-statutory burden of proof decision, the reference to the principle of proportionality sits well with the current test of justification and as applied in subsequent cases.

Legitimate aim

There is no definition of legitimate aim in either the domestic or European legislation. Instead:

..the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (R Elias v Secretary of State for Defence [2006] EWCA Civ 1293)

An employer does not need to show that the aim was either articulated or even realised at the time. It is therefore possible for an employer to rely upon post-event rationalisation (and consideration) to justify their stance.

Cost

Can the employer's needs to reduce or minimise costs be relied upon as a legitimate aim? Generally speaking this

is not permissible. An employer cannot rely solely on a consideration of costs in defending its position. However, an employer may be permitted to put costs into balance with any other justification; see *Cross v British Airways* [2005] IRL 423.

The provision was considered more recently in *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330 [see Briefing 640]. The EAT's view was:

> *We find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification, or why they need the admixture of some other element in order to be legitimised.*

The CA disagreed:

> *The guidance of the Court of Justice is that an employer cannot justify discriminatory treatment 'solely' because the elimination of such treatment would involve increased costs ... [this means] that the saving or avoidance of costs will not, without more, amount to the achieving of a 'legitimate aim'.*

Proportionate means

Even if an employer establishes a legitimate aim it would still be necessary to show that such an aim has been pursued by a proportionate means. This would require an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the particular undertaking. See for example *Homer*:

> *To be proportionate a measure has to be both an appropriate means of achieving a legitimate aim and (reasonably) in order to do so.*

In *Mangold v Helm* [2006] IRLR 143, the ECJ considered the German law's restriction by age on the maximum term for a fixed contract. Specifically further extensions did not apply to employees who reached the age of 52. While the ECJ found that there was a legitimate public interest objective, having regard to the particular structure of the German labour market, the means used to achieve such an aim were not appropriate or necessary. The exclusion of workers from the benefit of stable employment solely on the basis of age was disproportionate.

The assessment of whether a means is proportionate allows a wide margin of appreciation for the tribunal. See for example the comments in *Homer*:

> *..it is an error to think that concrete evidence is always necessary to establish justification ... justification may be established in an appropriate case by reasoned and a rational judgment. What is impermissible is justification based simply on subjective impression or stereotyped assumptions.*

This is also reiterated in *Seldon v Clarkson Wright & Jakes* [2009] IRLR 267 [see Briefing 636]. In the EAT's view:

> *We do not accept the submissions … The Tribunal must always have concrete evidence, neatly weighed to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature … be astute to differentiate between the exercise of their knowledge of how humans behave and the stereotyped assumptions about behaviour.*

Recent cases

In *Wheatley & Giles v Civil Nuclear Police Authority London Central* Employment Tribunal 2704027/2011 the female claimants complained about their treatment as firearms officers. Specifically they complained of indirect sex discrimination arising from:

1. The size of the grips on certain firearms;
2. The method of testing their accuracy with such firearms and in particular the use of a barricade constructed for use by a male of average height;
3. The provision of standard personal protective equipment.

In dealing with the correct pool for comparison for the use of firearms, the employer argued that the claimants had identified the incorrect pool of all authorised firearms officers. The employer argued that the correct pool was authorised firearms officers plus other males who might undertake the initial firearms training to become such an officer. It was also argued that the men with larger than average hands were also equally disadvantaged.

The ET dismissed these observations; the complaints were about the disadvantage (that is group disadvantage) for women in relation to the standard use of certain firearms, equipment and testing techniques. In the tribunal's view there was no proper basis for finding that the larger (or smaller) hands of some men meant that the claimants must fail at the first hurdle in showing group disadvantage. The ET also found that it was entitled to take judicial note of the physiological differences between men and women.

In considering justification the tribunal's view was that it was entitled to consider the evidence of how a comparable employer (in this case, another force) would deal with the training of firearms officers. The employer's case as to why different weapons' grips could not be provided as this would complicate their process of issuing firearms (and possibly training) did not stand up to scrutiny. The practical lesson that arises from the case is that while there might be a legitimate aim (it was accepted that safeguarding the nuclear stockpile was a

legitimate aim), the means to establish such an aim were disproportionate. Establishing many ways as to how the aim might be achieved is likely to dilute the arguments as to whether the chosen method is proportionate.

Another interesting observation in the case was the issue of the relative degree of justification. Virtually all officers employed by the employer are deployed as authorised firearms officers. In this particular case the failure to obtain and re-qualify as a firearms officer had particularly severe consequences, which might have led to the claimants being dismissed. The tribunal accepted that in such circumstance this placed a greater emphasis on a respondent to justify its treatment.

A further interesting issue is the correct pool – if there had been a comparison using the wider remit of the combined PCPs in relation to the choice of firearms, the method of testing and personal protective equipment? It is likely that the wider spread of the application of PCP's, will introduce more individuals into the comparison who might have different degrees of disadvantage. This might arguably dilute the particular disadvantage?

In *Keohane v Commissioner of Police for the Metropolis* UKEAT/2014/0463 [see Briefing 715] the claimant, a trained police dog handler, complained of the removal of her dogs while on maternity leave. The Metropolitan Police sought to argue that this was required to ensure that the dogs were effectively deployed. It was further argued that there was no particular disadvantage, as no decision had been made as to what would happen upon the claimant returning to work, and there was a possibility that she might be allocated the same or other dogs.

The tribunal found that there was discrimination on the grounds of maternity, but not indirect sex discrimination. On appeal to the EAT there were three main issues:

1. Can the same event give rise to both pregnancy discrimination and indirect discrimination? Although direct and indirect discrimination are mutually exclusive, indirect discrimination can arise out of the same set of facts for other proscribed discrimination such as pregnancy.
2. A claim for indirect discrimination can still be sustained where the policy only disadvantages certain individuals in some cases.
3. The degree of risk of the dogs being deployed elsewhere upon the claimant's return was sufficient to amount to detriment as was being exposed to such a risk once the dogs had already been reallocated. In contrast, if the inevitable result was that a woman who suffered a disadvantage that a man would not, this was a claim of direct discrimination on the grounds of pregnancy. However in cases where the consequence is something that is not automatic or inevitable, indirect discrimination might be engaged. The EAT accepted that there would be some occasions where a more tangible disadvantage might not materialise. However, it was sufficient that the Metropolitan Police's application of the PCP as to the reallocation of dogs created a disadvantage for the claimant.

Changes made by the EA to the concept of indirect discrimination are a welcome clarification of what is required to establish whether the claim is made out. Group disadvantage is a lower threshold than disparate impact and can be determined by an application of the ET's practical observations of working life. The test of justification forces the employers' reasons for their treatment to a much greater level of scrutiny – this is welcome news for claimants.

Discrimination and economic inequality: two faces of disadvantage; the DLA annual conference, October 20, 2014

Geraldine Scullion, editor of Briefings, summarises the presentations and issues discussed at the DLA's annual conference.

Responding to the conference theme – *Discrimination and Economic Inequality: two faces of disadvantage* – the speakers considered the issue from different perspectives; the general consensus was that legislative and policy changes are required to halt growing inequalities in the UK.

Barbara Cohen, chair of the DLA, opened the morning session by quoting from the Credit Suisse annual global wealth report which showed that in the UK the top 10% own 54.1% of the total wealth and that the UK is the only G7 country to have greater inequality in 2014 than in 2000. She also referred to statistics showing an overlap between the groups that are disadvantaged because of aspects of their personal identity and those that live in the most severe poverty.

The conference theme was timely and appropriate; a number of speakers referred to Alan Milburn's second State of the Nation report as head of the government's Social Mobility and Child Poverty Commission which had been released that day. This report highlights the real danger of Britain becoming a society permanently divided between the well off and the poor. The report accuses all the parties of paying lip service to the government's target to eradicate child poverty by 2020, warning that it cannot possibly be met and will leave an estimated 3.5 million children in poverty.

The two keynote speakers were asked to consider whether you can tackle either discrimination or economic inequality without also tackling the other. The first keynote speaker, Sarah Veale, head of the TUC's Equality and Employment Rights Department, proposed that ending discrimination would not of itself lead to economic equality, as equality could not be achieved without a fair outcome. For her the critical issue is fairness; for example, to achieve equal pay for women, men's pay could be reduced yet this would not be fair. She reviewed the use of discrimination as a tool for economic and social regulation over the decades and referred to structural discrimination in the economy as it affects women or disabled workers. She concluded that discrimination couldn't be eliminated without also addressing economic inequality if the aim is to create a fair society where an individual's protected characteristic will not be determinative of their economic status. She called on participants to support the development of the concept of a public sector duty to reduce inequalities of outcome which result from socio-economic disadvantage as anticipated by s1 of the Equality Act 2010 (EA).

The second keynote speaker, Colm O'Cinneide, Reader in Law at University College, London, considered whether discrimination and economic inequality were two sides of the same coin. His view was that the overlap between socio-economic disadvantage and group exclusion – gender, ethnicity, disabled status etc. – is considerable, especially when lack of social capital and precariousness are taken into account. While discrimination law is well developed, its impact on patterns of economic inequality is limited. He concluded that although there is some protection for socio-economic rights under the ECHR, issues of economic inequality are generally viewed as falling outside the scope of UK law.

To address this gap, he proposed a number of ideas for discussion. These included changes in the law or the development of policy tools such as monitoring on the basis of social class. Possible changes in the law included the implementation of s1 EA, 'stretching' the scope of protection under the EU Social Charter or extending article 14 ECHR to cover socio-economic status as a protected ground.

The three speakers during the morning plenary session, while focusing on discrimination law issues, also incorporated reference to economic barriers to equality.

Karon Monaghan QC brought the audience up-to-date with her review of recent legislative changes and case law which have provided both 'gains and losses', highlighting some judgments which have reiterated 'basic' principles, and others where conflicting views, e.g. between religious freedoms and anti-discrimination principles, collide. She commented on judgments in cases involving challenges to decisions on welfare benefits and fees at tribunals and expressed

the hope that appeals and further hearings on these topics will achieve improved outcomes.

Robin Allen QC framed his talk around the increasing international political concern about the effects of economic inequality on growth and stablity.[1] The recent statements of Janet Yellan, Chair of the US Federal Reserve,[2] Christine Lagarde of the International Monetary Fund, the Pope, and President Obama all highlight the need to tackle economic inequality if economic well-being is to be achieved. He reviewed some of the judgments of the ECtHR and the CJEU in equality cases, including cases where economic inequality was an issue. As the ECtHR has allowed states a large margin of appreciation to justify decisions on economic grounds, he warned that this could mean limited success in any future challenges against the UK. Cases at the CJEU have reiterated the principle that policies or practices which have *'aims of a purely economic nature cannot constitute pressing reasons of public interest justifying a restriction of a fundamental freedom'*. However, despite this, the CJEU has accepted, in the case of *Specht v Land Berlin* for example, that budgetary and administrative considerations can justify age discrimination.

Stephanie Harrison QC highlighted the UK's system of immigration control which has *'institutionalised distinctions, exclusions, restrictions and preference based on national origin that are so all-pervasive that they create a virtual apartheid in the economic and social life'* of individuals who have no legal status or permanent right of residence in the UK. Not only does this control system discriminate against people of poorer backgrounds but it is now government policy that a certain level of income is a central requisite for 'integration'. While such distinctions in treatment based on immigration status are not prohibited, she argued that the implementation of the controls can be in fact *based on 'racial origin, colour and religion which are likely to be the trigger factor(s) for suspicion, investigation and hostile action'* – and if these factors form part of the decision-making process this can and ought to be challenged under domestic and ECHR law.

The afternoon breakout sessions gave the practitioner audience valuable opportunities to raise questions and thrash out particular issues with the experts. Topics included developments in discrimination law in the workplace and in disability discrimination law; age discrimination in employment, services and public functions; harassment claims at the ET or county court: changes in judicial review: updates on public sector equality duty cases; practical advice on winning cases at the ET; and positive action under the EA.

The conference concluded with a stimulating panel discussion, chaired by Robin Allen, in which panel members presented their particular views on the connection between discrimination and economic inequality and how the two issues can be tackled most effectively.

Panel member Gloria Mills, CBE, with many years as a senior trade union officer, argued that social class is the major contributor to economic and social inequality; she called for more investment in public services, collective bargaining, access to decent jobs and pay as the tools to address the gulf between the poor and those with inherited wealth and privileges. Acknowledging a crisis of confidence and leadership in the Left, she argued strongly for the Trade Union movement and other leaders to find a narrative that resonates with the public – and proposed that equality could form the basis of that narrative.

Panel member Joy Warmington, CEO of brap (a Birmingham based charity which aims to help people, communities, and the organisations that serve them turn equality into reality) challenged participants to acknowledge prejudice within themselves and their organisations; she argued that the tools to address discrimination are crude and despite statutory equality duties and impact assessment tools, discrimination persists. In her view, the development of the EA had led to disharmony as different groups have competed for attention; finding ways to work together to mobilise a different response was critical.

Panel member Professor Richard Wilkinson, co-author of the Spirit Level and co-founder of the Equality Trust, agreed that inequality is inextricably linked to prejudice and discrimination. He referred to the prevalence in unequal societies of poor physical and mental health, violence, teenage births, bullying among children, status competition etc. He also agreed that powerful social movements such as the trade union movement or the women's movement have been critical in the past and our chances of improving equality in the future also depend on powerful social movements. He stressed the importance of training and educating

1. See, for example, http://www.theguardian.com/business/economics-blog/2014/oct/05/new-washington-consensus-time-fight-inequality or http://www.imf.org/external/pubs/ft/sdn/2014/sdn1402.pdf

2. http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/17/yellen-depth-and-breadth-of-u-s-inequality-greatly-concern-me/

others on the reality and consequences of inequality.

The DLA expressed its great appreciation to the keynote speakers, chairs, panellists and the 10 experts who facilitated the afternoon breakout sessions. Thanks were also given to Baker and McKenzie which hosted the conference and supported the DLA administrator Chris Atkinson in making the conference such a smoothly run event. Thanks were also extended to all of the participants for their contribution to making the conference an invaluable day of discussion and debate on such a critical topic.

Briefing 723

Freedom of religion and the ban on the wearing of the burqa in public in France

SAS v France Application Number 43835/11, European Court of Human Rights, Grand Chamber decision; [2014] EqLR 590, July 1, 2014

Implications for practitioners

The much anticipated recent judgment of the Grand Chamber of the ECtHR in SAS has given a clearer indication of the approach the court is now adopting when striking the difficult balance between manifestations of an individual's beliefs on the one hand, and the role of the state on the other, as the arbiter between competing claims and values within society.

In SAS while the ECtHR formally confirmed previous decisions concerning the wearing of religious attire, the decision also marks a departure in tone and approach to a number of issues. Further, the court also recognised a new ground for permitting restrictions to a number of rights, '*respect for the minimum set of values of an open and democratic society*' which essentially amounts to a limitation so to compel people of different faiths and religions to 'live together'. The judgment has attracted almost equal amounts of support and opprobrium which highlights the difficult and contentious position the ECtHR finds itself in when considering such matters.

Facts

The proceedings were brought by a Pakistani born female French Muslim citizen, living in France, who sought to challenge a 2010 law which bans the wearing of attire which covers the face in public. Violations of the law are punishable by a relatively small fine of up to €150 and the obligation to follow a citizenship course. Although the ban extends to all clothing which covers the face, it was clear from the legislative history and the context of the debates that proceeded the adoption of the law that it was religious attire, in particular, the burqa and niqab that were being targeted – hence the 2010 law widely being referred to as the 'burqa ban'. The ECtHR has considered bans on similar religious attire in earlier judgments concerning Switzerland (*Dhalab*) and Turkey *(Leyla Sahin)*. The ban in France, however, encompassed all public spaces and not just schools (*Dhalab*) or universities (*Sahin*). Because of the scope of the ban and also the wider repercussions of it upon the individual's desire to manifest her faith, the applicant sought to challenge the ban using five different European Convention of Human Rights' (ECHR) articles: article 3 (prohibition of degrading treatment); article 8 (right to private life); article 9 (religious freedom); article 10 (right to free expression); article 11 (right to association) and article 14 (the right not to be discriminated against). The court focused its analysis on the right which was central to the issue, article 9.

Right to freedom of religion

The applicant in the context of article 9 argued that the measure was not proportionate, as it extended to all public spaces and was not limited to sensitive buildings or environments such as airports. Further, it was argued that the ban reinforced prejudicial attitudes towards veiled women, especially as it was the applicant's decision and right to dress as she deemed religiously appropriate and it was not the role of the state to make that decision for her. The French state refuted these arguments submitting that such attire made social interaction and existence in society difficult; it relied heavily upon a broad margin of appreciation or discretion in how it regulated such issues when balancing individual freedoms with the interests of society as a whole.

723

ECtHR judgment

The ECtHR upheld the validity of the ban under article 9 of the ECHR. A number of aspects of the judgment are noteworthy. First, the court formally confirmed its earlier decisions in *Dahlab* and *Leyla Sahin*. The tone of the judgment in SAS however, is notably different when it comes to Islam as a value and religious system when compared to these earlier cases. Further to both those cases, the court was widely condemned for both its stereotyping of veiled Muslim women as oppressed and its own prejudices when commenting on Islam's approaches to gender equality and fundamental rights protection. In SAS, the ECtHR steered clear of such matters and if anything expressed that the burqa was an emancipated choice and expression of the free will of many women who wore it. This change of tack is made clear in the court's finding that the ban did not contribute to promoting equality or individual dignity.

Second, the ECtHR in assessing the ban unearthed a legitimate aim for the limitation of ECHR rights, which is novel and has not been identified in past ECHR jurisprudence. This legitimate aim is *'respect for the minimum requirements of life in society'* which is referred to as 'living together'. Articles 8(2) and 9(2) permit restrictions on individual rights if the restrictions are for the purpose of protecting *'the rights and freedoms of others'*. Although not referred to in articles 8(2) and 9(2) as a legitimate justification for restricting a Convention right, the court accepted that the aim of trying to ensure individuals could 'live together' came within the scope of those provisions although it also conceded that the concept was rather imprecise.

Third, the ECtHR granted a broad margin of appreciation to France. The court's approach to determining the breadth of state discretion in religious freedom cases seem to be at odds with its more general approach under other provisions of the ECHR. Here the court considered France had a broad margin as there was, in essence, no uniform approach among European states as to how they regulated religious practices. Considering, however, that the court also stated that there was no ban on the burqa in other European states, the margin of appreciation should have been a narrow one; this would have required France to prove why such a ban was needed, when other states did not deem it necessary, thus making it far more difficult to prove that the ban was proportionate.

Conclusion

It is clear that the decision in SAS consolidates the ECtHR's more recent approach to seek to extricate itself from the sensitive issue of how states regulate religious communities. As in earlier cases, the court's implicit logic is concerned with the detriment suffered by the individual. In balancing individual interests and rights with those of society as a whole, the court will grant broad discretion to the state but that discretion is still subject to scrutiny. Further there was the clear issue of France's secular nature and its assimilationist policy towards religious and cultural minorities. 'Living together' in the context of the case suggests assimilation, not multi-culturalism as has been the policy in other states, such as the UK. How these issues will be reconciled in future will be fascinating and well worth keeping an eye on.

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Discrimination – illegality defence

Hounga v Allen [2014] UKSC 47; [2014] EqLR 559, July 30, 2014

Facts

When H was about 14, she was brought from Nigeria to work for A. H's entry to the country was obtained by her knowingly presenting a false identity to the UK immigration authorities.

For 18 months, H worked for A as a sort of *au pair*; she did housework and cared for A's three children. She was provided with bed and board, but no wages. During her employment, A inflicted serious physical abuse on H, and also told H that if she left the household, she would be sent to prison, as her presence in the UK was illegal.

In June 2008, A discovered that the children had not eaten the supper which she had asked H to prepare. A hit H, threw her out of the house and poured water on her. H slept in the garden in her wet clothes; in the morning, when no one would still let her into the house, she made her way to a supermarket car park, where she was found and taken to social services.

Employment Tribunal

H brought claims for breach of contract and race discrimination.

Initially A's response was that she had met H, but had never employed her. Eventually she conceded that H had visited her house, and then that she lived at her house for an extended period.

The ET found that there was a contract of employment, but that no contract claims could be successful because of the defence of illegality – H could not enforce a contract she had entered into illegally, given that she had illegally entered the country. [See Briefings 606 and 641 for a detailed account of the ET and subsequent hearings.]

All of H's claims were unsuccessful apart from the race discrimination claim about her dismissal, resulting in an injury to feelings award of £6,187. The tribunal found that H had been dismissed because A knew that she was vulnerable because of her immigration status; that is, she had no right to remain in the UK.

Employment Appeal Tribunal

H appealed the ET's conclusion in her unsuccessful contract claims, and A cross-appealed the successful discrimination claim. The EAT dismissed both appeals.

Court of Appeal

H appealed the EAT decision, and A again cross-appealed. The CA, Rimer LJ giving the leading judgment, upheld A's cross-appeal. It found that the illegality of H's contract of employment was a material part of H's claim, and so to uphold it would be to condone the illegality.

Supreme Court

H appealed the CA's judgment in relation to A's cross-appeal. All five SC justices upheld the appeal, but they were split in their reasoning.

Lord Wilson, Lady Hale and Lord Kerr found that the defence of illegality did not apply to H's case - there was no 'inextricable link' between H's employment and the illegality. Further, it would be a breach of the UK's international obligations for H's complaint to be defeated by the defence of illegality, given that A had engaged in trafficking to bring H to this country.

Lord Hughes and Lord Carnworth agreed that the illegality defence did not apply, but did not think the international treaties governing trafficking had any application. This was because, although H was exploited when she arrived in the UK, she was not compelled to commit the immigration offences she in fact did.

Lord Wilson gave a detailed history of the defence of illegality, and the policy reasons behind it. For contract claims, the position is straightforward – contracts entered into illegally cannot be enforced. Discrimination is a tort though, and so the position is different. One test was 'public conscience' – would upholding the claim appear to indirectly encourage the unlawful conduct? Another test was whether there was an 'inextricable link'. This looked at whether the illegality was 'bound up' with the claim. Lord Wilson concluded that all of the tests were ultimately about public policy. In H's case, all of these factors pointed to the defence of illegality not applying. Allowing the discrimination claim to succeed would not mean that H profited from her wrongful conduct, nor would it mean that she would evade any penalty for illegally entering the country. Also, it was fanciful to think that the claim being successful would encourage people to enter into contracts like H's, given her exploitation.

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Analysis

Lord Wilson recognises immediately that the real wrongdoing to H is not her 'dismissal', or whether it is discriminatory, but her exploitation and the context of human trafficking. Once this is recognised, and that such trafficking is to be discouraged, it is easy to reach the conclusion that successfully deploying the illegality defence would allow those that traffick other humans to discriminate against them with impunity.

It is only when the tests are looked at in the abstract that they become hard to apply. Is entering a country 'inextricably linked' to being employed in that country? Quite possibly, given that one might not have happened without the other. Lord Wilson recognises that all causal tests have their root in some form of ideology; his judgment is a lesson in appreciating that such policy reasons should be made explicit and discussed, rather than adopting the illusion that a legal test can be mechanically applied as if determining causation is a matter of logic (and pretending the policy reasons do not exist).

Ultimately, the SC's decision asks judges to look at the consequences of the illegality defence – would it encourage illegality, or is the integrity of the legal system threatened if the claim cannot be successful?

Practical implications

Given the significance of whether a claim is in contract or tort when looking at illegality, it is important to advise clients about both causes of action. If immigration issues are likely to surface as part of the claim (or any other illegality, such as issues around tax), then it is worth considering whether framing a claim in tort may be more advantageous.

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Briefing 725

Reasonable adjustments: no duty to employees associated with disabled people

Hainsworth v Ministry of Defence [2014] EWCA Civ 763; [2014] EqLR 553; May 13, 2014

Introduction

Article 5 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Directive) concerns reasonable accommodation for disabled persons. It states:

> *Employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.*

The Equality Act 2010 (EA) contains provisions designed to implement article 5. S39(5) EA imposes a duty to make reasonable adjustments on an employer. The duty comprises three requirements (s20(2) EA), the first of which is set out in s20(3):

> *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

The reference to a 'disabled person' above is to an *'interested disabled person'* (paragraph 2(2)(c), schedule 8 EA). Under paragraph 5(1), schedule 8 EA, depending on the 'relevant matter' an interested disabled person will be either:

- a person who is, or has notified the employer that they might be, an applicant for the employment;
- an applicant for the employment; or
- an employee of the employer.

Therefore, read literally, the EA imposes a duty on an employer to make reasonable adjustments only in respect of a disabled person who is either an applicant for employment or an existing employee. In *Hainsworth* the CA considered whether article 5 of the Directive imposed a duty on the Ministry of Defence (MoD) to make reasonable adjustments in respect of a non-disabled employee whose daughter was disabled.

Facts

Ms Hainsworth (H) was employed by the MoD as an inclusion support development teacher, based in Germany. Her daughter (C) has Down's syndrome and is a 'disabled person' under s6 EA.

The MoD provided facilities for the education of the children of employees who worked outside the UK, but these were not designed for children with 'significant

needs'. Therefore C could not be schooled at the garrison where H worked.

In 2011, H requested a transfer to the UK so that C's educational needs could be met, but the MoD rejected her request.

Employment Tribunal and Employment Appeal Tribunal

H brought a claim in the ET asserting, amongst other things, that it would have been a reasonable adjustment under the EA for the MoD to grant her request and transfer her to the UK.

The ET rejected H's claim on the basis that the EA imposes a duty on an employer to make reasonable adjustments only for a disabled job applicant or employee, and not for a non-disabled employee who is associated with a disabled person. On appeal, the EAT upheld the ET's decision, finding that H's case was '*unarguable*'.

Court of Appeal

H appealed to the CA and the Equality and Human Rights Commission intervened. Both asserted that article 5 of the Directive imposed a duty on an employer to make reasonable adjustments for an employee associated with a disabled person, and the EA must be interpreted as giving effect to the Directive.

The CA rejected the appeal. Amongst other things, it concluded that '*the obvious and entire focus*' of article 5 is that employers make provision for disabled employees, prospective employees and trainees. It held that article 5 *'gives no clue'* as to who its potential beneficiary (other than an employee) might be and considered it *'would be an entirely open question who such a person might be'* which would render article 5 *'hopelessly uncertain'*. The CA found the concept of association *'vague and open-ended'*.

In support of her argument, H sought to rely on the CJEU's decision in *Coleman v Attridge Law* [2008] ICR 1128 [see Briefing 499] (where it held that articles 1 and 2 of the Directive require protection against associative discrimination in relation to direct disability discrimination and harassment). However, the CA noted that, in *Coleman*, the CJEU had drawn a clear distinction between the Directive's provisions relating to direct disability discrimination and harassment (which require protection against 'associative discrimination') on one hand, and those relating to reasonable adjustments on the other. With regards to the latter, the CJEU had determined that '*the measures in question are intended to accommodate the needs of disabled people at the workplace*' and *'would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only'*.

H also sought to rely on the principle that the Directive must, as far as possible, be interpreted in a manner consistent with the UN Convention on the Rights of Persons with Disabilities (the UNCPRD). However, the CA held that neither the UNCPRD, nor the EU Charter of Fundamental Rights or the European Social Charter are capable of qualifying the *'plain and inescapable meaning'* of article 5 of the Directive.

The CA went on to find that, even if article 5 did require the protection sought by H:

- There is considerable doubt as to whether words providing such protection could be read into the EA given the express and specific nature of s20(3) and schedule 8.
- Article 5 would not be directly effective against the MoD as an emanation of the state because the *'open-ended and unspecific'* approach to the identity of 'associated' disabled persons to be protected is *'insufficiently precise to permit its application by way of direct effect'*.

Comment

The CA was firm in its rejection of the idea that the EA imposes a duty on employers to make reasonable adjustments for job applicants or employees who are 'associated' with disabled people. Nevertheless, it would be good practice for employers to seek, where possible, to support and accommodate the needs of employees with caring responsibilities for disabled people.

H's original ET claim alleged direct disability discrimination by association with C, in addition to alleging that the MoD had a duty to make reasonable adjustments by association which it had failed to comply with. The former allegation did not form part of the CA proceedings. However, practitioners should be alert to the possibility of direct disability discrimination by association arising in circumstances where, for example, adverse action is taken by an employer against an employee for a reason relating to the employee's role as carer for a disabled person.

Further, all employees with at least 26 weeks' continuous employment have the right to request flexible working. Employees with caring responsibilities for disabled people can avail themselves of this right. Any such requests should be considered carefully and handled appropriately by employers in order to protect against possible discrimination claims.

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The bedroom tax – the gap between unwise policy and unlawful discrimination

R (on the application of MA) v Secretary of State for Work and Pensions [2014] EWCA Civ 13; [2014] EqLR 426 R; February 21, 2014

It was not unlawful to apply the bedroom tax to disabled claimants who needed a spare room as a result of their disability.

Facts

This was a judicial review challenge to regulation B13 of the Housing Benefit Regulations 2006 – also known as the bedroom tax (or the spare room subsidy, depending on your location on the political spectrum). The review was brought on three grounds:

1. the regulations did not provide for the needs of the claimants who have a range of disabilities. This, they said, breached article 14 of the European Convention on Human Rights (the Convention);
2. it was a breach of the public sector equality duty under s149 of the EA;
3. the Secretary of State had issued guidance on the calculation of maximum housing benefit, which could only be issued through secondary legislation.

Article 14 requires that rights and freedoms set out in the Convention must be secured without discrimination – including on the basis of disability. The claimants' disabilities made it harder for them to move to smaller properties – normally because they required their 'spare room' because of something related to their disability.

This, they argued, was indirect discrimination. It was also, they said, *Thlimmenos*[1] discrimination, which occurs under article 14 when a state fails, without justification, to treat differently people whose situations are significantly different. Their disabilities created significant differences compared with those recipients of housing benefit who were not disabled. And the government had no justification for failing to treat them differently.

Court of Appeal

The court held that such discrimination was made out. It was undoubtedly difficult to precisely identify and define the pool of disabled people who were adversely affected by the regulation. Many disabled people suffered no more disadvantage than non-disabled people. But this did not prevent there being discrimination under article 14. Nor did it change the Secretary of State's duty to ensure that his methods were appropriate and did not lead to a disproportionate adverse impact.

However, the difficulties in identifying the class of persons who required an extra bedroom as a result of their disability, was highly relevant to the question of justification – and to whether the Secretary of State had met the public sector equality duty. Without a clearly identifiable group that could be excluded from the regulation, the court concluded it was difficult to criticise the Secretary of State for failing to do so. There was provision for additional discretionary housing payments (DHP) that might be used to reduce disadvantage. The Secretary of State's approach was not, the court concluded, taking a disproportionate approach. Given this, the discrimination that did exist was justified.

The judicial review did succeed on the limited basis that it declared the guidance in Circular HB/CTNB U2/2013 was insufficient to implement the CA's judgment in *Burnip/Gorry (Burnip v Birmingham City Council* [2012] EqLR 701 CA [see Briefing 655]) – which related to children unable to share a bedroom because of their disability. The CA concluded that non-statutory guidance was not binding on local authorities. Local authorities might act against it – notwithstanding that this would place the Secretary of State in breach of the *Burnip/Gorry* judgment. The CA noted, dryly, that they expected that regulations in the proper form would be made speedily.

Comment

In many ways *R(MA)* is a routine JR judgment that reiterates the general principles and applies them to a particular set of facts. It highlights, yet again, that although JR can be a powerful weapon to protect the

1. *Thlimmenos v Greece* (Case No.34369/97) (2000) 31 EHRR 411 ECHR [GC]

disadvantaged, it is by no means infallible.

One might doubt whether DHPs are likely to remove the disadvantage created by applying a general rule to disabled people who have good reason to need a 'spare' bedroom. One might even suspect that the court might share those doubts.

But the court applies a test that leaves discretion to the Secretary of State. They ask not *'What should the Secretary of State have done?'* but *'Has the Secretary of State done something manifestly without reasonable foundation?'* This, inevitably, creates a gap between a policy that is unwise or discriminatory and one that is unlawful.

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Briefing 727

Withstanding the residence test[1]

R (Public Law Project) v Secretary of State for Justice and Office of the Children's Commissioner (intervener) [2014] EWHC 2365 (Admin), July 15, 2014

Facts

In 1948 – during another 'age of austerity' – radical legislation was laid before parliament by the Attlee government. This was the Legal Aid and Advice Bill, the means chosen to create the first statutory, state-funded legal aid scheme. The aim was always clear. Legal aid was fundamentally about promoting equality between those who could afford to take advice on, and vindicate, their rights in the courts, and those who could not. Eligibility in most civil cases would therefore depend on need. The type of case for which legal aid was sought had to be prioritised in the scheme. It had to be strong and important enough to justify public money being spent on it. The financial resources of the person involved usually had to be limited (though the original eligibility limits meant most in the UK were eligible for help with prioritised cases).

For all its many flaws, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) retains this basic model. As regards civil legal aid, part 1 of schedule 1 lists 46 types of case that can potentially be funded, subject to these tests being satisfied. The list was the product of some thought and consultation, followed by a great deal of parliamentary debate, during which ministers offered assurances that it listed *'for all to see'* the services that would remain available (Lord McNally, *Hansard*, HL Debates col 1569, March 5, 2012).

Specific services like representation in judicial review cases were on the list because the government expressly conceded that they were important to ensure state accountability. Likewise, services such as advice for victims of crime and abuse were retained because of the acknowledged needs of vulnerable people. This was the backdrop to the proposal made by the Lord Chancellor, Chris Grayling, just eight days after LASPO came into force on April 1, 2013 to discriminate between some people, who would remain potentially eligible for all schedule 1 listed services, and others without a 'strong connection' to the UK who would, in future, be denied most of them. The intended means of discrimination would be a 'residence test' for civil legal aid introduced through secondary legislation. It would modify LASPO so that those who failed it would no longer be eligible for schedule 1 services unless they, or the type of case they had, fell into an exempted class.

There was little coherence or logic to the exemptions that were proposed eventually. For example, all children would be entitled to legal advice on community care cases concerning accommodation, but those who failed the test would receive no legal aid to challenge unlawful refusals to provide it. Recognised victims of trafficking would receive legal aid to pursue civil claims against their traffickers, but some challenges to Home Office recognition decisions would not be eligible for funding.

Worse still, establishing a strong connection was, as the Lord Chancellor accepted, something which people without British nationality and/or UK national origins would find much harder to do than those with such characteristics. His colleague, Shailesh Vara MP,

1. A shorter version of this case note was first published in Legal Action September 2014. The Public Law Project was represented by John Halford and Stephen Grosz of Bindmans, Michael Fordham QC, Ben Jaffey and Naina Patel of Blackstone Chambers and Alison Pickup of Doughty Street Chambers.

Minister for the Courts and Legal Aid, added in parliament that what was 'important' was that those eligible for civil legal aid in future would be 'our people' (*Hansard* HC Debates col 624, March 18, 2014).

Despite criticism from two joint parliamentary committees, both of which expressed grave doubts about the legality of the test, and an unprecedented uprising of Treasury Panel Counsel, who produced a public letter doubting its compatibility with the rule of law, the Lord Chancellor resolved to press on.

A draft Order in Council to introduce the test was passed by the Commons on July 9, 2014 (Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014) (the draft Order). The Lords could still have voted it down in a 'fatal motion', but this would have been highly unusual. Meanwhile, however, the Public Law Project (PLP), a small charity concerned with the promotion of access to justice, had brought a judicial review of the decision to introduce the test. As a result of the Divisional Court's judgment, the Order was withdrawn before the Lords came to consider it.

Judicial review

Very shortly after the Commons vote, the Divisional Court gave judgment on PLP's judicial review. The judgment analyses the legality of the test from three perspectives: ultra vires, compatibility with the Human Rights Act 1998, and then common law equality standards. In each respect, the test was found to be unlawful.

Ultra vires

First, the court held expressly that LASPO was a needs-based statute and that the residence test would mean many of those it identified as being in the greatest need of legal representation would not receive it. Key examples were given from the hundreds of pages of evidence supporting the claim from solicitors, advice agencies and non-governmental organisations.

The shift in focus away from need meant that the Lord Chancellor's powers under ss9 and 41 to amend LAPSO could not be used to introduce such a test. Doing so would extend the scope and purpose of the statute, something which parliament had never contemplated.

Discrimination and justification

Secondly, the attempt to twist eligibility rules to what were clearly discriminatory ends could not be justified, either to the standard set by article 14 read with Article 6 (or by implication, other rights which are only effective if underpinned by legal representation for those who need it) or at common law. This was a high standard because legal aid was not, as the Lord Chancellor had argued, analogous to a welfare benefit. *'[W]hat is at stake is the protection which domestic law affords to all who fall within its jurisdiction'*, noted the court (para 78).

The first justification offered was cost-saving. The Lord Chancellor's arguments had an unpromising start because he was unable to quantify what would be saved. But the court held there was a further problem because the money was to be saved by withholding services that had already been targeted at those most in need through the structure of LASPO (paras 80-81):

> *There is a logically prior question. It is whether discrimination in the provision of legal services may be justified simply on the ground of the need to save money. It could be so justified if the context was the distribution of welfare benefits. But, as I have sought to demonstrate, the instant cases are not within that category.*
>
> *The context is the vindication of legal rights and the mere fact that the Government could, in non-s10 cases, refuse all legal assistance to anyone, irrespective of residence, is no answer to the allegation of discrimination on the grounds of residence….*

Drawing on well established case law such as *MoJ v O'Brien* [2013] UKSC 6, [2013] 1 WLR 522, [see Briefing 675] it went on to affirm *'The mere saving of cost cannot justify discrimination'* (para 82).

On the second justification offered, 'public confidence', the court was even less impressed:

> *Feelings of hostility to the alien or foreigner are common … But they surely form no part of any justification for discrimination amongst those who, apart from the fact that they are 'foreign', would be entitled to legal assistance. Certainly it is not possible to justify such discrimination in an area where all are equally subject to the law, resident or not, and equally entitled to its protection, resident or not. In my judgment, a residence test cannot be justified in relation to the enforcement of domestic law or the protection afforded by domestic law, which is applicable to all equally, provided they are within its jurisdiction. In the context of a discriminatory provision relating to legal assistance, invoking public confidence amounts to little more than reliance on public prejudice…* (para 84).

The court went on to make a declaration that the draft Order would be unlawful on these bases. That is being

appealed by the Lord Chancellor, permission having been granted by the Divisional Court itself because the case raises obvious issues of public importance.

Comment

On one level the judgment is not surprising. Multiple consultation responses, including published advice from members of the legal team that went on to represent PLP, confirmed the test's discriminatory effects. Residence tests have always been subject to careful scrutiny by the courts, whether they relate to student support (*Orphanos v Queen Mary College* [1985] AC 761, April 1, 1985), ex gratia compensation for wartime internment (*Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, October 10, 2006; [2006] 1 WLR 3213) or, very recently, local authority eligibility rules on a council tax reduction scheme (*R (Winder and others) v Sandwell MBC and Equality and Human Rights Commission* (intervener) [2014] EWHC 2617 (Admin), July 30, 2014 [see Briefing 728 in this edition]). What is heartening, however, is the acknowledgement of the special role legal aid plays in our constitutional arrangements.

The Divisional Court was emphatic that fundamental features of the scheme should not be tampered with by ministers alone. It remains to be seen what will happen on appeal. But, on August 4th, when the residence test was due to come into force, something very ordinary happened in solicitors' offices, Law Centres and advice agencies with a legal aid contract. People came seeking help that they could not afford to pay for, were not asked to prove that they were here lawfully, or where they had lived for the last 12 months. They were not told they could not be helped until these things were proven. They were not told they could not be helped because they lacked 'residence' status, a criterion for legal aid eligibility that the UK has managed perfectly well without for 65 years.

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Briefing 728

Council's residence criterion for council tax rebate was unlawful

R (Winder and Others) v Sandwell Metropolitan Borough Council and the Equality and Human Rights Commission (intervening) [2014] EWHC 2617 (Admin) Case No: CO/633/2014; July 30, 2014

Successful judicial review challenge brought by three women affected by the Sandwell MBC residence requirement for entitlement to council tax rebate (CTR). Two of the women had been victims of domestic violence and the other had experienced mental health problems.

Facts

For the 2013-14 tax year Sandwell MBC (the Council) sought to reduce the amount of CTR that it was paying. The Council produced and sent out for consultation a draft scheme for 2013-14 together with an impact assessment on it. The scheme was then considered by the full Council which expressed concern that the Council was at risk of receiving an influx of applicants for a council tax reduction from areas where property was more expensive.

It therefore decided to adopt a residence requirement for eligibility for CTR so that this rebate would only be paid in respect of *'those residents that have lived in the Borough of Sandwell for a minimum of two years immediately prior to the date the new claim is received by the Borough of Sandwell'*. This additional requirement was adopted by the Council without any further assessment of its likely impact. Three women brought a judicial review challenge in respect of this requirement. Each of the women did actually have long standing links to the Sandwell or Dudley area albeit they were not able to meet the 2-year residency requirement; two of the

women had been victims of domestic violence and the other one had experienced mental health problems.

High Court

The case was brought on six grounds:

1. Ultra Vires: the Council did not have the power to impose the residence requirement, because the Local Government Finance Act 1992 s13A(2)(b) (the 1992 Act) restricts the criteria by which classes for council tax reduction can be defined to financial criteria.
2. Failure to take into account material considerations: the requirement was irrational as it did not take into account material considerations.
3. Lack of consultation: the Council failed to consult on the criteria.
4. Barrier to freedom of movement: the requirement would disproportionately affect people wishing to use EU freedom of movement rights.
5. Discrimination: the requirement was indirectly discriminatory against non-British people as well as women and it was not justifiable.
6. Breach of the public sector equality duty: although the equality duty was engaged, the Council failed to conduct any equality impact assessment on the requirement, or address at all the characteristics protected by the Equality Act 2010 (EA) and affected by the requirement.

Outcome

The High Court ruled that the residence requirement was unlawful. Mr Justice Hickinbottom concluded: *'There is no evidence that any thought was given as to whether the requirement might have an adverse impact on the rights of those who wish to exercise freedom of movement, or be discriminatory of women and/or foreign nationals'.* In particular:

1. **Ultra Vires:** the Council did not have power to impose the residence requirement it imposed in its CTR scheme for either 2013-14 or 2014-15. On the true construction of s13A of the 1992 Act, the Council had no power to define a class for the purposes of s13A(2)(b) by reference to non-financial need criteria and the imposition of the residence requirement in both the 2013-14 and 2014-15 schemes was ultra vires and thus unlawful.
2. **Failure to take into account material considerations:** the residence requirement was irrational, because, in imposing it, the Council failed to have regard to a number of material considerations, in particular the Secretary of State's policy objectives as well as the wider consequences of other authorities adopting a similar requirement.
3. **Lack of consultation:** The residence requirement was fundamental to the Council's council tax rebate scheme and it had failed to consult upon it. If the Council had consulted on this requirement as it ought, it might have resulted in feedback which may have prevented it from adopting a scheme with a unlawful residence requirement.
4. **Barrier to freedom of movement:** The residence requirement disproportionately affected people wishing to exercise EU free movement rights and was therefore an unlawful obstacle to freedom of movement. It was likely to hamper the exercise of free movement rights of UK nationals contemplating leaving Sandwell temporarily for work elsewhere in the EU, as well as EU nationals generally as they are inherently less likely to have lived their lives (and, in particular, the last two years) in Sandwell.
5. **Discrimination:** The requirement was indirectly discriminatory against non-British people and against women, and that discrimination was unjustified. It amounted to:
   i. indirect discrimination under EU law,
   ii. indirect discrimination contrary to s19 EA, and
   iii. discrimination contrary to article 14 of the European Convention on Human Rights read with article 1 of the First Protocol to the ECHR.

   The residence requirement was indirectly discriminatory because it was liable to affect a larger proportion of foreign (including EU) nationals than British nationals. Second, it was discriminatory against women, because women are substantially more likely than men to suffer from domestic violence which requires them, for reasons of safety, to flee to a different local area.

   Indirect discrimination can be lawful, if objectively justified on grounds independent of the characteristic in respect of which there has been discrimination, in this case, nationality and gender, and if the means employed were proportionate to that objective. The objective justification the Council put forward was to prevent the additional demand for the council tax reduction that might arise from people relocating from the more expensive South East of England. The purpose was thus to discourage such migration. However, this justification had no evidential foundation – there was no evidence produced that people had been or would be discouraged from moving to Sandwell because of this requirement; there

was no evidence of 'benefit tourism'; no evidence as to the extent of the problem, and no consideration given to the collateral damage likely to be caused by the requirement. Thus, the indirect discrimination was not justified and was unlawful.

6. **Public Sector Equality Duty:** The public sector equality duty under s149 EA was engaged and the Council was under an obligation to have 'due regard' to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EA; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The equality impact assessment (EqIA) for the original CTR scheme may have been adequate, but it was not performed at a time when the residence requirement was an option. The potential impact of the residence requirement on those with protected characteristics – notably race and sex – was never considered. The Council failed to conduct any EqIA on the residence requirement, or address at all the characteristics protected by the EA and affected by the requirement. The duty is important; and, had the Council been rigorous in satisfying its obligation to have due regard to the relevant characteristics then it may not have proceeded with the unlawful course that it followed.

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Equality consultant

Briefing 729

Keeping sight of both the wood and the trees

Fraser v University of Leicester & Ors [2014] UKEAT 0155/13/0506; June 5, 2014

Facts

Professor Fraser (F) is Black Caribbean and an employee of the University of Leicester (UL) having been appointed as Professor of Economics in September 1995. The second respondent (R2) is the UL Vice-Chancellor and the third respondent (R3) Senior Pro Vice-Chancellor. From September 2005 until August 2008, F was Head of the Department of Economics (HoD) which experienced various divisions and tensions, particularly at a senior level, as to its future direction. F clashed with his predecessor Professor Demetriaes over his desire to broaden the Department's research base by hiring more theorists (like himself) which was seen by some as an attack on the applied economists.

F made several complaints against UL between March 2008 and November 2009 regarding:

- inappropriate emails, amounting to bullying and harassment;
- the manner of UL's response to his complaints, including delays in handling his complaints;
- actions related to Occupational Health (OH).

It was not however until November 2009 that F referred for the first time explicitly to his treatment being linked to racial discrimination

During F's headship, in March 2008 he complained to R2 that he was being subjected to:

> *…an unprecedented and persistent attack by mass circulation of emails by my predecessor and successor that, had I been of less robust temperament would have hospitalised me – and might still do.*

F's complaint was not addressed nor his suggestion that he had suffered an attack that might have impacted upon his health.

F then made a complaint about treatment he had received from Professor De Fraja for three years while he was HoD. F was then certified as unfit to attend work for health reasons. However, he still met R3 about his grievance regarding the emails, although R3 rejected the grievance concluding that the emails were bullish and aggressive and, sometimes inappropriate, but did not constitute bullying/harassment.

F decided to appeal against this decision. When he subsequently submitted a medical certificate signing him off work for 6 months he was referred to OH. He considered this to be a deliberate attempt to discourage

him from pursuing his grievance due to the delay that would ensue.

F raised two further grievances; in November 2009 relating to an email which F complained publicly belittled him, and the unreasonable delay in convening his grievance appeal hearing. The second, also against R1 and R2, for the first time specified that the treatment complained of was '*on the grounds of racial discrimination.'*

A panel in March 2010 upheld F's appeal, having concluded that the tone of Professor De Fraja's communications could not be considered normal in a university context. The panel then reconvened in October to address subsequent grievances; partly finding in F's favour, but declining to find that he had been less favourably treated on the grounds of his race. F appealed from the findings of the October panel to an appeal committee which rejected his appeal.

Employment Tribunal

F made two separate applications to the ET involving allegations of direct discrimination, harassment and victimisation. One of the complaints included UL's delay in responding to the Race Relations Act 1976 (RRA) statutory questionnaire. F's case was presented in a manner to encourage the ET to look at the 'broader picture' rather than an overly fragmented approach which considered the 66 individual allegations in the first complaint as well as the 17 in the subsequent application. The ET confirmed that it had done so but had also looked at the individual complaints which it placed in separate categories:

The ET considered the individual allegations, but concluded that there were either no suitable comparators, actual or hypothetical, and/or that there were insufficient facts to prove race discrimination. Furthermore, it did not consider that there was reason to draw an adverse inference from the late reply to the questionnaire, nor that there was anything in the complaints made against the appeal panel.

The ET then considered the warning in *Rihal v London Borough of Ealing* [2004] IRLR 642 CA of the danger of an over fragmented approach. It therefore, stood back *'to ensure that the bigger picture is exposed.'* It did so: *'firstly in respect of the major themes of the allegations'* and then *'in terms of the total picture which these themes make up'* concluding that while it had seen instances of unreasonable treatment, delays and poor practice, these were unrelated to F's race or colour.

Employment Appeal Tribunal

Following an oral hearing F was granted permission to appeal, which he did on the following grounds:

1. The ET erred in holding that R3 did not suspect that F intended to do a protected act for the purposes of the victimisation protection under s2(1) RRA.
2. The ET had not, as it had stated, stood back and looked at the picture as a whole; it had failed to properly apply the burden of proof and provide adequate reasons. There were sufficient findings of unreasonable treatment, delay and poor practice – in the findings relating to events on an individual basis – to give rise to the inference that this treatment must have been by reason of race.
3. The ET had erred in law in failing to draw inferences from the respondents' responses to F's statutory questionnaire.

Referring to the extensive case law on this matter the EAT disagreed with the allegation that the ET had not considered the whole picture. It referred to the fact that the ET cited *Rihal* and dismissed any suggestion of there being a conspiracy that had a racial basis. The EAT concluded that the ET had considered allegations thematically and overall, and made general findings of the complaints that were placed under broad headings. Also F was trying to go back to the detail of 17 of the original 66 individual allegations in the first complaint; but without linking them to the idea of a conspiracy.

Delays in handling F's complaints were properly tested by the ET and found to be explained by various other factors than race, including workload and general inefficiencies, dysfunctional relationships and departmental disputes. Delays in the grievance appeal were to do with F being on sick leave and respondents wanting to follow the correct procedure. This history informed the conduct and perceptions of the second and third respondent who responded as they would do to any other senior academic regardless of race and in like circumstances.

It was also submitted that the ET had not applied the two-stage process to the burden of proof, and had set too high a hurdle at the first stage by requiring F to demonstrate that the reason for the things he complained of were to do with his race or a protected act. The EAT disagreed with this assertion and concluded that there had been no error of law neither on this point nor in asking the respondent for a reason for the behaviour in question.

F submitted that the ET had erred by ignoring evidence that R2 had failed to respond to complaints

from Black academics. However the EAT concluded that this criticism failed to engage with the findings of the ET. Other allegations about R2's treatment of F had, according to the EAT, been treated holistically by the ET. There had been no error of law in its assessment of a comparator's treatment. The EAT also suggested that F had not applied a holistic approach in some of his own interpretation of events.

Conclusion

Although there was no finding of discrimination in this case, it serves as a reminder of the need to look at the whole picture rather than just individual allegations in isolation before concluding whether there have been any discriminatory acts, particularly when incidents complained of have taken place over a long period of time. In this case, allegations had been looked at individually, as part of general themes as well as a big picture. It is of course important as well that no individual allegation which may have some merit is 'lost' and dismissed too readily when reaching conclusions about the bigger picture.

Brenda Parkes
Equality and human rights consultant

Briefing 730

The reason for the disadvantage in indirect discrimination

Essop and Others v Home Office (UK Border Agency) [2014] UKEAT/0480/13/SM; [2014] EqLR 377, May 16, 2014

Facts

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

It was assumed for the purposes of the pre-hearing review that there was a statistically significant difference between the CSA success rates of BME candidates aged over 35 and the CSA success rates of younger non-BME candidates; although not all older BME candidates failed, they were at greater risk of failing. It was also assumed that these failure rates could not be explained by particular personal factors specific to any individual claimants.

Law

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

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

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

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

Employment Tribunal

At a pre-hearing review, the employment judge held that E would have to show *both* that there was a group-based disadvantage to a group of which he was a member, and *also* the reason why he himself was disadvantaged by the PCP.

The judge accepted the argument of the UK Border Agency that it was not enough for E to show that he had failed the CSA and that older BME candidates like him were disproportionately likely to fail, because that didn't show that the group-based disadvantage – 'that disadvantage' – was what actually caused E to fail the test. To see this point, the employment judge imagined:

> *…a job requiring that a successful candidate had a high level of spoken English. If such a requirement would put BME candidates generally at a particular disadvantage within [s19(2)(b)], but the case being considered was one of a particular candidate with excellent spoken English who failed to secure appointment, the correct way of approaching it would not be to rely upon his*

membership of the group, but to ascertain the reason for the failure. (para14)

In E's case, then, the judge held that *'…the mere fact of failure of the CSA test… is not determinative of whether the claimant has been put at that disadvantage'* (para14) and required E to show the reason why he failed the test.

On this view, s19(2)(c) requires a claimant to identify the reason why the PCP disadvantages members of a group and show that his own disadvantage had the same cause as the group disadvantage. According to the judge, any other approach would allow individuals to benefit 'fortuitously' from their membership of a disadvantaged group.

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

Employment Appeal Tribunal

The EAT overturned the ET decision. It held that an individual claimant who has been disadvantaged and is a member of a group which disproportionately suffers that disadvantage, does not also need to establish the reason why he himself suffered the disadvantage.

The EAT's reasons

The first and simplest reason is that the wording of the statute does not require a claimant to show the *reason* why he suffered the disadvantage, merely the *fact* that he suffered the group-based disadvantage. The judge's finding that *'…the mere fact of failure of the CSA test… is not determinative of whether the claimant has been put at that disadvantage'* was therefore incorrect. The particular disadvantage was failing the test, and E suffered precisely that disadvantage.

Secondly, the domestic indirect discrimination provisions implement requirements of EU law and should be given a purposive interpretation. The function of indirect discrimination provisions is to tackle disparate impact, which may be the result of 'disguised' discrimination or of processes whose disparate impact is as yet unexplained:

If it is clear from reliable and significant statistical or other evidence that a process adopted by an employer has results which disadvantage a particular racial or cultural group in comparison to others, but neither the employer nor its employees can point to a particular feature of the process which has that result, or explain why it does, to require either to show the reason for the disadvantage in any individual case is to ask them to do that which they cannot do. To make liability conditional upon their being able to do so is thus to remove any legal constraint upon it, and to permit the disproportionate effect to continue. (para 28)

Even if s19 EA could be read as imposing the additional hurdle, therefore, that reading should be rejected as inconsistent with the purpose of the provisions.

Comment

This robust judgment from the President of the EAT, Mr Justice Langstaff, follows Lady Hale in *Homer* in confirming that the focus of indirect discrimination is on outcomes.

The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic. (Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, para 17*)*

The important question is whether people who share a protected characteristic with the claimant disproportionately suffer the same disadvantage as the claimant. That question *may* be answered by showing that the PCP is intrinsically liable to have a disparate impact on group members, and in that case it is likely to be important to consider the reason or mechanism by which the impact is produced. However, the question may also be answered by showing that there is a statistically significant difference in outcomes, and that approach will be necessary when the precise cause of the impact is not understood. Following *Essop*, a claimant taking this statistical approach will not be required to explain the mechanism by which the disparate impact arises, nor to show the reason why he himself is disadvantaged.

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Powerful ET recommendations in race and sex discrimination case

Carol Howard v Commissioner of Police for the Metropolis Case Nos 2200184/2013 & 2202916/2013, Employment Tribunal, London Central, [2014] EqLR 630, July 1, 2014

It was the actions of the police in investigating the murder of Stephen Lawrence that led ultimately to the introduction of the race equality duty and its equivalents in respect of disability and gender, reproduced and expanded upon in s149 of the Equality Act 2010. Carol Howard's case, a claim for discrimination against the Metropolitan Police, illustrates clearly the continuing need for such an obligation and is shocking in many respects. It also emphasises the need for disclosure in discrimination cases – unfortunately made more problematic by the removal of the questionnaire procedure.

Facts

Carol Howard (C) is a black woman who joined the Metropolitan Police on July 12, 2004. She joined the Diplomatic Protection Group (DPG) in August 2011 and from January 2012 her second line manager was Acting Inspector (AI) Kelly. Prior to her joining the DPG there were no concerns about her performance and no complaints about or from her.

On January 30, 2012 C phoned in sick. The following day, she was visited at home by local police – something that she alleged was not usually done when off for such a short period. She was subsequently on sick leave.

AI Kelly gave evidence to the ET of forming the opinion from February 2012 that he had doubts about C's honesty and suitability for DPG – with no apparent basis for this. On C's return to work from sickness absence, the return to work interview was conducted not by her line manager but by AI Kelly, who focused not on the usual concerns regarding a return to work, but rather on C's commitment to DPG. AI Kelly asked two other officers to ask C if she was having sex with another officer; those two officers refused.

On March 24, 2012, C made a request for flexible working, though she subsequently withdrew it when it was made clear that it was not going to be feasible. She was also subjected to scrutiny on her Facebook account, orchestrated by AI Kelly, and disbelief regarding an injury for which she took further time off work. Her firearms licence, which had been suspended, was restored and additional retraining time was recommended for her – again by AI Kelly.

C's car was removed by bailiffs on August 9th and she asked for a day's leave to deal with the ensuing matters arising from this. Following speculation by another officer as to the veracity of her request for leave, AI Kelly directed that she be interviewed regarding her absence without informing her that it was being recorded and that in effect it was to form the basis of disciplinary proceedings. C lied about her car, saying that it had been stolen rather than that it had been taken by a bailiff. AI Kelly subsequently asked C to hand in her blue card – her authority to carry firearms. His reason for this was that she was going through a divorce and had financial difficulties.

C continued to be subjected to scrutiny by AI Kelly. In addition, she was not supported by him in her application for another post, though a comparator in very similar circumstances was; the welfare officer assigned to her during the investigatory procedure was removed from her; and Chief Superintendent Tarrant, who had discussed her with AI Kelly, would not release her from tenure in DPG.

C was subjected to a disciplinary procedure and a warning was given to her for misconduct.

C submitted a grievance under what was known as the Fairness at Work (FAW) procedure; although a finding of discrimination was made in the draft FAW report, it was removed from the final report that was given to her.

Employment Tribunal

C submitted claims of discrimination and victimisation.[1] The ET upheld the majority of these claims. It found that C was *'singled out and targeted by AI Kelly and that she was treated particularly badly and far worse than any other officer. There was a personal antipathy towards her. The respondent has not put forward any explanation for that. [The] DPG was at the time and probably still is an almost exclusively male and predominantly white unit. The claimant stood out in the unit because she was different from almost anyone else in it because she was black and she was female [157].'* The tribunal went on to find that no

credible explanation had been put forward by AI Kelly for his treatment of her and the view that he had formed of her abilities and her behaviour.

Of particular interest to anyone with a claim of discrimination against the Metropolitan Police is their approach towards internal grievances. It emerged during the hearing, following C's insistence on disclosure of the draft FAW report, and the revelation that this differed significantly from the final report, that the FAW policy required that in cases of discrimination no assessment should be made as it is not an advisor's role; this only applied to discrimination cases. The tribunal found that the only reason for applying this to discrimination but not other kinds of misconduct is because it can be made the subject of tribunal proceedings.

The tribunal went on to find that DS Hepworth was asked to delete all references to discrimination and harassment related to sex and/or race from the FAW report not because they were not supported by evidence in the report but because C had brought a complaint of race and sex discrimination in the tribunal. The tribunal expressed its concern that this policy of the respondent's might mislead both claimants and tribunals and would have done so had it not been for C insisting on disclosure of the draft report.

Remedies hearing

At the resumed remedies hearing, the ET awarded £25,000 for injury to feelings – higher band *Vento*, based on the distress that C had suffered, and, among other factors, the length of time the discrimination had continued. It awarded £10,000 for aggravated damages, based on AI Kelly's conduct being spiteful, the failure to recognise AI Kelly's conduct as serious, the failure to disclosure crucial evidence (the draft FAW report) until the first day of the trial, the failure to apologise in any press release; and the respondent's disclosure in its press releases of more information regarding C's subsequent arrest than would normally be the case in order, as the tribunal found, to deflect criticism from the press being levelled at it.

The tribunal declined to award exemplary damages on the basis that the respondent was not exercising a governmental function but that in any event even if it had been, account had already been taken of this in the award for aggravated damages. £350 was awarded for loss of opportunity due to sickness absence, as well as a 5% uplift for delay in dealing with the grievances, and interest. C was awarded a total of £37,117.50 compensatory award, with interest of £282.97.

Tribunal recommendations

The ET also made a number of recommendations as follows:

a) Within 3 months of the receipt of this decision the respondent should appoint an independent properly qualified person…to conduct a review of:
   i) The complaints of discrimination that have been progressed through the FAW procedure since January 2009 and of any changes or deletions that have been made to references to discrimination in draft reports during quality assurance reviews. The Commissioner and the Metropolitan Police Service should provide full and frank disclosure of all relevant documentation to the person conducting the review;
   ii) The current FAW procedure and to consider, in particular,
   - How complaints/grievances of discrimination and harassment related to a protected characteristic should be dealt with;
   - Who should investigate such complaints;
   - What training should be provided to persons investigating such complaints;
   - What impact, if any, the statutory misconduct procedure has on the investigations of complaints of discrimination;
   - What should happen if the person investigating the complaint finds that there has been discrimination;
   - Whether there should be any review of the investigation by anyone else and, if so, for what purpose;
   - What steps should be taken to ensure that the process is managed in terms of protection and redress for police officers and staff and not in terms of organisational risk;
   - What steps should be taken to ensure that the process is open and transparent and that the complainant is kept fully informed of the process that is being followed;
   - Whether the procedures set out in the ACAS Code of Practice should be adopted.

b) The respondent should publish the report produced at the end of the review and should consult extensively with groups representing police officers and staff on any recommendations made in the report.

c) The respondent should engage the services of persons with expertise in employment matters to assist it in the implementation of any recommendations.

d) In the interim, the guidance given to FAW advisors

that they should not make any assessment regarding discrimination should be revoked and any guidance that is given should be consistent with paragraphs 1.3 and 9.1 of the FAW procedure, complainants should at all times be kept informed of what procedure is being followed and the reasons why it is being followed and quality assurance reviews should not be used to instruct or suggest that any references to findings of discrimination should be deleted or changed.

e) Within three months of this decision the respondent should review the equality and diversity training provided to its officers and should consider whether there are more effective ways of providing such training than through e-learning packages and online training.

f) Within six months of this decision the respondent should ensure that the following individuals are provided with formal equality training which includes training on unconscious bias – Sergeant Kelly, Chief Superintendent Tarrant and David Jones.

g) The terms of reference of the investigation being conducted by the Specialist Investigation Unit into Sergeant Kelly's conduct, its conclusions and any action taken as a result should be shared with C and her Federation representatives.

h) C's sickness absence from November 20th to December 2, 2012 and from March 21st to September 2, 2013 should be disregarded in any applications C makes for transfer to a different unit or for promotion.

Comment

Anyone with a case against the police force – whatever force that might be – should look carefully at the grievance procedure and at the reports of any grievance instigated by the claimant, ensuring that all drafts have been disclosed, as these may be fruitful areas for bolstering a claim of discrimination.

While tribunals still have power to make recommendations, the Deregulation Bill currently going through parliament will remove these powers. Whilst they remain, it is important that practitioners use them to full effect; this case demonstrates how important they are, not simply for individuals but also to bring about wider changes to a workplace

Catherine Casserley
Cloisters

1. Ms Howard was represented by Schona Jolly, Cloisters Chambers, instructed by Kiran Daurka, Slater & Gordon.

Core Issues Trust loses appeal

The Core Issues Trust (the Trust) sought judicial review of Transport for London's (TfL) decision not to allow its advertisement to appear on the outside of its buses. The wording of the proposed advertisement was: 'NOT GAY! EX-GAY, POST-GAY AND PROUD. GET OVER IT!'

The Trust's advertisement was intended to be a response to an advertisement by Stonewall which had earlier appeared on the outside of TfL's buses stating: 'SOME PEOPLE ARE GAY. GET OVER IT!' The reason given for the refusal of the Trust's advertisement was that it was contrary to TfL's advertising policy. The Trust submitted that the refusal was in breach of articles 9 and 10 ECHR and that the decision had been made for an improper purpose, namely, to advance the Mayor of London's electoral campaign. The Trust's appeal to the CA on the ECHR grounds was dismissed. [See Briefing 677]

The CA remitted the issue of 'improper purpose' back to the High Court for reconsideration. On July 30, 2014, Justice Lang dismissed that claim holding that the Mayor, Boris Johnson, did not issue directions or instructions to TfL, although he had authority to do so; it was TfL which made the decision and although it was made aware of the Mayor's view that the advertisement was offensive and should not appear on London buses, the Mayor was not motivated by an improper purpose, namely, to advance his election campaign.

End of the road

Mr Seldon's long battle against his compulsory dismissal at age 65 from the law firm in which he was a partner has come to an end. In May 2014 his appeal against an ET decision that a compulsory retirement age of 65 was fair and proportionate was dismissed. In 2012, the SC had held that the rule requiring retirement at a fixed age had legitimate aims which were appropriate to achieve – namely, retention of associate solicitors, workforce planning, and 'congeniality' (not blighting the inter-personal atmosphere by challenging a partner with evidence of declining performance at a time in his life when it might be more likely) [see Briefings 578 & 636]. The issue that was remitted to the ET was whether the age of 65 was reasonably necessary to achieve these aims. It held it was. That decision was held to be within its entitlement to make – the fact that it could have been set a year later did not mean it was wrong in law to fix it at 65, which fell within a narrow range identified as proportionate (64-66) and it was appropriate to take into account other considerations such as the legislation at the time, and the default retirement age, in setting it at that point within the range.

Landlords to carry out immigration checks

From December 1, 2014, landlords in Birmingham, Walsall, Sandwell, Dudley and Wolverhampton will have to carry out 'right to rent' checks for new tenancy agreements to determine whether tenants have the right to live in the UK legally. The measures under the Immigration Act 2014 are part of a phased introduction across the country.

The new law will mean private landlords will have to check the right of prospective tenants to be in the country if they want to avoid potentially being fined up to £3,000.

Landlords will need to see evidence of a person's identity and citizenship, for example a passport or biometric residence permit. Copies of the documentation will need to be taken as evidence the checks have been carried out and retained for one year after the tenancy ends. Children under 18 will not need to be checked.

Following an evaluation of the West Midlands pilot next spring, the Home Office expects to continue with the phased introduction of checks across the UK next year.

Increase in hate crimes

The hate crime statistics for England and Wales in 2013/14 were published in October.[1] These show that there were 44,480 hate crimes recorded by the police, an increase of five per cent compared with 2012/13, of which:

- 37,484 (84%) were race hate crimes
- 4,622 (10%) were sexual orientation hate crimes
- 2,273 (5%) were religion hate crimes
- 1,985 (4%) were disability hate crimes
- 555 (1%) were transgender hate crimes

There were increases in all five of the monitored hate crime strands (race, religion, sexual orientation, disability and transgender identity) between 2012/13 and 2013/14.

The statistical report suggests that much of the increase in race and religious hate crime is likely to be due to a rise in offences in the months immediately following the murder of Lee Rigby in May 2013. Additionally, the police may have improved their recording of crime and the identification of motivating factors in an offence over the last year.

It is less clear whether the increase in sexual orientation, disability or transgender identity hate crime reflects a real rise in hate crime or improved police identification of these offences. The increase across all three strands may suggest improved identification is a factor.

1. *Hate Crimes*, England and Wales, Byron Creese and Deborah Lader; Kevin Smith (Ed.) 2013/14 October 16, 2014; HOSB: 02/14

At what price justice?

The TUC reports that since the introduction of fees in July 2013 there has been a 79% fall in overall claims taken to ETs, with women and low-paid workers the worst affected. *At What Price Justice?*[1] analysed the latest Ministry of Justice statistics and found that:

- Women are among the biggest losers – there has been an 80% fall in the number of women pursuing sex discrimination claims. Just 1,222 women took out claims between January and March 2014, compared to 6,017 over the same period in 2013. The number of women pursuing pregnancy discrimination claims is also down by over a quarter (26%).
- Race and disability claims have plummeted – during the first three months of 2014 the number of race discrimination and sexual orientation claims both fell by 60% compared to the same period in 2013. Disability claims have experienced a 46% year-on-year reduction.
- There has been a 70% drop in workers pursuing claims for non-payment of the national minimum wage. Claims for unpaid wages and holiday pay have fallen overall by 8%. The report says that many people are being put off making a claim, because the cost of going to a tribunal is often more expensive than the sum of their outstanding wages.
- Low-paid workers are being priced out – only 24% of workers who applied for financial assistance to take claims received any form of fee remittance. Even workers employed on the minimum wage face fees of up to £1,200 if a member of their household has savings of £3,000.

In June and July 2014 Citizens Advice undertook a six-week survey to enable CABx employment advisers to provide information on the clients they were seeing with a potential cause of action to the ET.[2] As well as providing details of the case, advisers were asked to assess, where possible, the strength of the claim, the likelihood of the client pursuing the claim, and the reasons for their assessment. The research found that:

- 80% of cases were assessed by an adviser as having a very good, good or 50/50 chance of success if they were pursued to the ET.
- Less than a third of claims assessed as having a very good, good or 50/50 chance of success were considered likely to be, or were definitely being, taken forward.
- For claims less than £1,000 in value, less than a quarter were assessed as likely to be, or were definitely being, taken forward.
- Where cases were assessed as unlikely to be taken forward, fees or cost were the most common reasons given by the adviser, in over half of cases.
- The most common bases of claim were unfair dismissal and withholding of wages. Holiday pay was the next most common basis of claim.
- One fifth of cases contained discrimination as a basis for the claim.
- 40% of clients were potentially eligible for fee remission.
- 43% were not in employment at the time of their contact with the bureau adviser. 25% were claiming a social security benefit as a direct result of the alleged complaint against the employer.

On September 18, 2014 the CA permitted UNISON to launch a new judicial review on the introduction of tribunal fees. The outcome of this fresh challenge is awaited with interest.

1. *At what price justice? The impact of employment tribunal fees,* TUC Equality and Employment Rights Department June 2014

2. Employment Tribunal Fees evidence, Citizens Advice July 2014

Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
AG	Advocate General
BME	Black and minority ethnic
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CTR	Council tax rebate
DDA	Disability Discrimination Act 1995
DHP	Discretionary Housing Payments
DLA	Discrimination Law Association
DRC	Disability Rights Commission
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEA	European Economic Area
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EqIA	Equality impact assessment
EqLR	Equality Law Reports
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
ICR	Industrial Case Reports
IMF	International Monetary Fund
IRLR	Industrial Relations Law Report
JR	Judicial review
LAPSO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LJ	Lord Justice
LLP	Legal liability partnership
MP	Member of Parliament
MoD	Ministry of Defence
NHS	National Health Service
OH	Occupational Health
PCP	Provision, criterion or practice
PLP	Public Law Project
QC	Queen's Counsel
RRA	Race Relations Act 1976
SC	Supreme Court
TUC	Trades Union Congress
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
WLR	Weekly Law Reports

Briefings